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Implied Terms of Voyage Charters

by

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September 1991

**A thesis submitted to the Faculty of Graduate
Studies and Research in partial fulfilment of
the requirements for the degree of
Doctor of Civil Law**



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TO MY WONDERFUL WIFE ESTER

ABSTRACT

This thesis is a comparative study of English, American, French, Canadian and Quebec law relative to the implied terms of voyage charterparties.

It addresses specifically the implied terms in the general law of contract demonstrating the similarity between the Civil and Common law systems as well as the need to convert the implied terms into rules of law not subject to exclusion by agreement. The latter proposal is also supported by the doctrine of frustration which has evolved from the notion of implied terms into a principle of law.

The thesis treats the implied undertakings of the shipowner which are to provide a seaworthy vessel, to go to the port of loading with reasonable despatch, to exercise reasonable care and to proceed without deviation.

In addition, it studies the implied undertakings of the charterer being, essentially, the obligation to nominate a safe port and/or berth, and the undertaking not to ship dangerous goods.

The thesis takes into account the impact of the transportation of goods under voyage charterparties upon the environment and suggests how this impact and its effects might be prevented by international law.

Finally, it is submitted that because implied terms have been and are part of the fundamental legal structure of the voyage charterparty in both Common and Civil law, they should become express rules of international law, not subject to exclusion by contract.

RÉSUMÉ

Cette thèse est une étude comparative du droit anglais, américain, français, canadien et québécois concernant les conditions implicites d'un contrat d'affrètement au voyage.

En particulier, les conditions implicites que l'on retrouve dans le droit des contrats seront abordées afin de démontrer les similarités qui existent entre les systèmes de droit civil et ceux de Common law ainsi que la nécessité de convertir ces conditions implicites en des règles de droit que l'on ne peut exclure par convention. Cette dernière proposition est soutenue par la notion de "doctrine of frustration" qui s'est développée d'une notion de condition implicite à un principe de droit.

Cette thèse traite des engagements implicites de l'armateur lesquels incluent essentiellement l'obligation de fournir un navire en état de navigabilité et les devoirs de procéder dans un délai raisonnable en exerçant un soin raisonnable et sans déroutement.

De plus, cette thèse étudie les engagements implicites de l'affrèteur, soit primordialement, l'obligation de désigner un port et/ou quai sécuritaire ainsi que l'obligation de ne pas expédier des marchandises dangereuses.

La thèse prend en considération l'impact du transport des marchandises par affrètement au voyage sur l'environnement et suggère comment cet impact et ses effets pourraient être évités par le droit international.

Finalement, il est soumis que parce que les conditions implicites ont été et demeurent une partie fondamentale de la

structure légale de l'affrètement au voyage en Common law et en droit civil, celles-ci devraient devenir des règles explicites de droit international non sujettes à des exclusions contractuelles.

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4. App. Cas. Law Reports, Appeal Cases (from 1875 to 1890).
5. C.C.L.C. Civil Code of Lower Canada (1866).
6. C.N. Code Napoleon (1804).
7. C.S. Cour supérieurs, recueils (Québec).
8. D.L.R. Dominion Law Reports (Canada).
9. DMF Le Droit Maritime Français.
- 10.E.R. The English Reports. Reprints of eighteenth and nineteenth century law reports.
- 11.F. Federal Reporter. Circuit and District Court decisions from 1880 to October 1924
- 12.F.2d Federal Reporter (second series). U.S. District Court and U.S. Circuit Court of Appeals decisions from November 1924 to January 1933 and U.S. Circuit Court of Appeals decisions from November 1924 to the present.
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- 14.F. Supp. Federal Supplement. United States District Court decisions from October 1932 to the present.
- 15.F.T.R. Federal Trial Reports (Canada).

