WEST

In a nutshell

Defence Guides

Contents

Introduction

The aim of this book is to provide a clear and concise summary to the shipping industry regarding the most common charterparty disputes. To many owners and charterers, the law surrounding these disputes may appear complicated and difficult to understand. This book is therefore primarily aimed at making what appear to be complex legal issues, easily understandable by breaking down each subject to its core principles, and explaining them in a simple, clear and non-legalistic manner.

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01 Formation of the contract

Formation of the contract

Does a charterparty need to be in any particular form?

A charter does not need to be made in any particular form. An oral agreement to charter a ship is binding on parties. The form of most charter parties includes a recap, the main terms and the riders.

"subject to" wordings

If, during negotiations, the charter contains "subject to" wordings, it means that the parties do not yet intend to make a binding contract. There is therefore no intention to create legal relations and a binding contract does not exist.

A binding contract is only created when parties expressly agree that all "subjects" are lifted. In ("The Junior K" [1988]), 2 Lloyd's Rep 583, the parties' negotiations led to a telex stating "sub dets Gencon CP". Although the telex contained all the essential terms of the charter and there were no unresolved operational issues between the parties, there was no binding contract because the contract was still subject to the details of the GENCON charter being finalised and such a subject was not lifted.

Parties may be deemed to have dispensed with the "subjects" if they had begun performing the charter. For instance, the delivery and acceptance of the ship would be deemed as a performance of the contract.

Such performance will lead to a binding contract even if the charter was made subject to the signing of an agreement see ("The Botnica" [2007]), 1 Lloyd's Rep 37.

A note of caution that the position as set out above under English law may differ from that of US law which focuses the inquiry on the existence of the "essential" or "main" terms of the charter.

Examples and effects of "subject to" wording

"Subject to" wordings can take many forms. These include "subject to contract", "subject to details", "subject to" a specific condition or requirement[1].

"Subject to contract" or "agreement to be finalised" suggests that a formal agreement must be entered before a contract is deemed binding. This is usually construed as a pre-condition to a contract, which has the effect of preventing a contract from coming into existence altogether. However, as mentioned above, the performance of a contract may waive a party's right to rely on the "subject to contract" wording.

When a contract is "subject to" a specific condition or requirement, the nature and construction of the parties' negotiations will decide whether such a condition is a pre-condition or a performance condition.

In the former, no contract exists and a contract only binds when the relevant condition is fulfilled. In the latter, a binding contract exists and the parties are obliged to perform the condition. It can be difficult to determine whether a subject condition is a pre-condition or a performance condition and there are differing views in case law. In ("Astra Trust v Adams" [1969]), 1 Lloyd's Rep 89, the words "subject to satisfactory survey" were deemed as a pre-condition and there was no binding contract until a satisfactory survey was completed. However, in ("The Merak" [1976]), 2 Lloyd's Rep 250, the same words were deemed to be a performance condition instead. This meant that there was in existence a binding contract and the parties were obliged to carry out the survey. If the survey is then not carried out or not carried out properly, ie the performance condition is not satisfied, this may in turn lead to the termination of the contract.

A "subject" is more likely to be a pre-condition if the subject involves the exercise of a personal or commercial judgment by one of the parties. For instance, if the "subject" is dependent on one party concluding a contract with a third party, this is likely to be treated as a pre-condition. As a result, a "Suppliers' Approval" subject was deemed to be a pre-condition because it involved a commercial

judgment, namely to choose third-party suppliers, the terminal as well as the cargo. Consequently, it was found that no binding contract was made when such a "subject" had not been lifted see ("Nautica Marine Ltd v Trafigura Trading LLC (The Leonidas)" [2020]), EWHC 1986.

1 For example, "subject to survey", "subject to enough material (STEM)", "subject to completion of two trial voyages" etc.

Under certain circumstances, even if the condition is satisfied, a further agreement must be reached between the parties before the contract is deemed to be binding. For example, in ("The John S Darbyshire" [1977]), 2 Lloyd's Rep 457, the words "subject to satisfactory completion of two trial voyages" meant that there was no binding contract until the trial voyages were completed and the parties had agreed to enter into a contract. The use of trial voyages suggests that the charterer would have an opportunity to evaluate the vessel and this meant that a contract was not automatically concluded once the trial voyages were concluded.

Do both the owner and charterer have to sign a charterparty?

A charter does not need to be signed in order for it to be binding. Under common law, three ingredients need to be present in order for a contract to be binding. These are (i) the offer and acceptance of terms by the parties, (ii) an intention to create legal relations and (iii) consideration. The presence of these will create a binding contract even if the contract is not signed.

What if there are contradictory terms in the recap, main terms and riders?

Certain standard form charters contain a clause which states that a particular portion of the charter shall prevail over the other portions. For instance, the GENCON 1994 states that the provisions in Part I shall prevail over those of Part II.

In another example, the NYPE 2015 states that the provisions of the riders and additional clauses shall prevail over those of the main terms.

Unless otherwise stated, the terms and amendments in the riders will supersede the main terms and the recap will supersede the riders because the recap is viewed as the latest version of the agreement between the parties. The courts will however try to reconcile as far as possible terms which may appear to be contradictory.

However, if a formal charter is eventually drawn up and signed between the parties, the terms of the signed charter will take precedence. The recap will still be relevant as an aid in construing the final terms of the signed agreement.

The pre-contractual negotiations can also shed light on the parties' intentions as to whether certain portions of the charter would supersede others however these will not override the terms of the charter.

Parties to the contract

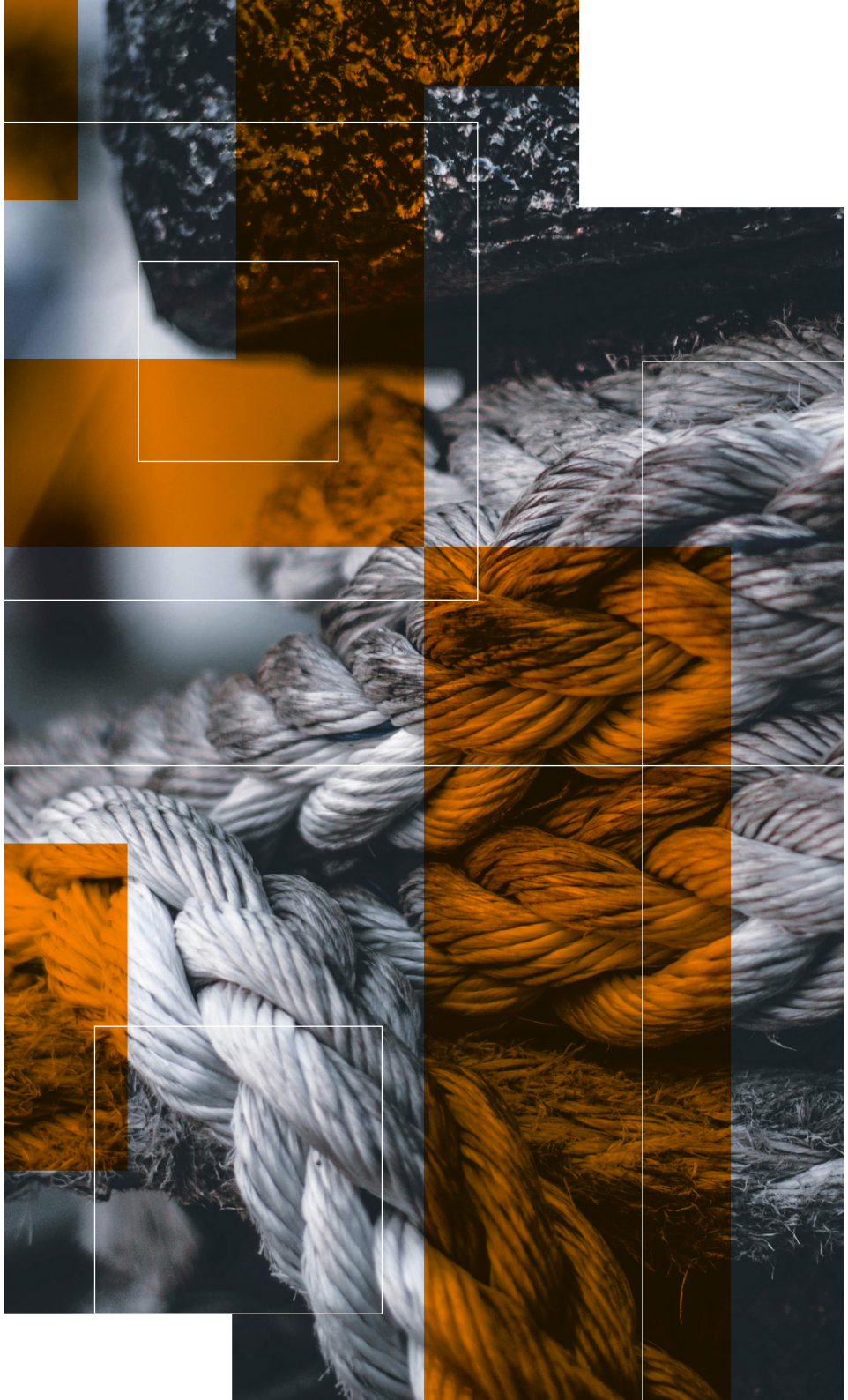
What if there is confusion over the identity of the parties? Will the charter still be binding?

If the terms of the charter are insufficient to identify the parties, the relevant factual background, including the correspondence between the parties, will be key to resolving any uncertainties. It is possible to look beyond a mistake and construe a charter as if the right name had been used.

For example, in ("The Double Happiness" [2007]), 2 Lloyd's Rep 131, the charterparty mistakenly named the disponent charterer as Front Carriers Inc instead of Front Carriers Ltd. It was found that there was a binding contract because Front Carriers Ltd attempted to rectify the error shortly after the fixture was concluded and the charterer failed to object to it in a timely fashion.

Are guarantors a party to the charter?

Guarantors are not a party to the charter. A guarantee is a separate contract between the guarantor and the owner. In the event of non-performance by the charterer, the owner's recourse against the guarantor is via the guarantee and not the charter.



Do charterparty guarantees need to be signed or incorporated into the charter agreement?

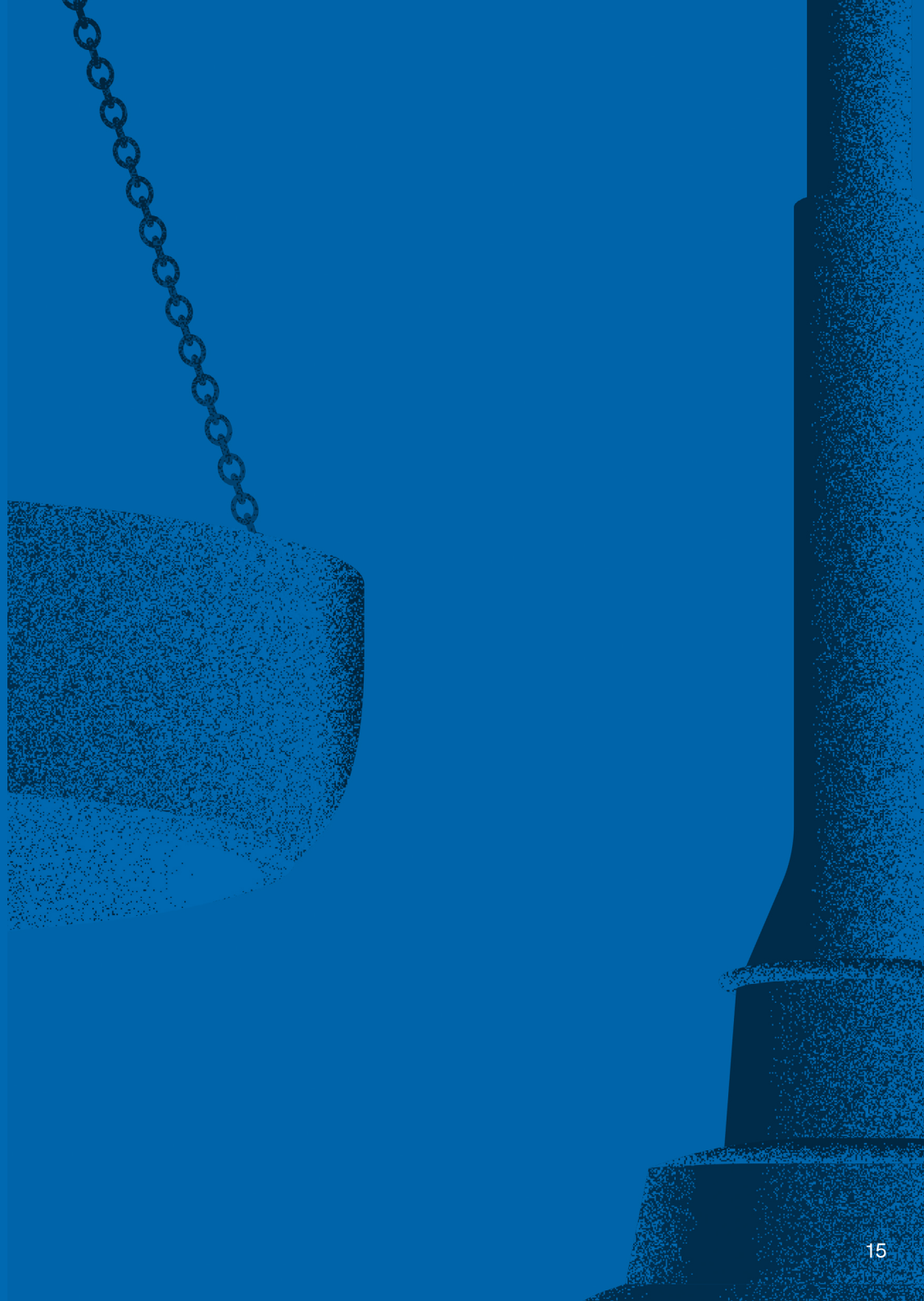
Generally, guarantees need to be made in writing and signed. However, a guarantee is enforceable even if it is electronically signed by a broker, so long as the broker has authority from their principal.

A guarantee is also enforceable even if there is no single document containing the whole contract of guarantee. For example, in ("Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd and Another" [2012]), 1 Lloyd's Rep, the guarantee and the charterparty terms were found to be encapsulated in two separate emails sent by the broker to the owner.

In fixing a charter guarantee, the owner needs to ensure that the guarantee is properly issued and that they did not merely obtain a promise by the charterer to procure a guarantee. In ("The Anangel Express" [1996]), 2 Lloyd's Rep 299, the fixture contained the wordings "Charterers agree to performance guarantee to be as per Owners' wording on … letter headed paper and signed by…". This was deemed to be a promise by the charterer to procure a guarantee and not an actual enforceable guarantee.

Although English law can be flexible, parties seeking to call on the guarantee should always check what the requirements are in the country of residence/registration of the guarantor in order for the guarantee to be enforceable. Some countries may require that guarantees be registered.

02 Notices of readiness



Notices of readiness

A Notice of Readiness ("NOR") is a notification by the vessel that she is ready to start the charter service (upon delivery) or is ready to load or discharge cargo. Giving an NOR has two purposes: (i) to inform the charterer that the vessel is at their disposal; and (ii) to start the running of hire or laytime. Disputes often occur in relation to the validity of a NOR, in particular under voyage charterparties.

1) General requirements for a valid NOR:

There are three requirements to be met in order to tender a valid NOR:

a) The vessel must have reached the agreed place (being an "arrived ship");

b) The vessel must be "physically ready"; and

c) The vessel must be "legally ready".

a) The vessel must have reached the agreed place:

In order for the vessel to be an "arrived ship", the NOR must be tendered when the ship has arrived at the contractual place of delivery, loading or discharging. The charterparty will usually state where the vessel must be before a valid notice of readiness can be tendered.

The ship must be at the immediate and effective disposition of the charterer, having come to rest at the place at which she can be described as an "arrived ship". Where that place is depends upon the terms agreed in the charterparty. In the most simple case, the place will be the name of a port, dock or a berth.

Port Charters

In a port charter, a "port" can include the legal, fiscal and administrative area of the port and is not restricted to the commercial area of the port ("The Johanna Oldendorff" [1974]). If the designated berth is available, the vessel must proceed immediately to that berth and tender notice of readiness upon arrival there. If the berth is not available, the vessel must normally have reached a position within the port where waiting ships usually lie ("The Johanna Oldendorff" [1974]). The master cannot tender the NOR as soon as the ship crosses the port's boundaries.

Berth Charters

In a berth charter, the owner can only tender the NOR when the vessel has actually berthed. In the case of a port charter when no berth is available, the vessel must normally have reached a position within the port where waiting ships usually lie. In this regard, the customary waiting area does not have to be "the commercial area of the port", but can be the "legal, fiscal and administrative area of the port".

Port Vs Berth Charters

In voyage charters in particular it is sometimes hard to determine the place when the charter mentions both the port and a berth. It is always a matter of construction whether the agreed destination is the port or the berth. For example, a charter which describes the destination as "one safe berth, London" is a berth charter, but one which describes the destination as "London, one safe berth" is a port charter (the reference to a berth is to be construed as a safe berth warranty).

WIBON/WIPON and other contractual variations

If the customary waiting area is outside the limits of the port, then no valid notice of readiness can be served. Some charters (Gencon for example) extend the waiting place beyond the port. The above basic principles can however be varied by the terms "whether in berth or not" ("WIBON") or "whether in port or not" ("WIPON"). The phrase "whether in berth or not" converts a berth charter into a port charter and ensures that under a berth charterparty the NOR

can be given as soon as the ship has arrived within the port's commercial area. However, this is only when the berth is inaccessible due to congestion and not bad weather. (This is because the charterparty puts the risk of navigational delays onto the owner and of commercial delays onto the charterer.)

It is thought that the phrase "whether in port or not" will mean that a NOR can be tendered outside port limits as long as the ship is at the port's usual waiting area. Also, some voyage charters commonly contain other exceptions and will for instance state that the commencement of laytime will start "Whether Customs Cleared or Not" (WCCON) and "Whether in Free Pratique or Not" (WIFPON).

b) The vessel must be physically ready:

In order to be ready the ship must be prepared in such a way that it is able to commence cargo operations without delay and to comply with the charterer's orders whenever they are given. The vessel must therefore be "physically ready" and "legally ready". The requirement for the vessel to be physically ready will include that the holds are suitable to receive cargo in accordance with the charter.

In respect of time charterparties for example, on delivery, the NYPE (1946) forms requires that, at the time of its delivery, the vessel is to be "ready to receive cargo ... with clean-swept holds and tight, staunch, strong and in every way fitted for the service".

The Baltime form requires by lines 25 and 26 that the ship is "in every way fitted for ordinary cargo service". Other rider clauses often supplement the standard clauses and impose additional requirements. The vessel generally needs to be ready in all respects to load or to discharge the whole cargo. This extends to all equipment required for the cargo operations (such as, hatches, cargo gear and equipment etc.). This does not mean, for example, that hatch covers have to be open before a valid NOR can be given. It does mean that the vessel has to be ready and able to commence the charter service required of the vessel without delay when the charterer give orders to load or discharge. In the situation where several voyage charters relating to one ship, there should be no overstowed cargo (relating to another charter) because cargo holds must be accessible.

With regards to hold cleanliness, see the specific charter on this subject.

c) Legal readiness:

In order to tender a valid NOR the vessel (not the cargo) must be legally ready. This requirement will include:

- Customs clearance or entry;
- Immigration and police approval; and
- Health or free pratique.

All papers necessary for the commencement of the charter service, loading or discharging must be in order for the vessel to be legally ready.

If the charterer is to arrange for a certain document or certificate before the vessel can carry out its cargo operations they have to do so with reasonable speed to enable the owner to tender a valid NOR. A NOR tendered after this reasonable period has expired would probably still be valid, if all other requirements have been met.

Free pratique

Until recently, free pratique used to be considered as a "mere formality" and routine. In such circumstance a NOR may be given without having obtained the necessary clearances. However, where there is a known or suspected problem, this "mere formality" exception to the general principle of readiness will not apply.

2) The format of the NOR:

In law, there is no prescribed form for tendering NOR. It merely has to be a statement that the vessel is ready to be delivered or load or discharge as the case may be. The NOR must be accurate in that the vessel is in fact ready. Unless the charterparty states otherwise nothing else is required. However, charterparties often contain express provisions on form and contents of the NOR.

3) Additional requirements under the charterparty:

a) NOR on delivery of the vessel under the charter-hold cleanliness clause:

It is common for charterparties to have provisions about the cleanliness of the holds. For example, time charterparties typically contain a hold cleaning clause which will state: "on delivery, all holds to be clean, swept, free from all cargo residue … failing which the vessel to be off hire from the date and time of the failure to the date and time of being inspected and passed by the surveyor".

With such a clause it is arguable that for a ship to be "off-hire" as stated, the ship must first have been accepted so that the NOR must have been valid. This implies that the holds do not need to be ready for the NOR to be valid and that if the vessel's holds are not clean on delivery the charterer will have to accept the ship and their only remedy will be to put the ship off hire. Conversely, in respect of voyage charters, if the cargo holds are not ready it is likely that the vessel is not physically ready and any NOR given will be invalid.

b) NOR tendered to be tendered during office hours:

Some charters stipulate that the NOR should be tendered during office hours (eg "notice of readiness to be tendered within 06.00 and 17.00 local time"). The fact that the NOR is tendered outside these hours (say 21.00 hrs) will not in itself render the NOR invalid. Unless the charter provides otherwise, such a NOR will be treated as having been given the next working day when office hours begin.

4) What happens if the NOR is invalid but there are other delaying factors?

The owner may argue that although the ship was not ready, because of some other factor (port congestion, for example) there was no actual delay which resulted from the lack of readiness. It is not relevant whether the ship was actually delayed in carrying out the cargo operations. The important question is whether the ship was ready at the time of tendering the NOR. If the ship was not ready (apart from minor and routine matters) then the NOR will be invalid.

5) Does an invalid NOR become valid once the requirements are met?

No. If the NOR is tendered before the ship arrives at the contractual destination or is not "ready", the NOR is invalid. An invalid NOR will never become valid. The owner, therefore, has to serve a new NOR when the conditions are met in order not to have the charter cancelled or run the risk that time does not count. If there is any doubt, it is recommended to serve fresh NORs without prejudice to the previous NOR/s.

6) What is the effect of tendering an invalid NOR?

a) NOR tendered on delivery of the vessel -rejection of the vessel and cancellation of the charter:

If on delivery the owner tenders an invalid NOR, the ship will be deemed not to be ready and not to have been delivered and if the ship is not ready by the end of the laycan period, the charterer will have the option to cancel the charter. The charterer is, however, not entitled to cancel before the cancelling date even though there is no way the ship will ever be ready by the cancelling date (although if the charterer can show that the vessel would not have been ready by the cancelling date, the owner is unlikely to be able to prove any loss/damages against the charterer).

In the context of voyage charterparties there is an argument that if the cargo gear (not the holds) are not ready, this would not be sufficient to cancel the charter. The situation is not the same for time charterparties as, for example, the NYPE forms stipulate that the ship must be "in every way fitted for service".

b) NOR tendered during the charter -commencement of laytime and hire

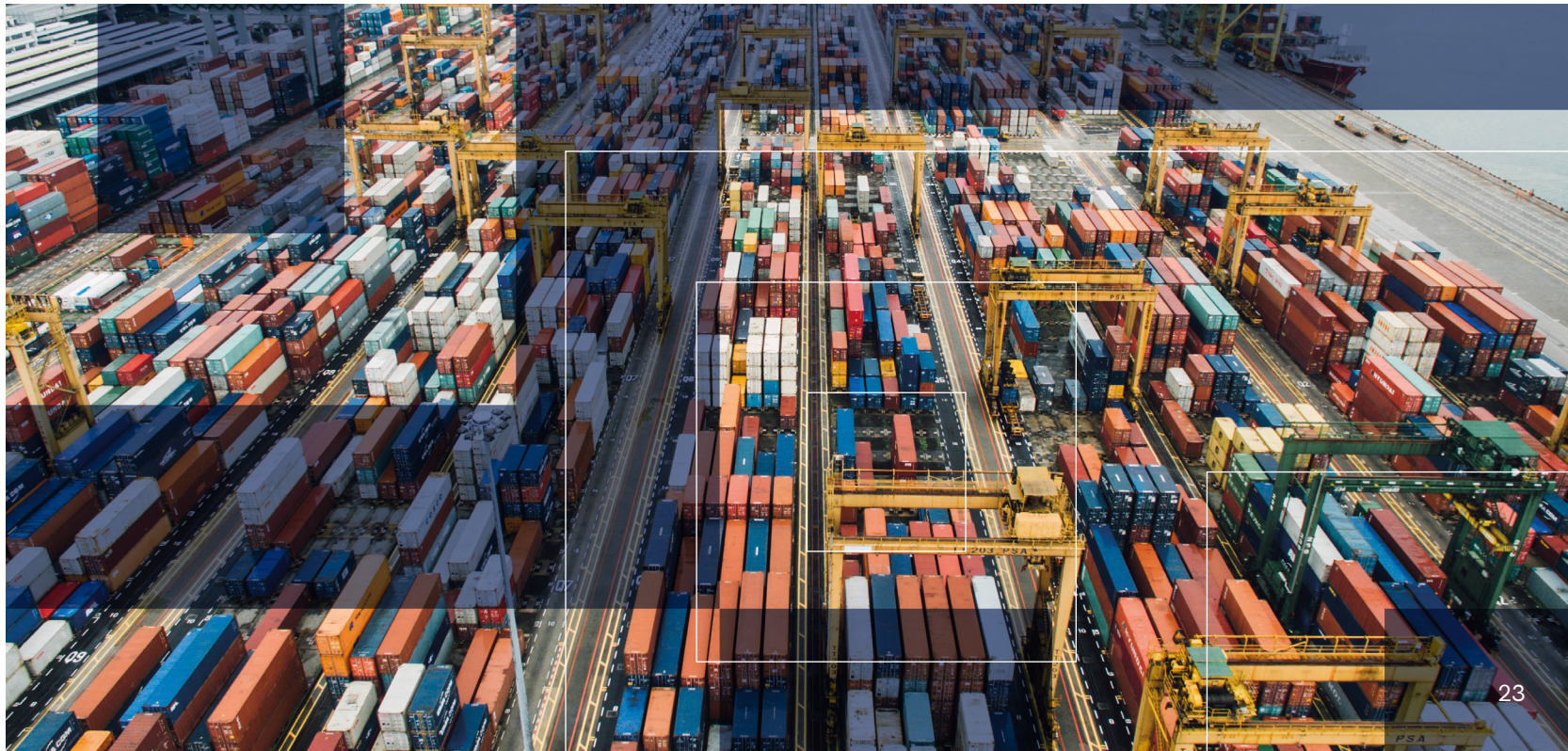
With regard to the running of laytime or hire, if the NOR is invalid, time will not start to count. If however the charterer starts using the ship (loading or discharging), there is an argument that time will start to count from that moment.

7) What happens if the charterer accepts an invalid NOR?

Even though, as stated above, an invalid NOR will never become valid, the charterer may be deemed to have accepted an invalid NOR either expressly or by their conduct, in which event, the charterer may lose the right to argue that the NOR is invalid. This is particularly so if the charterer had reasonable opportunity to ascertain the vessel's true condition. Acceptance by conduct could be demonstrated if the charterer has conducted themself in such a way as to show that they intend to be bound by the charterparty (for example giving orders to a ship to load cargo).

Acceptance of an invalid NOR can be made by the shippers or receivers who are considered to be the charterer's agents.

In order not to lose any rights, therefore, the charterer should accept a potentially invalid NOR on a "without prejudice to the charter" basis. Just because the charterer has accepted an invalid NOR does not mean that they have waived their right to claim damages for any loss suffered. However, the charterer may by their conduct be held to have waived their claim in damages. For example, where the owner has to deliver a ship which is grain clean but does not do so (because there is coal residue in the hold) and the charterer still accepts the vessel and the owner's NOR as they intend to load steel slabs as a first cargo, if the charterer does not reserve their rights to claim damages and simply accepts the ship, they may well lose the right to claim for time lost and cost of hold cleaning before loading the second cargo if this was due to the coal residue in the hold.



03 Safe ports and berths

Generally a port can be rendered unsafe due to (non exhaustive list):

- Sandbanks and shallows.
- Obstructions such as wrecks.
- An inadequate system at the port (such as weather warnings, mooring facilities and tug availability) to enable a ship to leave the port when weather conditions make it unsafe for the vessel to remain at berth.
- Inadequate fendering at the berth or berth exposed to the swell/ elements.
- Political situation or war.
- Losses due to inordinate delay caused by temporary and permanent obstructions.
- Outbreak of an epidemic.

I) Where does the obligation to nominate a safe port/berth come from?

a) Is there an implied term as to the safety of the port/berth?

If the charter does not have a safe port/berth warranty then the owner will not be able to make a safe port claim.

b) Safe berth warranty but no safe port warranty

While a safe port obligation will imply a safe berth warranty, the contrary is not the case. In the absence of a safe port obligation, the safe berth warranty will only apply to movements within the port and will not extend to the approach to the port.

