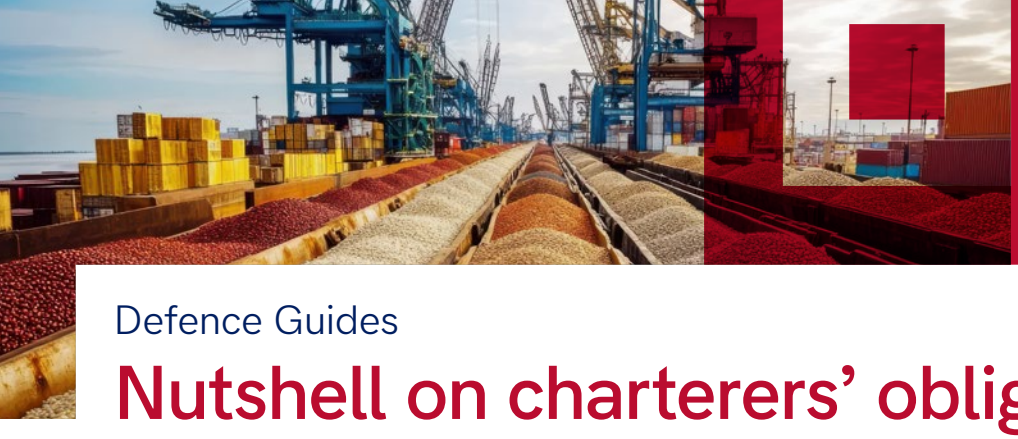


WEST

Defence Guides

Nutshell on charterers' obligation to provide cargo

What is the nature of charterers' obligation to provide cargo?

Under a voyage charter, charterers have an absolute and non-delegable obligation to provide cargo. This is an implied term and the burden of delays in respect of providing cargo falls squarely and solely upon the charterers. It is not a defence for charterers to argue that they had exercised reasonable endeavours to provide the cargo.

When must cargo be provided?

Charterers must have the cargo ready when it is the ship's turn to load.

Generally, a ship can tender her notice of readiness once she is ready and has arrived at the contractually agreed place (i.e. an arrived ship) even if cargo is unavailable. However, in some circumstances, the availability of the cargo may be a requirement for the ship to become an arrived ship. For instance, in a berth charter, a berth may only be allocated to a ship if there is cargo made available for loading. If so, charterers need to make the cargo available in sufficient time to allow the ship to become an arrived ship. Any delay in making the cargo available will give rise to a claim in detention.

On the other hand, if the availability of the cargo is not a requirement for a ship to become an arrived ship, the time the cargo is made available may no longer have practical significance because laytime and demurrage will simply start running accordingly. That said, it will nonetheless be open to owners to pursue a claim in damages against charterers should owners suffer damages in addition to the loss of time.

How much cargo needs to be provided?

Generally, charterers have an obligation to provide a full and complete cargo. This obligation is not limited by a representation of the capacity of the ship in the charterparty.

Charterers would fulfil this obligation if they have sufficient cargo to begin loading and if suitable arrangements have been made for the rest of the cargo to arrive in time such that loading would not be interrupted.

Once charterers duly provide cargo, there is no further absolute obligation to replace the cargo or any part of it that is damaged.

Do interruptions or exceptions suspend laytime if the cargo is unavailable?

Charterers would not be able to rely on an exceptions clause to stop laytime if they fail to provide cargo. This is because exceptions clauses have a causative requirement, are construed narrowly, and they only apply to loading and discharging operations. Unless otherwise stated, they do not apply to pre-loading operations such as the transport of the cargo from the mines to the port.

On the other hand, if cargo is unavailable and laytime is already running, charterers may be able to rely on an interruption to suspend laytime because all the charterers need to prove is the existence of the interruption at the relevant time.

Would the absolute obligation to provide cargo change if an opportunity arises for a ship to jump the queue?

In certain ports, cargo from various sources may be made available to ships in a pre-defined sequence (e.g. coal). If an opportunity arises for a ship to jump ahead of her queue to berth earlier, would charterers be obliged to immediately provide cargo to meet this opportunity?

