Charter Party clauses anno 2016:
time for a new standard?

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1. Introduction

The maritime transport business can be seen to evolve over extended periods of time. It is constantly trying to match or even stay ahead of trade market needs, which is not easy to do against the volatile economic situation in the world. At the core of this business are the agreements and contracts between a whole range of maritime players and intermediaries.

Various international organisations and associations are following these developments and try to facilitate contact between maritime businesses. One of the more prominent ones is BIMCO. They are well known for developing many of the model contracts used in maritime transport. More recently, they have updated one of their time charter forms, the NYPE. However, it was over 20 years since the last revision, making the new version long overdue. A similar update is expected for the other widely used model, the GENCON.

Meanwhile, business continues as usual and not every new proposal is implemented or even welcomed immediately. Sometimes the older models remain predominantly in use and contract parties simply choose to additionally clause them where needed. There is a certain limit to how long this practice can continue until the model is devoid of its original intention. On top of this, legal disputes arise and case law is constantly sculpting the ways of interpretation of the contract terms. Until a new (and improved) model contract comes along, contracting parties must find ways to make sense of the amalgam of clauses available and rules applicable to them.
2. Scope

With this dissertation, I hope to achieve a better understanding of the legal issues and nuances involved in concluding and performing contracts that facilitate transportation of goods by sea. More specifically, I would like to focus on charterparties (both voyage and time charterparties) as well as bills of lading issued under these charterparties. To achieve this goal, it is necessary to set out the principles that govern this field today, compare them to the proposed legal models for the future, while keeping an eye on the way the matter is dealt with in practice.

Charterparties are extensive and complex contracts that incorporate a whole set of agreed upon clauses relating to the maritime transport operation. Therefore, to accommodate the requirements set out for this dissertation, the scope will be limited to specific clauses, rather than the charterparty as a whole. First, the most interesting clauses to examine are those that are closely related to some of the liabilities shipowners and charterers can incur. Second, any clauses which have recently entered maritime transport practices or are expected to do so in the coming years.

The study method for this dissertation will be based on a review of some legislation, case law, legal doctrine, model contracts and actual agreements entered into by Seatrade Reefer Chartering. The outcome should provide for a comprehensive overview of the legal implications of a select number of contract terms.
3. What is a charterparty?

There are three big types of charter parties: voyage charters, time charters and demise charters (or bareboat charters). This section gives a brief of overview of the contracting parties involved, the motives to choose between the different charters, examples of model contracts available for each type, as well as the organisations that play an important role in the drafting and promoting of these models.

3.1 Voyage charter

A voyage charterparty is a contract by which a shipowner allows the charterer to make use of a vessel for one or several voyages. The shipowner retains the responsibility to equip and man the vessel, which means the captain and crew are the shipowners’ employees. The charterer provides the goods to be transported to the designated port of destination.\(^1\) Depending on the Incoterms used in the sales contract, or further mention of loading instructions in the charter party, the charterer can be the one to load the goods on board, at which point their care becomes the responsibility of the shipowner. It is of utmost importance that on this point the parties can agree, and clearly define, who is ultimately liable for damages, since claims relating to this matter are frequent.

An example of a widely used model for a voyage charter is the GENCON, developed by BIMCO. Some charters are commodity specific (LNGVOY, CEMENTVOY, FERTICON). The workings of BIMCO are discussed in the section ‘Organisations influencing charter model contracts’. The specifics of the GENCON model form are considered in the section ‘GENCON Voyage Charter’.

3.2 Time charter

Time charters are the other big type of contracts in the shipping industry, aside from voyage charters. Many of the same principles apply to both types of charters. This allows to make a meaningful comparison between them, to draw analogies from the new developments in time chartering and apply them to voyage charter practices. However, the relationship between the parties involved is not exactly the same, which translates into a different set of responsibilities and goals for each of the contracting partners.

A time charterparty is “a contract between a shipowner and a charterer for the hire of a manned ship, for an agreed period of time”. Whether parties choose to operate on a time charter or a voyage charter often depends on the state of the market and the trade involved. In a rising market, the shipowner loses out on additional money to be made if he agrees to a fixed price for a longer period. The charterer, on the other hand, is likely to be more interested to secure such contracts and hire vessels at lower rates than the spot market would offer.

The shipowner is the one to provide the charterer with a ship and crew. He also takes care of the insurance (hull, machinery and P&I insurance). The commercial exploitation of the ship is then the responsibility of the charterer. The charterer then simply pays the owner the agreed rate for the hire of vessel and crew. How much money the charterer can earn, is then completely up to him. However, the responsibility of the owner does not end there, considering he can still be involved through instructions on how the vessel performs during the voyages.

There are several time charter models that are often used (NYE, BALTIME, GENTIME). Some trades such as oil have their own model (SHELLTIME, BPTIME). For container trade there is BOXTIME. For the scope of this dissertation, the overview is limited to clauses found in the NYE 93 and NYE 2015 models, compared to some similar provisions found in the other models.

### 3.3 Demise charter

A demise charter is the third type of charter party, also known as ‘bareboat charter’. The charterer pays hire to the shipowner and takes over the responsibilities for manning the vessel, provides the equipment and supplies. The charterer will pay all the running costs, bunker costs and possibly even insure the vessel himself. The care for the cargo will of course also be for charterer’s account. At common law the distinction of the demise charter with the other charters is presented as “hiring a boat in which to row yourself” as opposed to contracting with someone “to take you for a row”. In other words, the demise charter holds the biggest transfer of rights and obligations from shipowner to charterer, amongst these three types of charters.

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BIMCO has a model contract for demise charters called BARECON, of which it has a 1989 and a 2001 edition. This contract shares some of the same provisions as the other charters (e.g. trading limits), but goes further with detailed provisions regarding topics such as repairs or insurance. Any further examination of the contents of the demise charter is beyond the scope of this dissertation.

3.4 Organisations contributing to model contracts

While the English common law provides a decent framework to conduct shipping business, there is a need for additional legal constructions that would provide more clarity, certainty and balance between party interests. Based on the freedom the parties have to conclude their own contracts, the ultimate responsibility for drafting legal documents lies with them and their counsel. However, there are a number of international organisations which take it upon themselves to provide guidance to industry members when concluding contracts. Briefly examining these organisations, their structure and functioning, might help better understand what sort of role they play in providing a standard and harmonised toolkit for the maritime world to use.

3.4.1 BIMCO

A very important organisation for the development of model contracts is the Baltic and International Maritime Council (BIMCO). Established in Denmark in 1905, it is the world’s biggest international shipping association today, with over two thousand members. They are themselves shipowners, operators, managers, agents and brokers. As stated on their website, the main objective of BIMCO is to facilitate the operations of their members by “developing standard contracts and clauses, and providing quality information, advice and education”.

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BIMCO is recognised as a non-governmental organisation (NGO) which allows them to participate in the regulatory work of bodies such as the International Maritime Organisation (IMO) and the International Chamber of Shipping (ICS). Although BIMCO is technically an organisation for the benefit of shipowners, the clauses and contracts they develop should have the interests of both shipowners and charterers in mind.

One of the six departments within BIMCO is the ‘Documentary & Education’ pillar. Central to their activities is the Documentary Committee, comprised of some 60 members from different countries which have commercial, shipping, legal and insurance expertise. The Documentary Committee is the body to consider proposals, form a drafting team in sub-committees and give final approval of documents. Although the Documentary Committee normally meets twice a year, there is a special procedure to act quickly in situations where this would be needed. This procedure was used recently to develop GUARDCON in 2014, a contract with additional guidelines used by shipowners to allow employing security guards on their vessels to defend against piracy and other violent threats to the voyage. BIMCO was able to develop this document in just three months. For comparison, the revision of the NYPE 1993 time charter contract started in 2012, was planned to be dubbed NYPE 2014 but was eventually published in early 2015.

BIMCO is constantly on the look-out for the needs of the industry and receives proposals from its members and other shipping-related bodies, such as the critique voiced by UNCTAD in its 1990 report about the state of charterparties at the time. The result of BIMCO’s work is not just

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complete model contracts, they also develop models for bills of lading (e.g. CONGENBILL, see further) and individual contract clauses (e.g. BIMCO General Paramount Clause).

In order to get these results, BIMCO must of course go through their drafting process which is based around the sub-committees. A BIMCO sub-committee consists of three or five experts who are relevant to the subject at hand and work closely together in consultation with the industry concerned. To this end, representatives from the charterer’s or trade organisations can be included in the working group. The sub-committee receives legal advice from P&I club representatives and other legal counsel, to make sure the document produced is in line with contemporary law and the cover a P&I club would be willing to provide.

After completion, BIMCO also engages actively in promoting and marketing the use of their (new) model forms. Although sample copies are available to download from their website, there is an online platform, called ‘idea’, which allows BIMCO members to redact these models to their liking and produce fully drafted contracts. This way BIMCO is also able to commercialize their work.

To avoid discussions and conflict over outdated clauses and contracts, it would seem like the best approach is to re-introduce a new and updated version. However, the shipping industry can be quite reluctant in this respect and the people involved often rely on documents that are familiar to them and which they have used in the past. BIMCO must also carefully manoeuvre between the extensive case law and arbitration practices that have been developed in the meantime. Ideally, we could take the new interpretations and apply them to the same forms, however there is some risk of overlap or conflicting provisions.

In the end, no matter what BIMCO develops, being an NGO without real regulatory footing, they cannot force the industry to switch over to new standards. It is always a challenge to try and lead the shipping industry by positive example and proving the superiority of the new approach over the traditional ways. Even if the new models are not (widely) accepted by their target audience, they can still serve as a reference in some cases. What is ultimately concluded depends on the negotiations between charterers and owners.  

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3.4.2 CMI

The Comité Maritime International (CMI), established in 1897 in Antwerp, is an organisation “concerned with the unification of maritime law and related commercial practices”. They were instrumental in the drafting of the Hague-Visby Rules, as well as the SDR Protocol.\(^1\) The CMI is perhaps even better known for its York-Antwerp Rules on General Average (YAR). The latest version was adopted in May 2016 and updates the previous 2004 version of the YAR. The 1994 version of the rules was actually the one to be prominently in use. However, BIMCO has re-evaluated its stance on the matter and now fully endorses the 2016 version of the York-Antwerp Rules.\(^2\)

The CMI was also important in the development of the Rotterdam Rules, in an attempt to address the need for a uniform regulatory framework for multimodal transport (see further).

3.4.3 UNCTAD & UNCITRAL

Within the work of the United Nations, two organs under the Assembly, namely UNCTAD and UNCITRAL, have had significant impact on developments in regulatory and contractual practices in the maritime transport industry.\(^3\)

The earliest UNCTAD programme in the 1960’s already recognized some issues with shipping as being impediments to world trade and development. They sought to bring more balance between developing states and major maritime countries, which were the developed states at the time. More specifically, they had set out goals to examine the topics of charterparties, marine insurance and the possibility to amend the Hague Rules. This lead to a report about bills of lading in 1971 and a comparative analysis of common charterparties in 1990.\(^4\)

\(^{1}\) N. H. FRAWLEY, “A Brief History of the CMI and its Relationship with IMO, the IOPC Funds and other UN Organisations”, http://www.comitemaritime.org/Relationship-with-UN-organisations/25114.111%20432.00.html, consulted on 14 April 2016.


This 1990 UNCTAD report is quite interesting in the context of this dissertation. It was the result of studies and surveys started back in the 1970’s, but was postponed until 1990 because preference was given to examine practices related to marine insurance, liens and mortgages. This report demonstrated the difficulties which existed with contracting on standard charterparty models and clauses at the time. They were considered to be unclear and vague, leading to various contradictive court decisions. The report concluded that: 1) certain clauses needed standardisation and harmonisation; 2) a set of compulsorily applicable rules should be developed to ensure the same level of responsibility for cargo, similar to the Hague-Visby Rules; 3) there should be definitions of commonly used terms. This report lead to the revision of some of the standard charter parties, like the GENCON in 1994 and the NYPE in 1993.21

While it was originally intended that UNCTAD was going to review the Hague-Visby Rules, it was UNCITRAL that completed this task with the ‘Convention on the International Carriage of Goods by Sea (Hamburg Rules)’ in 1978. Some of the criticisms on the HVR were that the exceptions provided in the rules were too much in favor of the shipowner, or that other methods to transfer cargo (such as lighterage and transhipment) were not foreseen. The Hamburg Rules were not as widely received as the HVR22, the latter remaining the predominant convention to take into account in maritime transport.23

UNCITRAL also co-operated with the CMI on the ‘UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)’.24 Although 25 states have signed this convention, only 3 states have ratified it. A minimum of 20 ratifications are required for the Rotterdam Rules to enter into force.25 Some of the criticisms are that the Rotterdam Rules are very complex, use too many words without achieving precision and contain exceptions and opting-outs which offer too broad escapes.26

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24 I. CARR and P. STONE, International Trade Law, 305.
4. Liability regime English Common Law

A charterparty does not operate in a legal vacuum, but is always set within a broader legal framework of national and international law. Some of these rules are mandatory and will take precedence over contracted terms, nullifying them completely or to the extent that they are not compatible to co-exist. Contract parties might choose to have their relationship governed by a given set of terms found in model contracts, but they are free to select or adapt these terms to better fit their own situation. It is possible that some provisions are simply deleted or cannot be applied to the contract at hand for various reasons. In that case, the solution to a dispute will be found in the law which applies to the contract. In the maritime trade, this will often be the English law. A judge (or arbitrator for that matter) will introduce implied terms into a contract to give it effect from a business point of view, as parties would have intended. Therefore, this section is devoted to a few concepts at common law, which explain the basic relationship between the parties commonly encountered in a charter contract.

4.1 Obligations of the shipper

At common law the shipper has three important obligations: to nominate a safe port, not to ship dangerous cargo and to provide the cargo. The first obligation will be important to understand the background against which a trading limit or sanction clause functions. While dangerous cargo provisions are not the main focus of this thesis, it is imperative to know when even seemingly safe cargo might become dangerous under implied terms. The duty to provide cargo is interesting to consider because the manner in which this obligation is fulfilled can have an impact on the division of liability between shipper and carrier. Another big obligation of the shipper is to pay the freight, but this topic goes beyond the scope chosen for this dissertation and will not be discussed.

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27 Even if parties have no real presence or link with the United Kingdom, they will still choose English law. The UK and London in particular are the world’s hub for marine insurance. The dispute settlement by English arbitrators and judges are of a high standard and carry great authority in the maritime trade.

4.1.1 Nominate a safe port

The obligation to nominate a safe port means that the charterer will warrant that the port is safe. This is a promissory obligation, which can be settled by damages if the obligation is breached. Whether a port is safe has been decided in case law. Within a relevant period of time, a ship must be able to reach a safe port and return from it, bar some abnormal occurrence, without “being exposed to danger which cannot be avoided by good navigation and seamanship”. This last element refers to a standard of skill that can be required of the master to avoid danger. The question to be asked is: “could an ordinarily prudent and skilful master get there in safety?”. A port that had underwater pipelines near the berth, which were damaged by a dragging anchor was considered to be unsafe, meaning the charterer could be held liable to pay for these damages. Other reasons why a port might be considered unsafe are for example: not enough draft clearance, vessel has to be lightened to enter, buoys are not in position or if there is no assistance of tugs. Political risks such as war, blockades and sanctions might be considered as risks in unsafe ports. A charterer might escape liability on this point if this would amount to an “abnormal occurrence”. To decide whether enforcement of sanctions such as detention, seizure or blacklisting is an abnormal occurrence, depends on the foreseeability of these measures. In case a blockade is foreseeable, the charterer will be liable for damages to the shipowner. If sanctions arise in context of military conflict or war, a war risk clauses might provide guidance. There is no requirement of actual physical loss to consider a port unsafe, a risk of damage is enough. If charterers nominate a specific named port, they cannot order the shipowner to then go to a different port (especially not after the vessel has become an ‘arrived’ vessel), unless the shipowner agrees and freight is compensated. If a range of ports is nominated under a charter party, this does not mean that the warranty of port safety is implied for each and every of those

31 S. GIRVIN, Carriage of Goods by Sea, 326.
33 GENCON 1994, cl. 17, line 252 and 255-259: “War Risks shall include: … blockades (whether imposed against all Vessels or imposed selectively against Vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever”.
34 S. GIRVIN, Carriage of Goods by Sea, 325.
ports. The express terms of the charter itself will have to specify this. The safety of the port is warranted during the whole period of the operation of the vessel in the port (arrival to departure). In case a port becomes unsafe upon arrival of the vessel however, the charterer will not be at breach and depending on the charterparty, might still order to proceed to an alternative port. If charterer and shipowner agree to proceed to an unsafe port, the shipowner will be considered to have waived his right to request an alternative port, but he will keep the right to claim damages.

4.1.2 Dangerous cargo

The obligation not to ship dangerous goods is of course not to be taken quite literally considering many cargoes of a dangerous nature must keep moving around the world to be used in various industries. The goal of this obligation then becomes to determine who will bear the risk if something goes wrong. At common law the liability of the shipper for dangerous cargo is quite strict. This was developed in such a way that the carrier would have a realistic possibility to refuse such transport or to take precautions to do so safely. Although, if the carrier knows about the dangerous nature of the goods, or should reasonably know, the charterer will not be liable for not giving notice. However, if the risks are excessive and develop in an unpredictable way, the charterer or shipper might still be liable if the carrier would not have agreed to charter had he known about such risks.