II) Safe ports and berths:

Definition

A port or berth will not be safe unless, "in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship" ("The Eastern City" [1958]), 2 Lloyds Rep 127.

a) Reaching the port or berth

A port or berth will be unsafe if the ship is unable to reach the port safely. For example a port may be considered unsafe even if the ship suffers damage during its passage on a river or channel when approaching a port. The approach can extend to more than 100 miles (say the Mississippi for example) and does not have to be in the immediate vicinity of the port. A port for example will be unsafe if the ship is required to lighten cargo or has an air-draft which exceeds the available clearance under a bridge that has to be passed whilst proceeding to the port. The risk of hostile seizure or attack during the vessel's approach to the nominated port may render the port unsafe, however such risk of attack must be sufficiently real.

b) Safety of the port

The port must be safe for the particular ship and for the duration of her stay. A ship may enter a port which is safe and which subsequently becomes unsafe due to adverse weather for example. A port will still be safe if the ship can safely leave the port because it has become dangerous. What makes a port unsafe is essentially a question of fact: weather, inadequate berthing and mooring facilities, obstructions and defective navigational aids may render the port unsafe.

However, the criteria which have to be applied in determining whether a port is safe are questions of law. Dangers, whether physical or not, which are avoidable by ordinary good navigation and seamanship will not render a port unsafe.

- The effect of weather on the safety of the port will be a factor which will be taken into account when establishing the safety of the port. Typically one will look at whether there are local weather warnings advising the master of adverse weather as well as whether the ship can safely leave the port because of the onset of bad weather.

- A port can become unsafe if the berthing and mooring facilities are inadequate (fenders damaged or missing/damaged mooring bollards).
- The fact that the port is safe to enter is not enough if it may become unsafe for the vessel to remain there.

c) Leaving the port

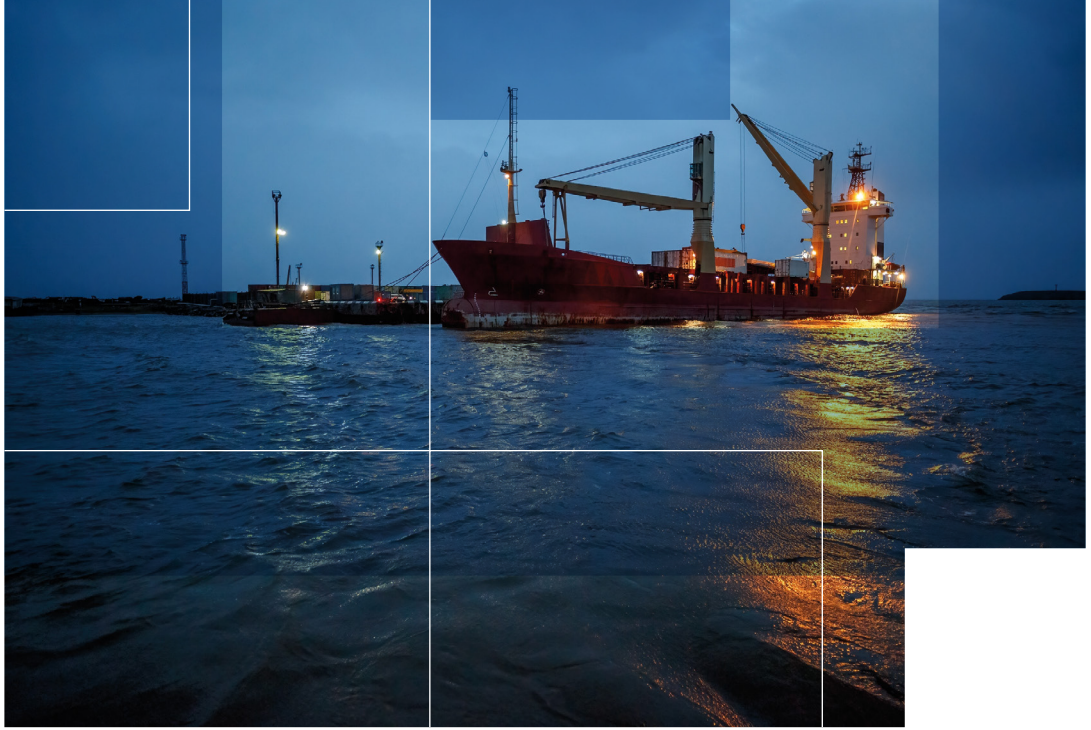
The port must be safe for the particular vessel in its condition to depart. A port will be unsafe if the ship is endangered when departing from the port. For example if on departure ice has formed and the ship's hull is damaged as a result when leaving, the port will be unsafe.

III) Rights and obligations under the charter

The charterer first has an obligation to nominate a safe port. If the port becomes unsafe after the first nomination, the charterer then has an obligation to nominate another (safe) port.

a) The charterer's obligation to nominate a safe port

- The charterer has an absolute obligation to nominate a prospectively safe port.
- The fact that the charterer does not reasonably know of the danger is no defence.
- The port does not need to be safe at the time of the nomination.
- However it must be safe when the ship is due to reach, stay and leave the port.



b) What happens if the port becomes unsafe after the port is nominated?

In such situation:

- In the case of a time charterparty, the charterer will have to cancel the original order and nominate a safe port.
- If the ship is in port, the charterer must order the ship to leave (if the danger can still be avoided).
- In the case of a voyage charterparty, where the port has already been nominated, the view is that the charterer has no general duty or right to re-nominate. If the charter (and the B/L) have a liberty clause (e.g. "so near thereto as she may safely get"), then the owner may discharge the cargo at some other port.

c) The owner's rights

- The owner is however entitled to act on the good faith that the charterer has nominated a safe port and proceed to the port without having to make further enquiries.
- The master does not have to instantly obey the charterer's orders if they are in doubt of the prospective safety of the port. They will have reasonable time to make enquiries.
- The owner is entitled to cease to obey the charterer's orders and refuse to proceed or continue to stay in the port.
- If the charterer fails to make a valid nomination within the time required, the owner is entitled to damages for the delay incurred in awaiting a valid nomination.
- If the charterer persists in giving the order, the owner may be entitled to terminate the charter. Note, however, that if it is found that the port was not unsafe, the owner may be held liable for any losses and expenses caused as a result of the owner's refusal to comply with the charterer's orders.

d) What happens if the owner accepts the charterer's orders in full knowledge of the unsafety of the port?

- In such a case, the owner may have waived their right to refuse to obey the charterer's orders.
- The fact that the master agrees to call at an unsafe port does not mean that the owner waives their right to damages.
- The owner may however be deprived from seeking damages if they unequivocally represent to the charterer that they will not treat the order as a breach of the charter or have not acted reasonably in trying to minimise damage to the ship.

IV) The charterer's defences to an unsafe port claim

a) Negligence of the crew

The negligence of the crew will be a valid defence to an unsafe port claim if it is proven that it broke the chain of causation.

Whether the master is negligent is a question of fact. Courts will generally look at the dilemma in which the master found themself as to whether or not to proceed and will generally decide that if the master acted reasonably (even though mistakenly) the cause of the damage stems from following the charterer's orders.

Generally courts will be reluctant to accept arguments from the charterer that the master could see that the port was unsafe and that the decision to proceed is the true cause of the damage. The charterer cannot generally rely on their own breach to defend a claim.

b) One named port in the charter. Is this a defence?

This situation will usually arise in a voyage charter. If for example the charter only names one port such as "one safe port, Hamburg", the owner will not have waived their right to make an unsafe port claim even if they knew or ought to have known that the port was unsafe.

c) Abnormal occurrences

The charterer will only be liable if the damage to the ship is due to the prevailing characteristics of the port.

A port will therefore not be inherently unsafe if the damage is due to an abnormal event such as a tsunami. An event is not an abnormal occurrence just because it is out of the ordinary. Whether an event is an abnormal occurrence is a question of fact and it can sometimes be hard to determine which category this event falls into.

The sudden outbreak of a war will not be a characteristic of the port. This event will be an abnormal occurrence and the charterer will not be in breach of their safe port obligations. However, if the war persists then this may become a characteristic of the port in relation to future nominations of that port. For the purpose of determining whether the charterer is in breach of the warranty, the time for judging whether the occurrence was "abnormal" is when the charterer gives the order.

If an event which was abnormal at the time of giving the order (so that the charterer's order is valid) but has become normal by the time of the vessel's call, the case will be one of supervening unsafety [and the charterer will be obliged to give alternative voyage orders – see b) above].

An abnormal occurrence can sometimes be hard to define. A good illustration of this problem can be found in the ("OCEAN VICTORY" [2015]) case: the OCEAN VICTORY, was discharging her cargo at Kashima in Japan when the berth was affected by considerable swell caused by long waves and high winds of up to Force 9 on the Beaufort Scale.

The Master then decided to leave the berth for open water, but due to severe gale force winds in the fairway lost control of the vessel while leaving the port and was driven back onto the breakwater wall. The ship became a total loss.

At first instance, the court found that Kashima port was unsafe because it did not have a safe system to make sure that vessels needing to leave the port due to these weather conditions (which were not deemed to be an "abnormal occurrence") could do so safely, and that safe navigation out of the port required more than good navigation and seamanship.

On appeal however, the Court of Appeal and the Supreme Court concluded that the "concurrent occurrence" of (i) the severe swell at berth from long waves that made it dangerous for a vessel to remain at the Raw Materials Quay; and (ii) the severe gale force winds from the northerly/north-easterly direction in the exit fairway conditions which affected Kashima was rare and was therefore an "abnormal occurrence".

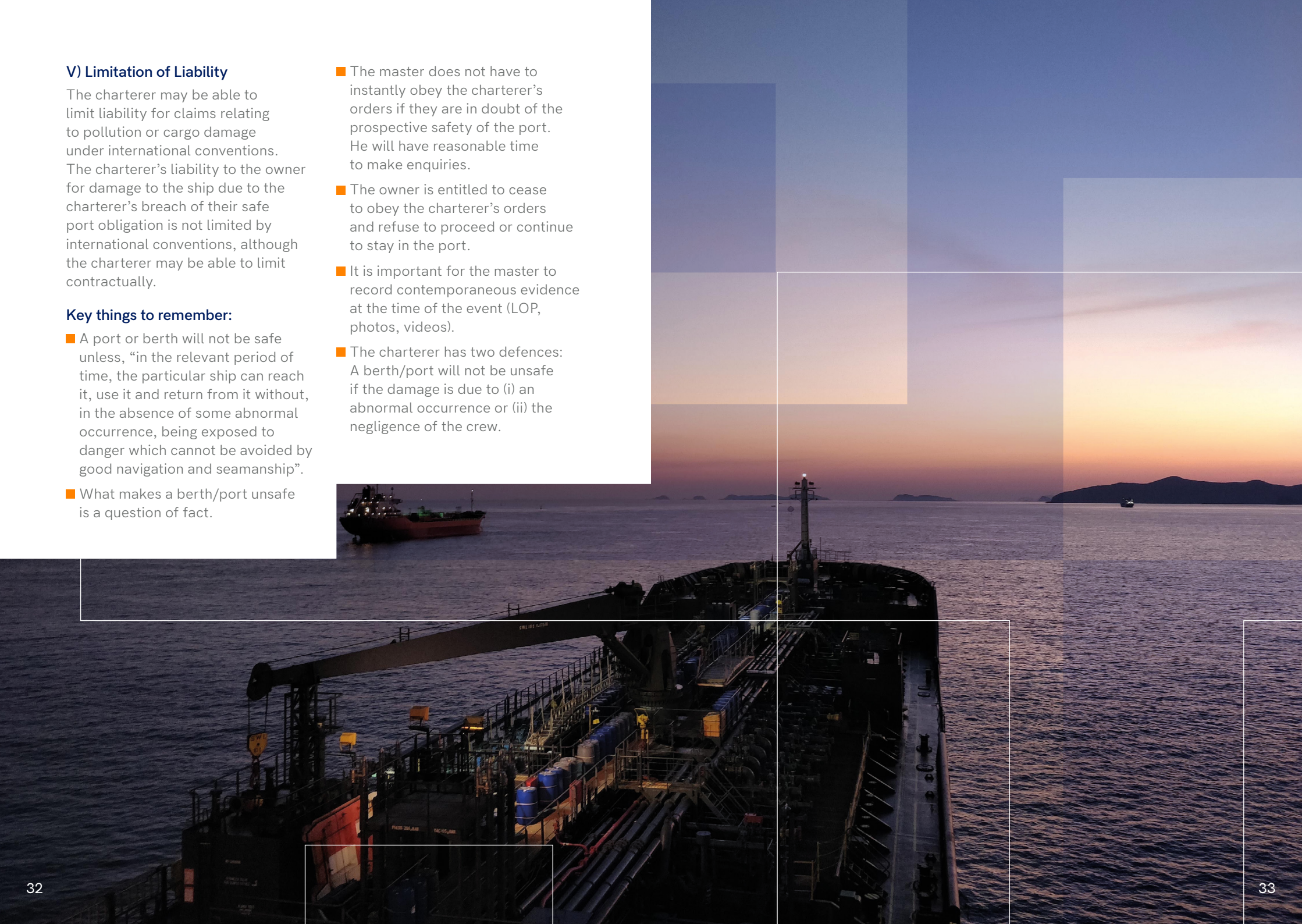
Hence, in this case, there was no breach of the safe port warranty.

V) Limitation of Liability

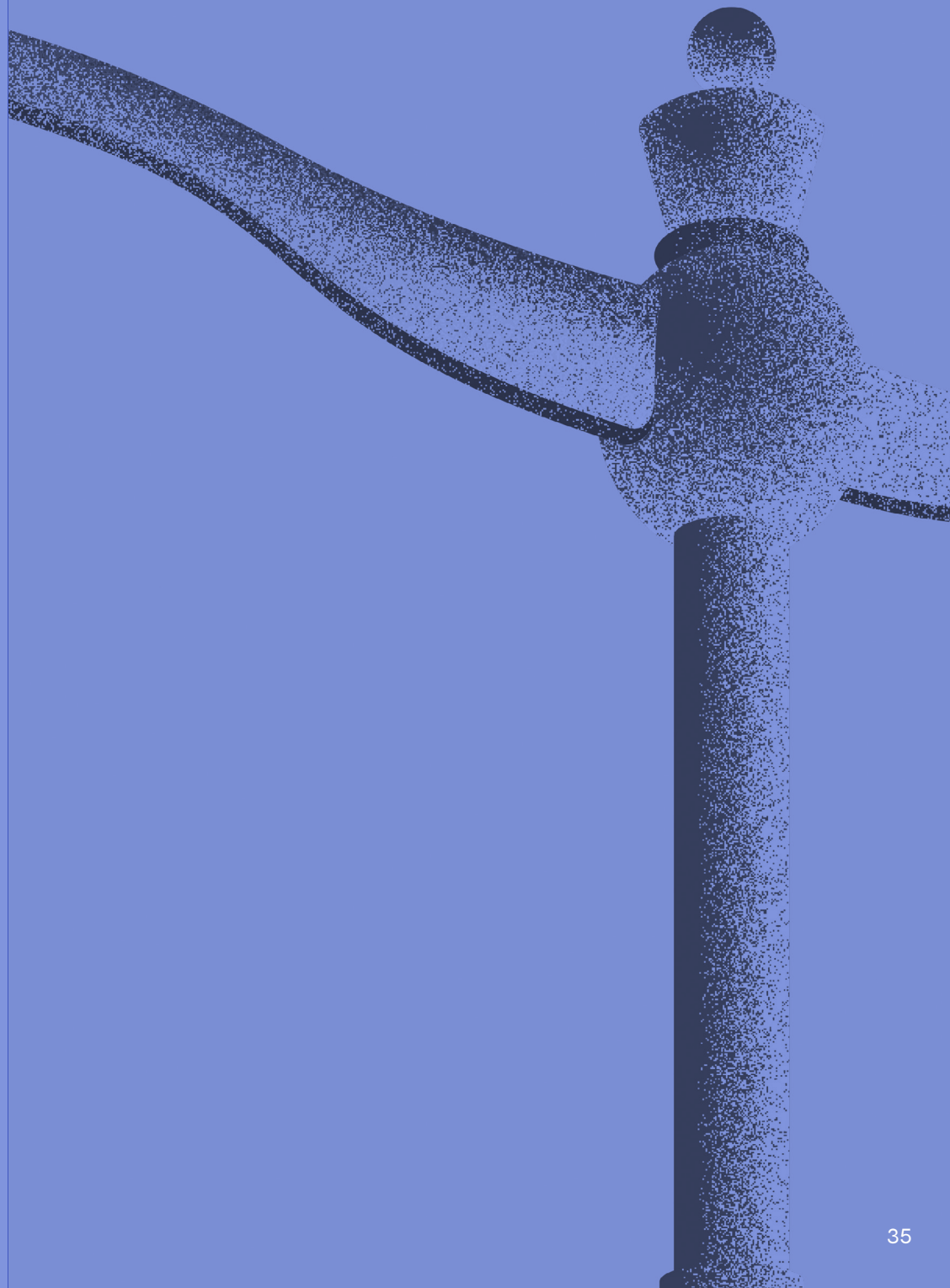
The charterer may be able to limit liability for claims relating to pollution or cargo damage under international conventions. The charterer's liability to the owner for damage to the ship due to the charterer's breach of their safe port obligation is not limited by international conventions, although the charterer may be able to limit contractually.

Key things to remember:

- A port or berth will not be safe unless, "in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship".
- What makes a berth/port unsafe is a question of fact.
- The master does not have to instantly obey the charterer's orders if they are in doubt of the prospective safety of the port. He will have reasonable time to make enquiries.
- The owner is entitled to cease to obey the charterer's orders and refuse to proceed or continue to stay in the port.
- It is important for the master to record contemporaneous evidence at the time of the event (LOP, photos, videos).
- The charterer has two defences: A berth/port will not be unsafe if the damage is due to (i) an abnormal occurrence or (ii) the negligence of the crew.



04 Hold cleaning
(time charters)



Hold cleaning (time charters)

1) On delivery:

In the absence of any specific clause, line 22 NYPE requires that the ship be “ready to receive cargo with cleans wept holds” i.e. she is ready to commence loading without delay.

Can the charterer reject the ship if the holds are not clean?

If the ship is not in the required condition, the charterer is entitled to refuse delivery/reject her, and the charter period will not start. If the owner is not able to rectify the condition of the ship before the cancelling date, the charterer may become entitled to cancel the charter.

However, the charter may incorporate the following clause ““Vessel on arrival first loadport/s to present with all holds clean, …. Failing such survey vessel shall be off-hire until fully passed…” in which case the vessel will not be rejected and a valid NOR may arguably be tendered since the remedy will be to off hire the vessel.

What if, despite the holds not being in satisfactory condition, the charterer accepts the vessel?

Where the charterer accepts delivery of the ship and the ship’s holds are not in the required condition, the owner may be liable in damages, subject to any Clause Paramount or other defence for the owner that is incorporated into the charterparty. (The charterer should however be careful not to waive their rights.)

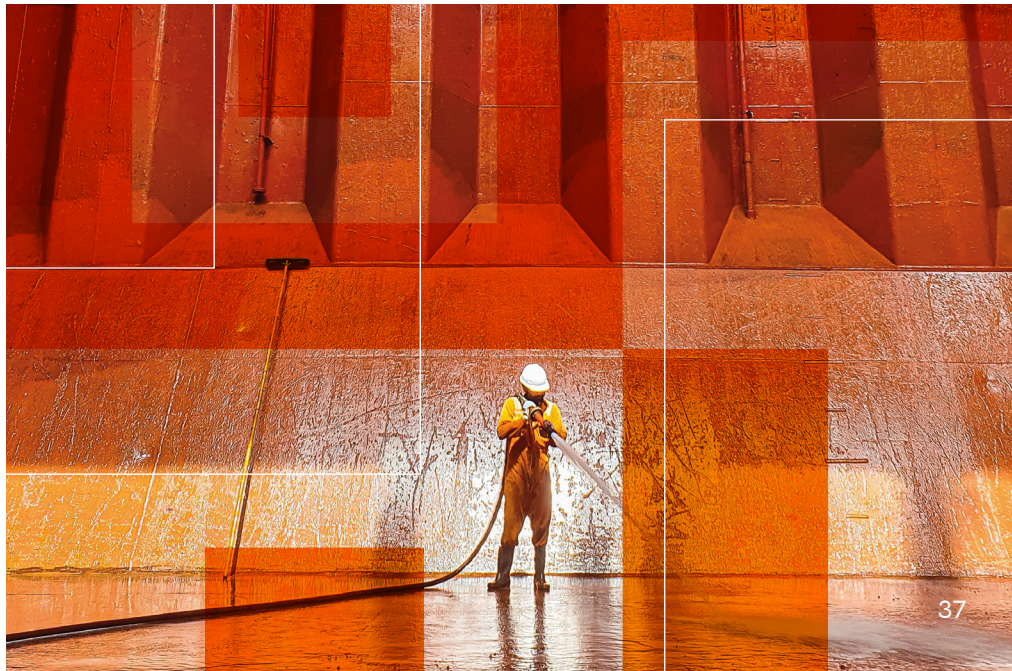
Where the charterer accepts delivery of the ship in circumstances where the owner’s failure to deliver the ship in accordance with the contract means that the charterer is deprived of substantially the whole benefit of the charter, the charterer may still have the right to terminate the charterparty, although the burden would be on the charterer to show that the defects in/condition of the holds prevented the charterer from carrying out the trade required of the vessel and that the charterer had not waived their right to terminate the charterparty. (If the defects in/condition of the holds only leads to delay and/or additional expenses, this is unlikely to entitle the charterer to cancel the charterparty. Rather, the charterer would be restricted to their claim in damages against the owner for such delay and/or additional expenses (subject to any Clause Paramount or other defence for the owner that is incorporated into the charterparty).

Can the charterer claim damages if they have missed their shipment laycan?

If the charterer can establish a breach by the owner which causes the vessel to miss a laycan due to hold rejection, damages for loss of the sub-charter are in principle recoverable (subject to any Clause Paramount or other defence for the owner that is incorporated into the charterparty). There may be arguments about causation (i.e. was this the only reason the laycan was missed?) and remoteness (i.e. was it reasonably foreseeable that such a breach would lead to such damages?). However, on balance, the owner would be presumed to know that (assuming there is a liberty to sub-let in the charterparty) the disponent owner would be sub-chartering with terms as to the condition of the holds on delivery, subject to arguments about remoteness, i.e. whether the owner undertook any liability for such losses.

2) Intermediate hold cleaning:

The owner has an obligation to maintain the ship which continues throughout the charter period. Unless otherwise agreed (for example, where the cargo loaded has not been one that is permitted under the charterparty but the owner has agreed to carry it at the charterer’s expense/risk and the carriage has resulted in additional hold cleaning being necessary), the owner must also pay for all expenses of intermediate hold cleaning. In the absence of an intermediate hold cleaning clause, the owner is responsible for exercising due diligence to clean the ship with reasonable care, skill and speed.



Three separate provisions arise in the charter in this regard:

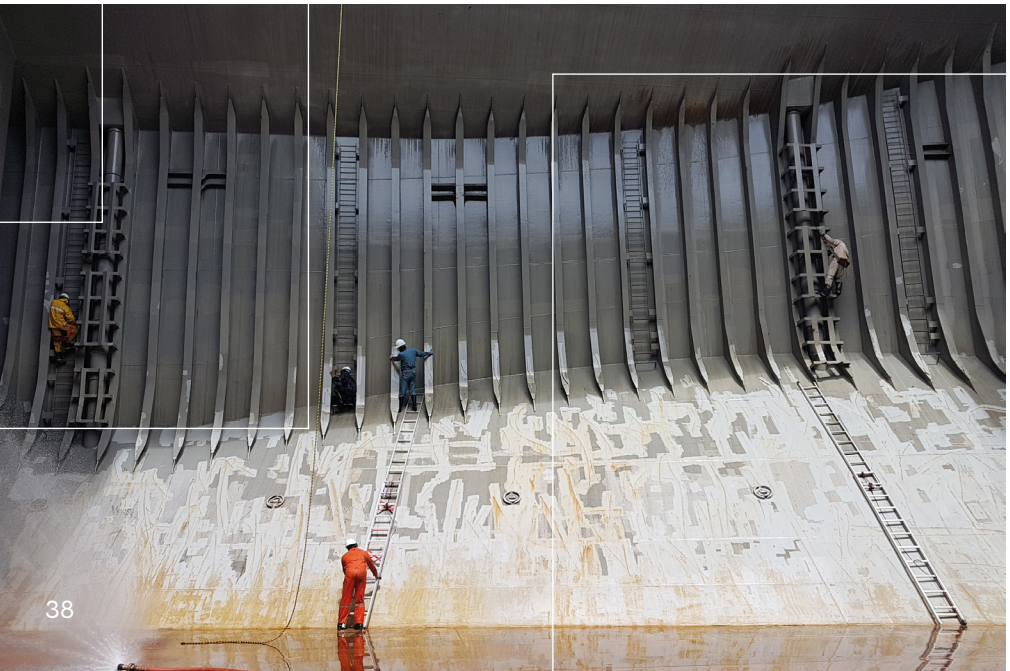
- The maintenance clause (e.g. lines 21-24 and clause 1 of NYPE 1946);
- The owner's obligation to render all customary assistance with the ship's crew (clause 8 NYPE);
- Implied term that the crew should perform their services with due diligence.

The question as to the level of cleaning that the crew can reasonably be expected to achieve is a question of fact. Cleaning the holds includes removal of loose rust scale and loose paint, always given time and calm weather. The crew are not regarded as skilled cleaning operatives and, therefore, there is a limit on what cleaning can reasonably be effected whilst at sea.

Cleaning holds & customary assistance does not include:

- Removal of hard adhering rust and large loose rust patches.
- Chipping rust.
- Scaling operations requiring sophisticated tools (pneumatic hammers, high pressure water jets, grit blasting equipment).

When extraordinary cleaning is necessary due to the charterer's choice of cargo (unless this cargo is one that has been agreed that the owner will carry, i.e. at the owner's risk and expense), the owner's reasonable costs should be recoverable from the charterer under an implied indemnity.



3) Common issues with charterparty clauses:

Courts will look at the wording of clauses and give them their literal meaning. The words "clean dry, free from loose rust flakes/scales and residues of previous cargo" will not mean that the holds can be rejected if "traces" of previous cargo are found, although there are conflicting arbitration decisions on this issue.

"Vessel …. ready to receive any permissible cargo allowed under the charter party to an independent surveyor's satisfaction"

- "Permissible cargo allowed under the charter party" may mean that the holds will have to be presented to a very high standard (say the charter permits grain or urea. If the holds do not comply with this standard of cleanliness, it is not relevant whether the failed holds are still in a suitable condition for the particular cargo to be loaded; the charterer will still be entitled to reject the holds and insist that these are cleaned to the agreed standard before the charterer accepts delivery of the vessel.
- "Independent surveyor" is usually meant to be a firm or organization that operates independently of the owner or charterer or receiver ("The Protank Orinoco" [1997]).

"Intermediate Hold Cleaning:
Upon completion of discharge of each cargo, the crew shall render customary assistance in cleaning all cargo compartments in preparation for the next cargo, if required by the Charterers ….the Owners will endeavour to effect such cleaning as best as possible but without any guarantee that the cargo holds will be sufficiently cleaned and accepted on arrival at the loading port and the Owners shall not be responsible for any consequences arising from the fact that the crew has been employed in cleaning".

- This clause makes it clear that it will be the charterer's risk and responsibility for the holds passing the hold inspection for the next port of loading however good was the cleaning done by the crew ("London arbitration" [6/07]).

"If vessel fails to pass any holds inspection the vessel to be placed off-hire until the vessel passes the same inspection and any expense/time incurred thereby for Owners' account."

- The charterer has an implied obligation to have the holds re-inspected without delay after a failed inspection, however the vessel will not immediately be back on-hire as soon as the Master gives notification that the holds are clean. The ship will be back on hire when the reinspection would have taken place if both parties had exercised reasonable diligence to ensure it took place without delay. ("The DL Lilac" [2023]).

Upon redelivery, charterparties will often include a provision that the charterer is to return the ship in the same condition as it was delivered in.

The charterer will also have the option of paying a lump sum In Lieu Of Hold Cleaning (ILOHC). This clause is only intended to cover for the cleaning of the holds when debris and residue is left inside. It does not extend to large amounts of cargo being left in the holds that have been rejected by receivers. In this situation, the charterer will have to indemnify the owner for the extraordinary costs of cleaning.

Facts to consider when dealing with a claim:

- The vessel's age.
- The configuration of the vessel's holds (height and accessibility).
- Regarding intermediate hold cleaning: was the amount of time and were the weather and sea conditions reasonably sufficient to enable the holds to be cleaned by the crew? What were the previous cargoes and the amount of cleaning required? In particular, were dirty cargoes such as petcoke or coal previously carried?
- The standard of cleaning required in the charterparty (e.g. "grain clean").
- What were the reason(s) why the hold(s) failed the inspection (removal of soft non-adhering rust is the duty of the crew, removal of hard adhering rust…cannot be done by the crew).