- 16.K.B. Law Reports, King's Bench.
- 17.JMLC Journal of Maritime Law and Commerce (United States).
- 18.L.R. Law Reports (from 1865 to 1875).
- 19.Ll. L. Rep. Lloyd's List Law Reports (up to 1950).
- 20.Lloyd's Rep. Lloyd's Reports (from 1950 to the present).
- 21.LMCLQ Lloyd's Maritime and Commercial Law Quarterly.
- 22.N.R. National Reporter. Canadian Supreme Court and Federal
Court of Appeal reports.
- 23.Q.B. Law Reports, Queen's Bench (from 1891 to the present).
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PART I
PRELIMINARIES TO IMPLIED TERMS OF VOYAGE CHARTERS

Chapter 1

INTRODUCTION

I. SCOPE OF THE THESIS

II. BACKGROUND OF VOYAGE CHARTERS: TRAMP SHIPPING

III. VOYAGE CHARTERS

IV. SOURCES OF LAW

- A. Introduction
- B. English and American Law
- C. French Law
- D. Canadian and Quebec Law
- E. International Law
- F. Ancient Maritime Law Codifications
- G. Standard Voyage Charterparty Forms
- H. Doctrine

"Whether we be judges, lawyers, professors, students, commercial men and women, or persons connected in some way with maritime commerce, we are all pilgrims in search of a just and comprehensible international maritime law."

W. Tetley, Marine Cargo Claims, 3rd ed.,
(Montreal: International Shipping Publications
Blais, 1988), Preface.

I. SCOPE OF THE THESIS

The wide use of the voyage charter, being the form of special contract for the hire of ships most frequently encountered, produces many problems and difficulties with which commercial men and their lawyers have to grapple.

Among the general problems posed by all charterparties, and especially among the issues peculiar to voyage charterparties, are problems of clarity of language in the construction of clauses, problems of "subject to details" clauses,¹ questions pertaining to the formation of voyage charterparties, problems relating to the incorporation of the Hague or Hague/Visby Rules, questions as to who is liable for damage to cargo,² the reckoning of laydays and the calculation of demurrage and despatch,³ the interpretation of various forms of "cesser clauses", questions pertaining to

¹ See, e.g. S.N. Ball, "Charter-Parties Fixed 'Subject to Details'" [1984] LMCLQ 250; C. Debattista, "Charter-Party Pictures 'Subject Details' - Further Reflections" [1985] LMCLQ 241; C. Debattista, "Charterparties Sub Details (the Junior K)" [1988] LMCLQ 439.

² See, e.g. J.B. Smith, Jr., "Recent Developments in the Law of Damages for Breach of Charter" [1982] 13 JMLC 313.

³ See, e.g. M.B. Summerskill, Laytime, Second Edition (London: Stevens & Sons Limited, 1973); J. Schofield, Laytime and Demurrage (London: Lloyd's of London Press Ltd., 1986); J. Trappe, "Laytime Problems and Comparison of Law" [1986] LMCLQ 251; F.M. Ventris, "Non-Maritime Demurrage Claims" [1984] LMCLQ 657; J.M. Textor, "Oilvoy Demurrage Clauses - What is a Storm?" [1985] LMCLQ 343; J. Trappe, "Recent Developments in Laytime Cases" [1990] LMCLQ 383. It is worth noting that a vast majority of judicial decisions concerning voyage charterparties deals with problems of laytime, demurrage and despatch.

liability for freight and dead freight,⁴ problems which arise in connection with the performance of consecutive or "spaced-voyage" charterparties, to list but some of the problems.

This thesis, however, is confined to those aspects of the implied terms of voyage charterparties which have yet to receive any significant degree of legal research and comment. There have been very few monographs or articles written on the subject of voyage charterparties and none of them, in any event, examine comprehensively the question of implied terms within the contracts.

This thesis, within the context of the overall treatment of implied terms in charterparties, is primarily a comparative study of English and American law. It is also a comparative study of Common law and Civil law (France and Quebec being chosen as the examples of Civil law systems) and it treats, finally, of the historical sources of maritime law, including the law of charterparties, with emphasis on ancient maritime law codifications.