It is the shipper’s responsibility to give proper information and details about the goods to be shipped, as well as proper labelling and marking. This information should even be consolidated in the contract of carriage. It is more common to find reference to ‘dangerous goods’ in time charterparties, rather than in voyage charters. This is because a shipowner under time charter needs to be covered in any situation, no matter the cargo the charterer wants to transport. While under voyage charter the contracting parties will likely agree on a specific shipment. In bills of lading, provisions about dangerous cargo are incorporated by paramount clause and the Hague-Visby Rules.

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37 Ibid., 141.
38 S. GIRVIN, Carriage of Goods by Sea, 312.
39 Ibid., 317.
40 Ibid., 311.
A comprehensive list of ‘dangerous’ substances does not exist, but is found in various legal statutes and regulations (e.g. Merchant Shipping Act, International Maritime Dangerous Goods Code). Goods can also be considered ‘dangerous’ by virtue of surrounding circumstances, for example wood pellets and high temperatures, causing combustion. Goods that contaminate the cargo holds and potentially damage future cargo can also be considered dangerous depending on the matter of degree (e.g. weedkiller on the first voyage, bananas on the way back). These are all “physically dangerous goods”. If the goods are of a nature to expose the shipowner to liability because the goods are illegal or not properly permitted, they are considered “legally dangerous goods” for which the charterer is responsible. The breach of the obligation not to ship dangerous cargo will be settled with damages, but might also lead to termination of the contract if it concerns non-compliance with an express clause prohibiting certain cargoes.

### 4.1.3 Provide cargo

The shipper has an absolute obligation to provide the full and complete cargo and bring it alongside the vessel. This means that the charterer has to provide the shipowner with as much cargo as the vessel can safely carry or as much cargo as was agreed. If the charterer ships less cargo and tries to pay lower freight, he will be liable for damages up to the agreed amount of freight. Proving that the charterer did everything possible to obtain the cargo (‘reasonable diligence’) will not be enough to escape liability. Any exception clauses that are drafted apply only in the case the loading operations themselves are experiencing delays. Although, there is precedent that considered the delivery to the vessel as part of the loading operation, if the only storage facility available is at a considerable distance from the loading point.

In any case, the charterer may receive ‘reasonable time’ to provide alternative cargo. ‘Alongside the vessel’ normally means that the charterer brings the cargo close enough so that the vessel’s tackle can reach it. At common law it is the shipowner’s responsibility to load. Often FIO(S)(T) terms are agreed in charters, which transfer the cost of the loading and unloading operations (possibly also stowage and trimming) from shipowner to charterer. However, special care must be taken in drafting this express provision to make sure that not only the cost, but also the

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42 Ibid., 314-315.
43 Ibid., 317.
responsibility for these operations is transferred (see further). There is a mutuality of obligations, the charterer must provide the cargo, the shipowner must receive it. The shipowner must let the charterer bring the cargo within the allowed laytime. Even if laytime has expired, the shipowner cannot withdraw his vessel before it is certain that the charterer will not provide the cargo or the delay is so long that the contract is frustrated. If the charterer expressly refuses to provide cargo, this constitutes anticipatory breach and the shipowner may sue for damages regardless of the time when performance was to be given.

4.2 Obligations of the shipowner

The shipowner has important obligations under English common law: the duty to provide a seaworthy vessel, to take reasonable care of the cargo, proceed with reasonable despatch and the obligation not to deviate. To examine what seaworthiness means based on common law is important because under Hague-Visby Rules the matter is dealt with in a slightly different manner. The care for the cargo operations is often transferred from shipowner to charterer, the common law principles might still be relevant. The basic principles behind reasonable despatch are discussed further below in the section on time charters. Deviation will not be considered within the scope of this dissertation.

4.2.1 Seaworthiness at common law

The obligation of seaworthiness by the shipowner at common law is implied and means that the vessel provided is fit to perform the voyage. This is an absolute, yet relative, obligation. If the vessel is found to be unseaworthy, the shipowner will be in breach of this obligation regardless of fault. However, the standard of seaworthiness depends on the particular voyage. It can be different for each stage of the voyage and relates specifically to the cargo carried.

45 S. GIRVIN, Carriage of Goods by Sea, 546-547.
46 Ibid., 548.
48 S. GIRVIN, Carriage of Goods by Sea, 554.
50 S. GIRVIN, Carriage of Goods by Sea, 384.
Seaworthiness is an overarching term, concerning not only the condition of the vessel, but also the available equipment, competence of master and crew and even required certificates and documentation. ‘Cargoworthiness’ is a term that is implied under the header of seaworthiness. If cargo holds are contaminated by the previous cargo and not properly cleaned afterwards, damage to the subsequent load might be claimed and granted on the basis that the vessel was not fit to carry the cargo and thus unseaworthy.\textsuperscript{51}

There is a fragile balance between the absolute character of the liability that flows from unseaworthiness and the objective test to determine whether there is unseaworthiness. At common law it has been held that it is not merely about the fact that shipowners “should do their best to make the ship fit, but that the ship should really be fit”. Also, “it does not matter that its [the ship’s] unfitness is due to some latent defect which the shipowner does not know of”.\textsuperscript{52} On the other hand if a defect existed, one must question whether a prudent owner would have required that the defect be fixed before sending the ship to sea. Furthermore, “the test … is not absolute: you do not test by absolute perfection or by absolute guarantee of successful carriage. It has to be looked at realistically”. It would seem then that even though a defect existed, which the shipowner knew about, there would be no unseaworthiness if a prudent shipowner would have set sail under the same circumstances anyway.\textsuperscript{53}

Seaworthiness is warranted by the shipowner at two moments in time: the moment of loading and the moment of setting sail. This is not a continuing obligation at common law. The shipowner does not have to guarantee that the vessel will remain fit during the voyage. However, a voyage can be divided into several stages. A new stage might begin when a vessel calls at intermediate ports, if the vessel stops for bunkering or even has to travel on a river to reach the high seas. The vessel must be seaworthy at the beginning of every such stage. This is known as the ‘doctrine of stages’.\textsuperscript{54}

\textsuperscript{52} S. GIRVIN, \textit{Carriage of Goods by Sea}, 390.
\textsuperscript{53} \textit{Ibid.}, 385.
It is often up to the charterer to prove that the vessel was unseaworthy at departure and that this was the cause of the loss. If unseaworthiness is combined with other causes which contributed to the loss (but for which the shipowner might be exonerated), that unseaworthiness will be considered as the main cause.\(^{55}\)

Normally, breach of the obligation will allow the charterer to claim damages, but not terminate the contract. However, if the breach was severe and affects the whole purpose of the contract (e.g. the vessel cannot be repaired to set sail in reasonable time), the charterer might be able to repudiate the contract. It must be remarked that even though the seaworthiness warranty is not of a continuous nature, it does not mean the shipowner is free of liability as soon as the charterer accepts the ship and only later discovers a defect during the voyage. If unseaworthiness can be proven to have existed at the time of commencement, the charterer might still claim damages and even terminate the contract if the breach was serious.\(^{56}\)

### 4.2.2 Reasonable care for the cargo

The responsibility of the shipowner does not end at the moment he provides a seaworthy vessel. At common law he must also take reasonable care of the cargo he is transporting. The shipowner becomes responsible for the goods from the moment they cross the ship’s rail during loading until he discharges them from the vessel. As mentioned earlier, the charterer brings the cargo alongside the vessel, the shipowner then takes charge of paying for the loading. Even though the loading is done by stevedores, the shipowner will be vicariously liable for their negligence as they are considered to be his servants. These common law provisions are also relevant in the context of a ‘liner bill of lading’, where the carrier takes care of stevedoring operations.\(^{57}\)

However, what the common law proposes is often quite the opposite of what the contract parties agree in their charters. Using what is referred to as ‘FIOS clauses’, the parties agree that charterers are better placed to deal with loading, discharge and stowage. However, transferring this obligation is not without difficulty. If, for some reason, the agreement as per charter party cannot be opposed to the cargo interest as claimants, the shipowner might still be liable. The conditions to turn responsibility back to the shipowner are established in case law (see further).


5. GENCON Voyage Charter

A widely used model form is the GENCON, developed by BIMCO. It’s a general purpose form for cargo that doesn’t have a specific model contract.58 This model charterparty is already the third version of its kind.59 These amendments followed the developments of the real maritime practices, which repeatedly had to include additional written clauses into the charterparties. Contract parties supplement the lacking model provisions in so called “rider clauses”, many of which have themselves become boilerplates in charterparties. The downside to this method is that the contracts become quite complex and very little oversight remains when it comes to reading the rider clauses and model contract together. This practice has been pitied even by judges in the UK and the US as a shortcoming of the GENCON76 form. Their judgements contained harsh comments towards the GENCON as lacking clarity, being “ambiguous” or even “hard to make sense of it”. In 1990 the clauses of several charter parties were studied by UNCTAD in a comparative analysis.60 This contributed to the revision of the GENCON in 1994. However, the latest GENCON 94 version is already over 20 years old and can no longer, in its standard form, completely take care of all the challenges in maritime transport of today. To a certain extent, the same practices that existed with using the GENCON76, continue to exist when using the GENCON94 form. A major revision of the GENCON is not announced as of yet, but BIMCO has been active in revising certain specific clauses which can be substituted within the GENCON 94 model in an attempt to stay relevant.

Some of the difficulties and pitfalls of working with voyage charters are considered in the following sections. The main focus is on the liability regime applicable to shipowners and charterers for their respective role in the maritime operation. The relevant provisions are closely related and only gain meaning from their simultaneous application. Therefore, it is difficult to study the impact of a certain term without reference to the other terms, or even to terms contained in bills of lading or the Hague-Visby Rules (when applicable). The essence of each clause will be discussed, while following the structure of the clauses found in the GENCON and cross-referencing where needed.

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58 As the name suggests: ‘GENeral CONtract’.
59 The GENCON was first issued in 1922, amended in 1976 and 1994.
5.1 Clause 2 – Owners’ Responsibility Clause

The owners’ responsibility clause, is the second clause found in the GENCON model form. This clause actually provides for the exclusion of liability of the shipowner in case some conditions regarding the loss, damage or delay of the delivered goods are not fulfilled. This clause is quite complex, not only because the concepts used are open to some interpretation, but also because it is closely linked to other clauses such as ‘Clause 5 - Loading / discharging’. Furthermore, the exclusions of liability in this clause could potentially be set aside if they are found to be incompatible with obligations which are introduced by a ‘paramount clause’.

In contracting practices the clause is sometimes left untouched in its model form. However, when altered, it is often done in two particular ways. First, the clause currently consists of two paragraphs (previously the GENCON 1976 form had three paragraphs). The second paragraph is sometimes removed in its entirety. The importance of each of these paragraphs in terms of liability will be touched upon. Second, parties sometimes leave out the ‘personal’ element in the first paragraph. This elements relates to liability in cases of lack of due diligence to make a vessel seaworthy or ‘acts or defaults’ which can be attributed to the owners or managers.

5.1.1 First paragraph

[ The Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by personal want of due diligence on the part of the Owners or their Manager to make the Vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied, or by the personal act or default of the Owners or their Manager. ] GENCON 1994, cl. 2, para 1.\(^6\)

In the first paragraph, the GENCON clause stipulates when shipowners assume liability for breach of their responsibility under the charter: 1) personal want of due diligence to make the vessel seaworthy; 2) personal want of due diligence to properly man, equip and secure the vessel; 3) a personal act or default. The interpretation of elements such as ‘personal’ and ‘seaworthy’ are discussed in a following section.

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At first glance, this clause heavily favours the shipowner as it significantly limits the scope of grounds on which he can be held liable. The operative word here being “only” would seem to imply every other cause is excluded. However, the appeal of this clause is somewhat qualified by the scope of claims which it actually concerns. The types of losses concerned are limited to ‘loss or damage to the goods’ and ‘delay in delivery of the goods’. It is to be understood that the former is based on physical damage and the latter relates to financial loss. For other types of claims, this clause does not provide any exclusion of liability, meaning they can still be recovered as damages if the cause is some other breach of the charter. For example, while the goods may have arrived on time and in their proper condition, the charterer might have paid additional warehouse costs because the vessel arrived too late for loading. Such a claim cannot be defended against by relying on the first paragraph of this clause.62

However, in practice not every claim can be easily placed within or outside of the ambit of this clause. From the wording of the clause itself, it remains unclear what would happen if there is a breach of the charter (other than the ones in this clause) that then leads to damage to the goods. Considering the example above, what if a delay before loading not only causes extra warehousing costs, but also leads to damage to the goods upon arrival? This creates a situation where the shipowner might argue that any claim where there is damage to the goods, again brings the claim back into the scope of the clause. He can then escape liability if he can successfully prove the cause not be a personal act or default, or lack of personal due diligence.63

In any case, this clause has been held not to be an indemnity clause. This means that the rules of causation and remoteness apply.64 Therefore, the shipowner can only be held liable to pay damages for the loss that can be considered somehow ‘foreseeable’. For this, either the loss falls within a possibility of ‘the ordinary course of things’ or the parties were aware of special circumstances which led to the damage. From the contract it must be possible to determine what the parties could have assumed to fall within their responsibility in case damage would occur.65

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63 COOKE & YOUNG, Voyage Charters, 258.
64 Ibid., 229.
5.1.2 ‘Personal’

Understanding what the effect of the term ‘personal’ is on the liabilities which can be incurred by a shipowner, especially if this shipowner is a legal person which in practice is often the case, is crucial to determining the final balance of responsibility between owner and charterer. Under an unamended GENCON clause 2, the owner (and managers) can delegate the responsibility of due diligence to another party. This is quite different if the Hague or Hague-Visby Rules apply to the charter by means of a paramount clause. It is this ‘personal’ element in particular that is considered to be conflicting with Article III rule 8 of the Hague-Visby Rules (see further about the incorporation of the HVR).\textsuperscript{66}

To understand which types of persons within a company can be considered to perform actions which can be personally accounted to this company in the maritime context, we must look at the liability limitation regime found in the Merchant Shipping Act 1894. Even though the Merchant Shipping Act has been amended in 1979 and 1995, which now holds different provisions on the limitation of liability, the older version of the Act is still relevant to explain the context which existed when the GENCON76 was drafted. From the Explanatory Notes published together with the changes to the GENCON94, we learn that the aim of the changes to clause 2 was “not to fundamentally change the basic character of the Charter”. Therefore, we can accept that any interpretation given to the term ‘personal’ as under the GENCON76, would still hold true for the GENCON94.\textsuperscript{67}

As a general rule, the Merchant Shipping Act wants to prevent the shipping company from being responsible for any acts of its servants, merely because they are employed by the company and fall under the scope of vicarious liability. The responsibility of the company should be limited to acts of the management, which carries out functions, that could also be expected to be performed by an individual shipowner. In practice, the chief executives and directors have been found to be capable of performing acts or omissions to be considered as ‘personal’ acts of that company. It is not absolutely required that the company’s bylaws or constitution should clearly define the tasks and functions of these persons, for them to be attributed to the company. The actual function these servants perform is of greater importance than what their legal status is in the company’s documents. Furthermore, even heads of departments could potentially fall under the category of

\textsuperscript{66} COOKE & YOUNG, Voyage Charters, 247.
\textsuperscript{67} Ibid., 248.
persons whose actions will be considered as ‘personal’. Although, most commonly, courts will only recognise faults as ‘personal’ faults of the company in case they are omitted at least by a director or a higher ranked servant. The idea behind the term ‘personal’ in clause 2 of the GENCON remains that owners take responsibility for the proper management of the vessel, but should not be “responsible for incidental faults occurring during operation”.  

The ‘personal’ element of clause 2 will not be bypassed simply because a management company is in charge of operating or chartering out the vessel on behalf of the owner. This is because clause 2 mentions owners and managers in one breath. If the management company, or its servants which can bind that company through a similar ‘personal’ link, show a lack of due diligence, this will lead to the liability of the owner who relied on the management company.  

It is possible to argue that the ‘designated person’ which the ISM Code introduces could also be considered a manager in the context of the ‘personal’ element of clause 2. While this person should be someone who can have direct access to the highest level of management, it is not guaranteed in practice that this person is able to daily monitor the vessel or actually be seriously involved in its operations. It must be remarked that the purpose of the ISM Code was to improve standards of maritime and environmental safety, not to create new liabilities between parties in the context of legal claims.  

In any case, the owner has a responsibility to institute or develop a system of control, supervision and reporting, that would allow faults by lower employees to be detected and prevented for the future. If there is no such system, or the system in place is not actually capable of mitigating such faults, the owner might nevertheless be held liable. He will not be able to escape liability by relying on clause 2, even though the negligence cannot be attributed to him personally in the strict sense. Alternatively, having such a system in place has the advantage of excluding liability of the Owner for incidental negligence of his employees based on this clause 2 of the GENCON.  