05 Hull fouling

Hull fouling

Hull Fouling in a nutshell

Hull fouling is a well-known problem affecting vessels trading in warm water ports and is the result of marine growth on the hull. It can lead to diminished vessel performance as well as additional costs and time lost cleaning the hull. Commonly, there will be protective clauses in the charter to deal with this situation. However such clauses are sometimes omitted or may be insufficient to encompass the specific scenario. English law has addressed these issues and the most often used charterparty forms are considered here.

1) The owner's obligation to maintain:

Clause 1 of the NYPE 1946 form (clause 6 of the 1993 form) sets out the owner's overriding duty to maintain the ship. The costs of cleaning fouling from the hull, repairing paint work usually fall to the owner as part of the maintenance obligation. It is also worth noting clause 21 of the NYPE 1946 form which (while often deleted) expressly provides for the vessel to be dry-docked at least every six months for bottom cleaning and painting.

2) The owner's claims that can arise:

a) Can the owner claim damages and/or an indemnity against the charterer for following the charterer's order?

This depends on whether the charterer's order was lawful or unlawful. In other words, did the charterer order the vessel to trade to a safe port, anchorage, berth or place within the permitted trading limits?

Hull fouling as a result of an unlawful order:

Where the fouling is shown to be a direct result of obeying the charterer's orders which involve, for example, the vessel trading outside the charterparty trading limits, the charterer will be in breach of the charterparty and is likely to be liable for the cost of cleaning the hull and the time taken for the cleaning operation.

The owner must still show a causal link between the breach and the hull fouling. Conversely, the charterer would need to show that their unlawful order did not cause the hull fouling.

Even if the charterer gives an unlawful order, it may be that the charterer can argue that the owner agreed to follow the charterer's illegitimate order and that the owner has thereby waived their right to damages. As a general rule, however, obeying the charterer's unlawful orders will not amount to a waiver by the owner of their right to claim for damage or losses arising. As a matter of prudence, the owner should clearly put the charterer on notice that the owner is not waiving their right to claim against the charterer for the charterer's unlawful order ("The Kanchenjunga" [1990]).

Hull fouling as a result of a lawful order:

The NYPE form does not contain an express indemnity from the charterer to the owner (unlike the Baltime form).

Furthermore, the owner will not be entitled to claim from the charterer under an implied indemnity where losses and expenses are incurred as a consequence of complying with the charterer's legitimate and ordinary employment orders. For example, the cost of cleaning the fouling from the hull and repairing the paint work falls to the owner as a risk which

they consented to bear on fixing the charterparty. Such fouling is considered foreseeable at the time of fixing the vessel and falls within the owner's obligation to maintain the vessel, especially where the vessel is permitted under the terms of the charter to trade in warm waters.

In some limited circumstances, however, an indemnity for hull fouling may be implied. Such an indemnity will generally be implied against unforeseen liabilities, losses or costs incurred by the owner as a direct consequence of complying with the charterer's orders ("The Island Archon" [1994]), further or alternatively, when fouling is fortuitous or unforeseen events occur.

It is unlikely that an indemnity will be implied in the owner's favour where: time spent at a warm water port was usual and expected for the particular port see ("The Kitsa" [2005]); the marine growth in the water was usual and expected at that place for that time of year; or if either of the parties had been aware of the environmental factors prevailing at that place before the vessel traded there.

As a matter of good practice, it is better to have a comprehensive clause in the charterparty agreed in advance rather than rely on implied indemnities which are less certain.

b) Can the owner make a claim against the charterer for failure to redeliver the ship "in like good order and condition"?

The charterer's duty is to redeliver the ship fully discharged, clean, and free of previous cargoes. The owner cannot however claim that the charterer is in breach of their redelivery obligation because of growth on the ship's hull where, for the particular trade for which the ship is chartered, such growth on the hull is "ordinary wear and tear" for which the charterer cannot be held liable ("The Pamphilos" [2002]).

To summarise, the owner has a duty to maintain the ship and will not be entitled to claim in respect of losses arising during the charterparty or for the charterer's failure to redeliver "in like good order and condition" if: The damage arises from obeying legitimate and ordinary employment orders; and/or the loss/damage was foreseeable at the time of fixing the vessel.

c) Can the owner claim damages from the charterer for an underperformance claim in a follow on charter?

This will depend on the terms of the charterparty. However, if a charter contains a hull fouling clause whereby, hull cleaning has to be performed at the charterer's time, risk and expense but the charterer does not clean the hull before redelivery, then the owner may be able to claim for the cost of hull cleaning and the follow-on underperformance deduction. This is however subject to the vessel not having had sufficient time to carry out thorough cleaning before delivery under the follow-on charter ("London Arbitration" [25/17]).

3) The charterer's claims that can arise:

a) Can the charterer make an off-hire and/or under-performance claim?

If the ship's performance is affected due to the hull being fouled on or before delivery, then the charterer will be able to put the ship off hire for any time lost ("The Ioanna" [1985]).

If the hull is fouled during the currency of the charterparty, the charterer may argue that the ship is off-hire by claiming that the hull fouling was a: "... cause preventing the full working of the vessel" and/or "defect in the hull" (clause 15 NYPE). However, where a vessel under-performs and time is lost due to hull fouling and that fouling arose as a natural consequence of the service under the charterparty, then the vessel cannot be considered to be off-hire in accordance with clause 15.

Similarly, unless the speed and consumption of the ship are warranties that apply during the charterparty (and not just on delivery under the charter), the charterer will also not be able to make an under-performance claim as the warranties are only given on delivery whereas the fouling occurred as a result of a natural consequence of the service of the ship during the charterparty.

The charterer might be able to make a claim under the owner's maintenance clause if the charterer can show that the owner breached the obligation to maintain the vessel by failing to adhere to an appropriate anti-fouling programme during the course of the charter or to clean the hull within reasonable time. However, if the charterer's trading of the vessel does not give the owner the opportunity to clean the hull, the charterer cannot complain about breach of the owner's maintenance clause and/or under-performance.

b) Can the charterer claim for time lost cleaning the hull?

While the owner bears the cost of cleaning the hull, time spent cleaning the hull during the charter will usually be for the charterer's account as the vessel will not be off-hire under clause 15. As a matter of prudence, however, the charterer's agreement should be obtained as to the time and place of cleaning.

If the charterparty contains a deviation clause, this usually permits the vessel to be placed off-hire for the period when the owner deviates the vessel from a voyage for the owner's own purposes, such as for cleaning the hull. When the vessel is laden, deviating to undertake cleaning may also constitute a "deviation" under the Hague/Hague-Visby Rules which in turn could compromise Club cover. The Club should be contacted in such circumstances.

To summarise:

- The vessel will not be off-hire for time lost (for example, due to slow steaming) as a direct result of hull fouling which arose as a natural consequence of the service under the charterparty;
- The owner has an obligation to maintain the vessel and should clean the hull within a reasonable time if it has become apparent that there is fouling;
- The vessel may be off-hire whilst the owner carries out maintenance/ cleaning of the vessel's hull during the charterparty.

4) Protective clauses

In order to avoid the risk of delays in tropical waters it is common for time charterparties to include protective clauses. These clauses are however not always adequately drafted and frequently do not offer the protection which the owner had hoped for.

During negotiations, the owner and the charterer may devise their own wording. The clause can sometimes give rise to unintended consequences. The owner should be careful with the following points (this is not intended to be an exhaustive list):

- Where does the clause apply? Does it apply when the ship is at berth, port, anchorage, drifting outside port limits but waiting to load/ unload or at any other place at which the vessel is ordered to wait for the charterer's business?
- For what period does the clause apply (for example, "the vessel being at anchor or in port for more than twenty five (25) days")? What if the vessel waits, for instance, 10 days at anchorage and 15 days in port, or if the vessel is ordered to leave the berth for a period to give room to a priority vessel?
- After how many days does the clause take effect? It may be wise for the clause to differentiate between tropical and non-tropical waters (Fouling may rapidly occur in warm and shallow water).
- What is meant by "tropical waters"? It may be wise to define a geographical area or range of latitudes and temperatures within which the clause is to apply.
- What if the delay is not all suffered on consecutive days? What if the vessel shifts between berths and so the delay is interrupted by steaming a few hours to bunker (e.g. "The stay shall not be interrupted by the Vessel shifting between waiting places and/or berths, nor by sea passage(s) of less than [12] hours")? It is common for the charterer to order a vessel to take a short local passage to break the waiting period and thereby prevent the delay from being all on consecutive days.
- Is there a strict obligation on the charterer to clean the hull (for example, "Charterers to clean Vessel at their time and expense, otherwise owner's representation of Vessel's speed/consumption to be non-operative…")? What if this is a time charter trip? The above clause does not impose an obligation to clean as it only states that the charterer will be unable to make a claim for underperformance. What if this is the final voyage and the hull is fouled at the redelivery port?
- Although the cost of cleaning is for the charterer's account, who is responsible for cleaning? Is it better for the owner or the charterer to undertake the cleaning?
- Evidence: from the owner's perspective, it is best to have a clause which simply provides for the charterer to clean the hull following a stay at a tropical port, without adding the requirement for the owner to prove any such hull fouling. However, practically, the charterer may not agree to such terms. In that event, does the owner have to provide evidence? Is it up to the charterer to reverse the burden of proof and show that the fouling occurred prior to the vessel's prolonged stay in warm waters? From the owner's perspective it is best for the clause to put the burden on the charterer to show that the growth was not caused by the prolonged stay in a port but, rather, by the lack of maintenance by the owner.

To summarise:

- If a clause turns out to be ineffective then parties will rely on the case law as discussed above;
- The owner still needs to prove that the prolonged stay caused the fouling.

5) Evidence

Where there is dispute about whether the prolonged stay caused the hull to be fouled (whether or not a prolonged stay clause is incorporated in the charter), the outcome is likely to turn on the quality of the available evidence. A claim for hull fouling can be hampered by a lack of reliable evidence that the fouling arose as a result of a particular delay and was not pre-existing. It is important to have evidence indicating where and when a particular fouling took place (for example, with photos and samples of the hull fouling). The charterer will attempt to allege preexisting fouling or that the hull was fouled to a greater extent than it ought to have to by arguing that the owner had not applied adequate anti-fouling paint or that the paint's efficacy was reduced due to passage of time and that the vessel needed to be repainted as part of planned dry-docking.

Tips for the owner:

- Where it can reasonably be anticipated that there might be delays and fouling, take pictures of the hull on arrival at the port. Good contemporaneous evidence of the condition of the ship's hull before a voyage will be better rather than relying on an after-the-fact reconstruction;
- Keep good records of the vessel's cleaning and painting history;
- It is important to have good evidence of the nature and extent of the fouling before cleaning, ideally by a good quality underwater survey;
- It may be possible to have an expert extrapolate from the available evidence, once fouling has been discovered, to determine how long the fouling is likely to have been present. It is therefore worth asking the underwater surveyor to take samples.

06 **Off-hire**

Off-hire

General Principles

Time charterparties invariably contain an off-hire clause providing for exceptions from the obligation for the charterer to pay hire from the time of delivery until redelivery. The specific terms of the off-hire clause will determine whether or not any particular event entitles the charterer to place the ship off-hire, and for how long. Using a common charterparty such as the NYPE '46 by way of example, a charterer should bear in mind the following general principles when bringing an off-hire claim:

- There must be a loss of time to the charterer (save where the off-hire clause is a period loss of hire clause – see paragraph 4 A) below).
- The loss must be caused by an event listed in the charter.
- The event must "prevent the full working of the ship".
- The burden is upon the charterer to prove that the event is within the scope of the off-hire clause.
- The off-hire clause is an exception to the owner's right to be paid hire from the time of delivery until redelivery and therefore will be construed narrowly against the charterer.
- Off-hire operates independently of any breach or the owner's fault.
- General exception provisions in the charter do not usually operate on the off-hire clause, unless expressly provided otherwise.
- Off-hire events must be fortuitous i.e. not resulting naturally from compliance with the charterer's order.
- Off-hire events caused by the charterer may in some circumstances prevent the charterer from invoking the off-hire clause.

When dealing with an off-hire matter, it is important to consider the following steps:

Step 1: check the charter to look at the list of events enabling the charterer to put the ship off-hire

A ship will only be off-hire if an event occurs which is specifically mentioned in the list of events in the off-hire clause. The events discussed below are some of the main off-hire events listed in clause 15 of the standard NYPE '46 form.

Deficiency of men: this refers to any numerical deficiency of the officers and crew (but not contractors) and not any other type of deficiency or their refusal to carry out orders.

Default of men (NYPE 1993) covers the situation where the officers or crew refuse to perform all or part of their duties as owed to the shipowner and/or refuse to carry out the charterer's legitimate and lawful orders.

However, these words have a limited meaning and do not cover loss of time due to the crew's negligent or inadvertent non- or bad performance of their duties, ("The Saldanha" [2011]).

Breakdown to hull, machinery or equipment: this is self-explanatory. The word "breakdown" is to be construed in a popular and reasonable sense, such as to cover defects which, when discovered, would render it necessary in the opinion of a prudent operator that she should proceed to a harbour for repairs. Damages to hull, machinery or equipment: it would probably not be an off-hire event if the damage resulted from the charterer's use of the ship (see for example our article on hull fouling).

Detention by average accidents to ship or cargo: this is generally taken to mean events normally covered by insurance. An average incident does not necessarily mean general average but general average incidents might be covered in some circumstances. The word "detention" means that there must be "some physical or geographical constraint upon the vessel's movements in relation to her service under the charter". As such, damage to cargo which causes discharging operations to be delayed (as opposed to the arrest of the ship) will not constitute detention.

Since such event must not result from the natural compliance with the charterer's orders, there is case law that detention by pirates would not be an off-hire event under this clause.

Detention by the arrest of the vessel, (unless such arrest is caused by events for which the charterer, their servants, agents or sub-contractors are responsible) - only in NYPE '93: the sub-charterer, shippers, consignees are deemed to be the charterer's agents and any arrest by these parties will not render the ship off-hire provided the act or omission of these agents or delegates were in the performance of a relevant obligation under the charterparty ("The Global Santosh" [2016]).

Or by any other cause preventing the full working of the vessel: any event claimed as an off-hire event under "any other cause" must be of the same type of event as specifically mentioned in the earlier part of the clause. This could include for example, legal action or administrative acts by a port or other lawful authority (acting properly and reasonably) relating to the condition, efficiency of the ship or crew ("The Laconian Confidence [1997]) (this is more restrictive than "Any other cause whatsoever"- below).

"Any other cause whatsoever" (sometimes this wording is added into clause 15): this means that an event claimed as an off-hire event under "any other cause" does not have to be the same type of event as specifically mentioned in the earlier part of the clause. Therefore, if this addition was made, off-hire events could include any event causing loss of time and preventing the full working of the ship – for example: arrest of the ship by cargo interests, capricious acts of local authorities, or detention by pirates.

Step 2: check that the event prevents the full working of the ship.

Once the charterer has demonstrated that one of the listed events in the off hire clause has occurred, they must then prove that the event prevented the ship from performing the next operation that the charter service required of her at that time.

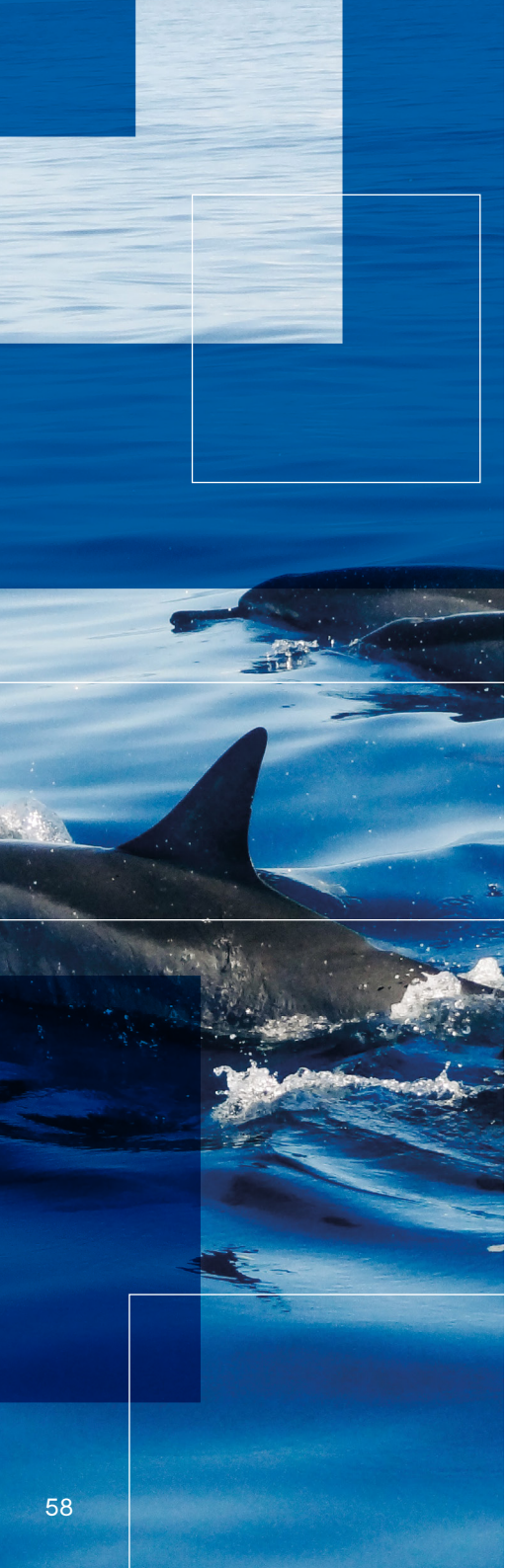
What is the next operation that the charter service requires?

This is a matter of fact and can sometimes be difficult to ascertain, leading to disputes. The question is not what service the charterer hoped or expected the ship would be able to perform, but what service they actually required at the time of the off-hire event. Generally, a ship is not prevented from working if, with a view to performing the charterer's orders, she is carrying out an operation which is in the ordinary way an activity required by the time charterer. The ship will not be prevented from working if in order to perform the charterer's orders the owner must first carry out an operation which is, in the ordinary way, an activity required by the charterer.

A ship will therefore be performing the chartered service when bunkering, ballasting, lightering and hold cleaning, if these services were next required at the time, even if the charterer would have preferred the ship to carry out another service, such as loading cargo. Some examples follow.

Examples: Next service required

1. Delays at the load port are incurred because of the crew inadequately cleaning the holds. The holds need to be cleaned further in order to load the cargo. The next service required is not the loading of the cargo, but further cleaning of the holds. Under NYPE '46, the ship would not be off-hire.
2. A master is asked to load as much cargo as possible in order to have a sufficient draft to enter into the Panama Canal but negligently loads too much cargo, requiring the ship to lighten cargo. Under NYPE '46, the ship would not be off hire, as the ship will not have been prevented from fully working: in this case, the next service required would be the lightering of the ship. ("The Aquacharm" [1980]).



Step 3: how long can the ship be put off-hire?

There are two types of clauses; period loss of hire clauses and net loss of hire clauses.

a) Period clauses

Under these types of clauses, the calculation of the off-hire period is relatively straightforward. The ship will be off-hire from the start of the off-hire event up until the off-hire event ceases, whether or not any time has been lost.

b) Net loss of time

This type of clause is the most commonly used and can be found in the NYPE '46, Baltime and Shelltime 4 charterparties. The charterer will only be able to put the ship off-hire for the time actually lost during the period that the full working of the ship is prevented. Difficulties can arise calculating how much time was lost, if any. For example, if a ship has 4 cranes and one of those cranes breaks down, the charterer may assume that the ship is off-hire for 1/4 of the time taken to complete cargo operations. This may however not be the case if no delay actually occurred because the other functioning cranes were used to complete the cargo operations without any loss of time.

The second part of clause 15 of the NYPE '46 charter specifically states that if the speed of the ship is reduced by defect or breakdown of the ship's hull, machinery or equipment, the charterer is entitled to reduce hire for the time lost and any extra fuel consumed and any extra expenses incurred. (For further advice on making deductions for speed and consumption claims please see our separate article).

c) Net loss of time: does the charterer take into account additional/ consequential time lost?

Example: A ship is off-hire for a small amount of time because of an engine breakdown. As a result, she misses a tide or loses her berthing slot. Under clause 15 of NYPE '46, the ship will only be off-hire for the period when the full working of the ship was prevented (i.e. until the engine was repaired and the ship was able to continue the next service required). Any consequential delay arising from the off-hire event – such as missing a tide - would usually not be part of the off-hire period.

d) Net loss of time: does the charterer take into account time made up?

Generally, it is not possible for the owner to claim credit for any time which is made up after the off-hire event. For example: a ship is on voyage from the Philippines to Shanghai; she suffers a breakdown at the Philippines which is an off-hire event, and is required to deviate to Hong Kong for repairs. It would be arguable for the purposes of calculating off-hire under clause 15 of NYPE '46 that the ship is still off-hire for the time spent on the Philippines- Hong Kong leg as a result of the off-hire event, even if by proceeding to Hong Kong for repairs she resumes her voyage to shanghai from a position closer to her destination, Shanghai.

There is authority that a ship will not be performing the service next required of her, merely because she is operating in a manner that is consistent with performing that service – therefore in this example, it would probably be irrelevant for the purposes of determining whether or not the ship was off-hire that part of the route taken by the ship proceeding to Hong Kong for repairs overlapped with the route to Shanghai. Sailing towards the charterer's intended destination may not be considered by an English Court or Tribunal as the same as sailing to that destination. However, in this example, had Hong Kong been the intended next destination, the result might be different.

e) Net loss of time: can the owner argue that there has been no loss of time if during the period of time lost, the ship would not have been able to berth in any event?

If, a ship drifted in international waters outside a port for 11 days because of an off-hire event ("default of Master"), it would be irrelevant for the purposes of off-hire under clause 15 of NYPE '46 that if the ship had sailed to the port 11 days earlier, the ship would not have been able to berth before the end of the 11 days period because of congestion. In this case, the service next required would be to sail directly to the port, and not to drift in international - the ship would accordingly be off-hire for 11 days. ("The Athena" [2013]).

Equitable set off: Other events not listed in off-hire clauses permitting the charterer to deduct from hire

If the charterer has a claim against the owner for breach of the charterparty and suffers a loss or incur expense as a result, but the breach is not an event listed in the off-hire clause, the charterer may still be able to withhold hire payments in full or in part for the amount of their claim. The charterer will have such a right of set off where:-

- The owner's breach of the charterparty has deprived or prejudiced the charterer in the use (partial or total) of the ship.
- The charterer exercises their right in good faith and on reasonable grounds (for example by deducting an amount which is a reasonable assessment of the claim).
- The charterer proves that there has been a breach of the charter by the owner.

a) The charterer may have a right to set off a claim for damages from hire payments for the following claims:

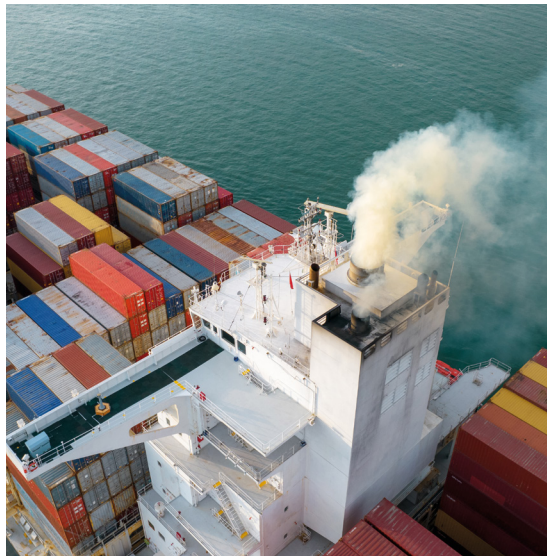
- Breach of a speed warranty.
- Failure by the owner to load a full cargo causing loss of time, or
- Time lost because of the owner's failure properly to perform their hold-cleaning obligations causing a loss of time.

b) Examples of claims that do not usually give rise to a right of set-off from hire payments (this list is not exhaustive):

- Claims for damage to cargo.
- Loss of an anticipated cargo to be loaded by the charterer.
- Crew party to a fraud with bunker suppliers.
- Bunker claims.

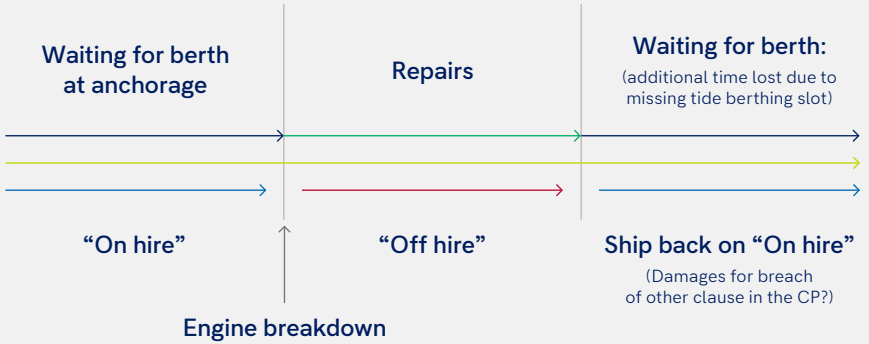
Other remedies available to the charterer

It is important to remember that under clause 15 of NYPE '46, the ship will only be off-hire for the period where time is lost and the full working of the ship has been prevented. An off-hire event may for example cause the ship to lose time by missing a tide, a berthing slot or incurring a loss as a result of missing a fixture. If these losses arise as a result of a breach of charterparty, the charterer may be able to claim for damages.



A charterer may therefore be able to claim damages for:

- Additional time lost or other losses incurred resulting from the breach of charterparty.
- In the event that the ship was not off-hire, damages for the time lost equivalent to the hire for that period. The charterer must establish a breach of the charterparty by the owner. The charterer will have to establish that they have, as a result of the owner's breach, been prevented from using the ship or have been prejudiced in their use of the ship, for the relevant period. This is different to putting the ship off-hire (the charterer does not need to show a breach to put the ship off-hire).

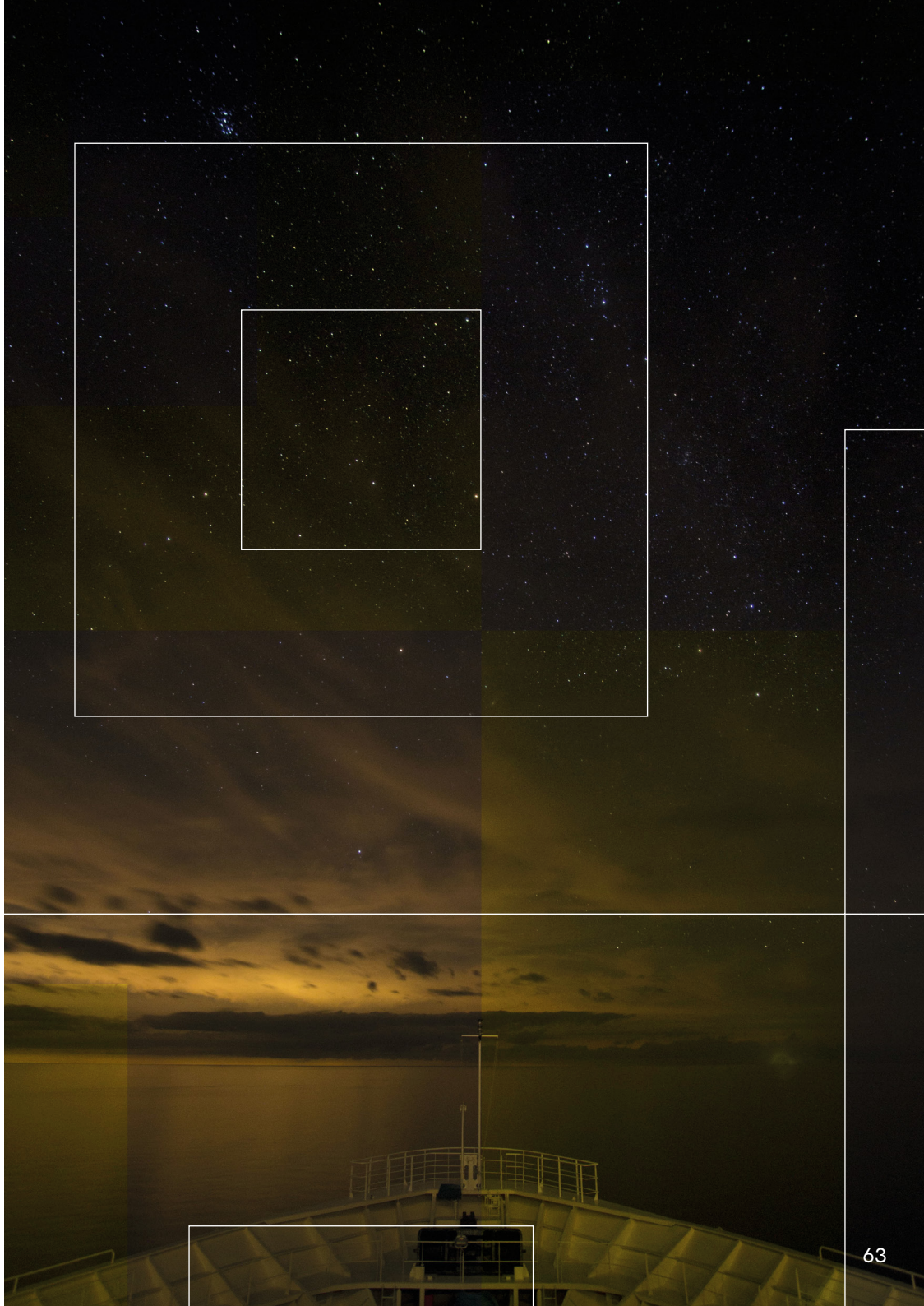


Such a claim would however be subject to the following:

- The charterer must prove a breach of the charterparty by the owner (note that some of the owner's obligations are not strict, such as the owner's duty to maintain the ship. Some obligations may be qualified by the obligation to exercise "due diligence" e.g. seaworthiness obligations in respect of cargo claims where US COGSA or the Hague/Hague-Visby Rules are incorporated into the charter), and
- The owner may have defences – for example, if the US COGSA or the Hague/Hague-Visby Rules are incorporated into the charter, under Article 4 rule 2(a), the owner may have a defence if the loss was caused by the act, neglect or default of the master, mariner, pilot, or servants of the owner, in the navigation or in the management of the ship, ("The Aquacharm" [1980]).
- In the case of lost sub-fixtures, the charterer would have to prove that the breach by the owner caused the charterer to incur damages in respect of the lost sub-fixture, and that the damages in respect of the same are not too remote (for example, if the cancelling date under the sub-fixture was missed and the fixture was thereafter cancelled because further time was lost by a separate intervening event, occurring after the owner's breach, e.g. the ship missing a tide, it would be arguable that a claim for the lost fixture was not a direct result of the owner's breach and was too remote to recover as damages).
- Note that whether a claim in damages is recoverable or not is a specialised topic in English law, particularly with regard to causation and remoteness, where detailed advice may well be needed.