It is intended that the thesis be an original contribution to contemporary scholarship. It specifically addresses the following subjects:

- * implied terms in the general law of contract
- demonstrating a similarity between the Civil and Common law systems, and demonstrating also the need for an

⁴ See, e.g. J.E.R. Stephens, The Law Relating to Freight (London: The Syren & Shipping, Ltd., and Sweet & Maxwell, 1907); F.J. O'Brien, "Freight and Charter Hire" (1975) 49 Tul. L. Rev. 956.

international convention on charterparties generally;

- * the implied undertakings of the shipowner being, essentially, the obligation to provide a seaworthy vessel and the duties of proceeding with reasonable despatch, exercising reasonable care and proceeding without deviation;
- * the implied undertakings of the charterer being, essentially, the obligation to nominate a safe port and/or a safe berth, and the undertaking not to ship dangerous goods;
- * the impact of the transportation of goods under voyage charterparties upon the environment and the degree to which the effects of this impact may be prevented by international law;
- * the frustration of voyage charterparties;
- * the promotion of the notion that because implied terms have been and are part of the fundamental legal structure of the voyage charterparty in both Common and Civil law, they should become express rules of international law.

II. BACKGROUND OF VOYAGE CHARTERS: TRAMP SHIPPING

Commercial needs and patterns of trade, relative to the carriage of goods, have caused the shipping industry to develop two major types of commercial ocean carriage: liner shipping and tramp shipping.

Liner service generally employs ships serving established trade routes. Liner cargoes generally consist of miscellaneous packaged or containerized cargoes belonging to a variety of shippers, and the cargo is carried under standard form liner bills of lading issued by the liner companies.

Under Common law, liner transportation is referred to as "common" or "public" carriage, as it is arranged after public offers and advertisements, and as it is available to all merchants who choose to utilize the service offered. Perhaps the liner vessel may be best characterized as a "sea-bus" habitually employed on a regular schedule.

On the other hand, tramp shipping has no advertised sailings and involves vessels which seek employment in the carriage of goods at such times and between such ports as opportunity offers. The Common law describes such carriage as "private" carriage and, to continue the analogy to land transportation, if the liner service runs buses, then the tramp service runs taxis. The former operates on a predetermined and scheduled route, the latter will go wherever it is said to do so.

In tramp shipping, a shipowner can generally employ his vessel in any one of three ways: by demise or bareboat charter, by time charter, or by voyage charter. His choice will depend upon the charter market conditions or trade in which he wishes to employ his vessel.⁵

⁵ See, e.g. K.T. Schiels, Tramp Ship Agency Practice (London: Lloyd's of London Press, 1987) at 9-24.

A demise or bareboat charter is a contract by which a shipowner places an unmanned or partially manned vessel at the disposal of a charterer for a fixed period of time. The shipowner transfers to the charterer the navigation, management, employment and agency of the ship. Thus, and for most purposes, the charterer is treated as the owner of the vessel.

A time charter is a contract by which a shipowner places a fully-equipped and manned ship at the disposal of a charterer also for a fixed period of time. The shipowner retains the navigation and management of the ship but transfers its employment, in other words the use to which the vessel is to be put, to the charterer.

The most common charter in tramp shipping, however, is the voyage charter which is the subject of this thesis.

III. VOYAGE CHARTERS

A voyage charter may be defined as a contract of affreightment by which a shipowner, bareboat, demise, or time charterer places all or part of a fully-equipped and manned ship at the disposal of the voyage charterer for the carriage of cargo for one or more voyages. Arrangements can be made for a vessel to perform a series of consecutive voyages or a number of nonconsecutive voyages within designated time frames. The shipowner, bareboat, demise or time charterer retains the

navigation, management, employment and agency of the ship.⁶

Thus, a voyage charter or voyage charterparty (the words may be used interchangeably) is distinct from the other forms of charterparty in that it directly concerns the carriage of goods, and as such may be referred to as a contract of affreightment. The other forms of charterparty (demise, bareboat, time) do not directly concern the carriage of goods, but rather the use and employment of the ship. On the other hand, the voyage charterparty cannot be assimilated to a simple contract for the carriage of goods in a ship, for the reason that the use and employment of the ship is also obtained.⁷