68 COOKE & YOUNG, Voyage Charters, 248-250.  
69 Ibid., 250.  
70 Ibid., 250.  
72 COOKE & YOUNG, Voyage Charters, 251.
5.1.3 ‘Due diligence’

The GENCON does not define the term ‘due diligence’ itself, therefore its explanation is to be found in principles of common law. The same concept exists in the framework of the Hague-Visby Rules. Due diligence is “the exercise of reasonable care and skill”, which is considered to be the opposite of negligence. To determine whether a shipowner has been due diligent, will of course depend on the facts of every case. The ‘reasonableness’ of his actions will be compared to those of his peers. However, in a given situation there can be more than one way to be due diligent if there are different reasonable opinions on the matter. Whether a shipowner was due diligent is not to be judged from a perspective of absolute hindsight. Although, if mistakes were made, there are lessons to be learned and the margin for tolerance will be smaller for the next incident, based on the hindsight that one should have acquired afterwards.73

5.1.4 ‘Seaworthy’

On this point the GENCON doesn’t add anything specific either. The standard of seaworthiness required is the one as described at common law. The main difference being that under a GENCON charter, the obligation to provide a seaworthy vessel is not an absolute one considering it depends on the elements of ‘due diligence’ and ‘personal want’ as described above.74 The explanation of ‘seaworthiness’ has been discussed earlier as part of the shipowner’s obligations at common law. On the point of ‘seaworthiness’ the GENCON term is close to that under the HVR.

73 COOKE & YOUNG, Voyage Charters, 1025.
74 Ibid., 233.
5.1.5 Second paragraph

[And the Owners are not responsible for loss, damage or delay arising from any other cause whatsoever, even from the neglect or default of the Master or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this Clause, be responsible, or from unseaworthiness of the Vessel on loading or commencement of the voyage or at any time whatsoever.] GENCON 1994, cl. 2, para 2.

The second paragraph is supposed to exclude the liability of the Owner in almost any other case which is not yet provided for under the first paragraph. The terminology of this paragraph has been criticized as being different from the wording in the first paragraph. While the paragraph boasts a broad scope speaking of “loss, damage or delay” in general, in fact its application is similarly limited to what is found in the first paragraph, being “loss of or damage to the goods or for delay in delivery of the goods”.

According to the judge in The Dominator case, the paragraph might as well have stopped after “any other cause whatsoever”. While he recognised the ambiguity contained in the paragraph, he chose to interpret against the draftsman because clause 2 is an exception clause. This opinion has been confirmed in other judgements, relating to similar provisions (like in the BALTIME form). The second paragraph of clause 2 was not given its wider meaning, which would have covered everything outside the ambit of the first paragraph. Everything that followed the word “whatsoever”, was to be seen as merely examples of situations that would fall outside the scope of the clause. Because the judge chose to restrict the application of the clause, it remains unclear what can be seen to fall under the term “whatsoever”. Exclusion of liability for deliberate wrongdoing of the Master or crew might fall under the scope of the clause. Barratry and pilferage are commonly excluded from the shipowner’s liability, thus would also be excluded under this clause. Misdelivery and theft would fall outside the scope of the second paragraph, because it is not considered as a clear and express provision covering these events, meaning a shipowner cannot rely on this clause in such cases.

75 COOKE & YOUNG, Voyage Charters, 253.
76 The Dominator [1959] 1 QB 498, see COOKE & YOUNG, Voyage Charters, 254.
77 Ibid., 255.
78 Ibid., 548.
5.1.6 Remarks

The wording of this clause remains roughly the same when comparing the 1976 version to the 1994 model version. This was done intentionally by BIMCO in order not to drastically change the responsibilities of owners and charterers, as they were established by legal decisions.\(^79\) While this is certainly understandable for the first paragraph, it is more difficult to see why BIMCO didn’t want to rework the second paragraph considering the vast legal criticism on its vagueness and redundancy. This is a point to consider for the new GENCON version. As the court in *The Dominator* suggested, perhaps it is best to shorten the second paragraph and draft it as follows “the owners are not responsible for loss of or damage to the goods or for delay in delivery of the goods arising from any other cause whatsoever”. This would better reflect the catch-all character of the second paragraph as the counterpart to the first paragraph. Specifying which types of loss, damage and delay are envisioned brings the wording closer to the interpretation given to the exception clause by the courts.

With the 1994 version of the clause there is now less risk of conflict with clause 5 ‘Loading/Discharging’. This is because the first paragraph no longer mentions “improper or negligent stowage” to be the responsibility of the owners. Previously, great care had to be taken to maintain consistency between the two clauses while redacting the possible options. It was possible to end up in a situation where owners would be liable for negligent stowage according to clause 2, while clause 5 actually picked charterers as the ones responsible for stowage operations. In a particular case under a GENCON 1976 charter, the words “unless stowage performed by shippers/Charterers or their stevedores or servants” were removed from clause 2, which made the clause impossible to read together with clause 5 (b) which selected the FIO alternative. Both were printed clauses, but clause 2 could be considered to prevail as the more specific one (because it concerned ‘improper or negligent’ stowage, rather than any stowage in general). According to clause 2, the shipowner would then be liable. However, if the Hague-Visby Rules are incorporated into the charter party, the shipowner might be able to rely on the interpretation of such conflicting clauses given in the *Jordan II case* (discussed further).

\(^79\) BIMCO, “Explanatory notes to GENCON 94”,
However, even in the 1994 version of the GENCON not all inconsistencies between clause 2 and clause 5 are taken care of. The shipowner remains responsible for the seaworthiness of the vessel, but it is not exactly clear if this is still the case when the seaworthiness is affected by the actions of the charterer. This is further discussed in the following section.

5.2 Clause 5 – Loading / discharging

(a) Costs/Risks. The cargo shall be brought into the holds, loaded, stowed, and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by the Charterers, free of any risk, liability and expense whatsoever to the Owners. The Charterers shall provide and lay all dunnage material as required for the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board. The Charterers shall be responsible for and pay the cost of removing their dunnage after discharge of the cargo under this Charter Party and time to count until dunnage has been removed. ] GENCON 1994, cl. 5, (a)

5.2.1 Transfer of responsibility

Both charterer and shipowner have responsibilities when it comes to the loading and unloading operations of the vessel. Originally, at common law, it was considered that the charterer should bring the cargo alongside the vessel to be loaded (see section on bills of lading), at which point the responsibility for the cargo shifted from charterer to shipowner as it was loaded over the ship’s rail. However, modern shipping practices deviate from this rule and charterers end up taking care of the whole loading/unloading operation based on the terms of the charterparty. Depending on the specific tasks the charterer commits himself to perform within the range of loading, stowing, trimming and discharge, these terms are referred to as FIO(S)(T).

80 Lord Devlin somewhat mockingly comments on this rule in Pyrene Co Ltd [1954] 2 QB 402 by saying: “Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship’s rail.”

Contract parties to the charter are free to determine what the balance of responsibilities for the loading operation will be. It is important to consider that the cost of the operations and the risk for their malperformance are two separate notions. Transferring the one, does not necessarily imply the transfer of the other. There is a need for clear provisions which specify exactly for which operations the cost and/or risk is transferred. It has been held that a reference to FIO(S)(T) as such, will not mean to transfer the risk of loading, stowage, trimming and unloading to the charterer, only the cost. The 1994 GENCON’s clause 5 (a) makes sure to reference both the transfer of cost and responsibility from owners to charterers (“free of any risk, liability and expense whatsoever to the Owners”). GENCON76 clause 5 (b) does so to the same effect.  

5.2.2 Improper stowage

The responsibility for damage caused by bad stowage is a common issue and one that remains complex, considering the particular factual circumstances in every case. Even under a clear provision of FIO(S)(T) terms with express transfer of risk or responsibility, the shipowner might still be held liable for bad stowage. Upon the charterers there is a duty to perform stowage ‘properly’ and with ‘due care’. This standard should be the same for shipowners and charterers alike and can be somewhat compared to the carrier’s duty under the Hague-Visby Rules. 

Charterers might escape their responsibility under a FIOS clause in two situations. First, the charterers do not guarantee perfect stowage, they simply carry out the task of stowage with reasonable skill and care, based on the information they have (or should have) about the nature of the goods. This could mean that if goods are stowed in a way, which under normal circumstances would be considered sufficient, but ends up being improper based on other circumstances the charterer could not have known (e.g. nature of other goods previously carried on the ship, substandard or outdated equipment on board) the charterer will not be liable. The cargo interests will then try to turn to the shipowner instead. Second, when a Master actually intervenes in the process and gives instructions to the stevedores. The liability of the charterers in such a case will be limited, depending on how impactful these instructions have been on the work of the stevedores. 

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83 T. NIKAKI, “The loading obligations of voyage charterers”, 63-64.
84 Ibid., 66-67.
There is a distinction to be made between stowage impacting only cargo safety and stowage impacting the seaworthiness of the vessel. The responsibility of the Master to oversee stowage operations in terms of cargo safety can have various degrees of relevance. At common law the master has the right to supervise the loading operations. This right exists in essence to make sure the Master can intervene in loading operations when he feels the seaworthiness of the vessel might be at risk. This cannot be construed as a duty to intervene when charterer’s stevedores would simply do a poor job which might lead to cargo damage. Even an express provision placing some task “under the supervision of the master” might hold no particular importance when assessing the liability of the shipowner for the cargo. Even if it did, it cannot remove the liability for cargo care from the charterer. However, the role of the Master could be extended by adding to the contract that the stowage is to happen under the “responsibility of the Master”. Such a provision can potentially interfere with a FIO(S)(T) clause which intends to transfer that risk to the charterer. It will be up to the judge or arbitrator to make sense of both provisions and to see whether they can be read together. It is conceivable that the liability for stowage shifts back to the Master, and thus the shipowner, because the parties intended to rely on the expertise of the Master to assist in the stowage process by adding such a typed clause.

When talking about improper stowage affecting the seaworthiness of the vessel, the situation is slightly more difficult because seaworthiness is normally a responsibility which rests with the Master. The outcome is different, depending on the fact if there is a paramount clause, incorporating the Hague or Hague-Visby Rules into the charter party.

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Without paramount clause, the situation is quite straightforward if the proper precautionary provisions are in place. The liability for unseaworthiness due to bad stowage can be transferred to the charterer based on the construction of the FIOST clause. At common law it is considered lawful to transfer this responsibility if “expressed in clear words and without ambiguity”. The basic clause 5 in the GENCON model using the term “free of any risk, liability and expense whatsoever to the owners” might not be considered as such an express provision, considering it does not mention consequences of unseaworthiness specifically. For the responsibility of unseaworthiness due to bad stowage to be transferred to the charterers, clause 5 must be amended, or there must be an additional clause in the rider.  

If the charter incorporates the Hague-Visby Rules by virtue of a paramount clause, the situation is more complicated. Although the HVR place the task of cargo operations on the carrier (being the owner), it has been established that the Rules do allow to transfer the cost and responsibility for these cargo operations to the charterer. However, the Rules do not allow the transfer of the responsibility for unseaworthiness resulting from improper stowage. Under the HVR seaworthiness is considered to be a non-delegable duty of the owner. Accepting this in every case without reservation would have the adverse effect that a charterer might be liable for poor stowage, but no longer would be liable if the stowage is so bad that the vessel becomes unseaworthy. This could not have been the intention of the Rules. To reconcile this seemingly contradictory situation, we must consider the balance between the level of due diligence both the owner (seaworthiness) and the charterer (cargo operations) have. It is then, depending on who has breached his duty of due diligence based on the facts, that we can decide who will be liable for unseaworthiness caused by improper stowage. In other words, it is not possible to say that if the charterer performs the stowage, the shipowner can always sleep on both ears, knowing he will never be held liable. However, there is more recent authority that leans towards a more favourable interpretation of the Rules for the shipowner. In the EEMS Solar case the shipowner was held not to be liable, even when the Master made a negligent stowage plan (discussed further).

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87 T. NIKAKI, “The loading obligations of voyage charterers”, 70-71.
88 Ibid., 74-75.
5.2.3 Remarks

In the GENCON model the only link between cargo operations and seaworthiness is when considering repair of stevedore damage that would have caused unseaworthiness (clause 5 c). This would be charterer’s responsibility to repair before embarking on the voyage. However, this doesn’t clarify what happens to the liability of the shipowner for his other obligations, if the vessel is rendered unseaworthy by charterer’s actions.\textsuperscript{89} Considering the GENCON does not have a paramount clause, this leaves the door open for the parties to agree themselves if they wish to take care of the issue of unseaworthiness due to improper stowage in the rider clauses. Doing so will inevitably lead to discussion when such clauses are actually relied on if things go wrong. Not to mention the commercial difficulty of even bringing up the possibility of negligent stowage and unseaworthiness during contract negotiations. Perhaps it would be better if a new GENCON version would address this point, reflecting the recent balance struck by judgements at common law.

5.3 Clause 10 – Bills of Lading

Although the main focus of this dissertation is on charter party clauses, the bill of lading is a pivotal point within the relationship of shippers and carriers. Without considering the effect of bills of lading, we cannot properly comprehend the rights and obligations flowing from the charterparty. The goal of this section is to review how charterparties impact the bills of lading issued there under and vice versa. Just like charterparties, there are models for bills of lading to be used. BIMCO has been working on new versions of these models, the latest from 2016. It might be interesting to compare the most commonly used CONGEN bill of lading of 1994 to the versions of 2007 and 2016.

5.3.1 Functions of a bill of lading

The bill of lading can serve three functions: as a receipt for the goods shipped, as evidence of the contract of carriage and as a document of title. Mainly these first two functions are of relevance to this dissertation.

\textsuperscript{89} T. NIKAKI, “The loading obligations of voyage charterers”, 68.
5.3.1.1 As a receipt for the goods

The bill of lading as a receipt is the original purpose of the document at common law. It contains information regarding the goods, such as, where they were loaded, in which quantity and their condition. On such matters the carrier might want to say as little as possible, so as not to implicate himself for being responsible if the description doesn’t add up.90

The Hague-Visby Rules require the carrier or Master by virtue of Article III rule 3 (b) to issue bills of lading “as furnished in writing by the shipper”. The shipper can do so for example by demanding bills of lading quantity “to be conclusive evidence of quantity of cargo loaded”. If the carrier then accepts and signs the bill of lading as presented by the shipper, the carrier will be conclusively bound by the accuracy to a third party bill of lading holder.91 For this reason the shipowner issuing bills of lading will want to make sure to contract-out of such obligations by including formulas such as ‘said to contain’ or ‘weight and quantity unknown’. Such phrasing is commonly found on model bills of lading like the CONGEN forms. The burden of proof is then on the one who claims damages to prove that an incorrect amount of cargo was shipped.92

Alternatively, a Master can outright refuse to sign a bill of lading or even decide to make a counterstatement about the quantity. His decision to do so must be “reasonable”. What this means exactly depends on the facts at hand. It has been held that a dispute arising over a difference of 1% between the master’s figures and the shipper’s figures was a reasonable ground to delay the departure and take time to sign accurate bills of lading.93

A similar issue is at hand when it comes to the condition of the goods. Normally, the bills of lading will provide that goods were shipped ‘in apparent good order and condition’. This has been held to concern only the external condition, which can be established by reasonable inspection. The statement ‘in good order and condition’ cannot be seen separately from the description of the nature of the goods. It is conceivable that the shipper wants the shipowner to transport clearly damaged cargo (e.g. scrap or dented steel coils). The shipowner can accept this

90 S. GIRVIN, Carriage of Goods by Sea, 67-68.
92 S. GIRVIN, Carriage of Goods by Sea, 72.
as ‘good order and condition’ after loading.\textsuperscript{94} The logical consequence is of course that the shipper will not be able to claim compensation for damages, if he himself believes to have accurately described the cargo as damaged. It’s unclear what would happen in a dispute where a shipper claims the shipowner damaged the goods even further. Regardless, the burden of proof would be quite difficult to overcome by the shipper, if he would only on the description in the bill of lading.

It is not the master’s or shipowners task to be able to assess and make a statement as to the quality of the goods. However, when dealing with perishable goods, the master must be able to tell if the goods can “withstand ordinary methods of transport”.\textsuperscript{95} Contracting-out in this respect is more difficult, considering including statements like ‘condition unknown’ only refers to the internal condition (which the shipowner cannot be held to reasonably check anyway) and ‘quality unknown’ is also redundant considering quality checks are not the shipowners responsibility.