Summary: when dealing with an off-hire claim, these are the steps to follow every time:

1. Check the off-hire clause: is the event listed in the off-hire clause? (If the event is not listed, can I claim for breach of the charterparty - is there a breach?)
2. Is there a specific clause relating to this event (holds on arrival, crane breakdown) which provide a "complete code"?
3. Check that the event prevents the full working of the ship.
4. How long can the ship be put off-hire (off hire does not deal with consequential time lost)?
5. If the event is not an off-hire event, can I still deduct from hire by way of equitable set off?
6. Can I claim damages for consequential time lost by proving a separate breach (proceeding with utmost dispatch, maintenance, etc...)
7. If I am claiming for a breach of contract, does the owner have a defence (US COGSA or the Hague/Hague-Visby Rules Article 4 rule 2(a).



07 Liens on cargo

Liens on cargo

Where hire/freight has not been paid to the owner by the charterer, it may be possible for the owner to lien the cargo shipped i.e. refrain from releasing it to receivers, pending payment of the outstanding hire/ freight. When can the owner exercise a lien?

Under English law, there must be a contractual right to lien.

The owner can lien the charterer's cargo only if the charterparty between the owner and the charterer has a lien clause, such as clause 18 of the NYPE form.

The charterparty lien clause must be incorporated in the bill of lading

In order for the owner to lien cargo which does not belong to the charterer, i.e. 3rd party bill of lading holder, the owner's charterparty lien clause must be incorporated (expressly or by reference) into the bill of lading. Otherwise, whilst the exercise of the lien may be lawful, as against the charterer under the charterparty, it could be unlawful as against the receivers under the bill of lading. General words of incorporation in the bill of lading, such as the Congenbill form, "all terms and conditions, liberties and exceptions of the charterparty" will only include the time charter lien clause if the bill of lading identifies the time charter as the contract whose terms are incorporated. However, if the bill of lading does not identify the time charter, the usual presumption is that the terms of the end voyage charter under which the bill of lading carriage is being undertaken will be incorporated and not those of the head time charter.

Can the disponent owner lien cargo?

Where the disponent owner is owed freight/hire from the charterer, but the bill of lading is issued by the head owner i.e. the owner is the contractual carrier, a disponent owner cannot exercise a lien over cargo under the bill, as they are not a party to the bill of lading contract. It is unclear whether the disponent owner can order the head owner to exercise a lien in these circumstances.

Although the disponent owner may not be able to lien the cargo as against cargo interests, they may still be able to exercise a lien as against the sub-charterer by ordering the master to not release the cargo ("The Aegnoussiotis" [1977]), although there is also a conflicting view, see ("The Agios Giorgis" [1976]).

Where and how can a lien be exercised?

Usually the lien must be exercised when the vessel is at or anchored off the discharge port, or ashore if the cargo can be discharged and stored in a warehouse under the owner's control (although the costs of storage will be for the owner's account unless there is an express charterparty provision for recovery of costs). Once the cargo is delivered to the receivers (i.e.is no longer in the owner's control), the lien is lost.

The owner cannot usually exercise this right by stopping the vessel en route to the discharge port e.g. when bunkering. However, there may be special circumstances where (if it can be proven that at the discharge port it is impossible to exercise a lien and any further carriage will lead to the loss of possession/lien of the cargo following the arrival at the port) a lien may be exercised earlier than at the discharge port.

Is the right to lien cargo recognised under local law?

Even if there is a contractual right to lien under English law, the lien must be capable – both legally and practically of being exercised in the local jurisdiction i.e the place of discharge. The contractual lien will need to be recognised and enforceable under the local law (e.g., by way of a court order). Many jurisdictions, China for example, do not recognise the right to lien cargo, unless it is owned by the debtor, so unless the cargo is owned by the charterer, the owner cannot lien the cargo.

If the owner exercises a lien unlawfully under local law, then the owner can potentially be exposed to a claim in damages for delay and loss of profit /arrest of the vessel from the bill of lading holder.

Dealing with the liened cargo

Once the lien is exercised over the cargo, the owner will still have a duty of care for the cargo as bailees. If the charter freight/hire remains unpaid by the charterer, the owner may wish to sell the cargo to recover the freight/hire from the sale proceeds. Unless expressly stipulated, the lien clause will not give the owner an automatic right to sell the cargo. Even if there is an express provision in the lien clause, it may still be necessary or advisable to obtain an order from the local court.

Advice on local law should always be taken before exercising a lien over cargo.

Lien in respect of which debts?

Once it has been established that the owner has a contractual right to lien cargo, the owner must show that sums are actually due and unpaid at the time the lien is exercised and that the type of claim is covered by the lien clause. For example, in the absence of any specific wording, a lien for non-payment of freight will not cover a claim for demurrage or any amount due under the charter, other than freight. (see however the Gencon 1994 charter party Clause 8, which is widely drafted and extends the lien to many claims: “the owners shall have a lien on the cargo and on all sub-freights, demurrage, claims for damages and for all other amounts due under this charterparty including costs of recovering the same”).

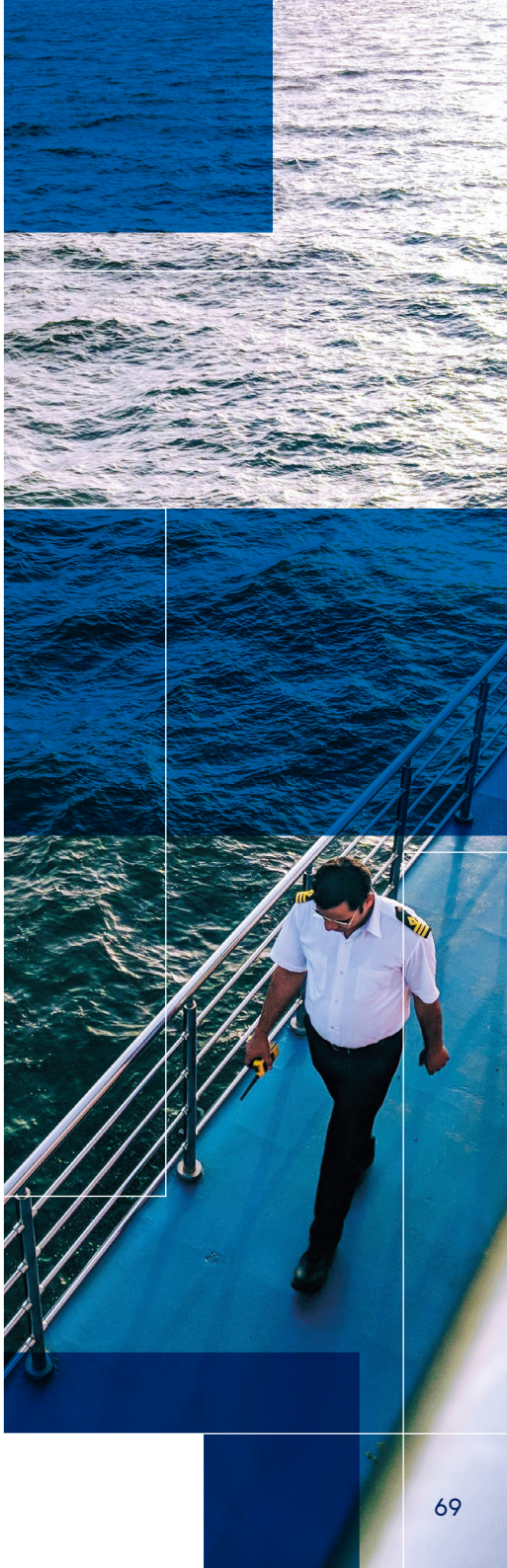
Will time lost be for the charterer’s account?

Subject to the terms in the time charterparty, the ship should remain on hire whilst the owner exercises their contractual right to lien. Similarly, in respect of a voyage charter, laytime, demurrage, detention should be for the charterer’s account.

However, the owner must act reasonably and if for example, a more practical and cost-effective solution is available but not followed, (warehousing instead of refusing to discharge) then time may be suspended.

Checklist when considering a lien on cargo

- Is there a contractual right to lien (Check the CP)?
- For which type of claim can the cargo be liened (freight, demurrage, detention, damages)?
- Are the sums due?
- Is the lienor’s charterparty right incorporated in the contact of carriage (check which CP is incorporated in the B/L – the owner’s or the charterer’s)?
- The disponent owner usually cannot lien cargo unless they are the carriers under the B/L?
- Where can the cargo be liened?
- Does local law allow the cargo to be liened?
- Remember that once the cargo is liened, it is under the control/responsibility/cost/expense of the lienor.



08 Liens on sub-freights

Liens on sub-freights

How can a ship owner recover hire in circumstances where the charterer fails to pay hire due under the time charter? The owner could withdraw the ship or even sue the charterer. This would, however, cost time and money and may prove to be ineffective particularly if the charterer has no assets.

One solution would be to tap into the charterer's sources of income:

a) The charterer may be carrying cargo for their own account;

b) The charterer's use of the vessel may generate income by way of the following:

i) Earning freight under bills of lading;

ii) Earning freight under a sub-voyage charter; or

iii) Earning hire under a sub-time charter.

Obtaining a lien on sub-freights is a mechanism which allows the ship owner to intercept the income due to time the charterer by requiring the cargo interests or the sub-charterer to pay to the owner any freight or sub-hire (as set out in paragraph b. above) that they would otherwise have paid to the defaulting charterer. (For B/L freight see following).

A lien on sub-freights can only arise as a contractual right (and does not exist in common law). A typical wording of a lien clause is as follows:

"The Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter Party and the Charterers to have a lien on the Ship for all monies paid in advance and not earned …" (NYPE 1946, cl 18). See also NYPE 1993, clause 23 and Baltime 1939, clause 17.

Does a contractual lien on sub-freights include sub-sub-freights?

Under an NYPE charterparty, the owner has the right to lien sub-freights. In that respect, the sub-charter should also contain a lien clause back to back with that in the charter above it, thereby providing an uninterrupted chain of lien clauses within the framework of the charter chain.

A lien would not extend to sub-subfreights if the wording used indicated otherwise. For example, the lien clause in the Baltime charterparty refers to sub-freights "belonging to the time-charterers".

Does a contractual lien on sub-freights include sub-time charter hire?

Clause 18 of the NYPE 1946 states that "The Owners shall have a lien upon all cargoes, and all subfreights….". There are conflicting court decisions as to whether the above clause includes sub-hire. However, the most recent view appears to be that liens on "sub-freights" do not cover liens on sub-hire party ("The Bulk Chile" [2013]). Express wording will, of course, change the position, eg NYPE 1993, cl 23: "lien upon all cargoes and all sub-freights and/or sub-hire".

Is a shipowner entitled to lien freight under their bill of lading when it stipulates that "freight is payable as per (a sub-voyage) charterparty"?

Yes. A provision that freight is "payable as per charterparty" (which is not the owner's charterparty) does not exclude that right. The freight would still be due to the ship owner, even though it may be payable to another party ("The Bulk Chile" [2013]).

When can an owner exercise their right to lien?

A distinction must be made between charterparty freight and bill of lading freight.

With regards to charterparty freight the owner is only allowed to lien freight until there is an actual default in the payment to the owner. Possible, probable or inevitable (future) default is not enough ("The Spiros C" [2000]).

With regards to bill of lading freight, it was believed that there was an implied term restricting the owner's right to lien bill of lading freight unless hire and/or other sums were due under the Charter ("The Bulk Chile" [2013]). However it was recently held that no such implied term existed and that there is no such restriction to the owner. The owner can therefore collect bill of lading freight whether or not the charterer is in default ("The Smart" [2021]).

When is the right lost?

The lien must be exercised by way of a demand that is to be received before the freight is paid by the sub-charterer either to the charterer or to their agent ("Samsun Logix v Oceantrade" [2008]).

Formalities in exercising a lien

By giving notice to the company due to pay the sub-freight. The notice does not need to be in any particular form. However, the notice should make clear:

- That the charterer is in default of payment of hire;
- The source of the lien;
- The demand for payment which should be quantified as far as possible;
- The consequences of not complying with the lien notice, namely that the party receiving the lien notice may end up paying the hire/freight that is being liened twice over.

It is recommended to ask a solicitor to draft the notice in order to comply with all the requirements.

How much may be retained?

Under the lien the ship owner may retain only those sums which are due from their time charterer ("Samuel v West Hartlepool" [1906]), com. Cas. 115. By way of example, if a lien over sub-freights is exercised on 15 May, the lien will only be effective in relation to unpaid hire which is payable before that date, but not effective in relation to hire which falls due on 20 May. Similarly, the lien does not extend to a claim by the ship owner for damages under the time charter.

After deduction of the amounts due, the ship owner must account to the charterer for the balance. However, where there is:

a) Unpaid hire which is not covered by the lien (see previous); or

b) A damages claim by the owner against the charterer,

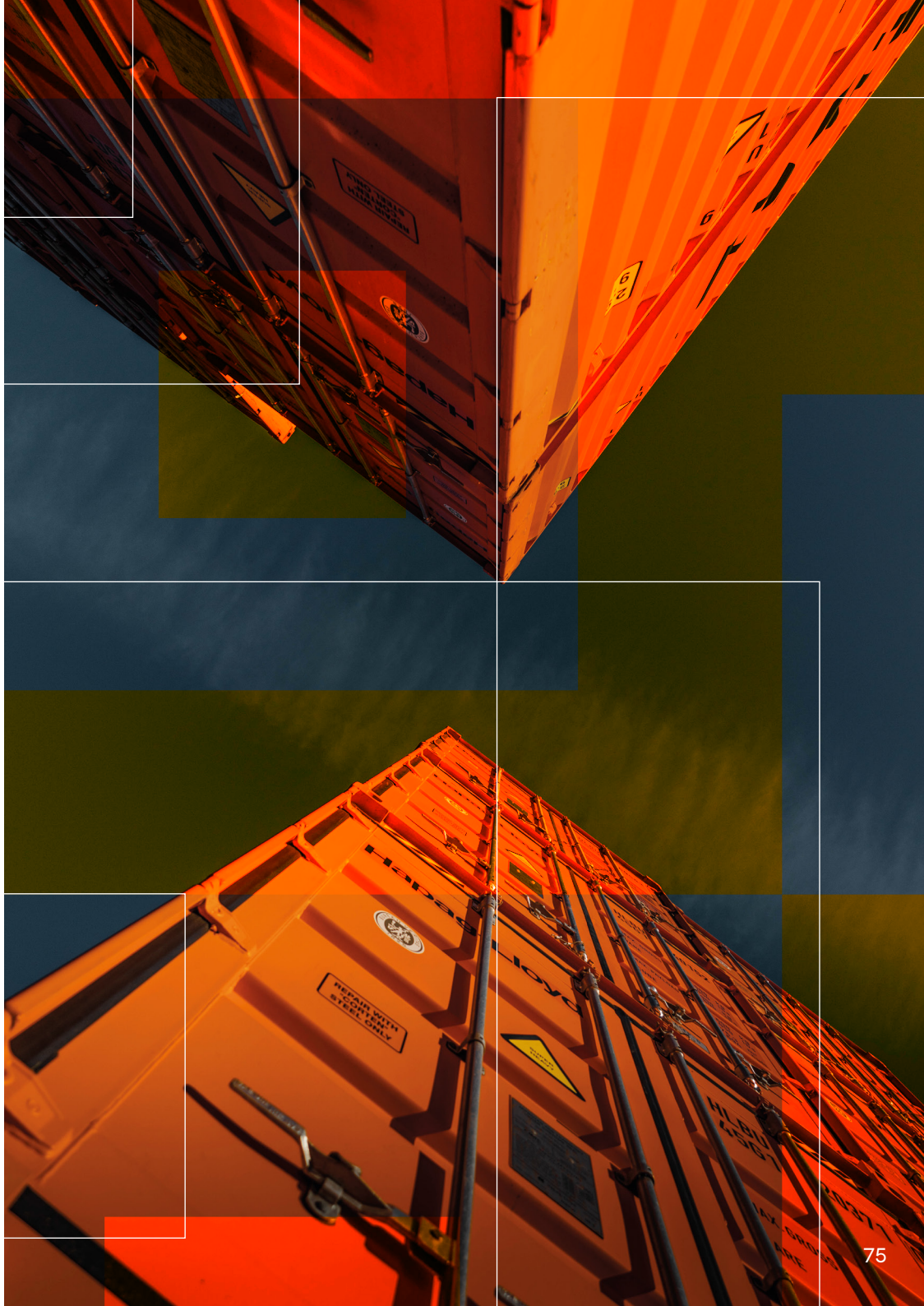
The owner may have a right of set-off and counterclaim over the balance in respect of the sums accruing due or the claim for damages ("Samuel v West Hartlepool").

"Freight pre-paid" B/Ls

A bill of lading containing the mention "freight pre-paid" will not necessarily mean that the owner will be barred from liening sub-freight. The important fact to ascertain is whether freight has actually been paid. Sometimes only a portion of the freight is paid, or not at all, despite the bill of lading stating that it is "freight prepaid".

What if the sub-charterer ignores the notice of lien?

If the sub-charterer ignores the notice of lien and goes ahead and pays freight to the defaulting charterer, the sub-charterer will be liable to pay the amount of that freight to the ship owner notwithstanding that the sub charterer will already have paid the same to the charterer above them in the charter chain.



09 Withdrawal & suspension of service of a ship

Withdrawal & suspension of service of a ship

When a charterer fails to make punctual payment, the owner has a variety of remedies. They may elect to lien cargo, (sub) freight and/or (sub) hire (see previous articles). Alternatively, the owner may have the right either to withdraw the vessel from the charter or suspend the service of the vessel and her crew from the charterer.

Here are 10 factors to take into consideration. (Note that factors 4, 5, 6, 7 and 9 below apply in relation to withdrawal of the vessel only, ie not also to suspension of service due to the charterer's late or non-payment of hire.)

1) Does the owner have a right to withdraw the vessel from the charter or to suspend service?

Unless stipulated in the charter, there is no right under English law to withdraw the vessel from the charter nor to suspend service due to non or late-payment of hire. Rather, in the event of non or late payment of hire, the owner simply has a right to claim for the hire owing plus interest on the late payment/s.

a) Where the owner has an express right

NYPE 1946 – Lines 61-62, NYPE 1993 Lines 150-151 and Baltime – Clause 6 / Line 86 all give an express right to withdraw the ship for late payment.

Only the standard NYPE 1993 charterparty gives an express right to the owner to suspend service. Other charterparties will need to have a rider clause granting this right such as the Bimco "non-payment of hire clause for time charterparties".

b) Where the owner does not have an express right

Where there is no express right to withdraw and the owner wishes to get their ship back from the charter, the owner faces a more difficult route. Payment of hire is not a condition and therefore failure to pay hire will not be a repudiatory breach ("The Astra" [2016]).

In such cases, the owner will need to establish that the charterer's failure(s) to pay hire also amount to a repudiatory breach of charter which, once accepted by the owner, would bring the charter to an end.
The difficult question the owner faces in this situation is how many missed hire payments are necessary to establish a repudiatory breach.

2) Is the hire actually late?

a) The midnight rule

The charter will very rarely set a deadline/time for payment. In the absence of an express agreement or settled practice, the charterer has until midnight on the due day to pay ("The Afovos"). As a result:

- The time the vessel is delivered under charter is irrelevant;

and

- It will not matter that the bank is closed and it is too late to transfer the funds.

b) When is payment deemed to be made?

The general rule is that payment is made when the owner's bank decides to credit the account. As a result:

- The charterer's instructions to transfer does not equal payment.
- An irrevocable instruction to the bank to pay the hire might be deemed paid once the order is received and authenticated by the owner's bank.

c) hire falling due on a non-banking day

For hire 'payable in advance', if hire is due on a non-banking day, payment must be made earlier, although the owner must still wait until payment is late on the official due date before withdrawing the vessel ("The Laconia").

For example, if hire falls due on a Sunday (where Sunday is not a banking day), payment must be made by the charterer by Friday (the last banking day), but the owner can only withdraw the vessel or start the withdrawal process (depending on the precise charter term) after midnight on the Sunday. The owner must also beware in case the tribunal finds that there has been a settled practice of acceptance by the owner of late payment throughout the history of the charterparty.

3) Partial/non-payment of hire by the charterer relating to a charterparty dispute. Can the owner withdraw or suspend service for insufficient payment?

Where the owner has an express right to withdraw the vessel or suspend hire they can withdraw the vessel from the charter or suspend service when there is no payment, late payment or insufficient payment by the charterer. However in certain circumstances, the charterer is entitled to make deductions from hire. If, as a result of such entitlement, hire is not owing, the owner will not be entitled to withdraw. Two questions arise:

a) In what circumstances does the charterer have a right to deduct?

b) How much hire is the charterer entitled to deduct?

a) Does the charterer have a right to deduct?

In certain circumstances, the charterer is entitled to make deductions from hire either where there is i) a contractual right ii) an off hire event, or iii) a right of "set-off".

If there is no right of deduction, the fact that the charterer believes, bona fide and reasonably, that they have a right of deduction will not prevent the owner from validly exercising their right of withdrawal or suspending service.

b) How much hire is the charterer entitled to deduct?

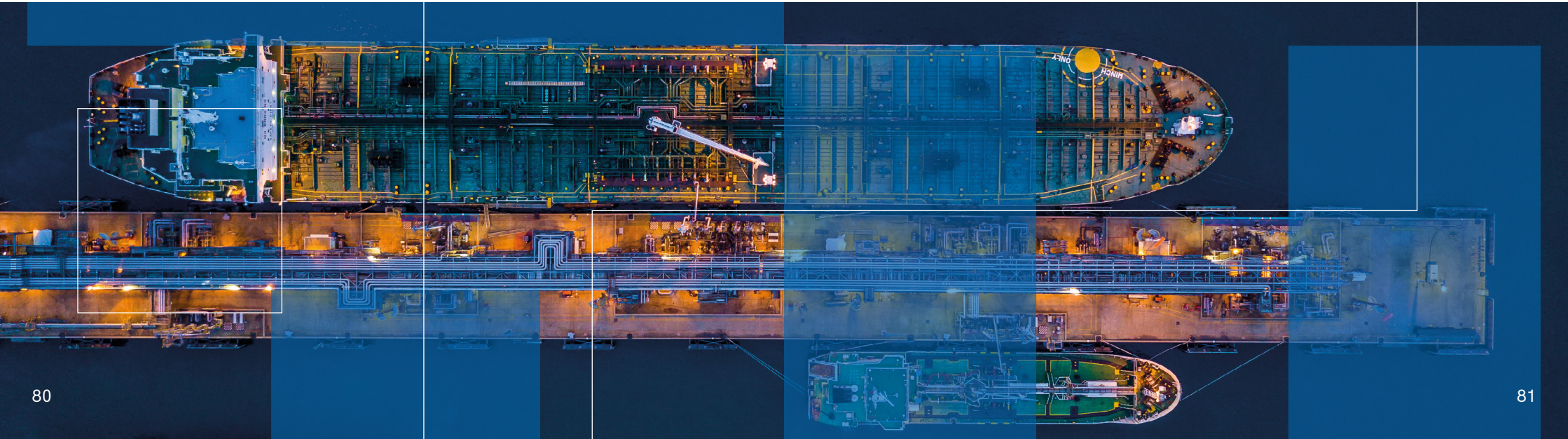
If there is a right to deduct, and the charterer quantifies their loss by a reasonable assessment made in good faith — and deduct only the sum quantified — then they are not in default and the owner will not then have the right to withdraw the vessel or suspend service ("The Nanfri").

4) Can the owner withdraw the ship as soon as payment is late?

A distinction must be made according to whether the charter contains an anti-technicality provision/clause or not.

a) Where there is an express right to withdraw and no anti-technicality provision, the owner may withdraw as soon as hire is late and/or overdue.

b) Where there is an express right to withdraw but the charter does contain an anti-technicality provision, the owner will have to comply with certain formalities and give the charterer a grace period before they can exercise their right to withdraw (see following paragraph 5).



5) 'Anti technicality' provisions

The standard form of NYPE 93 (but not the 1946 version) contains an "anti-technicality" clause. (Note that where the standard form charter does not include such a provision it is usual to find one in the rider clauses.) If the owner fails to comply with the procedure or withdraw earlier than the deadline imposed by the grace period, the owner will themselves be in repudiatory breach of charter, entitling the charterer either to keep the charter alive, alternatively, to treat the charter as at an end (which in this scenario the owner won't object to) and to claim damages against the owner for any losses caused as a result of the termination of the charterparty. It is therefore important to follow the anti-technicality procedure to the letter.

a) 'Anti technicality' provisions: the wording of the notice to be given by the owner

The notice must be in absolute terms and unequivocal. Words such as "owners will consider withdrawing/ may withdraw/will rely on their rights to withdraw/will temporarily withdraw", should be avoided.

The wording notice must make it clear that:

1. Hire has not been paid punctually and in full; and that
2. The owner is giving an ultimatum that unless the full hire owing is paid within the stipulated grace period the owner "will withdraw" the vessel.

b) 'Anti technicality' provisions: the timing of notice

The notice cannot be given until after the hire is overdue i.e. after midnight on due date. But in which time zone is "midnight" to be calculated? Say, for example, that the owner is Japanese and the charterer is based in Singapore, the vessel is loading cargo in Brazil, hire payments are made in US Dollars (thus going through a New York clearing Bank) and the owner's bank account is in London.

Does the owner look at the timing by reference to:

- The place of business of the charterer?
- The place of business of the owner?
- The location of the vessel?
- The location of the paying (or receiving) bank account? (If payment is made in United States Dollars, beware of the different time zones in the United States).

Under English law, the answer to this question is not clear. Therefore, to be on the safe side, the owner should give the notice at the latest date/time that might apply.

c) 'Anti technicality' provisions: the period of the Notice

Very often, the anti-technicality clause will stipulate a grace period by reference to working days or banking days. When calculating the period special caution must be paid to "banking days/working days" as they will often be different to calendar days. This can be difficult to calculate as one will have to take into account in multiple jurisdictions (as above with regard to the timing of the notice) for:

- Public holidays; and
- Weekends (the days for which may differ in different countries).

Once again, caution is to be applied. If the owner withdraws the vessel before the end of the grace period, they will be in repudiatory breach.

6) Notice of withdrawal

No particular form or wording is needed for the notice of withdrawal. However it must:

- Make clear that the owner is treating non-payment of hire as terminating the charter; ("The Aegnoussiotis" [1977]) and
- Be given to the charterer (the owner cannot just give it to the master) ("The Georgios C." [1971]).

7) Other considerations: Waiver by conduct or words

Although the owner may have acquired the right to withdraw, they may forfeit their right in certain situations should their subsequent conduct amount to waiver.
The owner should be careful that their words and actions do not constitute a waiver of the owner's exercise of their right to withdraw.

a) Waiver: can the owner waive their right to withdraw the vessel from charter if they delay the withdrawal?

When the grace period expires, the owner must withdraw within a reasonable time. Failure to withdraw within a reasonable time may give rise to waiver. What is a reasonable time is essentially a question of fact. The owner will be allowed time to check if the funds are received and to take prompt legal advice. ("The Laconia" [1977]).

Generally, the question is this: has the owner acted in such a way as to indicate to the charterer that they have elected to continue the charter and as a result waive their right to withdraw (for example, by accepting a late payment of hire – see below)?

b) Waiver: can the owner accept full late payment and then withdraw?