To illustrate the distinctions drawn in the immediately preceding paragraph, the parties to a demise, bareboat, or time charter are not necessarily, and in fact are generally not, the actual shippers of the goods. Such charterers are generally persons who seek to form contracts with third parties (i.e. shippers of cargo) and derive their profit from the freight to be earned. On the other hand, in the case of a voyage charterparty the charterer is almost always the shipper of the goods to be carried on the chartered ship. It is a function of commercial economics that if one, a shipper of goods, can employ a ship for his own exclusive use on a particular voyage (similar to the concept of hiring a

⁶ See, e.g. L. Gorton, R. Ihre, A. Sandevärn, Shipbroking and Chartering Practice (London: Lloyd's of London Press Ltd., 1980) at 126 et seq; R. Rodière, E. du Pontavice, Droit maritime, Dixième édition, Paris, Dalloz, 1986 aux pp. 353-355.

⁷ Compare W. Tetley, Marine Cargo Claims, Third Edition (Montreal: International Shipping Publications Blais, 1988) at 10.

taxi) the cost will be less than shipping a part cargo on a scheduled liner vessel (the concept of getting on the bus). It depends, of course, on how much cargo the shipper has to ship on any one voyage. If he can fill an entire ship, or a substantial portion of it, he will get a better deal from the operator of the ship if he charters the whole ship for an entire voyage. If, on the other hand, his cargo would occupy only a small part of the ship it will be cheaper for him to ship under a bill of lading and on full liner terms.

A voyage charter is, of course, subject to the usual requirements of contract law.⁸ In Common law, it is known as bailment for hire. It is a bilateral contract where the consideration for a promise (the payment of freight) is a counter promise (the undertaking to provide a ship in which to appropriately carry the cargo). In other words, it is a bargain or covenant between two parties, where one thing is given for another, a quid pro quo.⁹

From the commercial point of view, it is very important that the mutual promises are a sufficient consideration, one for the other or, in other words, that they strike a commercial balance. The shipowner must provide a seaworthy vessel to receive the cargo, generally has the obligation to carefully stow it in

⁸ See, e.g. Chapter 1 entitled "General Contract Law" in F.M. Ventris, Tanker Voyage Charter Parties (Bradford-on-Avon: Kluwer Law Publishers, 1986) at 1-23.

⁹ See P.S. Atiyah, Esseys on Contract (Oxford: Clarendon Press, 1988) at 180-181.

the ship (although stowage can be the contractual obligation of the charterer), carry it within a reasonable time and without deviation, exercise all needful care of it during the voyage, and convey it to the port of discharge.

The charterer, on the other hand, usually undertakes to load and discharge the cargo within a stipulated length of time, and he may be subject to a penalty of detention or demurrage if that length of time is exceeded, and he is always obligated to pay the freight, this being the fundamental consideration for which the vessel's operator will agree to carry.

It is to be noted that the compensation to be paid to the vessel operator by the voyage charterer is called freight, whereas in time charters it is called hire.¹⁰ This necessarily follows from the notion that voyage charters always directly involve the carriage of cargo (freight) whereas the other forms of charter involve the lease (and therefore hire) of the ship.

From an academic point of view, it is interesting to note that the Civil law¹¹ considers the voyage charterparty as being a contract falling under the generic category of the hiring of labor, locatio operis, pursuant to which the merchant contracts (hires) the services of the ship to carry the goods. This notion is described in Latin as locatio operis transvehendarum mercium in contrast to locatio navis et operarum magistri ad transvehendas

¹⁰ The Sarma v. Navibec, 1979 A.M.C. 1050 at 1056 (S.D.N.Y. 1978-79).