If the goods are clearly damaged at loading (when they shouldn’t be), the shipowner or Master are best to make a reservation or protest as regards to the bill of lading. One way to do this is to ask a ‘letter of indemnity’ from the shipper or charterer. At common law there’s a difficulty with requiring an indemnity from your contract party for blatantly incorrect statements, as this could be considered evidence of involvement with fraudulent misrepresentation. Knowingly issuing and signing a bill of lading which the carrier or Master considers to be incorrect, might even lapse the P&I cover. However, a letter of indemnity might still be a solution in case there is a ‘genuine dispute’ about the description. If the Master is convinced the description does not allow him to state ‘good order and condition’, but he is advised by a surveyor that the discrepancy is not as big as to warrant clausng\textsuperscript{96} of the bill, he might rely on a letter of indemnity. The English courts have a strict stance on the difference between ‘genuine disputes’ and ‘misrepresentation’.\textsuperscript{97}

\textsuperscript{95} S. GIRVIN, Carriage of Goods by Sea, 74.
\textsuperscript{96} Clausng was held to mean “a notation on the bill of lading by the Master or his agent, which qualifies existing statements in the bill of lading as to the description and apparent condition of the goods” from The Sea Success [2005] EWHC 1542.
Although the HVR require bills to mention ‘good order and condition’ and charter parties might include provisions to prevent the Master from claus ing the bill of lading, the Master still holds a right to do so anyway. It has been held that “there is no requirement, either in law or generally, that bills of lading should describe the cargo as being in ‘good” or ‘apparent good’ order or condition”. The pressure on the Master to comply is large, considering the commercial interests involved.98

Another difficulty arises where the charterer requires the Master to sign ‘clean bills of lading’ but the Master feels compelled to describe the damage. The Master must carefully consider his statement about the extent of the damage. This was the point of discussion in The David Agmashenebeli case where the Master made a general and too broad statement about the complete cargo, based on damage he noticed to only a part of the shipment. There was a discrepancy between what the charterer would have considered as ‘damage’, what the Master thought was worthwhile mentioning as damage and the condition of the goods which the consignee was willing to accept. Delivery was made with reduction of the price for which the shipowner was held liable because a “reasonably observant master” would not have claus ed the bill of lading as the master in that case did. Had the Master not overstepped his “reasonable” description, the court said that in any case such a description is “not a contractual guarantee of absolute accuracy”. Such degree of precision is not required by HVR, nor by common law.99

Opposed to accepting and signing the bill of lading as is, or attempting to clause it, the Master might also have a right to reject cargo which does not match the description and thus would be subject to remarks. This right might even go as far as to become an obligation for Master and owners to accept. A provision to this effect must be sufficiently clear. While the right to reject cargo really only comes into existence after loading, it might be preferable for the charter party or the bill of lading to provide a right to “refuse to load”. This way cargo that does not allow to issue clean bills will not even have to come on board.100

100 GARD, “When can a master refuse to load damaged cargo?” http://www.gard.no/web/updates/content/51688/when-can-a-master-refuse-to-load-damaged-cargo, consulted on 6 May 2016.
5.3.1.2 As evidence of the contract of carriage

The bill of lading as evidence of the contract of carriage can have different consequences, depending on who the holder of the bill of lading actually is. Between a shipowner and a shipper, the bill of lading is not the contract itself, but can act as evidence of its terms. Therefore, for the establishment of the contract of carriage between shipper and shipowner it is of no importance when the bill of lading is issued. Issuing a bill of lading with terms that are conflicting to those which were agreed upon before, might be of no effect, provided that the shipper can prove what was originally the content of the contract. This might be an oral agreement over the phone, e-mail correspondence or a fixture note. When a charterer himself is the holder of the bill of lading, the terms of the contract between him and the shipowner are governed by the charterparty. The bill of lading acts as a receipt for the goods. This remains true, even if the charterer gets the bill of lading transferred back to him. If the bill of lading is endorsed to a third-party holder, the terms contained within will be conclusive evidence of the contract of carriage. The shipowner must make sure the rights he has against the charterer under the charterparty are incorporated properly into the bill of lading, if he wants to be able to invoke them against this third-party holder.

5.3.2 Bill of lading types to be used with GENCON

5.3.2.1 CONGENBILL 1994

BIMCO developed a bill of lading specifically to be used with the GENCON94 form, namely the CONGENBILL 1994. It featured a box type form containing many of the boilerplate statements discussed earlier, which were common to bills of lading. The second page made sure to incorporate into the bill of lading all the terms, conditions, liberties and exceptions of the charterparty which it was linked to. The jurisdiction and arbitration clauses are mentioned separately, to guarantee there was no doubt those too are incorporated, as an answer to issues raised in case law (see further).

101 S. GIRVIN, Carriage of Goods by Sea, 84-85.
102 Ibid., 86.
103 Ibid., 87.
The CONGENBILL 1994 also contains a detailed “General Paramount Clause”, which can incorporate either the Hague Rules, the Hague-Visby Rules or similar rules as applicable by national statute in the country of shipment. Still widely used today, this version of the form is no longer officially supported by BIMCO since 2008.104

5.3.2.2 CONGENBILL 2007

In 2007 BIMCO released the CONGENBILL 2007, which in general had the same format and served a similar purpose as the 1994 version. The signature box was updated to more clearly state that the bill of lading was signed either by the Master himself, his agent or by the Owner’s agent, also indicating who that owner was. It was no longer considered relevant to feature a field mentioning the time used for loading, as was still the case under the previous version. If ‘Dispute Resolution Clauses’ existed in the charter party, they are now specifically targeted by the incorporation clause in the bill of lading as well (see clause 1, CONGENBILL). More importantly, the wording of the General Paramount Clause changed.105

The premise under the clause in the 1994 version is that the Hague Rules apply to the bill of lading at hand, while the HVR might apply if they are compulsorily applicable to the trade (in three situations, see further). This is reversed in the 2007 version which applies the Hague-Visby Rules by default. Even if the HVR are not enacted in the country of shipment or destination, the HVR will apply. The only situation that would allow the Hague Rules to apply is if there is no enactment of HVR in either country of shipment or destination and the Hague Rules are enacted in either of those countries to apply compulsorily. The CONGENBILL2007 also applies the SDR Protocol, whenever the HVR apply. The importance of the paramount clause, Hague-Visby Rules and relevant case law is discussed in a separate section further below.

5.3.2.3 CONGENBILL 2016

The 2016 version of the CONGENBILL retains the exact wording of the General Paramount Clause, as found in the 2007 version. Some minor changes have been made to the signature box, where nearly any possibility of signatory is now provided for. The Master, owner or charterer indicate themselves as such when signing. If an agent signs, he specifies on behalf of whom he does so by ticking the appropriate box and naming his principal.

The big new addition in the CONGENBILL 2016 is the ‘Himalaya Clause’. The purpose of a Himalaya clause is to extend the exceptions of liability a carrier has to servants, agents and independent contractors working for him. The latest version of the clause proposed by BIMCO also expressly mentions the possibility of stevedores and shipowners to be seen as servants of the carrier.

This was held to be possible according to *The Starsin case*. In that case a shipment of timber and plywood deteriorated during the voyage because it was wetted from rain prior to loading and on top of that it was negligently stowed. Because the carrier became insolvent, the cargo owners were seeking to be compensated for the loss by the shipowner. Despite attempts from the carrier to clause the terms of the bill of lading in a way that would make it an owner’s bill, the bills of lading were found to be charterer’s bills. This meant that the shipowners could rely on the Himalaya clause as servants, however subject to Article III rule 8 of the Hague rules (which were expressly incorporated in the bill of lading). Therefore, they were not exempt from all possible liability like the first part of the Himalaya clause suggests (compare clause 6 b, CONGEN 2016), but could only rely on all exemptions and limitations the carrier would enjoy (clause 6 c, CONGEN 2016).

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107 BIMCO, “CONGENBILL 2016”,
https://www.bimco.org/Chartering/Clauses_and_Documents/Documents/Bills_of_Lading/CONGENBILL_2016.asp,
consulted on 6 May 2016.
http://archive.onlinedmc.co.uk/starsin_hofl.htm,
consulted on 6 May 2016.
5.3.3 Link between charter party and bill of lading

5.3.3.1 Incorporation of charter party terms

There exists an important link between the bill of lading and the charterparty, even though each of these contracts might be concluded between different parties. The charterparty is concluded between the shipowner and the charterer, whereas the bill of lading is in principle important only to the charterer and the cargo owner. This cargo owner, being a third party to the charterparty, would normally not be impacted by the charterparty, since he did not sign it and technically didn’t agree to it. However, the parties involved often make it so that the terms of the charter party also apply on the bills of lading issued under it, even if the cargo owner has never even seen that charterparty. This relationship can be seen both in the charterparty, where reference is made to bills of lading (e.g. clause 10 of the GENCON1994) and on bills of lading themselves which often have a clause along the lines of “all the terms, conditions, clauses and exceptions contained in the charterparty dated … are hereby expressly included in this bill”.¹⁰⁹

Parties should of course try to identify clearly which charter party is made reference to. Sometimes however only a date is mentioned. If there are several charter parties which can be considered to apply, the rule-of-thumb is that the head charter party will apply (the one to which the carrier is a party), unless this would be a time charter in which case the voyage charter ‘further down the line’ will be the one to apply.¹¹⁰

Even though an incorporation clause mentions that “all terms” are incorporated, interpreting this is not always as simple and straightforward as it seems. Sometimes certain important clauses which require the agreement of the parties are to be mentioned separately.

English courts have decided that the arbitration clause found in a charter party that was referred to in the bill, nevertheless did not apply to that bill of lading. Understandably so, since accepting this would mean that disputes between cargo owner and charterer would be settled by means of a procedure that two other parties (shipowner and charterer) agreed upon. Therefore, when the charter party is referenced in general terms only, it means that only the provisions which are ‘directly germane’ to the shipment (e.g. freight, delivery, carriage of goods) will be incorporated. Directly germane terms are those which are relevant and necessary.\textsuperscript{111}

If the parties mean to incorporate other specific clauses from the charter party, then these are to be listed separately and individually. While the express mention about the arbitration clause is considered sufficient in English law, some civil law system courts would only accept the incorporation of the arbitration clause from the charter party into the bill of lading if that bill of lading was signed by both parties. However, no separate mention of the existence of an arbitration clause is required in the bill of lading if the charterparty’s arbitration clause itself mentions bill of lading disputes. Similar problems arise not only with the arbitration clause, but also other clauses. The new CONGENBILL versions make specific mention of the ‘Dispute Resolution Clause’, separately from law and arbitration clauses.\textsuperscript{112}

\subsection*{5.3.3.2 Identity of the carrier}

To determine which rules apply to which party under the charter or bill of lading, it is important to establish who is considered as the carrier. From the qualification as ‘carrier’ many different obligations follow, mainly under the Hague-Visby Rules. For the cargo interest to claim compensation in a law suit, they must target the right party, as per English law there can only be one such ‘carrier’ per contract of carriage.\textsuperscript{113}

Generally, the shipowner will be considered the carrier by default. The Master will sign his bills of lading as an agent. Although, it is more likely that the charterer is actually the one in contact with the third-party bill of lading holder. The charterer might also be the one to prepare the bills of lading for the Master to sign. However, if the charterer wants to sign bills of lading, without turning them into charterer’s bills, he must be authorized to do so for owner’s account under the

\textsuperscript{111} The Miramar [1984] AC 676; E. BIRCH and O. FURMSTON, “Web Alert: Bills of lading as the contract of carriage”.

\textsuperscript{112} UNCTAD, “Charter Parties: a comparative analysis”, 90-91; COOKE & YOUNG, Voyage Charters, 506.

\textsuperscript{113} S. GIRVIN, Carriage of Goods by Sea, 177.
charter party. This can be quite confusing to a third-party holder if there is some inconsistency with the carriage documents he has. Even in a case where a (sub)charterer was identified as a carrier on the bill of lading and no express authorization to sign was given, the court still held that the shipowner was to be considered the carrier, because the charter party provided that charterers had the right sign on the Master’s behalf.\footnote{The Rewia [1991] 2 Lloyd’s Rep 325, see S. GIRVIN, Carriage of Goods by Sea, 179.}

The opposite situation is also possible. The charterer can either signs the bills of lading and identify himself as carrier, or the charterparty can allow the Master to sign on charterer’s behalf. Such bills of lading will be charterer’s bills and the charterer will be liable as ‘carrier’.\footnote{S. GIRVIN, Carriage of Goods by Sea, 181.}

‘Demise clauses’ and ‘identity of carrier clauses’ can be used to clarify who is considered the carrier. Mostly, they will be drafted into the terms of the bill of lading by charterers to make sure the bills of lading are seen as owner’s bills. However, the application of demise clauses is somewhat criticized and not always given legal effect. Even in English law, these clauses can potentially be set aside if they are found on the back of the bill of lading, and if they are construed contrary to what the front of the bill would lead the holder to believe.\footnote{Ibid., 182-183.}

5.3.3.3 Indemnity

The GENCON94 version now contains an express indemnity clause, which allows the shipowner a right of recourse against the charterer in case he is asked to sign bills of lading which will expose him to more liability than what he agreed to under the charter party.\footnote{BIMCO, “Explanatory notes to GENCON 94”, https://www.bimco.org/Chartering/Clauses_and_Documents/Documents/Voyage_Charter_Particles/GENCON_94/Explanatory_Notes_GENCON94.aspx, consulted on 23 March 2016.}

The clause also specifies that the bills of lading which the Master is to sign, should be on a CONGENBILL 94 form. It has been held that if a charter party provides that a certain form is to be used (and certain terms are to be included in the bill of lading), the Master has the right to refuse to sign bills of lading which do not comply with the requirements set out in the charter party. This also doesn’t qualify the right of the Master to refuse to sign the bills when appropriate, even if they are on the correct form (see above).\footnote{The Garbis [1982] 2 Lloyd’s Rep. 283, see COOKE & YOUNG, Voyage Charters, 555.}
Considering clause 10 extends to “all consequences and liabilities”, this could mean to include the situation where the owner is liable to the holders of a bill of lading under Hague-Visby Rules for damages that he would be protected against based on clause 2 (no personal want of due diligence to make the vessel seaworthy) or clause 5 (the charterer is responsible by FIOS terms). In such a case the shipowner would be able to claim back from the charterer because he incurred “more onerous liabilities”.119

There is still some discussion on the point whether the liabilities that the shipowner assumes under the charterparty, might nevertheless include the Hague-Visby Rules, even though there is no paramount clause in the charter. The Hague-Visby Rules might be assumed by the owner, simply because reference is made to the CONGENBILL in clause 10. The CONGENBILL, as mentioned earlier, does contain a paramount clause. Accepting this view would then mean that the shipowner was not imposed a more onerous liability and therefore cannot rely on the indemnity clause. In *The C Joyce case*, the court refused to find an implied indemnity term in the GENCON charter party between shipowner and charterer, because the bill of lading contained a clause paramount. However, this opinion might be reversed considering clause 10 of the GENCON now has an express indemnity clause.120 Furthermore, the words “without prejudice to this Charter Party” have been understood to confirm that between the shipowner and the charterer, the terms of the charter shall remain the ones to govern their relationship, despite the bill of lading holding different terms.121

5.3.3.4 Which terms prevail?

It is possible that the bill of lading and charter party will be subject to different rules. The bill of lading might be subject to Hague-Visby rules, while the charter party is not (unless it also includes a paramount clause). To see which liability regime is to be considered upon the shipowner, we must determine which set of terms prevails. Two situations can be distinguished: either the charterer is also the shipper of the goods, or the shipper of the goods is a third party. In the situation where the charterer is also the cargo owner, it has been decided that the terms of the charter party should prevail over the terms of the bill of lading (which serves as a mere receipt),

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119 COOKE & YOUNG, *Voyage Charters*, 788.
121 COOKE & YOUNG, *Voyage Charters*, 562-563.
especially when it comes to liability. However, the parties can also agree on the contrary and allow the bill of lading to prevail, by specifying so in the charter party. In case the cargo owner is not the charterer, we cannot simply state that in any case the charter party should prevail. Following the judgement in *The Dunelmia*, we should see the charter party prevail, from the moment the bill of lading has been indorsed to the charterer, since at that moment it loses the quality of evidence of contract.

### 5.4 Hague or Hague-Visby Rules

#### 5.4.1 The convention

‘The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules)’ was signed in Brussels on 25 August 1924 under the auspices of the International Law Association and the Comité Maritime International (CMI). The Rules have been called into existence to provide more uniformity in the international maritime trade. They were meant to give shippers better defence against shipowners and the extensive limitations of liability they could impose under contracts of carriage. The Rules were accepted by the main maritime nations at the time. In 1968 the Rules were amended by the Brussels Protocol and became known as the Hague-Visby Rules. This was done to make sure the Rules were better adapted to the emerging world of container traffic. The existing limits of liability were increased and loopholes where the Rules would not apply due to contractual constructions were prevented. Although not all countries which were party to the original convention have ratified the new set of rules. However, the core issues of the rules apply in the same way. Therefore, further reference will be made to the ‘Rules’, ‘Hague Rules’, ‘Hague-Visby Rules’, or just ‘HVR’ for short.