If the funds are accepted without any qualification ie "as if" the hire had been punctually paid, then the owner will not be able to withdraw ("The Brimnes"). A waiver could possibly be construed against the owner if funds are retained for a long period without withdrawing. However the mere fact that the funds were received by the bank and being processed will not in of itself (without more) constitute acceptance of the hire and waiver of the owner's right to withdraw ("The Laconia").

c) Waiver: can the owner keep funds received after valid withdrawal notice was served?

The retention by the owner of the funds will not of itself be taken as an affirmation of the contract or as the owner waiving their right to withdraw or their having withdrawn the vessel. The owner should however be very careful not to use language or act in a way so as to give rise to new charter after the owner has withdrawn the vessel from hire. If the owner does seek to retain such funds it is recommended they make clear that the funds are being retained not as hire but as security for other damages claims under the charterparty see for example ("The Brimnes").

d) Waiver: can the owner accept partial payment of hire and still withdraw?

If the charterer makes a timely but insufficient payment of hire, acceptance of that payment is unlikely to amount to a waiver by the owner of their right to withdraw. The owner should however bear in mind point c) above and also proceed to withdraw within a 'reasonable time'.

8) Can the owner suspend performance of the vessel/her crew if the charterer is late in paying hire?

Withdrawing a ship is a draconian remedy and, where the market has fallen, it is often a move that the owner is unwilling to take. Instead, the owner may prefer to suspend the performance of the charter until the charterer pays the hire due.

However, unless the charterparty (or other contractual provision) grants the owner a right to suspend performance of the charter, the owner will not be able to suspend service, and if the owner was to do so where they do not have such a right, then the owner may themself fall foul of other terms of the charter, for example the duty to comply with the charterer's lawful orders. This may then entitle the charterer to put the ship off hire or give them a claim for breach of charter.

If the charterparty grants the owner the right to suspend service, generally this will be a right that usually arises only after the grace period in the anti-technicality provisions in the withdrawal clause has expired. The owner must check such clauses carefully and not suspend performance too soon.

Another factor to take into account is that if the vessel has cargo on board, the owner will also generally be party to the bill of lading contract and will have duties as bailee of the cargo and could possibly be in breach of their due despatch obligations vis-à-vis cargo interests and face claims in delay should they suspend performance under the charterparty.

9) Other considerations: is it the right moment to withdraw the ship? Is there cargo on board?

Upon withdrawal, the charter comes to an end. However what are the owner's rights and obligations if the vessel is still prosecuting a voyage and/or is still carrying cargo? If the ship is still carrying cargo, the owner will still have an obligation under the contract of carriage to deliver the cargo to cargo interests.

Because the charter has come to an end, all costs which were due to be paid by the charterer loading/unloading/bunkers) will be for the owner's account.

The owner may only become entitled to remuneration for those services rendered after withdrawal. They may also have an "equitable" claim to the bill of lading freights if the vessel was withdrawn before the freights became due. Getting these sums back may well end up be costly and fruitless if the charterer is insolvent.

10) Other considerations: Damages

Unless the charterer's conduct in failing to pay hire also amounts to a repudiatory breach, then the owner cannot be confident that they will also have a claim in damages for hire under the unexpired period of the charter. English law currently has conflicting cases on this point (and see previous regarding ("The Astra" [2013]) to be compared with the earlier judgment in ("The Brimnes" [1974]). As it stands, under English law the owner can only be confident of recovering unpaid hire up to the point of withdrawal and no more. Therefore as a practical matter, withdrawal following one missed payment will be more attractive to the owner in a rising charter market.

If a charter is lawfully terminated in a falling market as a result of a repudiatory breach by the charterer then the proper measure of direct damages will be the difference between the original charter rate and the prevailing market rate for equivalent business at the time of the breach. However, the issue as to which losses are recoverable as damages and how damages are calculated is the focus of numerous English law cases which is outside the scope of this publication.

NYPE 2015

Clause 11 of the NYPE 2015 deals with the owner's right to withdraw and suspend for non-payment of hire. With regard to suspension of performance of the vessel, there is now no need to issue an anti-technicality notice (as in the previous 1993 version). As soon as the hire is outstanding, the owner has a right to suspend performance.

If the owner wants to withdraw the vessel and terminate the charter for non- payment of hire, the owner will have to send a notice giving 3 banking days to rectify the failure (a grace period). This notice is not an "anti-technicality" notice per se. Unlike the NYPE 1993 charterparty, a notice can be served under the NYPE 2015 whether or not the failure to pay hire promptly is due to "oversight, errors or omissions on the part of the Charterers or their bankers". It is now unqualified meaning that whatever the reason for the charterer's failure to make punctual payment of hire, they will be in breach of charterparty entitling the owner to serve a notice to rectify the breach and if not rectified within the grace period, the owner can terminate the charterparty. The new provision simplifies the procedure and avoids the owner having to establish the reason for late payment of hire.

In addition to the right to withdraw the vessel under the charterparty for non-payment of hire, the owner shall also be entitled under the NYPE 2015 to seek damages for any loss suffered as a result of the early termination of the charterparty for the remaining period of the charter. The owner does not have to establish the breach is repudiatory. On the other NYPE versions, if there is no "repudiatory breach", the owner's only remedy is a claim for the hire due at the time of withdrawal. This provides a clear means of compensation to the owner should they be exposed to lower market rates than the charter hire rate due to the premature ending of the charter.

Key points to consider when withdrawing/suspending

1) Does the owner have a right to withdraw the vessel from the charter or to suspend service?
2) Is the hire actually late?
3) Can the owner withdraw or suspend service for insufficient payment? (the charterer's right to deduct?
4) 'Anti technicality' provisions?
5) Waiver by conduct or words.
6) Is the ship laden? (once the ship is withdrawn the owner is to take on the charterer's obligation).
7) Damages (what damages will the owner obtain if they withdraw – only unpaid hire? More damages?).

10 Bunker claims

Property and quantity of bunkers on delivery and redelivery under a time charter

Bunker claims

1) Property of the bunkers

Under the NYPE 1946, 1993 and 2015, on delivery of the ship, the charterer "takes over" the bunkers from the owner and on redelivery, the remaining bunkers are in turn taken back by the owner. In theory property of the bunker is vested to the charterer during the period of the charter. The owner will merely be in possession of the bunkers as bailees.

Issues may arise as to whether property reverts back to the owner if the bunkers supplied during the currency of the charter are subject to a supplier's retention of title and have not been paid by the the charterer. This issue refers to complicated legal arguments and will not be examined in this publication. See ("Res Cogitans" [2016]).

Who owns or takes credit for the bunkers if the ship is withdrawn or the charter is terminated early by some other way?

In a time charter bunkers are usually "owned" during the course of the charter by the charterer. If the vessel has been sub-time chartered, the bunkers will be owned by the sub-time charterer.

If the charter is terminated prematurely it will be a question of construction of the charterparty as to whether the ownership of the bunkers reverts to the owner.

For example, the mechanism of NYPE 1946 and 1993 only applies on contractual delivery and redelivery and does not apply on withdrawal or other early termination of the charter. In such a situation, although the owner will have possession, the charterer will still have title and property of the bunkers will not revert back to the owner. ("SPAN TERZA" [1984]). The NYPE 2015 remedies this situation and the property of the bunkers will revert to the owner upon "any termination".

By contrast Shelltime 4 clause 15 states that: "Charterers shall accept and pay for all bunkers on board at the time of delivery and Owners shall on redelivery (whether it occurs at the end of the charter period or on earlier termination of this charter) accept and pay for all bunkers remaining on board." This makes it clear that property passes from the charterer to the owner when the charterparty terminates for whatever reason.

Disputes may arise with regard to the price and quantity of bunkers taken over by the charterer and the owner in both cases.

2) Disputes relating to the quantity of bunkers

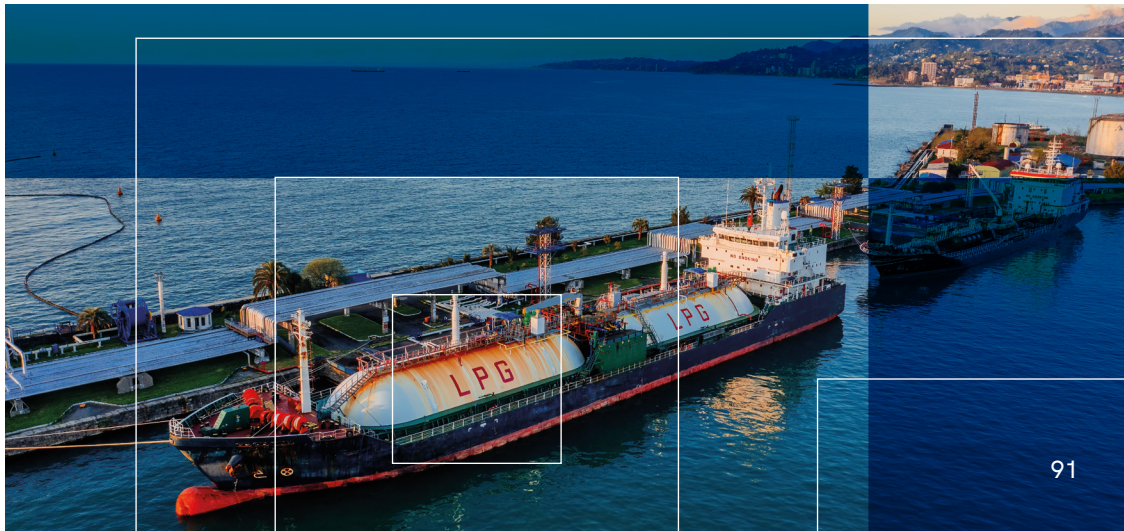
a) The owner's duty to co-operate with the charterer regarding the vessel's bunker consumption

With regard to the quantity of bunkers the charterer should supply during the charterparty, the owner is under a general duty to co-operate and to provide the charterer with all relevant information See ("The Patapsco" [1903]). This should include the previous and current consumption and any particular characteristics of the ship in order to allow the charterer to supply the required bunkers. The owner must give correct information. See ("The Captain Diamantis" [1977]).

b) Bunkers on delivery:

Insufficient bunkers

On delivery, if the ship has less bunkers on board than the minimum quantity required under the charterparty, this will not entitle the charterer to refuse delivery, provided that this shortfall does not make the ship unfit for service and that the vessel has sufficient bunkers to sail safely to the next port. Instead, this shortfall will be brought into account on redelivery and the charterer will be entitled to redeliver with the same amount of shortfall compared with the delivery quantity. When the charterparty term qualifies the quantity of bunkers on board on delivery with the word "about", it is the owner's obligation to provide an honest estimate based on reasonable grounds.



Excessive bunkers

If the owner delivers more than the contractual amount but the charterer had planned to stem bunkers at another port for a cheaper price, the charterer still has to pay for the bunkers on delivery and then bring a claim in damages for the price difference. See ("The Pantanassa" [1958]).

c) The charterer's last stem before redelivery

If before redelivery the charterer orders too many bunkers which are not needed for the chartered service and the charterer's intention is to take on these additional amounts solely in order to make a trading profit thereafter, the master is entitled to refuse the charterer's request. See ("The Captain Diamantis" [1977]).

If the charterer however redelivers the ship with more bunkers than provided for in the charter, the owner will not be able to reject the vessel's redelivery or the excess quantity of bunkers on board.

d) The charterer to redeliver with "about" the same quantity. What is the meaning of "about"?

There is no fixed percentage for the meaning of about. It is generally understood to be +-5% (London Arbitration 13/03). However this will depend on the circumstances of the case. For example, when and where was the last stem? How far away from the port of redelivery was the last possible bunkering port?

For instance a 5% tolerance might be needed to account for unexpected weather where the last bunkering port was a considerable distance from the redelivery port. Conversely, if the vessel is able to stem bunkers shortly before redelivery, a 5% tolerance may be less justifiable. In London Arbitration 15/13 where the ship was able to stem bunkers shortly before redelivery, the tribunal was only prepared to accept a 2% allowance.

3) Disputes relating to the bunker price

a) Where the bunker price not fixed by the charterparty

When the charterparty makes no provision regarding the bunker prices to be paid on delivery or re-delivery, the local market price will apply on the day of delivery/redelivery, without regard to the price actually paid ("The Good Helmsman" [1981]).

b) Where the bunker price is fixed by the charterparty

Certain charterparty forms either specify the price or provide a mechanism for establishing the price. By way of example, the Shelltime 4 form (line 290) provides that: "Such prices are to be supported by paid invoices". Alternatively, charters may for example state "bor about same as bod, bunker quality on delivery vlsfo about 1600 MT and mdo about 60MT. bunker price usd 726 p/mt for vlsfo and usd 1000 p/Mt for mdo…"

In these types of clauses the charterer is under an obligation to redeliver "about" the same quantity of bunkers. If the charterer fulfils their obligation the price agreed in the charterparty will apply. (This means that the risk of bunker prices increasing or decreasing during the term of the charterparty falls on the charterer and the owner, respectively.) Agreement to pay the same price for BOD as BOR means that so long as the charterer re-delivers with "about" (as to which see previous) the same quantity on delivery as re-delivery, no issues arise. However, issues arise if the ship is redelivered with an excess or deficit of bunkers onboard. How is the bunker price computed for the amounts in excess or missing beyond the 5% about margin?

When the charterer redelivers less than the charter quantity

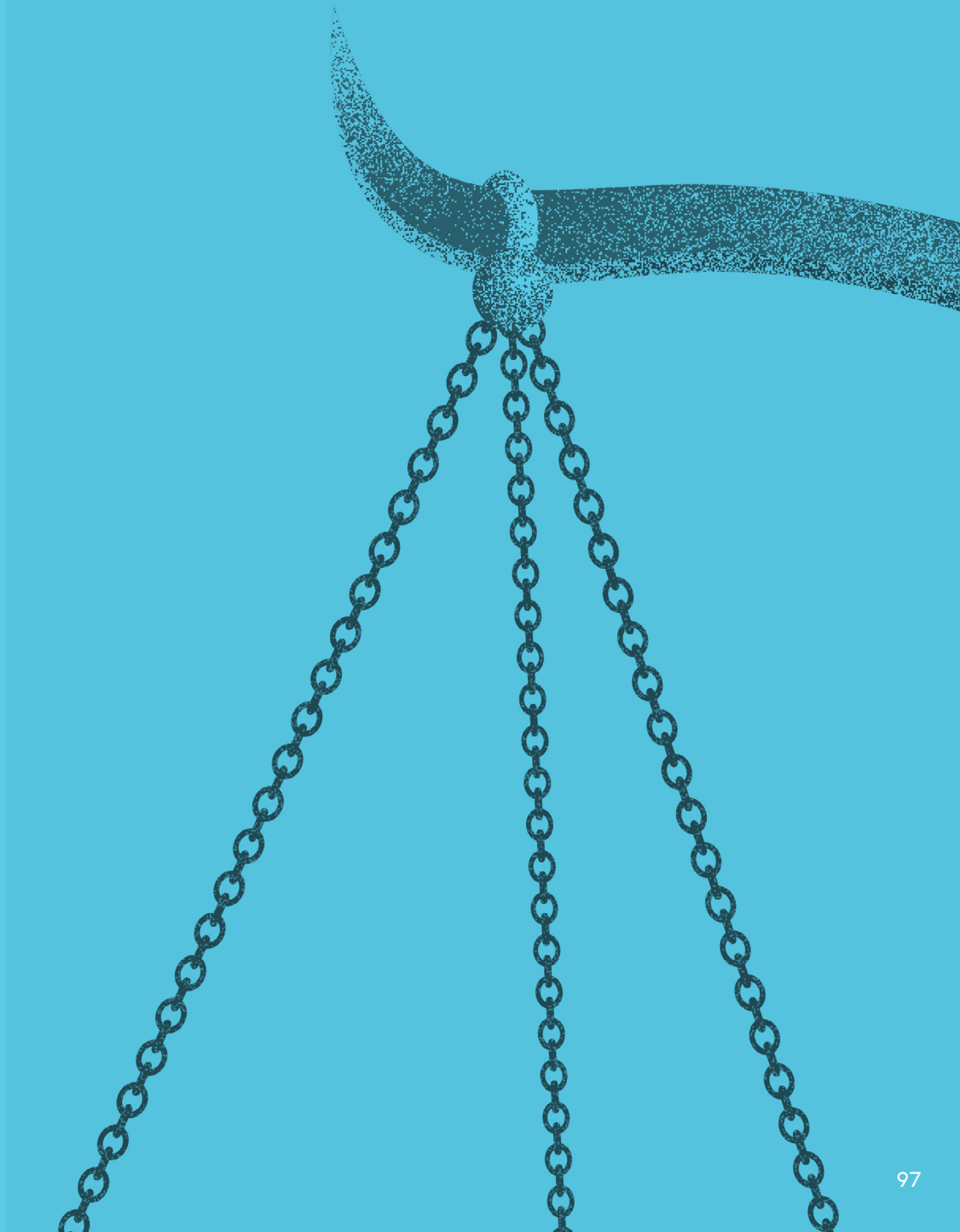
When the charterer redelivers the ship with less bunkers than provided for in the charter, the charterer will have to compensate the owner so as to put the owner in the same position as the owner would have been in had the charterer complied with their obligations under the charter:

- If the market price on redelivery is higher than the charterparty price, the charterer will have to pay the owner, the difference between the charter price and the market price for the shortfall in quantity.
- If the market price on redelivery is lower than the charter price, the owner may not be able to claim for the shortfall at the charter price. If the owner's claim is one in damages, they will be restricted to claiming for the shortfall on the basis of the market price. However, an owner may be able to claim for the shortfall at charterparty rate by bringing an action in "debt" if for example the charter states that parties "...shall take over and pay for..." (e.g. Clause 3 NYPE 46) the agreed quantity of bunkers. In this situation, the charterer will often not have to pay on delivery but will operate a set-off on redelivery. If the charterer redelivers less than the quantity received the shortfall will be calculated at the charter rate, as if bunkers had been paid on delivery. Whether the claim is in "damages" or "debt" will greatly depend on the wording of the charter.

When the charterer redelivers more than the charter quantity

If the market price of bunkers has increased during the charter period, the owner will only buy the excess bunkers at the charter price and the charterer will not be able to make a trading profit on the excess bunkers.

11 Bunker quality disputes



Bunker quality disputes

1) Contractual obligations under a time charterparty:

The charter will usually set out which parameters the bunkers must comply with (e.g ISO 8217 2005/2010/2017). If the charterer fails to do so, they will be in breach. This is however not the full story. Bunkers can comply with an ISO standard but damage the vessel's engine, in which case the charterer will be in breach.

Under English law, where the charterparty is on the usual time charter terms, e.g. NYPE, Shelltime 4 or Baltime, it is generally accepted that there is an absolute duty to provide bunkers that are of reasonable quality and that are suitable for the vessel's engine and machinery. Such an 'absolute' duty means that it would not be sufficient merely to use reliable suppliers (who then go on to provide off-specification bunkers). The charterer has to provide bunkers of suitable quality.

However, the charterer will not be obliged to meet any unusual requirements of the engine beyond those to be expected of the type of engine as specified in the charterparty unless this is drawn to the charterer's attention by the owner.

2) In what circumstances can the Master refuse to burn off-spec fuel?

The owner can refuse to burn the fuel if they reasonably judge that the burning the fuel might be dangerous – i.e. if it would give rise to a risk of material damage to the ship. In this context, the starting point is to recall the basic terms of a time charter.

1) The owner agrees to provide the charterer with the services of the ship and her crew. They do that by putting the ship's cargo spaces at the disposal of the charterer and ensuring that the Master follows the charterer's voyage orders and that the crew provides all customary assistance. Those services implicitly must be provided with reasonable professional care and skill.
2) However, the owner remains responsible for the navigation of the vessel and all other matters. In particular, the Master is responsible for the safety of the Vessel: see ("The Hill Harmony" [2001]).
3) Furthermore, the owner owes the charterer a duty to exercise reasonable diligence to maintain the ship in good working order.

How does one apply these principles to the question of when and whether a Master can refuse to burn the bunkers on board their ship?

1) The Master's duty is to consider whether, if they proceed on the ordered voyage, there is a real likelihood that the bunkers in question will cause harm to the ship.
2) In making that judgement, the Master is performing the services that the owner has agreed to provide under the terms of the Charter, and they are therefore required to make that judgment with reasonable professional care and skill.
3) If they reasonably conclude that the bunkers are or might be dangerous to the ship, they are entitled to stop and insist any necessary steps are taken to ascertain or mitigate the danger. They must of course make a reasonable judgement based on the reasonably available facts. But if they do so, and if they conclude that there is or might be a danger, they are not obliged to proceed.

3) Evidence

The success in defending or bringing a bunker quality claim will be heavily reliant on expert and factual evidence. It is therefore important to use a Marine engineer and Chemist to advise Members from the very beginning.

Can the owner prove that the fuel was off-spec and that it actually caused/will cause the damage (Causation)?. The charterer will argue that the breakdown was due to poor maintenance and not the bunkers. The maintenance records will be critical for the owner and the charterer.

The charterer may also allege that the off-spec fuel was not supplied by them or that it has been altered: Was the fuel commingled? Parties should check:

- The bunker transfer records.
- Analyse the fuel onboard and compare it to the sealed samples.

Particular attention should be paid to the charter as this may set out a procedure as to which laboratory (from a list or jointly appointed) may be used or which fuel samples will be analysed (e.g. BDN samples). Failure to follow the requires of the charter may invalidate the test results and the evidence may not be relied upon.

4) Mitigation

If the owner has proven that the bunkers were off-spec, they must also demonstrate that they did not aggravate their loss. For example, if the owner was on notice that the fuel was off spec, or that there were early signs of issues with the fuel, were they prudent in using the fuel?

With regards to remedies, the owner must also deal with the off-spec bunkers in the most cost-efficient way. Do Members necessarily need to de-bunker? Can the bunkers still be consumed by using additives or purify the bunkers? What is the cheapest option? If the owner debunkers but there were more cost effective ways of dealing with the bunkers, then they may not be able to recover their loss from the charterer.

5) Specific issues relating to the charterer

The charterer may not always be in a back-to-back position when they face issues with off-spec bunkers. In effect their indemnity claim may be against the bunker supplier rather than a sub-charterer. Ideally the responsibility terms in the supply contract should be the same as in the charter, however almost always they are not. The charterer may face hurdles in their contractual claim against suppliers whist still being liable towards the owner. Often these terms are as follows:

- Short notice periods to notify the issue with bunkers.
- Shorter time bar periods.
- The samples to be analysed may be different than the ones in the charter (very often the bunker barge sample will be binding).
- Analysis has to be in the supplier's preferred laboratory which may different than the one jointly appointed between the owner and the charterer.
- Limitation of liability (limit to the value of bunkers etc...).

12 Speed and consumption claims

(Part 1)

Speed and consumption claims (part 1)

A speed and consumption claim permits the charterer to deduct from hire (by way of set off) any extra time and bunkers spent performing a voyage. This claim is however not equivalent to putting the vessel off-hire as the method of calculation can lead to different results. (It is important to keep in mind that a vessel can only be off-hire if the reduction in speed is due to an event listed in the "off-hire" clause of the charterparty).

When considering such claims, it is important to first check:

- The charterparty and what exactly was warranted.
- The evidence.
- The calculation in accordance with the evidence.
- Any possible defences.

Step 1: check the charterparty

1) Were any warranties given?

The description of the ship's performance will either be given in lines 9-10 of the NYPE charterparty (lines 18-20 NYPE 93) or/and in the description clause in the rider clauses.

If the description of the vessel is given on a "without guarantee" basis there will be no warranty and a performance claim will probably fail. This is however subject to the statement being given in good faith. Showing the lack of good faith is generally very difficult unless, for example, the vessel has consistently underperformed on previous voyages prior to delivery.

2) Was the warranty given for the duration of the charter period?

There are conflicting judgments as to whether the warranty is only given upon delivery ("The Al Bida" [1987]), 1 Lloyd's Rep. 124 or only refers to the vessel's capacity at the date of the charter ("The Didymi"). In any event, unless the charter specifies that it is "continuing", the warranty does not apply throughout the duration of the charter. This is however subject to the owner's duty to maintain the ship in an efficient state.

3) Is the warranty conditional on weather factors?

The warranty will normally be subject to good weather conditions. The charter may define what this means, however in the absence of any specific details, "good weather" will probably be taken as periods where the wind is no more than Beaufort force 4 (11 -16 knots) (London Arbitration 15/06).

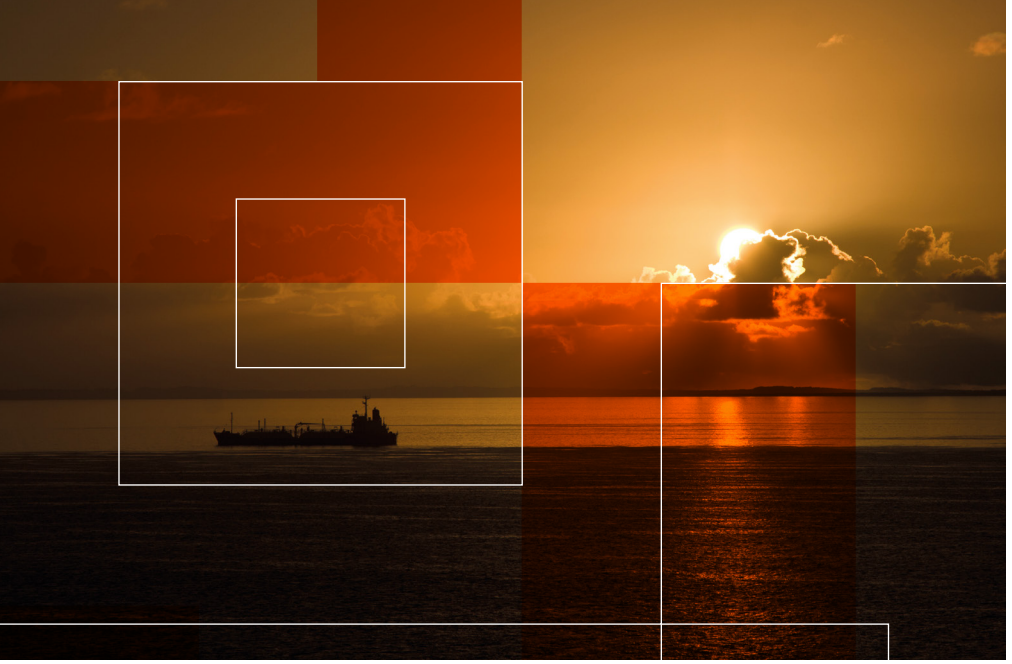
If the charter does not state that the warranty is subject to "good weather" then there will be no such implied term and the warranty will also apply to what are usually considered as bad weather days.

4) Is the warranty given on an "about" basis?

If the details are given on an "about" basis, some margin of error will be allowed. The margin of error is a matter of fact and will depend on the configuration of the ship, size, draft, trim etc. ("The Al Bida"). In practice, the cost of arguing such details may exceed the figure in dispute but it is commonly understood to be 0.5 knots and 5% bunker consumption.

5) Can "about" be taken into account twice?

Where a charter states that a ship is capable of (for example) "about 13.00 knots on about 28.50 mt", there is no consensus as to whether the owner may benefit twice from the "about" and therefore perform at 12.5 knots and consume 29.9 mt without being in breach of the warranty (see London Arbitrations 12/85 and 2/87), although for the last 10 to 15 years the trend has been for tribunals (at least in the published awards) to give such the double benefit to the owner (London Arbitrations 10/01 and 15/07). However, where such a double benefit is given to the owner, it is arguable whether the tribunal will award the full 5% plus 0.5 knot as this may end up being an over -generous result towards the owner, given that a reduction in speed will, of itself, reduce the vessel's actual consumption. For the sake of clarity,



it is recommended that Members clearly define the “about” tolerance to be given in the charterparty, stating for example that the ship is capable of “about 13.00 knots on about 28.50 mt where “about” means +/-0.5 Knots and +/-5% consumption, both tolerances to apply”.

6) Average speed

Where the charter warranty provides for an average speed, the average is usually defined over a prescribed period. In the absence of any defined charterparty period, the averages will be taken over the course of individual voyages (“The Al Bida”). It is thought that “average” cannot be substituted for “about” and no margin of 0.5 knots and 5% bunker consumption will be allowed (London Arbitration 13/97).

7) Are the effects of currents to be taken into consideration?

This issue is not settled and there are conflicting arbitration decisions as to whether the effects of the currents are to be taken into account when the charter is silent on this point. It is for the arbitrators to construe a clause to interpret the parties’ intention. The better view is that currents should be taken into consideration (see London Arbitration 21/04 not applying currents and London Arbitration 15/05 applying currents).

Step 2: look at the evidence

When assessing the performance of the ship, there are mainly two sources of information: the log books and the weather routing reports. The evidential value of these documents will depend on what the charterparty states.

1) What does the charterparty say?

Some charterparties will specifically provide that the weather routing company’s finding will be binding on the parties. This is however often not the case.