¹¹ See R.J. Pothier, Treatise on Maritime Contracts or Letting to Hire (Boston: Cummings and Hillard, 1821) at 54-55.

merces which is a contract for the hiring a thing (a vessel), by which the shipowner lets the ship to a merchant for the purpose of conveying his goods.

As Pothier goes on to say¹² this distinction may have legal merit from an academic point of view but little value commercially. In both instances the commercial result is the same. The charterer is, in the former case, provided with a service (but which necessarily includes the use of the ship) whereas, in the latter case, he is provided with a ship (but which necessarily includes its service).

Voyage charterparties are invariably made in writing (although nothing in law precludes the validity of an oral charterparty any more than the law precludes the validity of oral contracts generally). They are usually evidenced by one of the standard trade forms. Thus, one finds a variety of standard voyage charterparty forms each designed for a particular commodity, such as coal (NIPPONCOAL (1983)), fertilizer (FERTIVOY - 88), grain (NORGRAIN - 89), livestock (LIVESTOCK CHARTER PARTY), meat (PLATE MEAT A), ore (MEDITERRANEAN C. (ORE) 7), salt (COASTSALT (1966)), scrap (GENJAPSCRAP), steel (STEEL CHARTER PARTY), sugar (SUGAR CHARTER-PARTY (1977)), petroleum (ASBATANKVOY) and other liquids (VEGOILVOY (1950)), wood (SOVIETWOOD (1961)), etc. as well as charterparties designed for general purposes (NUVOY - 84).

The terms found in such charterparties vary according to the type of trade concerned. A modern voyage charterparty, for

¹² Ibid. at 55.

instance, may contain provisions with respect to the identity of shipowners and charterers, loading ports, description of cargo, laydays and cancelling dates, demurrage, despatch, destination, bills of lading, freight, loading and discharging, stevedores, a paramount clause, exemptions, overtime, the both-to-blame collision clause, a general average and the New Jason clause, war risks, address and brokerage commission, arbitration and others.

However, in addition to the foregoing express terms, there are several implied terms in every voyage charterparty and this subject, the implied terms, is the core of this thesis. The following chapters are, therefore, dedicated to the identification of these implied terms and a discussion of the problems and issues which arise therefrom insofar as they affect the commercial and legal relationship of the shipowner and charterer.

IV. SOURCES OF LAW

A. Introduction

This thesis provides comment, criticism, and suggestions with respect to law reform. It also contains a complete outline of the rules regulating the implied terms of voyage charterparties, drawn from English, American, Canadian, French, Quebec, international and ancient sources of law.

The primary source material is case law. It is supported by reference to arbitration awards, international conventions,

legislation, ancient codifications of maritime law, standard form contracts and doctrine.

The research consisted primarily of reading the source material referred to above. It was supplemented by discussions with professors of law, practicing specialists in maritime law and executives in the shipping business.

B. English and American Law

Most voyage charterparties submit disputes arising therefrom to arbitration in London or New York and, as a result, the substantive law governing such charterparties is usually that of England or that of the United States. Thus, this thesis treats of the judicial decisions, arbitration awards and laws of both jurisdictions.

There are no English or American statutes governing or regulating the terms of charterparties. The law of the United States governing charterparties is federal maritime law, which includes the general principles of contract law and agency, and the underlying principles, rules and customs, both domestic and international, that have been adopted and developed by the federal courts of that country.

C. French Law

The French Civil Code, French judicial decisions, such as

there are, and the legislation regulating voyage charterparties which was adopted in 1960's, largely as a result of Rodière's (Dean and Professor of Maritime Law in Paris) work will also be discussed.

D. Canadian and Quebec Law

Legislation of the Canadian federal Parliament in respect to maritime matters is slim but such as there is will be referred to, to the extent that it is relevant. Canadian judicial decisions on the subject will, of course, be considered.