5.4.2 Incorporation of the Rules

The draftsmen of the Hague Rules had the intention to draft provisions which would only apply to bills of lading. This is apparent from the title of the Convention, as well as from Article V which states clearly “the provisions of these Rules shall not be applicable to charter parties”. Nonetheless, the Rules have been held to possibly apply to charter parties as well.\(^{127}\)

The HVR can apply in two ways: either they apply compulsorily by statute or they are incorporated contractually. Compulsory application of the Rules is only ever possible for bills of lading. For the Rules to apply to a charter party, they must be incorporated expressly by including a ‘paramount clause’. The difference between compulsory and contractual application is important. This is because if the rules apply compulsorily, the parties cannot deviate from them. If the parties chose to incorporate the rules voluntarily, the extent of their intention must be clearly interpreted by reading it in the context of the entire contract. It is conceivable that the particular construction of a paramount clause, does not incorporate the full set of Hague-Visby Rules. The parties have the liberty to pick and choose which parts of the Rules they deem applicable to the charter, as long as proper sense can be given to the overall construction.\(^{128}\)

5.4.2.1 Compulsory incorporation

The HVR will apply compulsorily in three situations found in Article X. If the contract of carriage is a bill of lading for international shipments (between ports of two different countries), the Rules will apply if: “a) the bill of lading is issued in a contracting State, or b) the carriage is from a port in a contracting State, or c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract”. This means that to determine whether the Rules apply compulsorily in a certain case, it is sufficient to determine that the shipment begins in a Contracting State or that the bill of lading was issued in a contracting state. The destination is only important in so far as it shows to be a different country than the country of departure, to satisfy the ‘international’ element.\(^{129}\)

\(^{127}\) Adamastos Shipping [1959] A.C. 133; COOKE & YOUNG, Voyage Charters, 997.
\(^{129}\) COOKE & YOUNG, Voyage Charters, 1005.
The third situation under Article X warrants some further explanation. According to a strict reading of Article X, c, choosing English law to apply to the contract by virtue of a ‘law and jurisdiction clause’ will apply also the HVR to that contract. This is because the UK Carriage of Goods by Sea Act 1971 gives the Hague-Visby Rules application by ‘force of law’.

This Act even further expands the application of the Rules to shipments between two UK ports (section 1(3) of the Act). Although art. X, c) speaks of contractual incorporation of the rules, this does not reference a voluntary incorporation where parties would be able to deviate on certain aspects. This third situation as well, is a compulsory application of the Rules with ‘force of law’ (just like is the case under X,a and X,b). To an English judge, the ‘force of law’ means that he is bound to apply the Rules in situations that require their application as per Article X, regardless of the choice of law or jurisdiction in the bill of lading.

However, simply having English law apply to the bill of lading (expressly or implied) is not enough to invoke the application of the HVR under art. X,c in cases when neither the departure is in a Contracting State, nor is the bill of lading issued in such a state. There must be some further mention in the bill of lading of the HVR themselves or the Carriage of Goods Act 1971, otherwise the parties have no way of opting-out of HVR while remaining under English law, in situations where it is possible for the Rules not be compulsorily applicable.

5.4.2.2 Transhipment

Transhipment can make the matter of the application of the HVR somewhat more complicated. The HVR themselves do not contain provisions specific to transhipment. It has been previously held that for the purpose of the Rules, the only relevant port to consider is the ‘port of shipment’ which must be apparent from the bill of lading. Any transhipment that happens in between (even though it can be an agreed option for the carrier to invoke) has no effect on changing the application of the HVR.

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130 This Act has been amended by the Carriage of Goods by Sea Act 1992, but in art. 5(5) of that Act it is stated that the changes shall have effect without prejudice to the application of the Hague-Visby Rules.
131 COOKE & YOUNG, Voyage Charters, 1005.
132 Ibid., 1009.
133 Anders Maersk [1986] 1 Lloyd’s Rep. 483. This was a case where cargo was lost after transshipment had happened in Hong Kong, which the cargo interests claimed would mean the HVR would have to apply. The Court disagreed because Hong Kong was never mentioned as a “port of shipment” in the bill of lading. See COOKE & YOUNG, Voyage Charters, 1010 and W. TETLEY, “The Hague Visby Rules”, http://www.euro-marine.eu/hague-VisbyRules.html, consulted on 28 April 2016.
Such strict interpretation is however not applicable if the bill of lading is a ‘through bill of lading’. In such cases there is a difference between carriers that take responsibility for whatever happens on the full journey, and those that simply act as forwarders. In the second case it is important to carefully examine the construction of the bill of lading and which ports it considers as ‘port of shipment’. If it is found that there are two contracts of carriage, for which two bills of lading should have been issued (even though this was not actually done), then the Rules might only apply to a particular leg in the journey, but not the other. This way the liability of the carrier might be different in each part of the transport.\textsuperscript{134}

Another point of distinction is the application of the Rules to determine liability while the cargo is ashore (and waiting for transhipment). Even though the Rules do not apply during inland transport before loading onto a vessel, they might nevertheless apply between two maritime transports. If the transport can be seen as one operation, under a single bill of lading and the storage time ashore is short, the HVR might be found to apply continuously for the whole journey.\textsuperscript{135} However, where clear distinction can be made between the transport operations, multiple bills of lading are issued and the storage is for extended periods of time, the HVR will not apply during this time.\textsuperscript{136}

\textbf{5.4.2.3 Contractual incorporation}

As mentioned above, HVR can also apply to charterparties by virtue of incorporation. On one point it is quite clear, the incorporation is on a contractual basis as it cannot apply compulsorily. This means on the one hand that parties can qualify the extent of the Rules which will apply, but on the other hand some unforeseen consequences are possible if parties neglect to formulate their other clauses in a way which allows the HVR to function. This could even be done intentionally so as to circumvent the effective incorporation of the HVR, making any provisions on the matter obsolete in the context of the charterparty.

\textsuperscript{134} The Rafaela S [2003] 2 Lloyd’s Rep. 113. This was a case where the bill of lading mentioned a final destination beyond the port of discharge, explicitly limiting the carrier’s qualification as ‘carrier’ to the first segment. See COOKE & YOUNG, \textit{Voyage Charters}, 1010-1011.
Some difficulties arise from the manner in which the HVR are incorporated. Normally this happens by means of a paramount clause, but the exact construction can be done in a variety of ways. Sometimes only certain articles of the HVR are expressly incorporated, leaving out important defining aspects or details. The paramountcy of the HVR lies in its Rule VIII (discussed further), leaving this out will essentially give the charter party clauses their precedence back over the Rules, potentially rendering them ineffective in the face of contradictory terms. If the paramount clause is deemed “to apply and to be inserted in all Bills of Lading issued under the Charter Party” it means that the paramount clause is also included in the charter party itself, not just the bill of lading.

Although the HVR cannot apply compulsorily to a charter party, it is still relevant to consider whether the conditions that would make it so, are fulfilled. Merely mentioning “the clause paramount is incorporated”, might be considered to mean that the Hague Rules will apply, unless the Hague-Visby Rules apply according to the legislation of the country of shipment or based on the applicable law.

This has been the point of discussion in the Superior Pescadores case. The “Superior Pescadores” was a vessel carrying machinery and equipment from Antwerp to an LNG facility in Yemen. During the voyage, the cargo shifted in the holds and was damaged considerably. The cargo claimants brought a claim under the bill of lading. The shipowners did not try to escape liability altogether, but rather limit it according to the Rules.

The Rules were incorporated by a paramount clause in the bill of lading. The paramount clause was drafted as follows: “The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract”.

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137 The Tasman Discoverer [2002] 2 Lloyd’s Rep. 528. In this case only Articles I to VIII were incorporated, leaving out Article IX which determined the gold value, making the limitation of liability much larger in favour of the carrier. See COOKE & YOUNG, Voyage Charters, 995.


According to the shipowner the Rules “as enacted in the country of shipment”, being Belgium, would have to mean that the particular paramount clause actually incorporates the Hague-Visby Rules. Furthermore, English was chosen to govern the contract, therefore, by virtue of the UK Carriage of Goods Act, the Hague-Visby Rules should apply compulsorily. The cargo claimants went even further, leading to believe that the paramount clause was construed this way, in order to apply both sets of Rules, whichever would provide the highest limitation of liability.

Although the court was compelled to interpret that paramount clause as incorporating the Hague Rules, it rejected the idea that both sets of Rules could apply simultaneously. This was definitely the case for packages under the same bill of lading. However, because English law was chosen to govern the contract, the limitation from Hague-Visby Rules would still have to apply.¹⁴⁰

If reference is made to a national law which incorporates the Rules, such incorporation will still apply as a matter of contract, meaning that the interpretation of the terms used in that law will be done according to the chosen law which governs the charterparty (e.g. referencing the US Carriage of Goods by Sea Act will the US terms from that Act, an English law meaning).¹⁴¹

Sometimes even clearly erroneous formulations such as “This Bill of Lading incorporates the Hague Rules” found in a charterparty, could be understood to have some meaning and incorporate the Rules in the charter. Although, such careless constructions are of course to be avoided.¹⁴²

¹⁴⁰ Superior Pescadores [2016] EWCA Civ 101, para 15. On appeal the end result of the first judgement was upheld, but the reasoning to come to this conclusion was slightly nuanced by the court.
¹⁴¹ COOKE & YOUNG, Voyage Charters, 996.
5.4.3 Seaworthiness under HVR

The Hague-Visby Rules’ core understanding of ‘seaworthiness’ is largely the same as at common law. However, it differs on three main points: the absolute character, the doctrine of stages and the burden of proof.

The absolute obligation to provide a seaworthy vessel at common law is replaced by the HVR by a commitment to be ‘due diligent’. However, close attention must be paid to the way the HVR were incorporated into the particular contract. If the Rules apply by virtue of law or statute, the absolute obligation will be replaced. However, if the Rules apply contractually (like in a charterparty), other terms of that contract might nevertheless impose an absolute warranty of seaworthiness on the shipowner.143

Article III, rule 1 HVR requires the carrier to provide a seaworthy ship “before and at the beginning of the voyage”. This has been held to mean that seaworthiness must be guaranteed throughout the complete loading operation.144 However, as soon as the vessel departs, the carrier will no longer be liable for later defects during the whole voyage (unless they can be proven to have existed before departing). This is quite different from the ‘doctrine of stages at common’ law, because that requires the shipowner to make sure the vessel is seaworthy at every new stage. Such stages can start at the moment of intermediate port calls or even bunkering operations (see the above section ‘Seaworthiness at common law’).145

The HVR seems to impose a positive obligation on the carrier to prove due diligence in a case of unseaworthiness. Article IV, rule 1 HVR ends as follows: “Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article”. The actual application of this rule in practice is closer to the system of proof at common law. For the claimant to have a case against the carrier, he must prima facie show that the carrier is in fact the person from whom he seeks compensation and that he is the one who can be linked to the damage or loss of the goods.

143 S. GIRVIN, Carriage of Goods by Sea, 421.
144 Maxine Footwear [1959] AC 589, see S. GIRVIN, Carriage of Goods by Sea, 422.
Instead of then having to prove that the ship was seaworthy, the carrier can first rely on an exception ground in the HVR. If the carrier in fact has a right to such an exception because it was the cause of the damage, the claimant will have to be the one to show that the damage was allowed to happen due to a lack of due diligence. In other words, he must prove seaworthiness at the beginning of the voyage. In cases involving damage by sea water, the burden of proof is somewhat reversed, as the cause is most likely found in the seaworthiness of the vessel. However, the carrier might still be able to show that due diligence was at hand.146

5.4.4 Paramountcy of the HVR

The article that gives the HVR its paramount effect is article III, rule 8. It reads as follows: “Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability”. It is interesting to examine which clauses commonly found in charter parties and bills of lading would be considered as “lessening liability” and what the “nullifying effect of the rule” would be.

If there are clauses found which would lift the liability of the carrier for seaworthiness or negligence, they will be given no effect by virtue of the HVR. In case the contracting carrier is not the actual carrier, then article III rule 8 will only disapply clauses concerning liability for negligence and fault.147

Jurisdiction clauses can potentially be a way to invoke other liability regimes by virtue of national law. However, if applying that national law would lead to a lower level of liability limitation than the HVR provides, article III rule 8 would render such a jurisdiction clause null and void. This is especially true in situations where the Rules apply compulsorily (eg. based on the country of shipment, see above).148

147 COOKE & YOUNG, Voyage Charters, 1065.
Arbitration clauses will normally not be nullified, but if they provide for lower time bars than what is foreseen under HVR (one year), this lower time bar provision will be disregarded.149

Although the HVR seemingly places the responsibility for loading, handling and stowage on the carrier in article III rule 2, this doesn’t limit the liberty of the contract parties to agree otherwise. This issue has been the point of discussion in the Jordan II case. The owners of the vessel, who were defendants in the case, chartered the vessel out on a Stemnor 1983 voyage charter form that contained a FIOST provision (“3. Freight to be paid at the rate of U.S.$ . . per metric tonne F.I.O.S.T. - lashed/secured/dunnaged”). Another relevant clause read as follows “17. Shippers/charterers/receivers to put cargo on board trim and discharge cargo free of expense to the vessel. Trimming is understood to mean levelling off the top of the pile and any additional trimming required by the master is to be for owners account”. This would mean that the cost and responsibility of loading, unloading and stowage would not be held by the owners. The cargo was steel coils going from Bombay to Barcelona and Motril. The bill of lading was a CONGENBILL, incorporated “all terms and conditions, liberties and exceptions” of the voyage charter, also containing a General Paramount clause. The Hague-Visby rules were found to be applicable as enacted by Indian legislation. The steel coils were damaged, which happened apparently due to rough handling during loading or unloading.

According to the claimants, the art. III rule 2 HVR would overrule the FIOST provision in the voyage charter by virtue of art. III rule 8 HVR, meaning the owners would be held liable for damage resulting from loading or unloading. The Court did not agree, particularly because other clauses (such as clause 17) clearly indicated the intention of the parties to transfer not only the cost, but also the performance of the loading and unloading operations from owners to charterers. The fact that clause 17 mentions trimming (which does not apply to steel coils) does not mean this clause is to be ignored entirely, instead it must be given proper meaning by reading it in accordance with clause 3, which specifies the operations falling under the FIOST term. It is important to note that a mere FIOST provision would simply transfer the cost from owner to charterer, but not the responsibility. In this case it was the addition of clause 17 that confirmed the intention to transfer responsibility as well.

149 The Ion [1971] 1 Llyod’s Rep. 541 and COOKE & YOUNG, Voyage Charters, p. 1066
From the Jordan II case we must therefore remember that “art. III, r. 2 did not compel the shipowner to be responsible for loading and unloading; it simply compelled the shipowner to load and unload properly if he undertook those functions” (emphasis added).\textsuperscript{150}

More recently the \textit{EEMS Solar case} has confirmed the above judgement in Jordan II (which in itself was already based on a previous \textit{case Renton}). This time the GENCON 94 voyage charter was used and the dispute arose over the combination of clause 5 ‘Loading/Discharging’, art. III rule 2 and art. III rule 8 HVR. The terms of the voyage charter were again incorporated into a CONGEN bill of lading. The claimants tried to argue that incorporating clause 5 in a bill of lading context would make no sense, because it would mean consignees would have to be responsible for loading and stowage. However, the court held that clause 5 shows the intent of the contract parties to pass the responsibility from the owner to the shippers or cargo receivers. Furthermore, in case such shift in responsibility is agreed the court states that “the shipowner will not be liable for damage arising from improper stowage even if it renders the vessel unseaworthy unless it is established that the bad stowage leading to the damage arose from a significant intervention by the shipowners or their master”. The actual and concrete intervention by the Master can thus lead back to responsibility of the owner. In case, for example, the Master proposes a stowage plan, which is of a kind that leads to damage to the cargo during the voyage. Such a faulty plan was actually at hand in the EEMS Solar case, but there was no evidence found that the stevedores had actually consulted it, so the causal link could not be made under the factual circumstances.\textsuperscript{151}


5.5 Remarks on the GENCON 1994

The GENCON 1994 model is still widely used today, even though it is over 20 years old. It is hard to say whether that is due to its robust construction, or because BIMCO and the contracting parties who use it have found ways to make it work. Particularly by swapping some of the clauses for their newer counterparts (e.g. VOYWAR Clause 2013 or BIMCO Arbitration Clause), or by adding clauses concerning compliance with modern regulations in riders (e.g. ISM, ISPS).

Despite the heavy criticism on the GENCON 1976 voiced by UNCTAD in 1990, even that version of the model is still in use. Therefore, we must acknowledge that BIMCO definitely got some of the core principles of the contract right, which encourages parties to come back to it. Some of those problems which were highlighted still exist in the 1994 version however.

Considering that BIMCO claims that its documents are normally on a 10-year cycle for revision, it seems inevitable we are heading towards a new GENCON version in the coming years.152 The question then remains, what will the GENCON of the 21st century look like and will it be received with widespread use by the industry?

Looking at all the other charters that BIMCO has developed or updated since 1994, the biggest change would probably be the addition of the protective clauses, mainly the ‘paramount clause’. It has been held and commonly accepted that even though the Hague-Visby Rules expressly mention they do not apply to charterparties, they nevertheless can be incorporated provided they can be given their proper meaning. In fact, BIMCO has revised its ‘General Clause Paramount’ back in 1997 with a view of applying it to “bills of lading, seawaybills and voyage charterparties”.153

The difficulty of incorporating a ‘paramount clause’ into the GENCON by default is that some clauses (like the Owners’ Responsibility Clause) become incompatible with the HVR.154 Therefore, it would seem that this clause no longer has a place in a new GENCON version at all. Even though attempts were made to “clean it up” since 1976, the terminology of clause 2 remains vague and redundant.