Generally, the absolute nature of the obligation remains. However, if it is either common knowledge or an express term of the charter that cargo from various sources will be made available to ships in a pre-defined sequence, then it may not be necessary for charterers to have cargo available before the ship's turn, on the off-chance that a berth might become available earlier. (Little v Stevenson [1896] AC 108 and Jones v Green [1904] 2 KB 275)

DEFENCE

Exceptions to charterers' Obligation to Provide Cargo: Frustration and Force Majeure

There are a number of circumstances where the absolute obligation of providing cargo may not apply to charterers.

The first is if a frustrating event occurs. The effect of frustration is that parties are mutually discharged of their obligations against each other and this would consequently discharge charterers of their absolute obligation to provide cargo. It is important to note that proving frustration requires a high threshold and is extremely difficult. The threshold may be slightly lower if the charterparty states that the cargo is from a specific source and that source, through no fault of the parties, ceases to exist or to produce the cargo. That said, because of the high burden of proof, frustration is still not a practical way for charterers to circumvent their obligation to provide cargo.

An example of a frustrating event which exonerates charterers of their duty to provide cargo is where a prohibition against the export of the cargo arises after the charterparty was concluded. However, if the prohibition exists at the time the charterparty was formed and the parties entered into the charter with an expectation that the prohibition may be lifted by the authorities, then the charterers would likely be seen to have taken on the risk of the relaxation of the said prohibition and would still be responsible for providing cargo even if the prohibition remains in place.

For more on the topic of frustration, please see West's Defence Guide "Frustration and force majeure".

The second is where there are specific exceptions clauses (usually under the Force Majeure clause) which apply to the charterers' operation of providing cargo. Generally, exceptions clauses only apply to loading and discharging operations and would only affect laytime. However, if the exceptions clause specifically states it applies to the charterers' operation of providing cargo, then the charterers may be excused of liability if the charterers fail in their obligation to provide cargo.

For instance, if the cargo needs to be transported from a mine to the port by railway and the exceptions clause contains an exception of "breakdown of railways", the charterers may be exonerated of their duty to provide cargo if there was indeed a breakdown of the railways. However, even if there is a Force Majeure event, charterers still need to prove causation, ie that it was the Force Majeure event that caused their inability to perform the contract. Therefore if charterers were in breach of their duty to provide cargo before the Force Majeure event occurred and charterers would have continued not to provide the contractual cargo, charterers will not escape liability due to a Force Majeure event - see eg Classic Maritime Inc v Limbungan [2019].

For more on exceptions clauses, please see West's Defence Guide "Interruptions and exceptions to laytime in a nutshell".

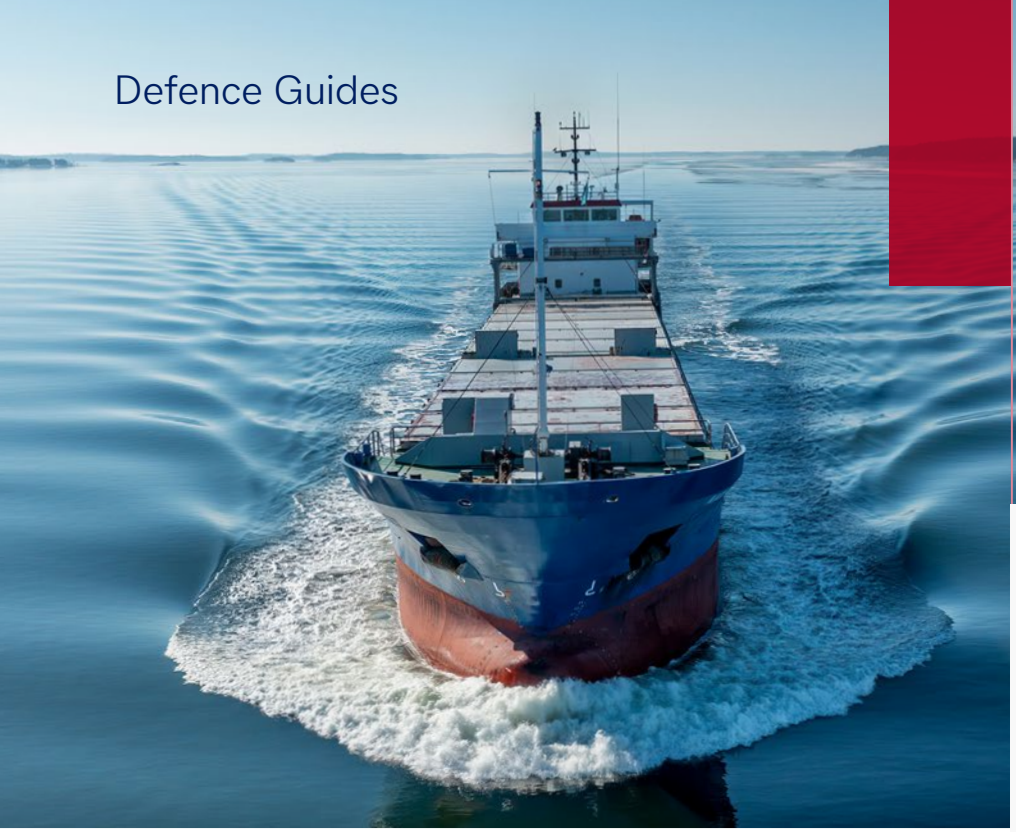
What if the charterparty provides for more than one cargo choice?