On the other hand, the Civil Code of Lower Canada (1866) [hereinafter the C.C.L.C.] together with its proposed reforms and the caselaw relating to its provisions provide an extremely useful source of maritime law, not only generally but also specifically in the area of charterparties.

It should be noted, however, that the Supreme Court of Canada decided in the landmark case of The Buenos Aires Maru¹³ that Canadian maritime law is not the law of any province of Canada, but rather Canadian federal law which, the Supreme Court had held in Quebec North Shore Paper Co. v. Canadian Pacific Ltd.¹⁴, could not include provincial law because of section 101 of the British North America Act. Section 101 prescribes the jurisdiction of Canadian

¹³ ITO - Int'l Terminal Operators v. Miida Electronics, [1986] 1 S.C.R. 752.

¹⁴ [1977] 2 S.C.R. 1054.

"federal" courts to "the better Administration of the Laws of Canada". Chief Justice Bora Laskin, one of Canada's foremost constitutional experts, held, in writing the decision for the Supreme Court in Quebec North Shore Paper, that the words "Laws of Canada" in section 101 do not include provincial law. Chief Justice Laskin also wrote the decision for the Court in the Tropwood A.G. v. Sivaco Wire & Nail Co.¹⁵ which held that Canadian maritime law was uniform throughout the Country. This line of cases which concerned, primarily, the jurisdiction of the "new" Federal Court of Canada, which came into existence in 1970, replacing the Exchequer Court of Canada, has been followed in a number of recent decisions of the Supreme Court¹⁶. Thus, of what relevance are references to Quebec law.

Firstly, there are several passages in the Chartwell case¹⁷ underlining the importance of Civil law, in its broad sense, to the development of English admiralty law and, consequently, to Canadian maritime law.

For instance, Mr. Justice La Forest notes that "the development of English admiralty law, from which Canadian maritime law in considerable measure derives, owes much to the civilian

¹⁵ [1979] 2 S.C.R. 157.

¹⁶ See Roberts v. Canada, [1989] 1 S.C.R. 322; Chartwell Shipping Ltd. v. Q.N.S. Paper Company Ltd., (1989) 101 N.R. 1; Whitbread v. Walley, (1991) 120 N.R. 109, and Monk Corp. v. Island Fertilizers Ltd., (1991) 123 N.R. 1.

¹⁷ (1989) 101 N.R. 1.

tradition".¹⁸

Similarly, Mme. Justice McLachlin underlines the fact that "the history and tradition of the Admiralty Court suggests that, in some cases, it might have had recourse to civilian traditions"....¹⁹ (and further that).... "I do not read this court's decision in ITO - International Terminal Operators Ltd. v. Miida Electronics Inc....(the "Buenos Aires Maru") as precluding the consideration of civil law principles in areas of Canadian maritime law where there is no precedent in the English Court of Admiralty prior to 1934".... (The) "context, I venture to suggest, is neither a common law context, nor a civilian context; it is an international context in which both a civilian and common law tradition may play a part".²⁰

Mme. Justice L'Heureux-Dubé states that "Canadian maritime law encompasses principles of tort, contract and bailment, but it also encompasses civil law principles which were always a part of maritime law as applied by the English High Court of Admiralty".²¹ Having reviewed the doctrinal writings and judgments of the High Court of Admiralty, she concludes that the Civil law sources which had emerged from the tradition of Roman law and which had been embodied in a series of doctrinal sources available in Europe,

¹⁸ Ibid. at 10.

¹⁹ Ibid. at 16.

²⁰ Ibid. at 16-17.