154 COOKE & YOUNG, Voyage Charters, 229.
While clause 5 ‘Loading/discharge’ seems like it came out stronger after the changes from the 1976 version, some legal developments have shown that some matters are left unanswered in the clause. From the clause is not clear what is to happen with the liability of the parties after unseaworthiness due to bad stowage. Perhaps a clear provision could help, excluding the liability of the shipowner to a full extent in case the charterer takes care of stowage, similar to what the courts found in the *Jordan II* and *EEMS Solar* cases. As it stands now, the mention of “supervision of the Master” is somewhat confusing in this context as it seems to imply a degree of responsibility where the courts do not particularly see one. A stricter contrast between ‘supervision’ and ‘responsibility’ is advised. Perhaps a transhipment or lighterage clause is also bound to be provided.

The bill of lading clause is generally up-to-date enough to continue its existence in its current state. A slight change might be that BIMCO wishes to endorse its newest CONGENBILL 2016 as a default. Should the parties choose not to use a bill of the CONGEN type, it would be best to provide that this bill of lading should then properly incorporate the terms of the charterparty. The express indemnity for bills as presented in the clause is already a good thing. Although, possibly the rights of the Master can be set out more clearly in situations where has a right (or according to charterer even a duty) to sign clean bills or reject/refuse to load cargo. While it is implied that the charterer will be the one to present the bills, which the Master will sign on the owner’s behalf, it could be beneficial for the sake of transparency to identify the owner as carrier in that case. This is especially important if the CONGENBILL 2016 is used, which now features a Himalaya Clause (see the discussion about ‘servants’ above).
6. NYPE Time Charter

The New York Produce Exchange (NYPE) form is a commonly used time charter form in the dry cargo markets. The latest version of this form was released in 2015, making it the 6th amendment in the series. Although BIMCO was instrumental in the revision of the NYPE, it was the Association of Shipbrokers and Agents (ASBA) as copyright holder that was the catalyst for the revision. The Singapore Maritime Foundation (SMF) was also a co-author. With every revision, the NYPE has expanded the number of clauses. The NYPE has gone from 28 clauses in the 1946 version to 45 clauses in NYPE93, and now 57 clauses in 2015.155

In the following sections we consider several clauses which are of contemporary importance or have been revised since the NYPE 1993 version.

As mentioned previously, the shipowner provides the charterer with a properly manned vessel. His responsibilities do not end there, as he can remain involved with the way the ship operates on its voyages. This can have a major impact on the earning ability of the vessel for the charterer and is to be clearly determined beforehand through clauses such as performance and bunkering.

More recently, as oil prices were at an all-time high and the market was plagued by overcapacity, shipping companies started operating with ‘slow steaming’ practices. Even though oil prices and bunker costs dropped significantly, this practice didn’t disappear and continues to be very important in shipping. Slow steaming has an impact on the position of shipowners and charterers alike and will be discussed further below.

In recent times, the geopolitical games that leading nations of the world play have received renewed interest in the media. With the lifting of sanctions against Cuba and Iran, newly imposed sanctions against trade involving the Crimean Peninsula or regions under control of the Islamic State of Iraq and Syria (ISIS), this matter again becomes a hot topic.

155 BIMCO, “NYPE 2015”,
consulted on 8 May 2016.
6.1 Preamble

6.1.1 Parties to the contract

As mentioned above, the time charter is concluded between shipowner and charterer. However, there are several types of legal entities which can be considered a ‘shipowner’ in the broad sense. That is why the NYPE2015 allows to specify whether the contracting party is the ‘Registered Owner’, ‘Disponent Owner’ or himself a ‘Time Chartered Owner’. This is a welcomed addition to the preamble, which can provide some more insight into the relationship between contract parties, about who they are or whom they represent. Unfortunately, there is no mention of the possibility that agents would be the ones to actually conclude the contract on behalf of the owners. In that case, contracting parties must amend the preamble to specify they are, for example, contracting “as agents to Owners”.

6.1.2 Description of the vessel

The description of the vessel, consisting of elements like the Name, Flag, Built year, Port and number of registry (with the IMO), classification, tonnage, capacity, speed and consumption are important to the charter party. When it comes to the name of the vessel, it is considered a condition of the contract. This means the charterers can refuse the delivery of a different vessel than the one mentioned in the contract, even though it might have identical characteristics. For this reason damages can be claimed for breach of contract, unless of course the charter allows for substitution (which includes re-substitution, where the originally intended vessel is offered again) and reasonable notice is given.156

All these elements are also found on the front page of the charter in the NYPE93 form. However, the common practice became to only mention the name of the vessel (for reasons stated above), strike-through all the other characteristics and simply refer to a ‘Vessel Description Clause’ in the rider and/or an Annex attached to the model form. The NYPE2015 recognises this trend and only provides space for the Name, IMO Number, Flag, Built (year) and Deadweight All Told.

156 S. GIRVIN, Carriage of Goods by Sea, 602.
While the NYPE93 also came with an ‘Appendix A’, it didn’t amount to more than a field to write in titled “further details of the vessel”. The reference to the ‘Appendix A’ under the NYPE2015, leads to an extensive questionnaire about the vessel’s specifications. The general information includes coordinates to contact the vessel through modern means of communication (INMARSAT number, fax and e-mail). There are detailed sub-questions concerning loadlines, tonnages, dimensions, bunkers, speed and consumption, as well as the crew. The vessel description is concluded with an overview of the validity and expiration dates of required certificates, some of which did not exist at the time of the NYPE93 (Safety Management Certificate as per ISM Code or the International Ship Security Certificate as per ISPS).

The ship’s flag is important to shipowners and charterers because from this various obligations and restrictions imposed by port and coastal states may flow. As a part of the vessel description, the nationality mention is normally an intermediate term of the contract. However, this can become a condition to the contract if it is crucial to the trade the ship is involved in, or the ship itself can be compromised in a war situation. Breaches of such a condition, for example by selling the ship to a foreign entity, may give rise to termination of the contract by charterers.

6.1.3 Order of items in the preamble

The order of the elements contained in the preamble of the NYPE93 (owners – charterers – vessel description) was perhaps more logical than the one found in the 2015 version. The preamble in the new version immediately tries to describe the vessel after “described below”, putting it between the mentions of owner and charterer. This appears to be an unnecessary change, if not to say a step backwards. As discussed above, the truly dominant element in terms of legal consequences found in the vessel description is the vessel’s name. While the NYPE2015 recognises that it is better to have all the vessel’s characteristics at the end of the model form (in Appendix A), leaving some of these elements behind in the preamble seems like a job half done. The name and IMO number should be enough to identify any unique vessel. Perhaps the intention was to keep a few key specifications on the front of the document, at a glance away. However, the natural flow of mentioning owner, charterer and only then the vessel description is preferable.

157 NYPE 1993, line 530
158 NYPE 2015 Appendix A (Vessel Description)
6.2 **Speed and Fuel Consumption**

The description of the speed of the vessel and its fuel consumption are important factors that the charterer relies on in order to correctly estimate the profitability of his maritime undertaking. If a vessel can’t actually reach the speeds it was designed for, he will not be able to perform the same amount of voyages within the hired timeframe. This also affects the cargo interests, as the charterer is unable to reliably confer his commitments to his own clients, if the description of the vessel does not represent reality.

In the NYPE93 form the speed and consumption were found in the preamble (as well as in rider clauses or an additional appendix in practice). These are intermediate terms of the contract for which damages can be claimed if the ship does not live up to the presented standard. The amount of damages is normally “the difference between the market hire rate for a vessel with the required specifications and the market hire rate of the one that was in fact delivered”. In case the difference is too large, this could even be a ground to terminate the contract.

An important operative word found in clauses to determine the allowed margin for variation is ‘about’. This has to be interpreted as a value which can be higher or lower, but always as a matter of fact relating to other characteristics of the vessel. Attempts have been made to define ‘about’ more strictly, as an exact 0.5 knots or a 5% consumption difference. There is authority to the contrary, which says that this margin should “be tailored to the ship's configuration, size, draft and trim etc”. Contracting parties are of course free to be more specific with their own margins, but it is unlikely that shipowners will want to commit themselves too strictly. On the other hand, drafting a margin which is too liberal, might send the wrong signal about the guaranteed performance of the vessel.

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6.2.1 ‘Good weather conditions’

The performance of the vessel as described must be compared to the actual speed and consumption in ‘good weather conditions’. Such conditions are present when the vessel is not significantly affected in its forward motion (mostly linked to wind strength on the Beaufort scale). Again, this can be particular to each vessel type and must be interpreted as a matter of fact.\(^{163}\) The data about the weather conditions can be ascertained by the Master in the log book, a routing company or even independent weather bureaus. In English law the preference goes out to the authority of the captain, unless the log book consistently overstates the weather conditions.\(^ {164}\)

The calculation is done based on average performance for several of these good weather periods during the relevant voyage. The *Ocean Virgo case* has shed some light on the time window that can be considered as a good weather period. The “Ocean Virgo” was chartered to go from China to Canada (ballast voyage) and continue laden to South Korea. The vessel was hired to carry coal on a one time charter trip on the NYPE form, containing a speed and performance warranty referring to “good weather”. Charterers sought to get compensated for underperformance by reduction of hire based on alleged underperformance in good weather conditions. Arbitration was initiated by the owners.\(^ {165}\)

The arbitrator stated that the sample period of ‘good weather conditions’ to be used for any speed and consumption analysis “must be sufficiently large as to be representative of the voyage in its entirety”.\(^ {166}\) He even went as far as to say that this should be at least 24 consecutive hours, from noon to noon. Because in that case no such period could be found during the voyage, the calculations submitted by charterers to claim underperformance were not sufficient to represent the whole voyage.


\(^{166}\) Polaris Shipping Co. Ltd. v Sinoriches Enterprises Co. Ltd. [2015] EWHC 3405, para 11.
The case was then submitted to appeal to the High Court, which held that there was no legal ground to claim that relevant good weather periods cannot be shorter than 24 consecutive hours. The case was therefore sent back to the arbitrator to consider whether sufficient samples of good weather could be found. If so, any findings concerning underperformance would lead to a breach of the performance warranty for the whole charter period (excluding slow steaming periods).  

6.2.2 When the speed warranty applies
The NYPE93 does not specify when exactly the warranty of the ship’s speed applies. It has been held that this should be the time of delivery.  

However, the above mentioned ‘good weather conditions’ imply that the warranty would be lifted or temporarily suspended in favour of the shipowner for reasons he cannot control (wind and thus bad weather conditions). Arguably, the only way for a charterer to know whether the vessel is actually performing as warranted is by departing on the voyage. Alternatively, there is case law which states that if no reservation is made about when the warranty applies, this would imply the warranty is a continuing obligation, throughout the vessel’s service. The charterparty used in that case (“Gas Form C”) made no express mention of ‘good weather conditions’ and the mere reference to a “Beaufort Force 4 wind” was not considered to be sufficient.

The capability warranty about speed and consumption from the preamble was given its own clause 12 ‘Speed and Consumption’ in the new NYPE2015 and is now clearly a continuing warranty as per cl. 12 (a) the vessel is capable “upon delivery and throughout the duration of this Charter Party”.

6.2.3 Related clauses
The ‘Speed and Consumption’ clause also refers to “slow steaming”. Should the charterer choose to have vessel operate at lower speed, then he obviously cannot claim a breach by invoking the speed warranty for these periods. ‘Slow steaming’ has its separate clause 38 in the NYPE2015, which is discussed in a further section.

There are other clauses to consider to determine whether a claim for damages or compensation based on vessel speed and performance is legitimate. Clause 8 ‘Performance of Voyages’ of the NYPE form\(^{170}\) provides that “the Master shall perform the voyages with due despatch”. This allows for claims to be deemed appropriate, even if the vessel description was not the cause of the discrepancy between expectations and reality. This has been the issue in *The Hill Harmony* case, where the captain chose a longer route, despite instructions of the charterer and his weather routing service. At common law, the captain should follow the fastest and shortest route, despite charterer’s orders, unless another route is common or there is a maritime reason to do so.\(^{171}\)

Another possible reason for the vessel’s underperformance could be that the bunkers which were provided are not up to standard.\(^{172}\) What this means for the possible claims or reductions of hire is considered below.

### 6.3 Bunkers

#### 6.3.1 Motives to change the clause

The amount of disputes relating to bunkers can be seen to rise in times that oil prices are high, as the bunkering cost is one of the main operational expenses for a vessel. But even in market conditions when prices are low, the matter remains important economically, but also ecologically. It is no longer just up to the shipowners and charterers to agree how the vessels are to be fuelled. The push for green energy, as well as cleaner ship propulsion has brought the bunker debate to the attention of regulators, such as the IMO and the European Union. This makes that it is incredibly important to clearly draft the boundaries of the responsibility the contracting parties bear when it comes to the consequences of bunkering the vessel. The new NYPE2015 model form takes into account modern developments and has expanded the ‘Bunkers clause’ accordingly.

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\(^{170}\) The numeration and title of this clause are the same for the NYPE93 and the NYPE2015.


The charterparty will mention who is responsible to pay for the bunkers to be used. In most cases, this will be the charterer. The NYPE forms provide so by default in clause 7 ‘Charterers to provide’ and clause 9 ‘Bunkers’. The price for the bunkers will of course be determined by the market situation, however it is also relevant to the relationship between charterer and shipowner. A vessel is delivered with some amount of fuel by the shipowner, which holds a certain property value to the charterer. The same is true at the moment of redelivery, when the vessel is given back to the owner with some leftover fuel. Such a mechanism is described in clause 9 of the NYPE. If the charterparty holds no agreement about the fuel price, the compensations will be determined by the current market price at delivery port.¹⁷³

Under the NYPE93 form the bunkers clause consisted out of three main components. The first part, concerns fuel amounts and price at delivery and redelivery. The second part, acknowledges the importance of fuel quality itself and expresses the commitment of the charterer to be made under Appendix A. The third part, expressly mentions the right of the owner to claim damages to the main engine or auxiliary engine caused by unsuitable fuel. If such fuels are used, the owner cannot be held liable for underperformance of the vessel. However, from the clause it is unclear what happens if substandard fuel is used by the charterer, while this doesn’t lead to actual damage to the machinery or any performance claims.¹⁷⁴

The NYPE 2015 form has a more extensive approach when it comes to bunkering. This was done specifically to adapt to the modern practice where ships have to carry more than one type of fuel. Therefore clause 9 “Bunkers” consists of seven components dealing with: quantity and price, bunkering prior to (re)delivery, bunkering operations and sampling, quality and liability, fuel testing, sulphur content, as well as grades and quantities on redelivery.¹⁷⁵

### 6.3.2 Bunker quantities and prices

Subclause (a) offers three alternatives in the NYPE 2015 version. First, the charterer can pay for the fuel, this is the default option if no other alternative is chosen. Second, the shipowners can bunker the vessel for entire trip. Third, the charterer will pay for the bunkers, but he chooses not to take over fuel at delivery.

¹⁷⁴ NYPE 1993, cl. 9, line 109-124.
The first alternative is similar to what is found under the NYPE93 form. Additionally, it has been specified in the new model that the taking over of fuel on board can happen not only at delivery and redelivery, but also in case the contract is terminated.

The second alternative is proposed to be used in case the NYPE form is used as a trip charter agreement. In such a case it is more convenient for the shipowner to completely bunker the vessel for the intended trip and to send an invoice to the charterer together with the first hire payment. Afterwards, calculations can be made based on the actual consumptions to compensate fairly.

The third alternative prevents the transfer of property involved at delivery and redelivery. Because fuel prices can fluctuate, it is not unthinkable that when a charterer takes over fuel at delivery, he will pay a different price per ton than the one he can receive at redelivery. By choosing this third option the Charterer commits himself to redeliver the vessel with about the same grade and quantity of fuel. For the charterer, this option can be more advantageous than the first alternative, if it is expected that the fuel prices will drop.\textsuperscript{176}

6.3.3 Bunkering prior to delivery/redelivery
Clause 9 (b) NYPE 2015 allows the contract parties to bunker the vessel for their account before delivery or after redelivery. This is done in order to facilitate the bunkering operation with the desired grade of fuel, because it is conceivable that at the port of delivery, for example, the required type of fuel might not be available. Based on reciprocity, both charterers and shipowners agree to this right. However, prior consent must be additionally provided to make sure this does not interfere with the ship’s previous or future assignments.\textsuperscript{177}

6.3.4 Bunkering operations and sampling
Clause 9 (c) NYPE 2015 is new within the scope of the clause, but is somewhat redundant in that it states that bunkering should happen with the cooperation of the Chief Engineer. The supervision of bunkering operations is his task anyway\textsuperscript{178}. It could be argued that cooperation goes somewhat further than supervision, therefore the Chief Engineer will have to engage himself more closely.

\textsuperscript{177} Ibid., 9.
Primary sampling should happen according to IMO Guidelines in line with MARPOL. This of course is mandatory and not just a matter of contract. However, this could mean that any sampling the parties would have conducted without complying with these guidelines, could not be used as evidence to the contrary. Furthermore, from the primary sample, each party should be able to receive their own sample per grade of fuel. The charterer takes it upon himself to warrant that these guidelines were followed by his bunker suppliers, otherwise he can be held liable.