Such clauses should be carefully drafted to have the required effect (London Arbitration 21/04, “data supplied by Ocean routes shall be taken as binding on both parties”, where it was found that only the “raw materials” used in the calculation were binding, not the calculation itself).

2) Weather routing vs. deck log

If there is a discrepancy in the data between the weather routing company and the log books, tribunals will usually prefer the log books. The reasoning behind this is simple: mariners are recognised by the Word Meteorological Office as trained weather observers. Furthermore, the information is collected in two separate ways. The weather routing companies will use information from weather buoys and satellite. Weather buoys for example cover areas of about 300 sq/m and can be far away from the ship’s actual position and the weather conditions may well be different. The vessel’s log will record the weather conditions actually encountered by the ship.

It is however open for the charterer to argue that the ship logs are unreliable. Any evidence of inaccurate (or fraudulent) entries in a log book may plant the seed of doubt in an arbitrator’s mind, whether they relate to the claim or not. For example, ballast movements may be recorded inaccurately, in order to give the appearance that a ballast exchange has taken place. It may be possible to discredit log entries by comparing them with the ballast log and stability computer records. Similarly, if the vessel’s performance is poor due to an unauthorised deviation, it should be possible to compare log positions with AIS data and ECDIS position logs. When checking weather recorded by a vessel, it should be confirmed whether the vessel is a Voluntary Observing Ship. Such vessels should be making more detailed weather situation reports for transmission to a national meteorological authority than would be noted in a deck log book.

If there is information that should normally be recorded, but is occasionally omitted, this may lend weight to an argument that the Master and officers are not wholly diligent in their completion of the log. Contradictions in the recorded weather can often be found by comparing the weather information recorded in the relevant boxes with details of weather entered in the narrative section.

For example, the Beaufort scale describes force 3 as being characterised as having a sea-height of 0.6-1.0m. Should the narrative contain words to the effect: “moderate seas” (Beaufort scale sea height of 2.0 -2.5m) recorded at the same time, then the abilities of the recording officer as a weather observer may be called into question.

Step 3: calculating the vessel’s performance

1) Look at periods of “good weather”

Courts and tribunals will look at the “good weather days” and look at the ship’s performance on these particular days. If the ship complies with the warranty on these days the ship is also deemed to comply for the whole voyage. The reverse will apply if the ship does not comply during the good weather days. (“The Didymi” [1987]), 2 Lloyd’s Rep. 166 and (“The Gas Enterprise” [1993]), 2 Lloyd’s Rep. 352.

Whilst an alternative methodology is acceptable in principle, it will have to be shown to be as reliable and consistent if it is to displace the ‘good weather’ method on the facts. In (“Eastern Pacific Chartering Inc -v- Pola Maritime Ltd” [2022]), the alternative methodology performance assessment by reference to the engine’s measured RPM was rejected as ‘very theoretical’ and unreliable.

When identifying good weather days it is better to look at the deck logs than the log extracts/abstracts. In effect deck logs give a more accurate picture of the vessel’s performance as the vessel’s position should be recorded at least every two hours, the weather at least every four hours, and the distance made good, as well as the average speed for the preceding day, and for the voyage so far, at every noon as well as upon completion of the voyage. Some vessels may also possess information pertaining to the speed achieved through the water (speed log data) which can be compared to speed achieved over the ground, and may help to show the vessel has encountered adverse currents and/or tides. Further, high “slip” figures in the main engine log can also indicate adverse tides and/or currents. (Slip is the difference between the theoretical distance the propeller should have moved (pitch multiplied by revolutions made) compared to the actual distance achieved over the ground for the same time period).

This is not always the method used by the weather routing companies, who often calculate an average speed which includes those days where the weather conditions were not “good”. A weather factor is then applied to the overall calculation to estimate the extent to which the vessel’s speed was affected by the conditions apparently encountered.

2) Is it necessary to identify “good weather days”?

Unless the charterparty states otherwise, it is not necessary to identify one or more good weather “days” (in the sense of a period of 24 consecutive hours) in order to be able to assess the vessel’s performance. Shorter periods can be considered if they are a sufficiently representative sample to enable a breach to be established. This will be a question of fact for the court/tribunal to find. Therefore if, on a voyage, the ship only encountered two periods of 14 and 16 hours of “good weather”, the tribunal should consider whether these periods in total amount to a sufficiently representative sample, and they should not automatically be excluded because they are each less than a “day”. (“The Ocean Virgo” [2015]).

3) Performance calculated over a voyage

When assessing the performance of the ship, the performance will usually be assessed on each individual voyage.

4) Calculation

a) Speed and consumption

The vessel’s performance on the voyage should be measured during a good weather voyage, namely by dividing the distance travelled by the time taken (adjusting for current if appropriate). This will give you the vessel’s “good weather speed”. If the “good weather speed” is not as good as the charterparty warranted speed, it is usually assumed that the vessel

also underperformed to a similar extent on bad weather voyages. A similar calculation is carried out for the vessel's bunker consumption.

b) Consumption: credit given for under-consumption?

If slower speed leads to apparent under-consumption of one or both of the types of fuel used, the owner can set off bunker under-consumption against a claim for damages for lost time ("The Ioanna" [1985]), 2 Lloyd's Rep. 164.

The next question then arises is how much credit is to be given for the under consumption? If the charter states that a ship can perform with a consumption of "about" 40 mts ("about", for argument's sake being 5%) and the ship consumes less than this, is the saving to be calculated by reference to the lower "about" figure of 38 mt, the higher "about" figure of 42 mt or just 40 mt? It has been held in ("GAZ ENERGY" [2012]) (against the vessel owner) that any "overperformance" should be calculated by reference to the best warranted figure, i.e. in this example credit for the vessel's "over-performance would only arise where the vessel had consumed less than 38 mt.

c) The breach of warranty is a claim in "damages" and not an "off-hire" claim

The mere breach of warranty will not render the ship off-hire. A vessel can only be off-hire if the reduction in speed is due to an event listed in the "off-hire" clause of the charterparty. If it is so listed and the vessel is off-hire the charterer will be able to deduct the additional time taken and fuel consumption equivalent to the off hire period. This method of calculation can amount to a higher claim amount than the charterer would be entitled to claim as damages for breach of the performance warranty. When a ship's speed is reduced due to the ship's bottom being fouled, the owner may have a defence, particularly where the fouling arose during the charterparty – see Hull fouling chapter.

Step 4: Defences

When defending a performance claim, depending on the charter wording, we have already seen that the owner will usually benefit from the "about" allowance and the fact that the performance warranty may not be a continuous warranty.

The underperformance may also be due to poor quality bunkers supplied by the charterer or simply due to bottom fouling occurring as a natural consequence of following the charterer's orders. In such circumstances, the owner may have a defence to the charterer's claim – see Hull fouling chapter.

NYPE 2015

The NYPE 2015 has a new clause (clause 12) dealing with speed and consumption issues. The most significant difference between this clause and the one in the NYPE 1993 charterparty is that the speed and consumption warranties given in the NYPE 2015 are continuing warranties, in that they must be complied with throughout the charter period and not only on delivery (as per the NYPE 1993). The clause also provides for a procedure to deal with these claims. The owner is to provide copies of the vessel's deck logs after which the matter shall be referred to an independent expert or alternative weather service selected by mutual agreement. The independent expert report shall be final and binding on the parties. The cost of such an expert report shall be shared equally. The intention is to try to achieve a quick and cost effective resolution of speed and performance claims. However if the parties do not agree on a mutual independent expert either side is presumably free to pursue the claim through arbitration.

Key Points:

- Always start by checking what is warranted in the charter (WOG, "good weather", currents etc...).
- Is the warranty for the duration of the charter or just on delivery?
- Has the charterer taken the "abouts" into consideration.
- Does the charter state what evidence will prevail (Weather routing vs. deck log).
- Do not over rely on weather routing reports as arbitrators/judges will usually prefer the deck logs.
- Does the owner have any defences (hull fouling)?

13 Speed and consumption claims

(Part 2) analysing the weather report

Speed and consumption claims (part 2)

Courts and tribunals will look at the "good weather days" and evaluate the ship's performance on these particular days. If the ship complies with the warranty on these periods/ days the ship will also be deemed to comply for the whole voyage. The reverse will apply if the ship does not perform during the good weather days. ("The Didymi" [1987]) and ("The Gas Enterprise" [1993]).

Whilst an alternative methodology is acceptable in principle, it will have to be shown to be as reliable and consistent if it is to displace the 'good weather' method on the facts. In ("The Divinegate" [2022]), the alternative methodology performance assessment by reference to the engine's measured RPM was rejected as 'very theoretical' and unreliable.

For a closer look at speed and consumption claims, please refer to the previous chapter.

Analysing the performance report

The charterer will commonly support their underperformance claim by referring to a performance report. When looking at a performance report it is essential to properly understand the contents and check whether all charterparty criteria have been applied.

A common clause is performance warranty is: "ABOUT 13 Knts on About 25 MT, SPEED/ CONSUMPTIONS IN GOODWEATHER CONDITIONS I.E: WINDS NOT EXCEEDING BEAUFORT SCALE FORCE 4, SEA / SWELL CONDITION NOT EXCEEDING DOUGLAS SEA STATE 3, / SIGNIFICANT WAVE 1,25 MTRS WITH NO ADVERSE CURRENTS."

The following are tips that will permit the reader of the reports to quickly spot any errors.

First step: check whether the performance report has taken into account the fact that the warranty was given on an "about" basis. It is not uncommon to see that a report has omitted to reduce the base good weather speed and consumption by 0.5 Knots and 5% consumption (see our guide for more details as to the definition of "about").

Second step: check the total transit time and distance throughout the entire voyage and in good weather days. These may sometime differ as the weather company may only take the positions of the ships on the basis of the noon reports and estimate the distance between the two points. Invariably, ships do not always take a straight line between two points and this estimated distance may not reflect the actual distance sailed by the ship. A discrepancy between the ship's logs and the weather bureau's data will lead to a difference in performance (see picture 1 below).

Laden Conditions	Overall Performance	"Good Weather" Performance Winds: Beaufort 4/less Sig. Wave 1.25M/Less. DSS(3)	
Transit Distance:	6518.29 NM	1208.47 NM	
Transit Time:	565.30 Hours	99.90 Hours	
Average Speed:	**11.53 Knots**	**12.10 Knots**	(Distance/Time)
Weather Factor:			
Current Factor:		0.00 Knots	Adverse Currents excl.
Performance Speed:	-0.50 Kts Applied to Laden Charter Speed of 13.00 Kts	**12.10 Knots**	(Speeds Adjusted for the above factors)
Allowable Charter Speed:		**12.50 Knots**	
Performance Time:		**538.70 Hours**	(Times are calculated Distance divided by respected speeds)
Allowable Charter Time:		**521.46 Hours**	

Third step: check that all elements of the definition of a good weather period in the charterparty have been taken into account. In the present example, this means that for a period of good weather to count there must be:

- Winds not exceeding Beaufort scale force 4.
- Swell not exceeding Douglas Sea State 3.
- A significant wave height of no more than 1,25 m.
- No adverse currents.

It is not uncommon to see that a report has omitted one of the above criteria.

Fourth step: check that all reported good weather periods only contain periods which contain all of the previous criteria. It is not uncommon to see a report which states that it is sufficient that the majority of the steaming day (i.e. at least 12 hours of the steaming day) meets the charterparty good weather criteria for the whole 24 hour period to count as a "good weather day". To this effect, the weather company may only submit a summary for 24 hours such as the following:

In the spreadsheet on page 117, the 2nd and 3rd March are counted as good weather days.

Date/time (UTC)		24 Feb 21 19:30	25 Feb 21 07:00	26 Feb 21 06:30	27 Feb 21 06:30	28 Feb 21 08:00	01 Mar 21 08:00	02 Mar 21 08:00	03 Mar 21 09:00
Latitude		Kandla	21.99 N	19.82 N	17.60 N	15.20 N	13.45 N	11.97 N	15.63 N
Longitude		Kandla	67.72 E	63.38 E	59.07 E	54.40 E	49.80 E	45.03 E	41.63 E
Posn Type		ATD	A	A	A	A	A	A	A
Load Conditions (Laden)		Laden	Laden	Laden	Laden	Laden	Laden	Laden	Laden
Streaming	Time (hrs)	- - -	11.5	23.5	24.0	25.5	24.0	24.0	25.0
	Dist (nm)	- - -	139.4	277.1	280.4	306.2	289.8	294.6	316.4
Speed	Time (hrs)	- - -	12.12	11.79	11.68	12.01	12.08	12.27	12.65
	Dist (nm)	13.00	13.00	13.00	13.00	13.00	13.00	13.00	13.00
Wind - Beaufort	Dir	W	W	W	W	NE	ENE	ENE	SSE
	Spd (kts)	11	6	8	7	8	9	10	14
	Scale	4	2	3	3	3	3	3	4
Seas	Wave (mtrs)	0.7	0.4	0.5	0.5	0.5	0.5	0.5	0.5
	Dir	W	SSW	SSW	S	ENE	ENE	ENE	ENE
	Hght (mtrs)	0.75	0.50	0.50	0.50	0.50	0.50	0.50	0.50
Ship report	Dir	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Speed (bf)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Current factor (kts)		-0.14	-0.09	-0.09	-0.10	-0.05	0.00	0.18	0.45

This is wrong on two counts:

1) First, a good weather period does not need to be of 24 hours. Unless the charterparty states otherwise, it is not necessary to identify one or more good weather "days" (in the sense of a period of 24 consecutive hours) in order to be able to assess the vessel's performance. Shorter periods can be considered if they are a sufficiently representative sample to enable a breach to be established. This will be a question of fact for the court/tribunal to find. Therefore if, on a voyage, the ship only encountered two periods of 14 and 16 hours of "good weather", the tribunal should consider whether these periods in total amount to a sufficiently representative sample, and they should not automatically be excluded because they are each less than a "day". ("The Ocean Virgo" [2015]).

2) Second, only periods where all "good weather" criteria are met can be counted as a good weather period. A good weather day cannot be considered as such when the majority of the steaming day (i.e. at least 12 hours of the steaming day), meets the charterparty good weather criteria (e.g. see London Arbitration 22/18). With the above summary it is impossible to know whether only good weather periods have been taken into account or just the majority of the day was a "good weather day". A breakdown of the day in at least 6 hour periods should be requested (see spreadsheet below).

When one analyses the data, it can be seen that one period on 2nd and 3rd March did not meet the good weather criteria. These should be excluded from the good weather periods.

01 Mar 12:00	13.20N	49.00E	W	ENE	10	3	0.50	ENE	0.50	ENE	0.69	0.69
01 Mar 18:00	12.83N	47.81E	W	ENE	9	3	0.10	ENE	0.50	E	0.66	0.64
02 Mar 00:00	12.46N	46.62E	W	ENE	12	4	0.50	ENE	0.50	NNW	0.75	0.03
02 Mar 06:00	12.09N	45.43E	W	E	10	3	0.50	ENE	0.50	SSW	0.88	-0.52
02 Mar 08:00	11.97N	45.03E	W	E	11	4	0.50	ENE	0.50	NE	0.34	0.30
02 Mar 08:00	11.97N	45.03E	A	ENE	10	3	0.50	N	0.50	ENE	0.20	0.18
02 Mar 12:00	12.28N	44.24E	W	ENE	8	3	0.10	E	0.50	ESE	0.62	0.62
02 Mar 18:00	12.93N	43.21E	W	SE	16	4	0.50	ESE	0.50	SE	0.63	0.66
03 Mar 00:00	13.93N	42.47E	W	SSE	17	5	0.75	SSE	0.75	SSE	0.61	0.57
03 Mar 06:00	15.09N	41.95E	W	S	15	4	0.50	SSE	0.50	S	0.13	0.12
03 Mar 09:00	15.63N	41.63E	W	S	11	4	0.50	SSE	0.50	SSE	0.22	0.20
03 Mar 09:00	15.63N	41.63E	A	SSE	14	4	0.50	N	0.50	SE	0.41	0.45

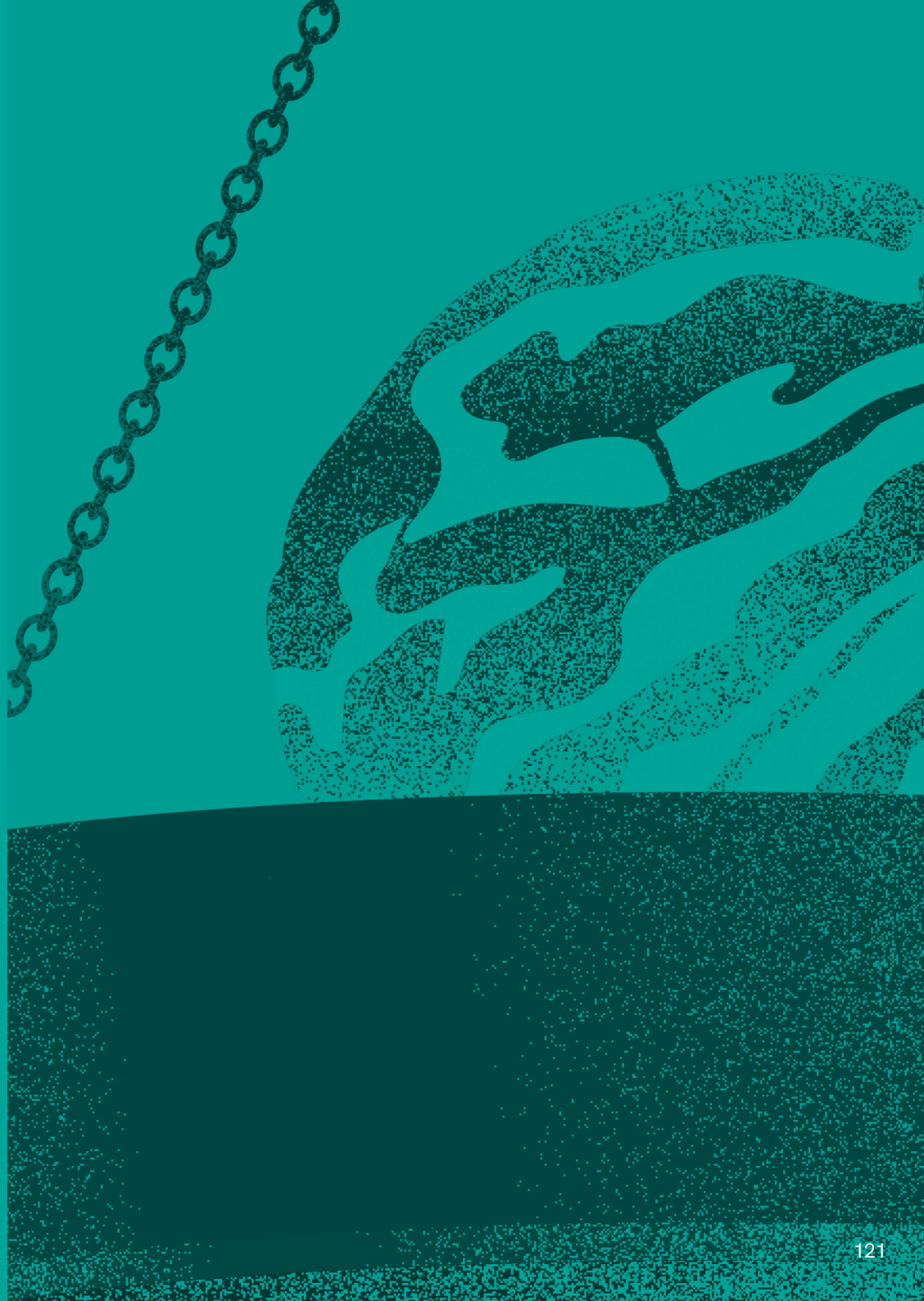
Fifth step: check that a current factor is not subtracted to the final good weather calculation. When the warranty specifies that there should be "No adverse current", a current factor should not be subtracted from the final good weather speed ("The Divinegate" [2022]). However, a majority of reports will deduct a current factor if overall the vessel benefited from a positive current during the whole voyage.

Sixth step: performance will usually be assessed on each individual voyage, ("The Al Abida" [1985]). Some charterparties will state that the performance has to be evaluated by looking at the average speed over the duration of the charter. In case of the latter, this will mean that the analysis for a time charter with two legs will have to evaluate the average speed over both legs cumulatively.

Good Weather

Total distance sailed in good weather	4950.72 nm
Time at sea in good weather	374.00 hrs
Average speed	13.24 kts
Current factor	+0.28 kts
Performance speed	12.95 kts
C/P allowable time	358.88 hrs
Track time loss	15.12 hrs
Loss applied to overall track time	34.33 hrs

14 Notices of redelivery



Notices of redelivery

The purpose of a notice of redelivery is to enable the owner to have enough time to fix the ship for her next employment. Usually the charterparty will provide for example that "Charterers are to give Owners not less than 20/15/10/7 days approximate notice of vessels expected date of re-delivery, and probable port and 5/3/2/1 day(s) definite notice of redelivery".

Is the tender of a redelivery notice a prerequisite for redelivering a ship?

It is important to note that the charterer can redeliver a vessel back to the owner without issuing notices of redelivery. Although the charterer will be in breach of contract, the owner will not be able to reject the delivery of the ship and insist on continuing the charter.

Does an approximate notice need to be accurate?

An approximate redelivery notice implies that there is no absolute obligation to redeliver on the approximate date given.
An approximate redelivery notice is not contractually binding or a condition precedent to redelivery, unless the charterparty and/or the notice state otherwise.

Although an approximate notice of redelivery does not need to be precise, it must be given honestly and upon reasonable grounds.
The owner will not be able to claim damages if the timing of such a notice is incorrect but was deemed reasonable and given honestly at the time when the notice was issued. Many events can arise between the first notice (20 days in the previous example) and the actual redelivery (port congestion etc.).

Definite notices of redelivery

A definite notice will have to be correct and accurate.

If the charterer redelivers the vessel within the charterparty permitted period but gives a definite redelivery notice with a shorter time frame than that required in the charterparty and/or do not serve any notice, the owner will have a right to damages, although the owner will still be obliged to take delivery of the ship.

The breach will only occur on the date of redelivery and not before, even if it is obvious that the charterer will be in breach.

Can a redelivery notice be withdrawn unilaterally by the charterer?

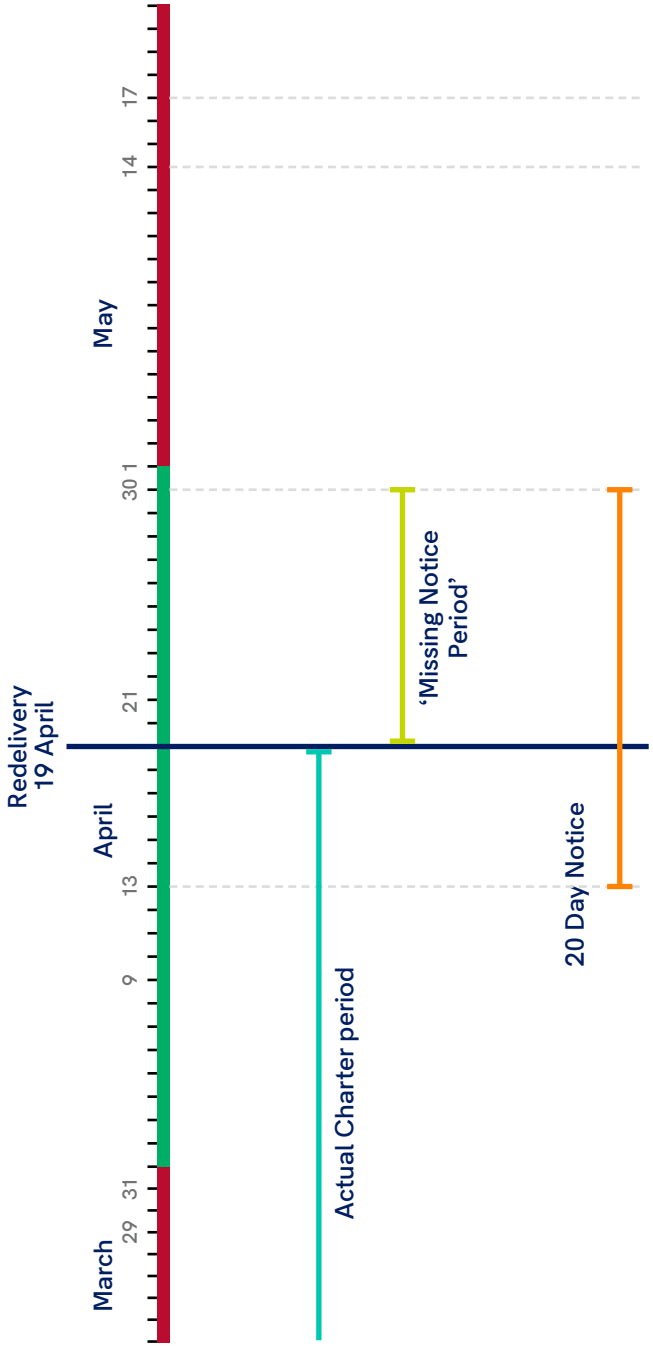
English law states that parties are not bound by representations made "WP" or "WOG". As a result, if the charterer tenders a redelivery notice with reservations such as "AGW, WP, WOG", the owner subsequently fixes the ship for her next employment but in contravention with this notice the charterer then decides to employ her for another voyage (within the allowed charter period), the owner will not be able to refuse such order nor claim damages for loss of profits for cancelling the next fixture ("The Zenovia" [2009]). To avoid this risk, the owner should insist on an unqualified notice from the charterer.

Damages

The amount of damages payable by the charterer will be measured by putting the owner in the position in which they would have been in had notice(s) been properly tendered see ("The Great Creation" [2014]).

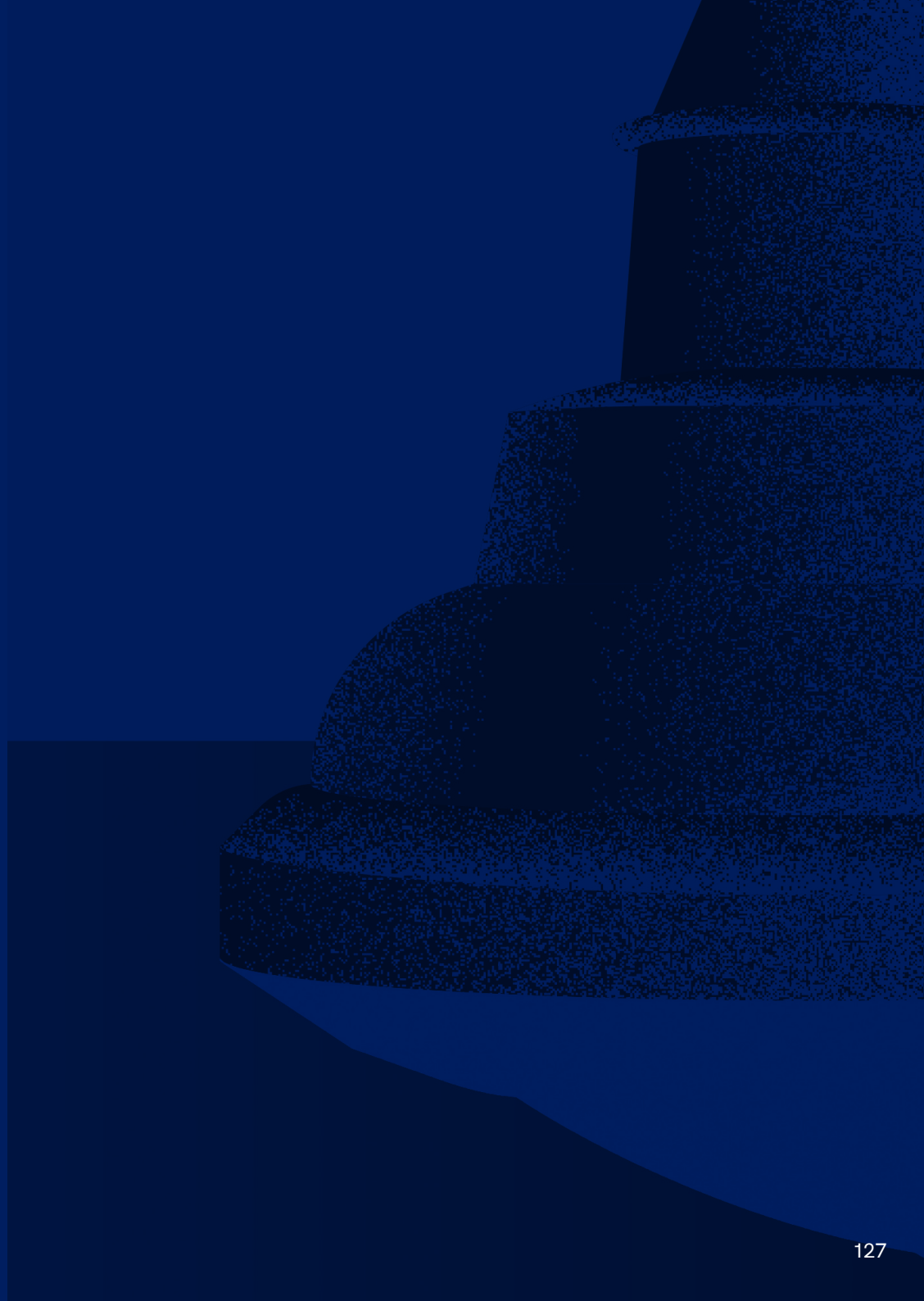
Where the charterer redelivers the vessel without having served the redelivery notice/s required by the charter and/or redeliver the vessel earlier than the notice period in the charter, the owner will be entitled to the hire which would have been earned during the balance of the notice period after the charterer's actual (premature) redelivery.
For example, if 20 days' notice is required and the charterer only gives a notice 7 days before redelivering the vessel then the starting point for damages would be the amount of hire the owner would have earned during the 13 days after actual redelivery. Credit will then be given to the charterer for the hire earned by the owner in any subsequent charterparty in reasonable mitigation of their loss.