If the charterparty provides for two or more cargo choices, the unavailability of one choice of cargo would mean that the charterers are obliged to provide the other cargo.

In a case where there were two cargo choices with an exceptions clause excluding charterers' liability for delays if the "cargo intended for shipment under the charterparty" could not be provided, it was held that the charterers were not entitled to rely on this exceptions clause. This is because the delay referred to in the exceptions clause related to the delay affecting the loading of all cargo choices intended for shipment under the charterparty, and not the delay in loading a specific cargo which the charterers intended to ship. (The Niki [1959] 1 QB 518).

However, in another case where the exception clause used a slightly different phrase of "the cargo or intended cargo", such wording was found to have relieved charterers of their duty to find an alternative cargo should there be delays caused by an exception in the clause.

This highlights the narrow construction of exceptions clauses to which owners and charterers should be mindful of.



What if the charterparty provides an option for the charterers to elect a specific cargo?

If the charterparty provides for an option such that the charterers have the right to elect an option for a specific cargo to be shipped, this may override the charterers' absolute obligation to provide cargo if the elected cargo is unavailable. (Reardon Smith Line v Ministry of Agriculture [1963] AC 691).

Similar to the nomination of ports under a voyage charter, charterers exercising their right of election would lead to the elected cargo being written into the charterparty such that the cargo becomes the sole contractual cargo. If it becomes impossible to load the elected cargo, charterers are under no obligation to re-elect or re-nominate another cargo. Depending on the circumstances, the charter may even be frustrated due to the impossibility of performing the voyage.

However, it is important for parties to understand whether there is indeed a true option to elect a cargo under a charterparty.

For example, if the words "a cargo of steel pipes and/or steel bars in charterers' option" are used, charterers would have to nominate an alternative cargo if the elected one becomes unavailable as this is not a true option. If however, the words "a cargo of steel pipes and/or steel bars in charterers' option, to be declared no later than ship's arrival at first load port" are used, charterers have no obligation to elect a different cargo should it become unavailable.

What if charterers fail to elect a cargo?

If the charterparty provides for an election between a primary cargo and an optional secondary cargo, the failure to elect would lead to an automatic election of the primary cargo.

If the charterparty does not provide for an election between primary and secondary cargoes, the position is less clear. However, owners would still be entitled to claim damages for losses suffered as a result of the charterers' failure to notify the owners promptly of the nature of the cargo to be shipped.

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Eugene read law at the National University of Singapore and was admitted to the Singapore Bar as an Advocate & Solicitor in 2013. Prior to joining the Club, he practised law at a boutique shipping law firm based in Singapore. His practice straddled both wet and dry disputes and he has appeared as counsel before all levels of the Singapore Courts. He was also appointed as an Adjunct Research Fellow at the National University of Singapore's Faculty of Law where his academic papers have been published in leading international law journals.

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