The owner is protected against claims from the charterer about lack of bunker tank capacity, in case the grades of fuel needed are not to be mixed but must be kept in separate tanks. This means that any extra costs which would arise from the need to bunker more often are accepted to be borne by the charterer.\(^\text{179}\)

### 6.3.5 Bunker quality and liability

Clause 9 (d) NYPE 2015 instantly departs from the statement that it is up to the charterers to supply the vessel with bunkers. These bunkers must be of a particular standard, at least ISO 8217.

There are two problems with this subclause. First of all, this provision is only relevant if the charterers contract to bunker the vessel under subclause (a). However, no cross-reference is made to this earlier point. Potentially, there is room for error and disputes if under subclause (a) the owner was supposed to bunker (e.g. for trip charter), but subclause (d) remains unredacted and pointing to the charterer. Perhaps the conflict could be resolved by including wording like “notwithstanding anything else in this charter”.

Secondly, it is not specified whether the quality standard applies only to bunkers to be used during the voyage or also bunkering operations at other stages. It is conceivable that the owner might deliver the vessel with substandard bunkers on board, but hold the charterer responsible to redeliver according to the standards in the model contract. On this point, the requirements about quality seem to be drafted incompletely, as well as favouring owners too much. This subclause does not cover all possible scenarios that the other subclauses deem possible: owner to advance bunkers (subclause a, ii), redelivery with same quantity (subclause a, iii), prior bunkering (subclause b). Charterers might want to improve their position by adding to this clause a similar commitment on the part of the shipowner. It might be useful to specify either that bunkers during all stages should be held to the same standard.

The second point of the subclause is an improvement compared to the wording in the NYPE93. If unsuitable fuel is supplied, charterers can be held liable for any loss or damage, either to the owners or to the vessel. Previously, this was only relating to damage to the main and auxiliary engines. More specifically, charterers are also responsible for the cost of removing the unsuitable fuel and supplying it with fresh fuel. However, it is not exactly clear whether this would mean the charterers also lose their right of compensation for the cost of the (correct) fuel at redelivery. The clause ends by restating that any shortcoming in the fuel quality resulting in underperformance of the vessel cannot be held against the owner. Again, this only holds true if the charterer was indeed the one responsible for supplying the fuel. This would seem to follow from the words “such supply” referring to unsuitable supplies done by charterers.

6.3.6 Fuel testing program
Clause 9 (e) NYPE 2015 states that if the owners submit the fuel sample to testing in a recognized laboratory. If the results are not satisfactory with the standards which were agreed, the owners should notify the charterers of such a report. The samples and results can be submitted by the charterers for a second opinion with another, but mutually agreed upon, testing facility. The contents of the second report will be binding for both owners and charterers. This subclause is a welcomed addition which should help with disputes based on conflicting quality reports.

6.3.7 Bunker fuel sulphur content
Clause 9 (f) NYPE 2015 draws the line between the obligations of the charterer and the owner when it comes to the sulphur content of the fuel. Basically, the responsibility of the charterer ends, where the responsibility of the shipowner begins. It is up to the charterer to order fuel which will comply with the specific MARPOL regulations applicable to the emission control area (ECA) where the vessel wants to trade, as well as any other regulation from a regional or national authority. If, for some reason, he is unable to do so, he will indemnify the owner for the consequences. Under normal circumstances, the responsibility then shifts to the owner to use the

181 Ibid., 11.
182 NYPE 2015 clause 9, f, iii mentions the ECAs established by the EU and the USA as non-exhaustive examples. As of 1st April 2016, China also introduced an emission control area with 0.50% SOx for key ports (e.g. Shanghai) in the Yangtze River Delta. See GARD, “Gard Alert: China emission control areas – update”, http://www.gard.no/web/updates/content/20923234/gard-alert-china-emission-control-areas-update, consulted on 8 May 2016.
provided bunkers as required by the regulations.\textsuperscript{183} It must be remarked, that in subclause (f) the phrasing wisely starts with “Without prejudice to anything else contained in this Charter Party”, which allows to more easily dismiss any inconsistency between conflicting clauses if the charterers were not the ones responsible for providing the fuel (cf. subclause d above).

6.3.8 Grades and quantities of bunkers on redelivery
Clause 9 (g) NYPE 2015 requires charterers to redeliver the vessel with the same quantity and grades of bunkers as on delivery. Moreover, the quantity of bunkers should always be enough for the vessel to reach a bunkering port which can offer the required fuel.\textsuperscript{184} The clause allows the contract parties to agree otherwise, making this subclause of secondary importance in case of conflicting provisions. Peculiarly, subclause (g) does not mention the charterers expressly, unlike the previous subclauses. Although, the term ‘redelivery’ implies that the charterer is addressed. Neither does subclause (g) require a similar commitment from the owner, to deliver the vessel with enough bunkers to proceed to a proper bunkering port which can offer the correct quality of fuel. Arguably, the requirement found in clause 2 ‘Delivery’ for the vessel to be “seaworthy” and “fit to be employed” could include such a responsibility to the shipowner.

6.4 Slow Steaming
Slow steaming is a recent practice in which vessels are deliberately navigating at lower speeds and RPM than their intended design speeds, in order to consume less fuel. This trend started around 2007-2008 when oil prices were more than three times as high as in 2016.\textsuperscript{185} Other factors like oversupply of tonnage and low freight rates also pushed the maritime industry further towards slow steaming. On top of that, lower fuel consumption also means less emissions, so this practice can be welcomed from an environmental point of view as well. Unlike the bunker price, these other factors remain impactful to this day. Considering slow steaming sometimes requires adjustments to the ship’s machinery, newbuilds have been ordered with these adjustments already in place. It’s safe to say that slow steaming is here to stay, atleast in the short to medium term.\textsuperscript{186}

\textsuperscript{183} BIMCO, “NYPE 2015 Explanatory Notes”, 11.
\textsuperscript{184} Ibid., 11.
6.4.1 Pitfalls of NYPE 93 – The Pearl C

From this perspective it is understandable why the NYPE2015 is the first model form of its kind to deal with the concept of ‘slow steaming’. Operating on an older model like the NYPE93 in this respect might hold some pitfalls and uncertainty, because without additional provisions there is no right to perform slow steaming. On the contrary, the voyage must proceed with due despatch, as has become apparent from The Pearl C case.\footnote{The Pearl C [2012] 2 Lloyd’s Rep. 533; D. MARTIN-CLARK, “Bulk Ship Union v Clipper Bulk Shipping - The Pearl C”, http://www.onlinedmc.co.uk/index.php/Bulk_Ship_Union_v_Clipper_Bulk_Shipping_-_The_Pearl_C, consulted on 8 May 2016.}

The “Pearl Sea” was a bulk carrier, time chartered on an amended NYPE form. Charterers claimed reduced hire in arbitration because they alleged that the vessel failed to proceed with due despatch (clause 8 NYPE93). They also wanted to deduct the time they lost because of slow steaming based on the off-hire clause (amended clause 15 NYPE93). The owners tried to claim there was no continuous performance warranty based on clause 8, according to them the obligation ended at delivery. There was however already case law at the time, which stated to the contrary (see above The Gas Enterprise). The owners then tried to claim that slow steaming could be allowed (or rather would not lead to an off-hire event) based on how clause 15 was construed.

The judge disagreed on this point and saw a “default of the Master” in deliberate slow steaming. Interestingly, the Hague Rules were incorporated in the charter party, meaning the owner could try to escape liability for the default of the master based on Article IV rule 2 (a). The High Court rejected this as well, stating there is a difference between deliberate slow steaming and “a negligent error in the navigation or management of the vessel concerning a matter of seamanship”. According to the Court, Article IV rule 2 (a) could only apply to the latter.

It must be noted that this situation might have been resolved more smoothly had there been a BIMCO ‘Slow Steaming clause’ at the time, even when combined with a NYPE93 form.
6.4.2 BIMCO 2011 & 2015 clauses

Even before the release of the new NYPE2015 form, BIMCO had drafted clauses for slow steaming in time charters in 2011\(^{188}\) (and for voyage charters in 2012).\(^{189}\) This was intended to be used with the NYPE93 at the time. The clause itself remained generally the same. The main difference being that the NYPE2015 is a proper framework for this clause to function, thanks to the cross-references in the other clauses (like clause 8 ‘Performance of Voyages’ and clause 12 ‘Speed and Consumption’).

The NYPE 2015 recognises two types of slow steaming in its clause 38 ‘Slow steaming’, subclause (a). The ‘regular’ type of slow steaming involves speeds and RPM between design speed and the cut-out point of the Vessel’s engine auxiliary blower.\(^{190}\) This is the default alternative that the owner can allow to the charterer, as this doesn’t require any changes to the engine or machinery. The other type is ‘ultra-slow steaming’, which occurs when the engine is brought to operate under the cut-out point of the auxiliary blower. Normally, this cannot be achieved without alterations to the engine.

The clause leaves it undecided whether the owner or the charterer should take it upon himself to be responsible for “physical modifications, update of equipment and keeping of extra spares”. It is expected that this will be the owner, considering slow steaming practices are becoming more established. Vessels and their engines are nowadays specifically designed to be capable of slow and ultra-slow steaming. In any case, the Master is allowed to ignore the instruction to slow steam if doing so would hamper the safety of the vessel, the crew and cargo, the marine environment, obligations to bill of lading holders (issued by owner), or be against engine manufacturer’s recommendations.\(^{191}\)


\(^{190}\) An auxiliary blower is a compressor powered by an electric motor to provide the main engine with air when starting or operating at low speeds. From http://www.marinediesels.info/2_stroke_engine_parts/turbo_charger.htm, consulted on 8 May 2016.

It follows from clause 38 (b) that the fact that slow steaming is agreed as a possibility does not mean the performance warranty should be set aside completely. It means that if the vessel chooses to operate at a speed below the performance warranty, for example on charterer’s orders, this period will not be relevant in performance calculations.\textsuperscript{192}

Subclauses (c) and (d) invite the contract parties to work together and exchange best practices in order to minimise fuel consumption and improve energy efficiency. This is however not a strict obligation considering this could be considered sensitive information.\textsuperscript{193}

Subclause (e) reiterates that both the principle of due despatch and following charterer’s slow steaming instructions can co-exist and have their place in the contract. There must be a mechanism drafted in the clauses containing due despatch obligations, which would allow slow steaming without liability for delay.

Subclause (f) protects the owner from claims by third-party holders of “bills of lading, waybills or other documents evidencing contracts of carriage” based on underperformance or lack of due despatch. The charterer has to incorporate the slow steaming clause into bills of lading issued by him. If he is unable to do so for some reason, he will have to indemnify the owner “against all consequences and liabilities that may arise”.\textsuperscript{194} On this point the 2011 BIMCO Slow Steaming Clause and clause 38 NYPE2015 differ slightly in their wording, but the ultimate goal remains roughly the same. The 2011 clause prompts charterers to draft their bills of lading in a way that makes sure compliance with such a slow steaming clause cannot be seen as a breach of the contract of carriage. The NYPE 2015 clause simply demands incorporation of the slow steaming clause into contracts of carriage, as well as any sub-charter.

\textsuperscript{192} BIMCO, “NYPE 2015 Explanatory Notes”, 23.
\textsuperscript{193} Ibid., 23.
\textsuperscript{194} Ibid., 24.
6.4.3 Remarks
BIMCO’s attempt to provide more guidance in this matter is definitely a better solution than leaving the point undecided like under the NYPE93 or trying to patch things up by including one’s own rider clauses. However, BIMCO is yet again plagued by its heritage as a shipowner association, providing protection against claims to owners in situations of slow steaming ordered by charterers, but not the other way around.195 It is hard to say for certain, whether the BIMCO clause would be able to prevent a situation like in the Pearl C case, when it’s the owner’s intention to slow steam. The structure of the clauses which are connected (Performance of Voyages, Bunkers, Speed and Consumption and Slow Steaming) is a nudge in the good direction for contract parties to further build truly reciprocal rights and obligations.

It remains to be seen whether this practice will be accepted throughout various jurisdictions around the world. The precedent has been set by English courts, however the question remains whether claims from third party cargo owners would still be possible if it is held by other courts that slow steaming does not fall under due despatch or due speed.196

6.5 Sanctions

In principle, the purpose of the time charter is for the charterer to operate the vessel he hired as he sees fit within the agreed time period. The amount of voyages and their trajectory is up to the charterer to decide. However, it might be interesting for the shipowner to intervene and agree on some limits. This is because the instructions of the charterer might lead to liability of the vessel. Third-party cargo interests might find breaches of their contracts of carriage and state authorities might find infractions to laws and regulations. International sanctions are an important element to consider when time chartering a vessel. These sanctions are normally imposed over significant amounts of time, so business partners should be able to plan accordingly. However, it is possible that sanctions are lifted or imposed while time charters continue to run based on unaltered provisions. For this purpose it can be beneficial for contract parties to agree on mechanisms that are flexible to allow changes in sanction regimes.

6.5.1 General application

The NYPE93 form did not have any provisions specific to sanctions. Contracting parties were to deal with this matter themselves under the clause about trading limits (clause 5).\(^{197}\) The trading limits clause still exists in the NYPE2015, but is now found under clause 1 ‘Duration/Trip Description’.\(^{198}\)

Under the new NYPE 2015 form there is a separate clause 46 ‘Sanctions’ that deals with the matter. This version of the clause is nearly identical to the one released separately by BIMCO in 2010.\(^{199}\) The only difference, perhaps not unimportant, is that under subclause (d) of the 2011 version, the charter party requires the charterer to incorporate the sanctions clause “into all sub-charters and Bills of Lading issued pursuant to this Charter Party”. For some reason, the 2015 version leaves out bills of lading in this respect. This seems like an editorial mishap, considering subclause (c) just above it clearly references indemnity by the charterer for claims under bills of lading by cargo owners against the shipowner.

The sanctions mechanism is mainly contained in the two first subclauses, depending on whether the vessel is about to embark on a sanctioned trade (subclause a) or if the vessel is being used when the new sanctions enter into force (subclause b).

According to subclause (a) the shipowners have the right to refuse to employ the vessel in a way which could expose it to sanctions. To make a decision, the owners must perform a “reasonable judgement” test.\(^{200}\) Such a test originally found application in a war context. *The Houda case*\(^ {201}  \) involved an oil tanker, time chartered on a Shelltime 4 form. It was loading oil at Min Al Ahmadi (Kuwait), when Iraq invaded the country on 2 August 1990. The vessel sailed partly loaded and the bills of lading were left behind in Kuwait and eventually lost. The charterer moved offices from Kuwait to London, at which point the shipowner refused to comply with further instructions, because he felt that this was potentially done to avoid UN sanctions against Iraq. While it was recognised that the master could decide to set sail early to protect the vessel from

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197 NYPE 1993, line 70-76.
198 NYPE 2015, line 21-22.
201 The Houda [1994] C.L.C. 1037
war risk (even without immediate physical threat), the first trial held that the owners were wrong to delay compliance with the further instructions by charterers. The owners appealed and a second trial was ordered to determine the reasonableness of the decisions made.

As a general rule, the owners and the master are obliged to follow charterer’s lawful orders immediately, with the exception of three situations: 1) “obedience to an order might involve a significant risk of endangering the vessel or its cargo or crew” (like a war risk); 2) “it was necessary to seek clarification of an ambiguous order”; 3) “the owners had knowledge of circumstances which were not known to the charterers but which might, if known, affect their orders, and the owners needed confirmation that the orders were to stand”. At first glance, the risk of sanctions being applied to the vessel would not fall under any of these exceptions. However, the judge on appeal held that “a master of a vessel, on receiving orders relating to the cargo, was under a duty not to obey instantly but to act reasonably”. This meant that under certain circumstances it would be unreasonable to continue “without further consideration or enquiry”. The question (or test to be performed) was then to ask in each case what a “man of reasonable prudence” would have done. This allows to perform also other considerations outside the three exceptions before departure, which might cause delay. It is not unreasonable then, for a Master to take time to consult with legal advisors on the lawfulness of charterer’s orders in terms of compliance with sanctions.

Subclause (b) of the NYPE2015 sanctions clause covers the situation where the sanctions are applied at a moment the vessel is performing employment. The owners have the right to refuse to embark or continue a sanctioned voyage and will promptly give notice to the charterers of such a decision. The charterers then have 48 hours to propose an alternative voyage, otherwise the cargo may be discharged from the vessel at charterer’s cost. Compliance with orders to proceed on such alternative voyage cannot be used to assess claims relating to off-hire or deviation. It’s important to note that where a charterer commits to indemnify the owner against claims (subclause c), he only does so for the alternative voyage, not for the consequences of proceeding on a sanctioned voyage. The latter may end up being the responsibility of the shipowner yet. 202

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For maritime traders that cannot afford to completely blacklist a sanctioned region from their charter party, it is important to take a closer look at how the particular sanctions are applied. Unarguably, sanctions most often serve a political purpose. However, this purpose is often motivated by safety concerns and therefore targets a range of specific goods, rather than the country or region itself. To better understand the way sanctions apply to maritime trade, as well as give a contemporary overview of recent developments, it can be interesting to study the cases of Iran and Crimea.