“Great Creation” Timeline



Where the charterer serves contractual redelivery notice/s but then redeliver the vessel late, the owner will be entitled to claim damages at the charterparty hire rate for the “overspill” period. In any event, the owner cannot usually claim additional damages for loss of business opportunity / lost profits in relation to an actual or potential follow-on fixture that has been lost due to the charterer’s late redelivery of the vessel. These types of losses are not considered to be recoverable because these were not within the contemplation of the parties at the time the charterparty was entered into. However, if when fixing the charter, the owner was also fixing a follow-on fixture and the owner stated this to the charterer at the time of fixing, the owner may be able to claim damages for the loss of such follow-on fixture, for example, if the follow-on fixture is above market rates at the time of fixing.

15 Early & late redelivery



Early & late redelivery

When is the ship redelivered early?

A charterer has an obligation to deliver the vessel in compliance with the redelivery provisions of the charter. The timing of a redelivery will primarily depend on the duration of the charter.

Usually a time charter will fall into two categories:

1) A fixed period which could be a flat period, for example “1 year” or a period of time until a certain date, for example “until 15th July”.
2) A variable period (for example, “11 to 14 months” or “6 months, 15 days more or less”).

1) Fixed period

Even when the word “about” is not included in the redelivery period, “there is a presumption that a definite date for the termination of the charter should be regarded as approximate only” (“London Explorer” [1971]). The precise date agreed for redelivery means “about that date”. The charterer is allowed a reasonable margin before and after this precise date.

How big is the margin?

The extent of the margin of time for redelivery will depend on many facts. For example, a ship redelivered 8.4 days beyond the stated period of a 6 months, 20 days period could be deemed as reasonable (see also discussion on “about” below).

2) Variable period

There are broadly two types: “11 to 14 months” or “6 months, 15 days more or less”.

i) “6 months, 15 days more or less”: here the parties have agreed a fixed duration with a built-in tolerance clause. There is therefore no implied allowance.

ii) “11 to 14 months”: here the answer is not straight forward. Whether an implied allowance is allowed will depend on the period of the spread. If the spread is 15 days (“6 to 6 1/2 months”) the law may allow an implied tolerance. If the spread is long (“11 to 14 months”) arbitrators and judges are less likely to allow an implied tolerance. There will be no implied tolerance if the range is defined by a minimum and/or maximum period (“minimum 6 months, maximum 7 months”).

“About”

The NYPE charter for example usually qualifies the duration of the charter with the word “about”. There is no hard and fast rule to determine the margin imported by the word “about”. It largely depends on the duration of the charter and any specific factual circumstances that reflect the intention of the parties.

In one case, for example, a ship was chartered for “about 4 to 6 months” and 5 days was an allowable margin. However, 12 days was not deemed reasonable in a charter for “about 6 months”.

If the word about is deleted, the judge/arbitrators may take this into account to deny a tolerance margin.

Trip time charter on a “without guarantee” duration

If for example the charter provides a trip between 2 ports for a duration of “70/80 days WOG” there is no minimum or maximum period as long as the estimate is made in good faith. If, for instance, in the above example the voyage lasts 150 days due to some unforeseen circumstance, then the charter will not be liable for late redelivery and will just have to continue to pay hire at the agreed rate.

Early redelivery

When the charterer delivers the ship early, then the owner has two options:

- Accept the redelivery and claim damages.
- Refuse the redelivery with the ship remaining on hire without the owner having to mitigate their loss.

The owner’s refusal to take redelivery

This course of action is however subject to the owner having “no legitimate interest” in continuing to perform the contract. If the owner’s conduct in continuing with the charter is “wholly unreasonable” (note the emphasis on wholly) then the owner will not be able to claim the full hire.

In most cases it is generally not advised to leave the ship idle and wait until the end of the charter as the owner will have to recover the hire due to them. It is usually best to accept the early redelivery and start the ship trading again.

What is a “wholly unreasonable”?

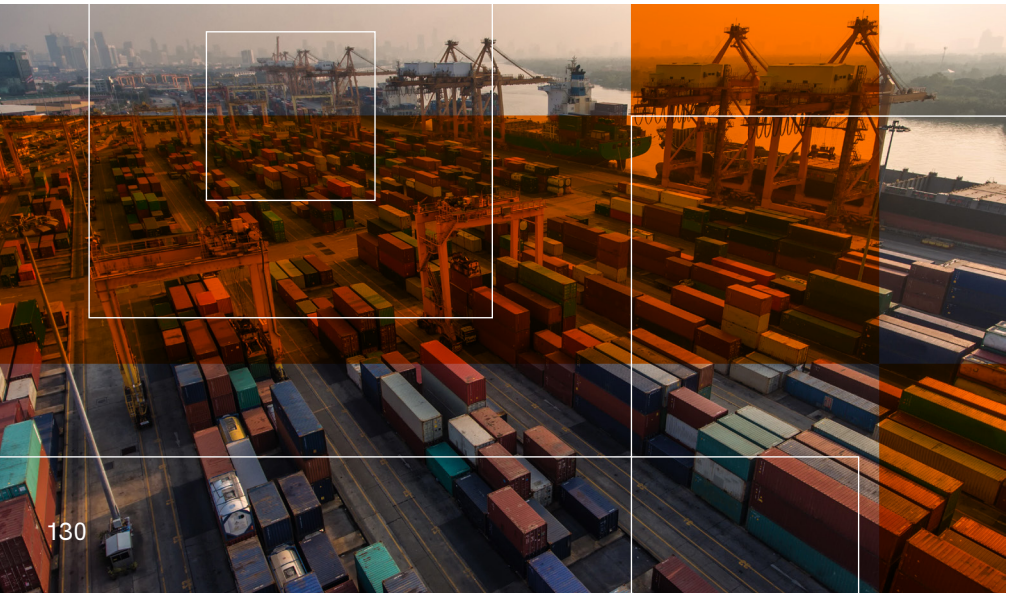
The owner’s mere unreasonable behaviour will not be sufficient. It must be “wholly” unreasonable. What is considered to be wholly unreasonable will depend on circumstances. If the ship is redelivered 10 days early, it is very likely that the owner will be able to refuse redelivery of the ship and insist that hire is paid until the minimum redelivery date. If, however, the redelivery date is 2 years early, there probably would be no “legitimate interest” in the owner insisting on the charterer continuing to perform the charter.

How much damages may the owner recover?

The general rule is that the owner will be able to claim the difference between the charter rate and the “available market” rate if the ship had been promptly re-chartered for the remainder of the charter period. (C/P rate – Available Market rate) x days redelivered early = damages.

What constitutes the “available market” rate?

The “available market” rate will be determined by reference to the same market as the original charter i.e. the same geographical area, trade and for a charter period corresponding to the remainder of the original charter. If a ship was chartered for 12 months on the Atlantic trade and redelivered after 7 months, then the relevant market would be for a 5 months charter (the remainder of the original charter) in the Atlantic trade.



What if the owner re-charters on a different market?

Taking the above example, what if the owner decides to relocate the ship from the Atlantic to the Asia trade? There is nothing stopping the owner from doing so, albeit at their own risk. If the owner ends up earning less hire in Asia than they would have done in the Atlantic, then the damages will still be based on the “available market” rate. The owner will not be able to claim the difference between the available market and the different market.

What if the owner finds a different market better paid than the “available market”?

The fact that the owner has suffered fewer losses than under the available market is not relevant. The loss will still be calculated by reference to the “available market”. The owner could potentially make a profit and still claim for losses against the charterer.

What if there is no available market?

In such circumstances, the owner will be entitled to such sums as would put them in the same financial position as if the charter had been performed.

What if an event permitting termination of the original charter occurs after redelivery but before the end of the minimum period?

In a situation where an event occurs (after redelivery but before the end of the minimum period) which would have meant that the charterer could have terminated the charter early (war, etc…), the owner will only be able to claim damages up to the date of the event which would have triggered the termination of the contract.

Taking the previous example (12 months C/P redelivered after 7 months), if an event permitting the termination of the charter occurred on the 9th month, then the owner would only be able to claim damages for a 2 month period instead of 5 months.

Late redelivery

The charterer has an obligation to redeliver the ship within the charter period (including the tolerance margin).

What can the owner do if the charterer gives an order for a final voyage which cannot reasonably be completed during the charter period?

This is also called an “illegitimate last order”. In such circumstances the owner is entitled to refuse to perform such an order and insist on asking for fresh orders.

What if the charterer refuses to give new orders?

If the charterer refuses to give new orders, then the owner might be able to treat the charter as repudiated and claim for damages. The owner and the charterer should make sure that their decision to repudiate the charter or insist on the order is correct as the consequences of their decision may end up being very costly.

Can a “legitimate” order become “illegitimate”?

The obligation to make sure that the voyage orders are legitimate is continuing. If there is a change in circumstances then new instructions must be given.

Time at which legitimacy is determined

The date to keep in mind is the date the performance of the orders falls due. The charterer will give orders in advance of the performance. If at any time before the performance, circumstances change, a legitimate order will become illegitimate and the owner will be entitled to ask for new orders. If circumstances change after the performance then the owner will have to carry out the orders and claim damages.

What if the owner has knowingly chosen to accept an “illegitimate” order?

The owner will be deemed to have waived their rights to refuse to perform the order. The owner will however not have waived their rights to damages. The owner’s acceptance must be unequivocal although the owner must be careful not to tacitly accept the order as in some circumstances silence may constitute an agreement.

Damages

If the charterer sends a vessel on a legitimate (or illegitimate) last voyage and the vessel is thereafter delayed for any reason (other than the fault of the owner) so that it is redelivered after the final terminal date, the charterer will have to pay hire until redelivery together with damages. (“The PEONIA” [1991]).

The normal measure of damages is the difference between hire earned under the charter and what would have been earned on the market for the overrun period: (Market rate – C/P rate) x period overrun = Damages

How to calculate the period of overrun?

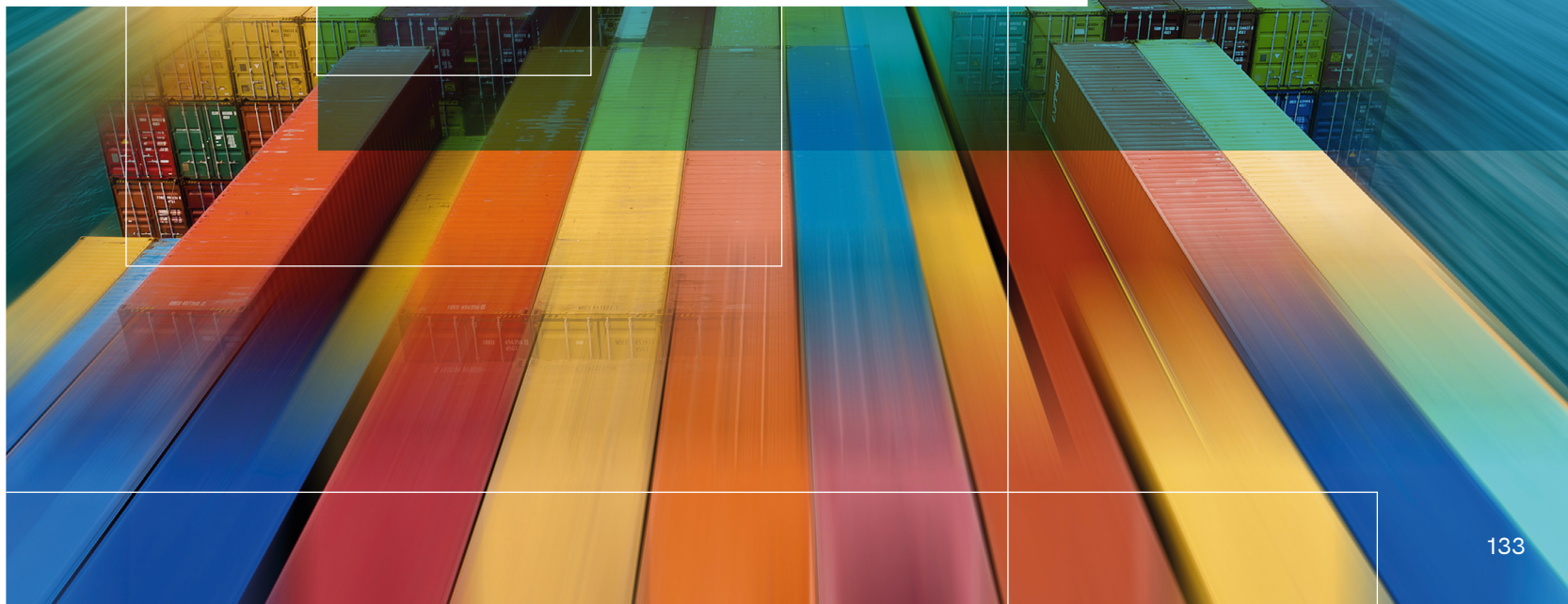
The period of overrun is the number of days from the latest date at which the ship could have been redelivered and the actual date of redelivery. The period does not start to run from the date when the ship would have been redelivered had the last order not been “illegitimate”.

Market rate

The market rate will be calculated on the basis of a charter for a similar period/region/trade as the original charter. If the original charter was one for “10 to 12 months in the Atlantic trade”, then the market rate will be one for a charter “10 to 12 months in the Atlantic trade” (see difference with early redelivery previously).

Can the owner claim for the damages suffered as a result of not being able to perform the next fixture?

Unless the laycan date of the following C/P is brought to the knowledge of the charterer at the time of entering into the contract, the owner will not be able to claim for the loss of profit on the follow-on fixture. (“The Achileas” [2008]).



16 Redelivery of a ship

Redelivery of a ship

The charterer must redeliver the ship at the agreed time (see the previous chapter on early and late redelivery) and place and the ship must be redelivered in the same good order and condition.

a) Place of redelivery

If the ship is not redelivered at the contractual place, the owner cannot refuse redelivery of the vessel. The owner's only option is to sue in damages. The measure of damages is the profit that the owner would have made on the final voyage to the agreed nearest place less any profit in fact made from any substitute employment.

There is doubt as to whether this rule applies if it means that the final voyage to the nearest contractual place had the consequence of redelivering the ship late: this would award damages for delivery in the wrong place by putting the owner in a position as if the charterer had redelivered late (different breach) but correct destination.

b) State of the ship on redelivery

The NYPE and Baltime charters oblige the charterer to redeliver the ship "in like good order and condition, ordinary wear and tear excluded". There can be difficulties distinguishing between what lies within the owner's duty to maintain and the charterer's duty to redeliver the ship in like good order and condition.

Essentially, the charterer's obligation under the charter means that the charterer will have to indemnify the owner for any damage resulting from the compliance with the charterer's orders (wear and tear excepted). This obligation also means that the ship should be fully discharged, clean and free of previous cargoes. An obvious example would be a ship damaged by stevedores. However, what "wear and tear" means can cause considerable debate.

Hull fouling: Can the owner make a claim for failure to redeliver the ship "in like good order and condition"?

The charterer's duty is to redeliver the ship, undamaged, fully discharged, clean, and free of previous cargoes. The owner cannot however claim that the charterer is in breach of their redelivery obligation because of growth on the ship's hull as it is "ordinary wear and tear" for which the charterer cannot be held liable ("The Pamphilos" [2002]).

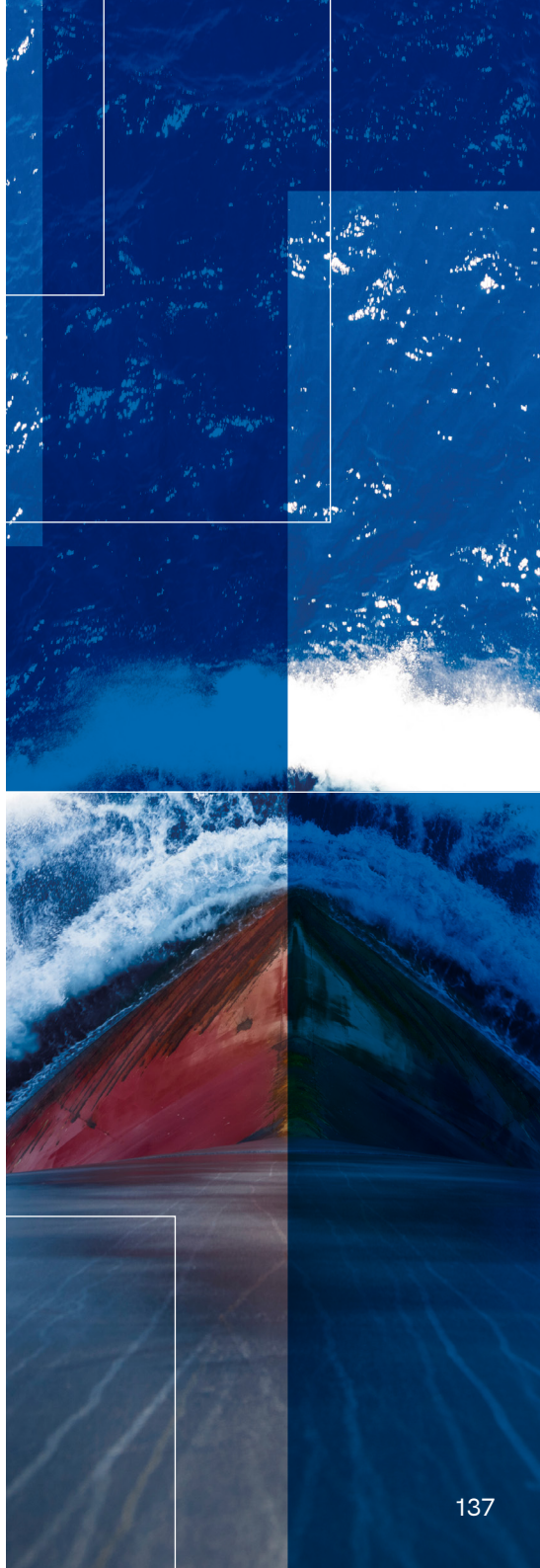
The charterer may be liable to the owner if after redelivery the owner faces a speed and consumption claim from a subsequent charterer if the charterer failed to clean the hull in breach of a hull fouling clause (see London Arbitration 25/17).

ILOHC clause and the obligation to return the ship "in like good order and condition"

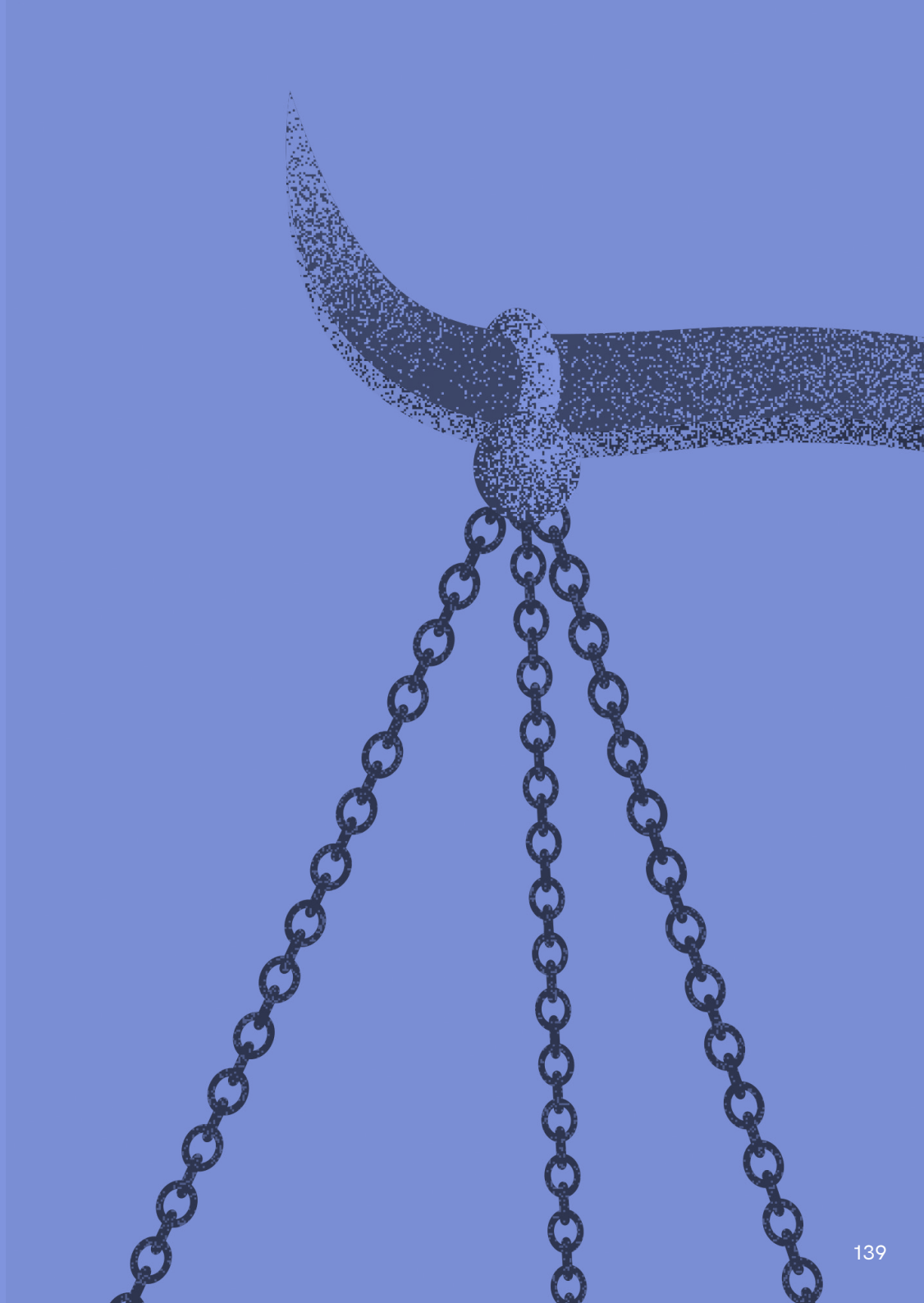
Upon redelivery, the charter will often include a provision that the charterer is to return the ship in the same condition as it was delivered in. The charterer will also have the option of paying a lump sum In Lieu Of Hold Cleaning (ILOHC). This clause is only intended to cover for the cleaning of the holds when debris and residue is left inside. It does not extend to large amounts of cargo being left in the holds that have been rejected by receivers. In this situation, the charterer will have to indemnify the owner for the extraordinary costs of cleaning.

Can the owner refuse redelivery of a ship that is not "in like good order and condition"?

If a ship is returned to the owner in a damaged condition, the owner cannot refuse redelivery and insist that the ship is on hire until the ship is repaired. The owner will have to accept redelivery and then claim damages.



17 Interruptions & exceptions to laytime



Interruptions & exceptions to laytime

1) Difference between Interruptions and exceptions to laytime

An interruption to laytime covers a period when time does not count because it is outside the definition of laytime as expressed in the laytime clause. A common example is “Weather Working Day” (WWD) laytime period.

An exception to laytime, refers to a period that is within the definition of laytime, but is excluded by an exceptions’ clause.

The principal difference between the two is that with an exception to laytime it is necessary to show a causal connection between what is excepted and the failure to work cargo, whereas with an interruption to laytime all that needs be shown for causation is that the excluded state of affairs exists at the place where cargo would have been worked.

For example:

- Ship A has a port charter with an interruption to laytime expressed in “Weather Working Days”.
- Ship B has a similar charter but with laytime expressed in working days and additional clause excluding time lost due to adverse weather.
- If both are waiting at anchorage for a berth, for ship A, rainy periods on working days will be excluded from laytime, but not in the case of ship B. This is because the rain did not delay the cargo operations.

2) Interruptions to laytime

There are numerous interruptions to laytime. The most common are Weather Working Days and Sunday and Holidays excepted.

a) Weather Working Days

The meaning of the word “weather” is to be determined as a question of fact. What might constitute bad weather for one vessel will not necessarily be the same for another, even though both are in the same port at the same time. A period of rain may well prevent the discharge of a cargo of rice, but not a cargo of crude oil.

Weather days: Is the Statement of Fact (SOF) binding?

The SOF usually record the weather conditions in the port and is prepared by the agent. It is usually counter signed by the master. Although the SOF is persuasive evidence, it is by no means binding. It is open for a party to rebut the information in the SOF with, for example, evidence from a local weather station. If the owner has any doubts as to the objectivity of the agent’s SOF, it is recommended to appoint a protective agent to make sure the information in the SOF is accurate.

b) Sundays and holidays excepted

Although Sunday doesn’t pose any problem in its interpretation, the word “holiday” can in some cases be harder to define. Whether a day is a holiday or not is a question of fact which will be decided by looking at regulations, practice, and custom. A holiday can be decided by a local authority and may apply to just the port and its local area regardless as to whether work is in fact done.

3) Exceptions to laytime

An example of exceptions to laytime can be found in the Gencon charterparty: the “General Strike Clause” and “General Ice Clause”.

a) Period of application of exceptions to laytime

- An exceptions clause will normally only apply to laytime.
- It will not protect the charterer after the vessel has come on demurrage, unless it explicitly provides so.
- The charterer’s duty to have the cargo at the loading place ready for shipment at the right time is an absolute one.
- Exceptions clauses will be limited to the periods when loading and discharging operations are going on, unless the clause clearly indicates that it also applies to the operation of bringing the cargo down to the loading place or removing it after discharge.

b) The clause will be narrowly interpreted

- Exceptions clauses are construed against the party for whose benefit they are included in the charter.
- Laytime exceptions will be strictly construed and an ambiguous clause will offer no protection.

c) The charterer must use reasonable means to overcome the hindrance

The charterer cannot avail themself of the exception clause if they can surmount by reasonable endeavor, the hindrance. If the port authority orders the suspension of loading at a berth but there is another berth where the cargo can be loaded, albeit to do so would be at extra time and expense to the charterer, then the clause will not protect the charterer.

d) Do exception clauses apply to laytime and demurrage?

It is doubtful that a general exception clause would apply to laytime and demurrage unless specifically stated. A typical example is that contained at clause 19 of Part II of the Asbatankvoy where the wording is too general and the laytime and demurrage provisions have their own code of more limited exceptions.

There is however an argument that such clause could constitute an exception to laytime and demurrage, if a general exception clause refers to delay in loading or discharging and there is no other separate code of laytime and demurrage exception.

4) Fault of the shipowner

a) What period of time can the charterer claim for?

Laytime and demurrage will not run when the delay is caused by the fault of the shipowner. The delay and the cause of the delay must however be contemporaneous and will not include consequential delay. Only where the charterer has been deprived of the use of the vessel at a time when they wanted the use of her, will time be suspended. For example, where time is lost because a berth is no longer available because of an earlier fault of the owner, the charterer will not be able to suspend laytime or demurrage for the time waiting for the berth. The charterer may however have a claim in damages for breach of a separate obligation under the charter.

b) What does "fault" mean?

The mere fact that the shipowner by some act of theirs prevents the continuous loading or discharging of the vessel is not enough to interrupt the running of the laydays; it is necessary to show also that:

- There must be a "breach of obligation" on the part of the shipowner to have the vessel available for cargo operations.
- The "breach of obligation" does not necessarily need to amount to a breach of a clause in the charterparty.
- Fault is an act/default of the owner which removes the ship from the charterer's service for the owner's purposes. The owner must do nothing voluntarily to prevent the ship being continuously available for cargo operation (unless for the safety of the crew/ship//cargo).
- The delay must be for a duty for which they are directly responsible under the charter or for which they have delegated their responsibilities.
- The fault must be the only or the only effective cause of the delay. The delay must not be beyond the control of the owner and the owner must do nothing voluntarily to prevent the ship from being continuously available for cargo operations.

Examples:

If under a charter, the owner is responsible for the stevedores, any time lost as a result of stevedore's negligence will be for the owner's account. However, if the cause of the delay is beyond the control of the owner, such as a stevedore's strike, the owner will not be responsible for the delay.

If de-ballasting or ballasting delay cargo operations and it is not necessary for these operations to be carried out but are done for the convenience of the shipowner then the time lost will be due to their fault and will not count.

If a ship grounds due to the negligence of the crew then time will be suspended. Conversely time will count if the grounding was not due to the negligence of the crew.