²¹ Ibid. at 35.

played a significant role in the development of maritime law.²² She then says:

To summarize, as at 1934, which marks the last statutory reception into Canada of English admiralty law, English courts were still drawing upon, and indeed developing, the civilian tradition in maritime law. Of course, Canadian maritime law did not freeze in 1934, and nor did the civilian tradition. As McIntyre, J., noted in *Buenos Aires Maru* (at p. 774), "[a]n historical approach may serve to enlighten but it must not be permitted to confine... [T]he words 'maritime' and 'admiralty' should be interpreted within the modern context of commerce and shipping". Part of that modern context is contemporary civil law.²³

Although these references are, of course, to the broad civilian traditions of law and, if you like, to the civilian traditions extant in English law, the Quebec Civil law is as pure a tradition of such a philosophy of law as any other. Quebec secessionists may, indeed, one day have the opportunity of legally, within the political sense of the word, applying Quebec Civil law to maritime matters. But irrespective of political prognostication, the Quebec Civil law can be and has been used as an example of the traditions of Civil law in the development of maritime law.

One may look, for example, to the writings of two Canadian jurists both, not suprisingly, being professors at the world renowned English language university in Quebec, namely McGill, who both use Quebec Civil law traditions in their doctrinal writings relative to Canadian maritime law.

²² Ibid. at 37 et seq.

²³ Ibid. at 46.

Professor Tetley of the Faculty of Law of McGill University, in his article "The Buenos Aires Maru - Has the Whole Nature of Canadian Maritime Law Been Changed?",²⁴ sets out a number of facts and arguments concerning the origins and nature of maritime law and concludes that "the definition of Canadian maritime law as being common law orientated is an astounding finding".²⁵

Professor Glenn of the same Faculty of Law shares a similar opinion to the effect that:²⁶

Incorporation by reference of English admiralty law and common law principles adopted and applied in English admiralty cases therefore accomplishes two useful purposes in Canadian maritime practice. It provides a corpus of learning readily available in common law provinces for use in the extended maritime practice now possible in the Federal Court. It also ensures the reception of those civilian principles administrated by English civilians as part of the European ius commune, and thus ensures the continuing relevance of Quebec civil law and the Quebec Civil Code, not as provincial law, but as evidence of received civil law principle. Quebec civilians may thus continue the civilian tradition in maritime

²⁴ (1988) 10 Supreme Court L.R. 399. See also W. Tetley, Maritime Liens and Claims (Montreal: International Shipping Publications Blais, 1989) at 1-41; A. Braen, "L'arrêt ITO-International Terminal Operators Ltd. c. Miida Electronics Inc., ou comment écarter l'application du droit civil dans un litige maritime au Québec" (1986/87) 32 McGill L.J. 386; Lefebvre G., Tamaro N., "La cour suprême et le droit maritime: la mise à l'écart du droit civil québécois est-elle justifiable ?" (1991) 70 Can. Bar. Rev. 121.

²⁵ Tetley, "The Buenos Aires Maru...", *supra*, note 24 at 413.

²⁶ H.P. Glenn, "Maritime Law - Federal Court Jurisdiction - Canadian Maritime Law - Relationship to Civil and Common Law: ITO-International Terminal Operators Ltd. v. Miida Electronics Inc." (1987) 66 Can. Bar. Rev. 360 at 364-365.

matters. [Emphasis added]

E. International Law

There are no international conventions governing charterparties. Furthermore, charterparties are generally not subject to the international conventions or statutes that regulate the carriage of goods under bills of lading.

However, there are two important occasions²⁷ when the Hague²⁸ and Hague/Visby Rules²⁹ (which do not apply by force of law to charterparties) do apply to a voyage charterparty:

1. Where the voyage charterparty itself specifically incorporates the Rules; and
2. Where a bill of lading expressly incorporates the terms of a voyage charterparty, thereby making the charterparty itself subject to the laws and conventions which govern the bill of lading.

Most of the standard forms of voyage charterparties expressly incorporate the Rules, or a particular national enactment of them, and thus the Rules, as stated under paragraph 1 above, become directly applicable to the voyage charterparty.

²⁷ Compare Tetley, supra, note 7 at 36.

²⁸ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and entered into force June 2, 1931.