6.5.2 Iran

Sanctions against Iran date back to 1979 and were first imposed unilaterally by the United States after American diplomats were held hostage in Tehran during the Iranian Revolution. These sanctions were expanded over the coming years. Export from the US was limited, especially when it comes to arms sales, WMD (weapons of mass destruction) and their components. Import from Iran was banned for all goods in 1987. After 2006, sanctions were also imposed at the international level by the UN and the EU when it was discovered that Iran was engaging in uranium enrichment. The link was then made between Iran’s nuclear programme and its funding stemming from energy sector exports. This made that the EU banned Iranian oil, like the US did before them. The sanctions were expanded to include export of equipment and components used in the petrochemical industry.203

These sanctions of course mainly focussed on manufacturers in the relevant industries and businesses that facilitate the sales of sanctioned goods. However, to further hamper the possibility of these goods making it to Iran, transporters were also targeted as intermediaries. The US Comprehensive Iran Sanctions, Accountability, and Divestment Act 2010 (CISADA) prohibits the transport of refined petroleum products and facilitating goods for the oil industry by US shipowners, operators and charterers. Non-US maritime players were also at risk if they have assets in the US, which can be frozen by the US authorities. The difficulty being that these goods are not clearly defined and some of them are dual-use goods204. The EU had similar provisions (Council Regulation No. 961/2010). The difficulty there was that it was unclear whether transport

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204 Dual-use goods can be defined as “products and technologies normally used for civilian purposes but which may have military applications” from http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/, consulted on 10 May 2016.
between EU ports and Iranian ports was targeted, or any kind of trade involving Iranian ports done by EU flagged vessels, shipowners, operators or charterers.\textsuperscript{205} The wave of sanctions that came in 2010 brought BIMCO to develop a ‘Sanction Clause’ to be used with time charters (like the NYPE93 at the time).\textsuperscript{206}

Furthermore, shipowners risk to lose cover from their insurer or P&I club when their vessels are engaged in prohibited trade. P&I clubs will have to pay for the financial consequences in case sanctions are enforced against their Members by state authorities. To prevent this, insurance policies incorporate ‘sanctions compliance clauses’ which will suspend cover and force the insured to indemnify the insurer for the amounts paid. Non-compliance with sanction regulations might even lead to termination of the membership with the P&I club.\textsuperscript{207}

As of 16 January 2016, proudly dubbed Implementation Day, it has been confirmed that Iran complied with its obligations under the Joint Comprehensive Plan of Action (JCPOA) which stated that Iran is only to use nuclear research for peaceful purposes. Considering this was one of the motives to impose sanctions on Iran in the first place, the US and the EU provided Iran with sanction relief. However, some sanctions remain as they are linked to Iran’s ballistic missile programme and human rights violations.\textsuperscript{208} The US has only really lifted its ‘secondary sanctions’ which concern non-US persons and entities. The ‘primary sanctions’ applicable to US companies concerning export of goods and insurance cover of claims related to Iran continue to exist.\textsuperscript{209}

The EU, on the other hand, has lifted all economic and financial sanctions against Iran. Since Implementation Day, the import, purchase and transport of crude oil and petroleum products from Iran is allowed. EU companies can now export and transport equipment used in the petrochemical industry. Sanctions related to shipping and shipbuilding have been lifted as well. Iranian vessels can now be registered, classed, serviced and bunkered in the EU.

6.5.3 Crimea

The sanctions in the case of Russia, Ukraine and Crimea are perhaps even more difficult to correctly grasp, considering the political will to impose them is not as strong and the economies involved are so closely dependant on each other. The Russian Federation took over control of the Crimean Peninsula in 2014 after the Maidan Revolution in Ukraine. The European Union considered this act to be a breach of Ukraine’s territorial sovereignty and imposed sanctions on Russia. Aside from financial and economic sanctions, trade sanctions were brought into force, mainly targeting the Russian military and energy markets. Some trade restrictions specifically apply to Crimea and Sevastopol, prohibiting export of key equipment needed for “infrastructure projects in the transport, telecommunications and energy sectors and in relation to the exploitation of oil, gas and minerals”. Conversely, imports of goods originating in Crimea to the EU have been banned. Russia has responded with various sanctions in retaliation.

In 2014 the Ukrainian parliament has in turn voted a law ("On Assurance of Rights and Freedoms and Legal Regime on the Temporarily Occupied Territory of Ukraine") which introduces a special regime for vessels that call at Ukrainian ports, after having visited Crimean ports. Although calling at Crimean ports was not completely banned by Ukrainian authorities under this law, special procedures must be followed and the required documents must be provided. Breaches of the provisions contained in this law may lead to administrative penalties for the Master and crew, as well as criminal sanctions of imprisonment up to 3 years. The vessel itself

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210 Meaning those mentioned in 16.1-16.4 of Annex V of the JCPOA.
211 European External Action Service, “Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA)”
might be detained for investigation and even confiscated.\textsuperscript{213} Such occurrences have been reported in 2014 involving Turkish vessels.\textsuperscript{214} The crew might get officially blacklisted to enter Ukrainian ports.\textsuperscript{215} There are also NGOs keeping their own blacklists of vessels, the influence of such lists is not to be underestimated. Some carriers will refrain from using vessels on such lists, even though they are not legally binding.\textsuperscript{216}

6.6 Remarks on the NYPE 2015

The NYPE is a good example of why a new version of a model contract is not always an improvement that will be accepted by the maritime community. The NYPE 1946 still enjoyed more preference than the 1993 version.

BIMCO hopes the 2015 will not share the same fate because it has put great care in balancing the needs of shipowners and charterers. The new model is quite extensive, but should be better able to operate as a fully fledged standalone contract, requiring less rider clauses. The downside to this approach is that the model itself must then be changed if one of the clauses becomes outdated. Changing a single clause in the rider is easier in this respect.

As mentioned earlier, a lot of practices have changed and new regulations have been introduced since 1993, and especially since 1946. For years BIMCO has been keeping up by releasing separate clauses. However, with the NYPE 2015 they really come together in an overarching framework that contains cross-referencing to read these clauses together.

Generally, the new NYPE can be considered an improvement in balance compared to the 1993 version. However, some expect it to lead to lots of new litigation on points where it remains unclear. Charterers might feel it is still quite beneficial to owners in some areas (e.g. not completely reciprocal obligations for slow steaming or bunkers).\textsuperscript{217}


\textsuperscript{216} A. KLYMENKO and O. KORBUT, “Blacklist: 105 foreign ships that entered Crimea over period of annexation (Russian and Ukrainian not included)”, http://www.blackseanews.net/en/read/102605, consulted on 10 May 2016.

7. Conclusion

No matter their age, format or content, model contracts remain the core of charterparties of various kinds. The work done by BIMCO and other international organisations is not to be underestimated in terms of the effect it can have on maritime trade. While the freedom to contract is ultimately with the contracting parties, it is good to examine what happens in reality to pick and choose the best practices. A lot of complacency found in maritime transport is due to habit forming and convenience. However, given the opportunity to improve to a better standard, shipowners and charterers alike will definitely see the merit and try something new.

Some developments in recent times have come from regulators at the national and international level, to try and steer the industry towards the new millennium goals. Model contracts are to reflect these aspirations, otherwise they are doomed to be set aside because of their conflicting nature with compulsory rules.

Arbitrators and judges, especially in the UK, keep working to solve disputes and provide more clarity in obscure areas. It is up to organisations like BIMCO to timely review all these developments and evolutions to prevent future disagreements. However, some disputes are bound to arise, because it is not foreseeable to take into account every possible mishap beforehand.

The goal of a model contract is of course to make it work in as many situations as possible in the state that it is in, without having to change too many of the clauses. However, even the best drafting of a model form might cause conflict when inconsistencies are added on top of it. The rules of interpretation at law will be a good enough remedy in many cases to reconcile contradictory provisions. Alternatively, clauses can be construed in such a way that they only add some to the contract, if they are not found to be contradictory with other clauses.

However, prevention is better than cure, and BIMCO knows this. They take their promotion and marketing quite seriously and commit themselves to spread knowledge and information on how to work with their models through seminars around the world.

The most recent developments of the NYPE are still at an early stage and only time will tell if BIMCO’s effort will be appreciated. The GENCON is still somewhere out on the horizon, but promises to reconcile some of the difficulties in voyage chartering quite soon as well.
8. Bibliography

Books

  - FAGHFOURI, M., “UNCTAD and its role in regulation of liability for carriage of goods by sea and multimodal transport”.
  - TETLEY, W., “A summary of some general criticisms of the UNCITRAL Convention (the Rotterdam Rules)”.
  - NIKAKI, T., “The loading obligations of voyage charterers”.
  - REYNOLDS, F., “Bills of lading and voyage charters”.

Online sources

- ANDERSEN, O., “Gorrissen: Slow steaming opens up for a variety of legal disputes”
- ANDERSON, P., “The ISM Designated Person – Keystone or Scapegoat?”, 2005,
- BIMCO, “About BIMCO Standard contracts and clauses”,
- BIMCO, “About BIMCO”,
  https://www.bimco.org/About/About_BIMCO.aspx, consulted on 14 April 2016.
- BIMCO, “BARECON 2001”,
- BIMCO, “BIMCO Slow Steaming clause for time charter parties”,
- BIMCO, “BIMCO Slow Steaming clause for voyage charter parties”,

- BIMCO, “BIMCO to refer to new York-Antwerp Rules 2016 in future documents”,

- BIMCO, “Explanatory notes to GENCON 94”,

- BIMCO, “Explanatory Notes to Sanctions Clause for time charter parties”,

- BIMCO, “Light at the end of the tunnel”,

- BIMCO, “NYPE 2015 Explanatory Notes”,

- BIMCO, “NYPE 2015 launched in Tokyo”,

- BIMCO, “Organisational chart”,

- BIMCO, “Paramount Clause General”,

- BIMCO, “Reflections 2016”,

- BIMCO, “Sanctions clause for time charter parties”,

- BIMCO, “Standard contracts and clauses”,

- BIRCH, E. and FURMSTON, O., “Web Alert: Bills of lading as the contract of carriage – guiding principles as to the incorporation of charterparty terms”,


- CMI, “York-Antwerp Rules and General Average Interest Rates”,

- DESECK, P., “Bunkering”,

- EUROPEAN EXTERNAL ACTION SERVICE (EEAS), “Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA)”

- FRAWLEY, N. H., “A Brief History of the CMI and its Relationship with IMO, the IOPC Funds and other UN Organisations”,

- FURMSTON, O. and HOSKING, B., “Defence Class Cover. Speed and Performance claims”,

- GARD, “Gard Alert: China emission control areas – update”,
  http://www.gard.no/web/updates/content/20923234/gard-alert-china-emission-control-areas-update, consulted on 8 May 2016.

- GARD, “When can a master refuse to load damaged cargo?”
  http://www.gard.no/web/updates/content/51688/when-can-a-master-refuse-to-load-damaged-cargo, consulted on 6 May 2016.


- HILL DICKINSON, “The EEMS SOLAR and responsibility for bad stowage”,

- HOSKING, B. and FURMSTON, O., “Web Alert: The Ocean Virgo - High Court affirms the principles in respect of performance warranties in charterparties”,

- KLYMENKO, A. and KORBUT, O. “Blacklist: 105 foreign ships that entered Crimea over period of annexation (Russian and Ukrainian not included)”,

- LIANG, L. H., “The economics of slow steaming”,

- LINDERMANN, M. and SHOUR, R., “Trade sanctions against Iran: an overview”,
  consulted on 24 April 2016.
- MAREX, “Ukraine blacklists all crew visiting Crimean Ports”,
  http://www.maritime-executive.com/article/ukraine-blacklists-all-crew-visiting-crimean-ports, consulted on
  10 May 2016.
- MARTIN-CLARK, D., “Starsin HofL”,
- MARTIN-CLARK, D., “Bulk Ship Union v Clipper Bulk Shipping - The Pearl C”,
  http://www.onlinedmc.co.uk/index.php/Bulk_Ship_Union_v_Clipper_Bulk_Shipping_-_The_Pearl_C,
  consulted on 8 May 2016.
- MARTIN-CLARK, D., “SDTM-CI and others v Continental Lines amd another - the Sea Miror”,
  http://www.onlinedmc.co.uk/index.php/SDTM-CI_and_others_v_Continental_Lines_amd_another_-_the_Sea_Miror,
  consulted on 6 May 2016.
- MAYNES, R., “Speed and consumption disputes under English law”,
  consulted on 8 May 2016.
  and Canada take further action in Ukraine crisis”,
  http://www.nortonrosefulbright.com/knowledge/publications/114059/european-union-us-and-canada-take-
- MESSER, C., “The “Superior Pescadores”: Clause paramount and package limitation”,
  consulted on 6 May 2016.
- NOBLE, H., “Effects under Irish Law of a contractual limit in the bill of lading purporting
  to lessen liability below that stipulates in the Hague-Visby Rules”,
- PLC, “Remoteness”,
  responsibility for the loading / discharge of cargo with the use of clear language”,
  consulted on 6 May 2016.
- REUTERS, “Ukraine arrests Turkish cargo ship over Crimea port call”,
  http://www.ukpandi.com/knowledge/article/iran-sanctions-implications-of-implementation-day-134325/
  consulted on 10 May 2016.
- SEWELL, V., “Iran Sanctions – impact on time chartering”,

- SKULD, “Case study: The Jordan II”,

- SKULD, “Incorrectly claused bills of lading – the David Agmashenebeli”,

- STEAMSHIP MUTUAL, “Ship v Shore Figures”,
  https://www.steamshipmutual.com/publications/Articles/Articles/LoadFigures0406.asp, consulted on 6 May 2016.

- TETLEY, W., “The Hague Visby Rules”,

- UK P&I CLUB, “Circular 18/15:Lifting of Certain Sanctions under the Joint Comprehensive Plan of Action (JCPOA)”,


- X., “Cargo Quantity”,

- YANITSKYI, A., “Problems of shipping between Ukraine and the Autonomous Republic of Crimea”,
Legislation

- The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (Hague Rules)
- UK Carriage of Goods by Sea Act 1971
- UK Carriage of Goods by Sea Act 1992
- UK Merchant Shipping Act 1894
- UK Merchant Shipping Act 1995

Case law

- Superior Pescadores [2016] EWCA Civ 101
- Sea Miror [2015] EWHC 1747
- Polaris Shipping Co. Ltd. v Sinoriches Enterprises Co. Ltd. [2015] EWHC 3405
- The Pearl C [2012] 2 Lloyd's Rep. 533
- The Sea Success [2005] EWHC 1542
- The Starsin [2003] UKHL 12
- The Jordan II [2003] 2 Lloyd's Rep 87
- The Rafaela S [2003] 2 Lloyd's Rep. 113
- The Tasman Discoverer [2002] 2 Lloyd’s Rep. 528
- The David Agmashebeli [2002] EWHC 104
- The Hill Harmony [2001] 1 AC 638
- The Gas Enterprise [1993] 2 Lloyd’s Rep 352
- The Antares [1987] 1 Llyod’s Rep 424
- The Miramar [1984] AC 676
- The Hollandia [1983] 1 A.C. 565
- The Apollonius [1978] 1 Lloyd’s Rep. 53
- The Polyglory [1977] 2 Lloyd's Rep 353
- The Ion [1971] 1 Llyod’s Rep. 541
- The Dominator [1959] 1 QB 498
- Maxine Footwear [1959] AC 589
- Adamastos Shipping Co Ltd v Anglo Saxon Petroleum Co Ltd [1959] A.C. 133
- The Eastern City [1958] 2 Lloyd’s Rep 127
- Canadian Transport v Court Line [1940] AC 934
- Rodoconanchi Sons & Co v Milburn Bros [1887] 18 QBD 67
- Hudson v Ede [1868] 3 QB 412
Model contracts (sample copy available at bimco.org)

- GENCON 1976
- GENCON 1994
- NYPE 1993
- NYPE 2015
- CONGENBILL 94
- CONGENBILL 2007
- CONGENBILL 2016

Websites

- http://belfercenter.ksg.harvard.edu
- http://ec.europa.eu
- http://e eas.europa.eu
- http://www.blackseanews.net
- http://www.comitemaritime.org
- http://www.dias-co.com
- http://www.euro-marine.eu
- http://www.exclusivelyforcharterers.com
- http://www.fd.unl.pt
- http://www.forwarderlaw.com
- http://www.galleon.uk.com
- http://www.gard.no
- http://www.hilldickinson.com
- http://www.incelaw.com
- http://www.marinediesels.info
- http://www.maritimeknowhow.com
- http://www.nortonrosefulbright.com
- http://www.onlinedmc.co.uk
- http://www.reuters.com
- http://www.seatrade-maritime.com
- http://www.shipinspection.eu
- http://www.shippingwatch.com
- http://www.skuld.com
- http://www.standard-club.com
- http://www.uk.practicallaw.com
- http://www.ukpandi.com
- http://www.uncitral.org
- http://www.unctad.org
- https://www.bimco.org
- https://www.steamshipmutual.com