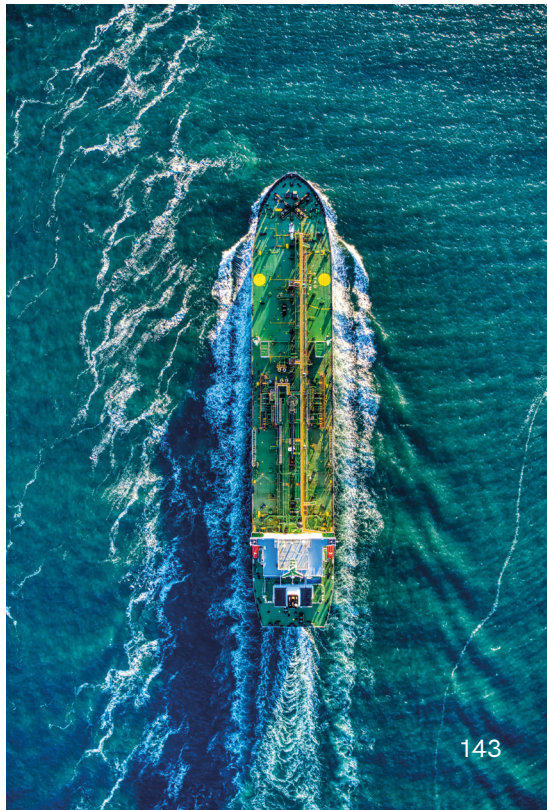
Time lost for non-production of a bill of lading at discharge port will not count unless the charter obliges the owner to accept an LOI.

c) Can the fault of the owner be excluded?

Fault of the owner can be excluded however the clause would have to be very clearly worded. Clauses incorporating the USCOGSA or general exception clauses which make the owner not liable for delay arising from acts, neglects of the master and other servants of theirs in the navigation or management of the vessel, will not be sufficient to exclude the fault of the owner ("The Union Amsterdam" [1982]).

Summary

- Is the event listed an "interruption" or "exception" to laytime.
- If it is an "interruption", no need to prove that the event caused a delay.
- Unless otherwise expressed, exceptions only apply to laytime and not demurrage.
- Fault of the owner can also suspend laytime however the delay and the cause of the delay must however be contemporaneous and will not include consequential delay.
- Fault is an act/default of the owner which removes the ship from the charterer's service for the owner's purposes.



18 Deadfreight

Deadfreight

A charterer's obligation to provide cargo is absolute and non-delegable. A claim for deadfreight arises when a charterer fails in this obligation to provide sufficient cargo to load a vessel to the contractual stipulated quantity.

What is deadfreight?

Deadfreight is the name for damages to which an owner is entitled to claim against a charterer if the charterer fails to load the full quantity of cargo as stipulated under the charter. A claim for deadfreight is only available in voyage charterparties where freight is earned based on the quantity of cargo carried.

What is the rate of deadfreight?

In some charterparties (for example "ASBATANKVOY" and "ASBAGASVOY"), the rate for deadfreight is expressly provided for. Under such circumstances, the claim for deadfreight is liquidated and payable in full at the said rate without regard to any saving of expense by the owner in the voyage.

Some other standard forms of voyage charters ("GENCON" [1994]) do not have a clause specifying the deadfreight rate. If so, the owner's deadfreight claim would be unliquidated in nature and such damages are usually calculated by reference to the freight which would have been earned on the short-loaded cargo less the expenses which would have been incurred by the owner in carrying that cargo.

If the quantity of the cargo is stated in the contract as a range at the charterer's option instead of a fixed quantity, the minimum quantity of the range would be the contractual stipulated quantity of cargo to be loaded. For example, if the charter states "50,000 MT – 55,000 MT to be loaded at charterer's option", the charterer is only obliged to load 50,000 MT so the owner's claim amount will be calculated on this smaller quantity and therefore lower, accordingly.

Would the calculation of deadfreight be affected by demurrage?

In a charter where the laytime is proportional to the amount of cargo loaded and where there is no express deadfreight rate, the owner's deadfreight claim would need to take into account the credit for the increase demurrage earned due to the shorter laytime ("The Ionian Skipper" [1977]), 2 Lloyd's Rep 273.

Is the owner obliged to mitigate their losses in a deadfreight claim?

The owner is obliged to take reasonable steps to obtain a fill-up cargo if the additional freight earned exceeds the expense of loading, carrying and discharging the fill-up cargo. In fact, the owner is entitled to deviate to a reasonable extent, in order to fulfil their obligation to mitigate their losses. Subject to any contrary terms in the charter, such a right to a reasonable deviation is an implied term. For example, in ("Wallem Rederi A/S v WM H Muller & Co" [1927]), 2 KB 99, the vessel was chartered to load at Surabaya and to discharge at Madras, Alexandria and Bristol. The vessel was short-loaded and the owner loaded further cargo at Alexandria to be discharged at Avonmouth. The charterer attempted to argue that the owner was not entitled to a claim in deadfreight because they had illegally deviated and had breached their obligation of completing the voyage with reasonable despatch. The owner was found to have acted reasonably on an implied term to deviate in order to mitigate their losses.

It is important to note that the replacement cargo was to be discharged at Avonmouth which is technically a port in Bristol. The application of the case may therefore be limited to situations where the replacement cargo was due to be discharged in the original discharge port of the voyage and not in a discharge port which was not contemplated by the parties or the voyage. Further, if the ship were to deviate to a discharge port which was not contemplated by the parties or the voyage, there would be issues of Club cover arising out of such a deviation. It is also important to note that a permitted deviation under a charterparty may not necessarily equate to a permitted deviation under the contract of carriage (as evidenced by a bill of lading) because the terms of the contract of carriage may differ from those under the charter.

Can the owner still claim for deadfreight if a partially loaded vessel was ordered to leave?

This depends on whether the order to sail is one which the charterer can be held responsible for. If the order to sail is given by the charterer, the owner will be entitled to a deadfreight claim. On the other hand, if the order is given by the port authority or terminal to which the charterer has no control over such a decision, then there is no breach on the charterer's part ("The Johnny K" [2006]), 1 Lloyd's Rep 666.

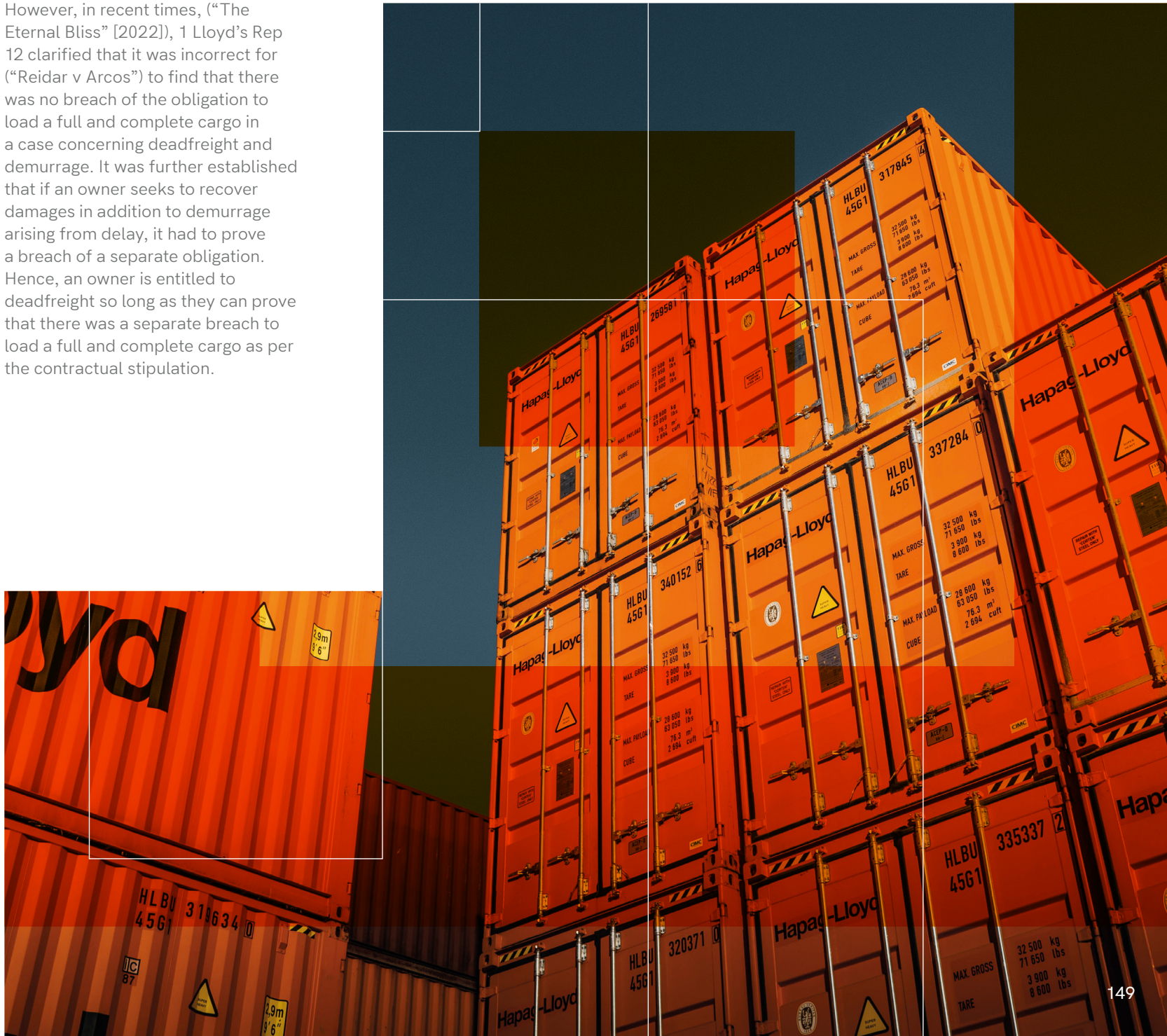
Can the owner exercise a lien for deadfreight?

The owner must show that the lien clause in the charterparty covers deadfreight claims. In the absence of any specific wording, a lien for non-payment of freight will not cover a claim for deadfreight as the two are two different types of claims. (See Defence Guides - Liens on cargo in a nutshell).

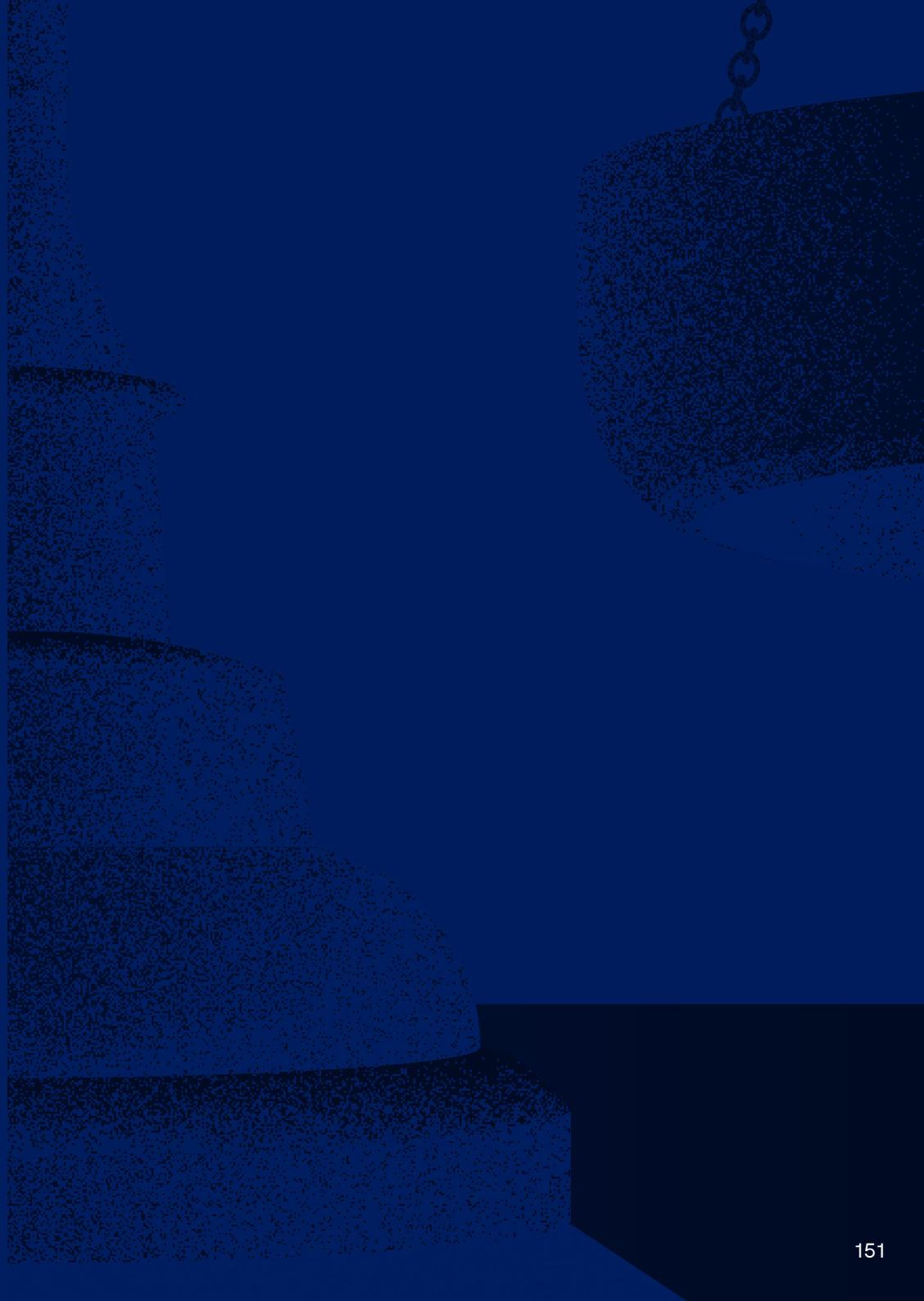
Can the owner claim deadfreight over and above demurrage?

For some time, it was questionable whether deadfreight was claimable over and above demurrage because of the decision in ("Reidar v Arcos" [1926]), KB 352. In that case, which concerns deadfreight and demurrage claims, it was found that there was only one breach by the charterer, namely the failure to complete loading within the laytime. There was no breach of the obligation to load a full and complete cargo.

However, in recent times, ("The Eternal Bliss" [2022]), 1 Lloyd's Rep 12 clarified that it was incorrect for ("Reidar v Arcos") to find that there was no breach of the obligation to load a full and complete cargo in a case concerning deadfreight and demurrage. It was further established that if an owner seeks to recover damages in addition to demurrage arising from delay, it had to prove a breach of a separate obligation. Hence, an owner is entitled to deadfreight so long as they can prove that there was a separate breach to load a full and complete cargo as per the contractual stipulation.



19 Frustration & force majeure



Frustration & force majeure

Frustration

Frustration occurs when, without default of either party, the performance of a contract is rendered impossible or changes the party's principal purpose for entering into the contract so as to render it "radically different" ("Davis Contractors V. Fareham UDC" [1956]), A.C. 696.

What makes a contract "radically different" is a question of fact and will depend on a wide range of factors. The situation in which frustration can be invoked is tightly controlled by courts and the mere incidence of expense, delay or onerousness is not sufficient.

Among the factors which have to be considered are the terms of the contract, the contemplation of the parties (in particular as to risk at the time of contract,) the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances ("The Sea Angel" [2007]), 2 LLR 517.

The fact that the event was contemplated by the parties at the time the contract was entered into is relevant and is likely to (though not automatically) negate a claim for frustration of the contract.

Causation: fault, election and negligence

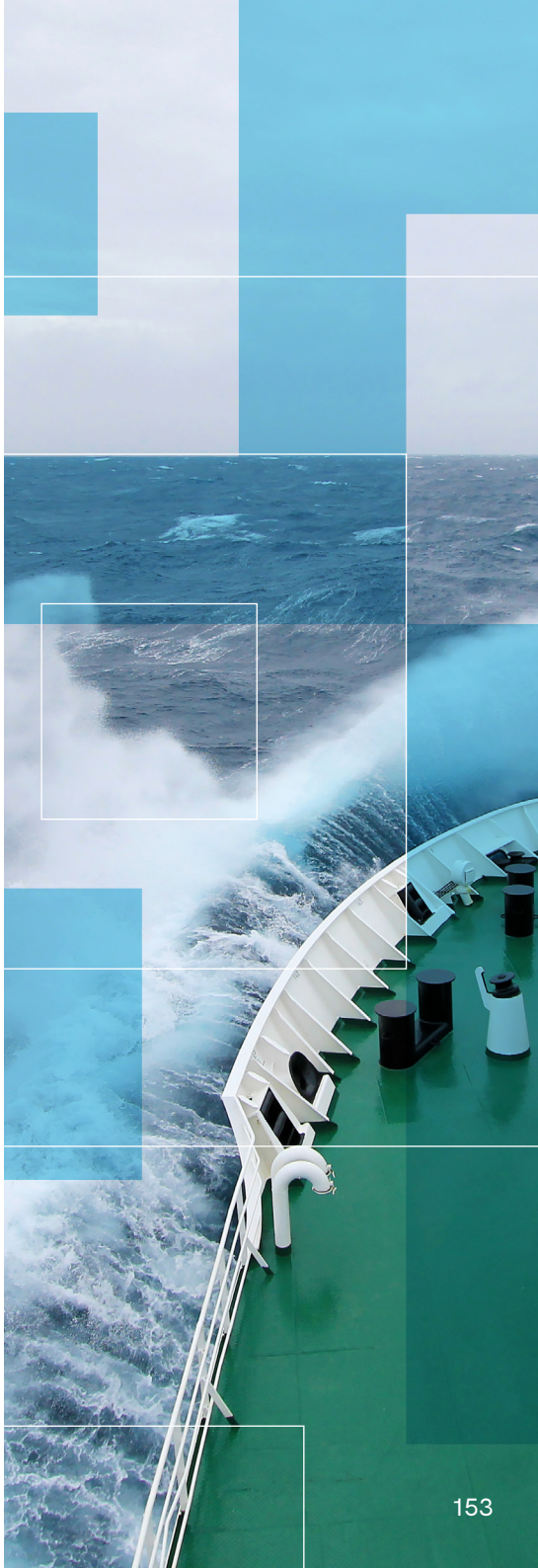
A frustrating event cannot be self-induced. If the alleged frustrating event is due to the deliberate act or choice of one of the parties, they will not be allowed to rely upon the doctrine of frustration. A party to the charter will not be able to rely upon the doctrine of frustration if an event which makes further performance impossible has been caused by their breach of the charter or their own negligence.

Financial loss

Whilst a frustrating event would inevitably cause financial loss of a party if the charter was continued, financial loss does not in itself cause the charter to be frustrated. "The fact that it has become more onerous or more expensive for one party than they thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound" ("The Eugenia" [1963]), 2 Lloyd's Rep 381. For example, the fact that the contemplated route is not available will not generally frustrate the charter.

An exception for commercial loss: damage to vessel

However, a line of older cases suggests an exception to this rule, which arises where a vessel sustains damage on voyage and the costs of repairing her to the extent necessary to enable her to complete the voyage (and the repair could thus be temporary) would exceed her repaired value, such that no reasonable owner would incur that cost. In that case the situation is treated in the same way as if a repair was physically impossible and is considered now to be a species of frustration ("The Kyla" [2012]), EWHC 3522 (Comm). The exception will not apply however where the charter contains an obligation on the owner to maintain a certain level of hull insurance coverage, from the proceeds of which the cost of repair could be funded; in that case the owner cannot claim that they could not reasonably be expected to fund the repair cost, so long as that cost is within the agreed sum insured ("The Kyla").



Delay

A charter may be frustrated if the performance of the charter is sufficiently delayed. The main factor is whether the interruption will be, (or likely to be) substantial in relation to the remainder of the charter period. The length and effect of the interruption must be assessed at the time that the cause of the delay operates and without the benefit of hindsight. If at the outset of an event, the delay appears likely to be of short duration, the contract will be frustrated when subsequently it appears that the delay will be inordinately lengthy. The type of delaying events capable of causing frustration are:

- Requisition.
- War.
- Strikes.
- Ice.

The same event may frustrate a voyage charter but not a time charter

War, ice or strikes for example may not necessarily render the charter frustrated depending on the terms of the charter. A war or a general strike may frustrate a voyage charter whilst these may not have any effect on a time charter with a wider trading limit. It does not matter for example that a time charterer intended to trade the ship between the UAE and Yemen (a country now at war); if the charter permits the ship to trade between other places then the charter will not be frustrated even though the charterer may find it hard to find employment for the ship.

Events covered in the charter

As seen above, strikes, ice and wars may lead the charter to be frustrated. What is the position where the charter already regulates these situations? Can the charter still be frustrated or the fact that the contract already deals with these events bars one party from claiming frustration? The established view is that it is relevant but not conclusive. Unless a clause specifically excludes the doctrine of frustration from operation and is a complete provision, a party will be able to claim frustration if the contract is rendered "radically different". As put in the case ("Fibrosa v. Fairbairn" [1943]), AC 32: "where supervening events, render the performance of the contract indefinitely impossible and there is no undertaking to be bound in any event, frustration ensues even though the parties may have provided for the case of a limited interruption".

Damage, delay in obtaining the cargo

A charterer owes an absolute and nondelegable duty to provide cargo for loading ("The Nikmary" [2003]), EWCA Civ. 1715 and if they are unable to do so because their chosen supplier fails to supply a cargo, that event will rarely amount to a frustrating event or an event beyond the control of the charterer ("The Mary Nour" [2008]), 2 Lloyd's Rep. 526.

If the intended cargo is damaged before shipment, the contract will not be frustrated unless it related to a specific cargo. The charterer will have to find another source of cargo. The same goes if charters are delayed in obtaining the intended source of cargo. However, if there are no other alternative cargo, the contract may be frustrated.

Key points to remember:

- The performance is rendered impossible or the contract becomes "radically different".
- Financial loss does not in itself cause the charter to be frustrated.
- A frustrating event cannot be self-induced (whether by breach or negligence).
- The same event may frustrate a voyage charter but not a time charter.

Force Majeure

Force majeure is a civil law concept which does not exist at common law. It is very similar to frustration but has a wider scope. Under civil law a force majeure event will bring the contract to an end and parties will be released from their obligations. Three factors must be show in order to establish force majeure:

- Externality.
- Irresistibility.
- Unpredictability.

Because force majeure is not a common law concept, parties will try to recreate it contractually and set out in advance a list of events where force majeure can be invoked. Most voyage charters will contain force majeure clauses such as: “Strikes or lockouts of men, or any accidents or stoppages on Railway and/or Canal, and/or River by ice or frost, or any other force majeure causes including Government interferences, occurring beyond the control of the Shippers, or Consignees, which may prevent or delay the loading and discharging of the vessel, always excepted” (Sugar charterparty 1969).

Force majeure under English law only shares two of the three elements of the civil law concept.

Externality

A force majeure clause can only be invoked if the event occurs without the intervention of any other parties. A party relying on force majeure must show that the non-performance was due to circumstances beyond it’s control.

Irresistibility and party’s obligation to take reasonable endeavours to overcome the hinderance

A party relying on force majeure must show that there were no reasonable measures that it could have taken to avoid or mitigate the circumstances or its consequences and must use reasonable means to overcome the hindrance, whether or not this causes a loss on the party relying on the force majeure clause. For example, if the port authority orders the suspension of loading at a berth but there is another berth where the cargo can be loaded, albeit to do so would be at extra time and expense to the charterer, then the clause will not be of any protection.

This was recently illustrated in a case (“Classic Maritime Inc v. Limbungan Makmur SDN BHD” [2019]), EWCA Civ 1102 . The charterer had long term supply contracts in place with two Brazilian mining companies, Samarco and Vale. Under the COA, the charterer had the option to either ship from the port where Samarco exported, or another port where Vale exported. Following a dam burst, production at the mine operated by Samarco stopped and as a result the charterer was unable to procure any cargo from this supplier. The charterer could not procure cargo from Vale. The court held that all the charterer had to do was to make all reasonable efforts to ship out of the other port instead. If the charterer took reasonable steps to provide cargo but still failed, then force majeure was the cause of the charterer’s failure to perform and in that event the force majeure clause would have given the charterer a defence to the owner’s claim for damages for failure to provide a cargo, such that the owner had no claim for an award of substantial damages.

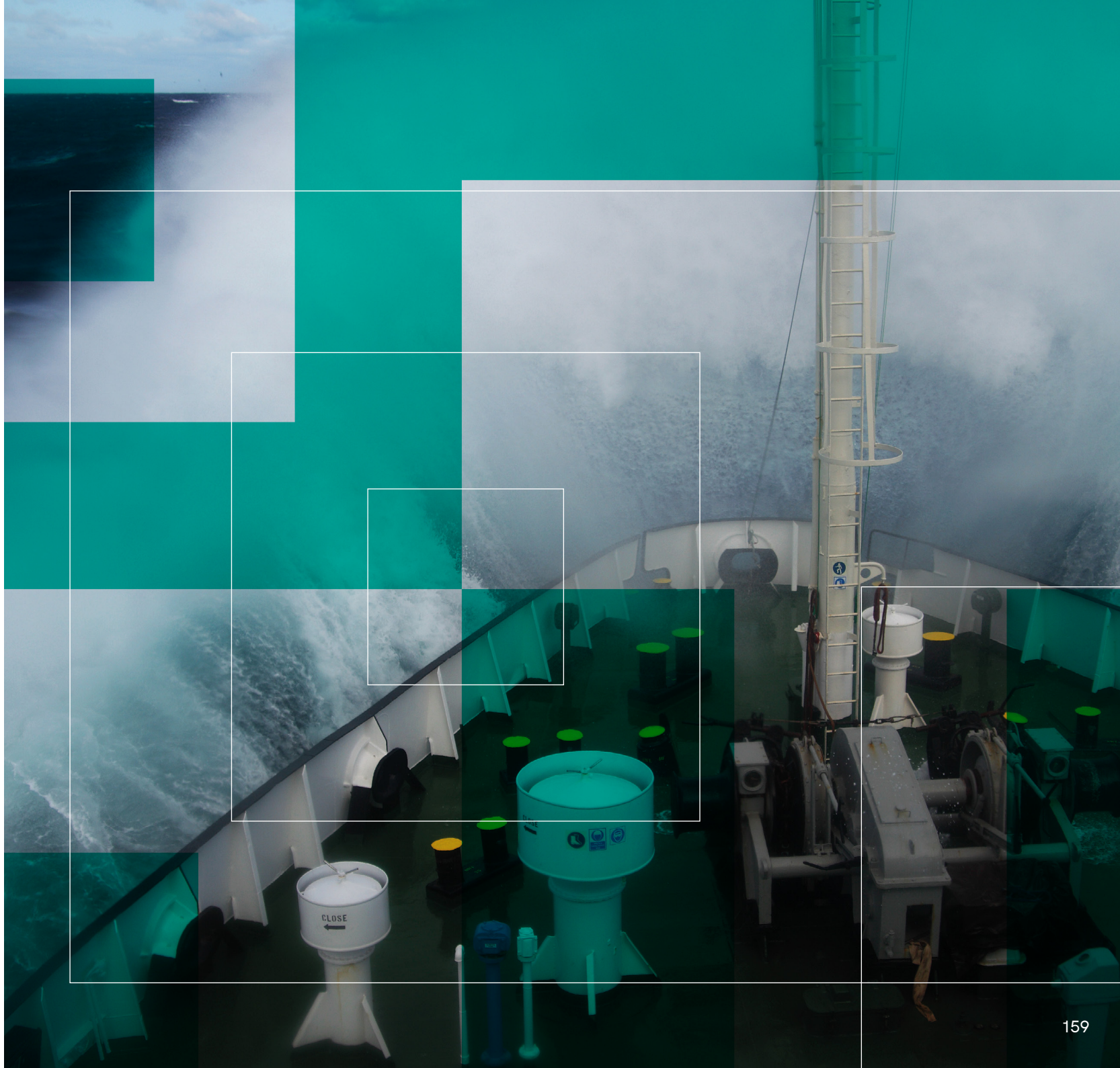
Another example of “reasonable endeavors” to overcome the hindrance is illustrated in (“MUR Shipping v RTI” [2022]), where MUR invoked the force majeure clause in a COA, stating that it would be a breach of sanctions for it to continue with performance of the COA in circumstances where the sanctions meant that MUR was unable to receive dollar payments from RTI. RTI had proposed for payments to be made in Euros which was rejected by MUR. The Court of appeal held that the “state of affairs” could have been overcome by MUR accepting payment in Euros (even though this would have been a variation from the contract).

Unpredictability and narrow interpretation by the courts of such clauses

This is where English law defers from civil law. Force majeure will only be invoked if the event is listed in the force majeure clause i.e. a foreseeable event. Force majeure clauses will be construed against the party claiming the benefit under the charter and will be strictly construed. Any ambiguous clause will offer no protection. Broadly speaking they will be interpreted like any exception clauses in a voyage charter.

Key points to remember:

- Force majeure is not a common law concept.
- Only the contract will dictate what constitutes a force majeure event (read the clause carefully).
- The party must show that there are no reasonable measures that it can take to avoid/ mitigate the circumstances to overcome the hindrance.
- Force majeure clauses will be construed against the party claiming the benefit under the charter and will be strictly construed.



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