²⁹ Protocol to Amend the 1924 Convention. ibid. signed at Brussels, February 23, 1968 and entered into force June 23, 1977.

In addition, reference will be made to other international conventions and documents where they are applicable, albeit indirectly, to voyage charters.

F. Ancient Maritime Law Codifications

The roots of modern maritime law, including the law of charterparties, can be unearthed from the ancient codifications. These codifications generally transcended national boundaries.

This thesis will consider, amongst others, The Byzantine/Rhodian Sea-Law of the seventh or eightieth century A.D.; The Laws of Oleron, promulgated about 1150 A.D. by Eleanor, Duchess of Guienne, which demonstrate the customs then prevailing in respect to many of the most important subjects relating to shipping; The Laws of Wisbuy, published in the following century and probably based upon The Laws of Oleron; The Laws of the Hanse Towns, which appeared in 1597; and The Marine Ordinances of Louis XIV drawn from the Laws of Oleron and The Consolato del Mare of the fifteenth century, inspired by Colbert, the celebrated minister of Louis XIV whose reign spanned the years 1643 - 1715.³⁰

It is worth noting that Book II, Title First of The Marine Ordinances of Louis XIV regulates "Charter Parties and Freightage of Ships", codifying customs of maritime law which are still part of modern chartering practice.

³⁰ For further discussion on the history of maritime law see Tetley, "Maritime Liens and Claims", supra, note 22 at 1-16.

On this point one cannot do better than quote the words of Chief Justice Tilghman of the Supreme Court of Pennsylvania in the case of Morgan & Price v. The Insurance Company of North America in 1807:³¹

[The Marine Ordinances] and the commentaries on them, have been received with great respect in the courts both of England and the United States, not as conveying any authority in themselves, but as evidence of the general marine law. When they are contradicted by judicial decisions in our country they are not to be regarded: but on points which have not been decided, they are worthy of great consideration. [Emphasis added]

G. Standard Voyage Charterparty Forms

For the purpose of this thesis, more than ninety standard form voyage charterparties have been reviewed, including those used in coal, fertilizer, grain, livestock, meat, ore, salt, scrap, steel, sugar, petroleum and other liquids, wood trades, and those used for general purposes.

H. Doctrine

As Professor Tetley complains in his Preface to the third edition of Marine Cargo Claims, many persons, including judges, only rely on and cite the writings of "authors who are dead". The research which underlies this thesis as much encompassed the

³¹ The decision is cited in 30 Fed. Cas. 1203.

doctrinal writings of contemporary jurists as it did the wealth of work left to us by their predecessors.

The doctrinal writers include English, American, French, Canadian and others as will be referenced in the following chapters.

Chapter 2

IMPLIED TERMS IN THE LAW OF CONTRACT

I. INTRODUCTION

II. DEFINITION OF IMPLIED TERMS AND THEIR PLACE IN THE LAW OF CONTRACT

III. IMPLIED TERMS IN CIVIL AND COMMON LAW

A. Civil Law

1. Introduction
2. Terms Implied by Nature of the Contract
3. Terms Implied by Equity
4. Terms Implied by Usage
5. Terms Implied by Law
6. Conclusion

B. Common Law

1. Terms Implied in Fact
 - a. Definition of Terms "Implied in Fact"
 - b. The "Business Efficacy" Test
 - c. The "Officious Bystander" Test
 - d. Both Tests Should be Applied Together
 - e. Conditions Implied in Fact
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 - g. Contracts Implied in Fact

2. Terms Implied in Law

- a. Definition of Terms "Implied in Law"
- b. Codification of Terms Implied in Law
- c. Conditions Implied in Law (Constructive Conditions)
 - i. Definition
 - ii. The Sale of Goods Act (1979)
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 - i. Definition
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IV. DIFFERENT APPROACHES TO INTERPRETATION AND IMPLICATION

- A. Objective Textual Approach
- B. Subjective Contextual Approach
- C. Goetz and Scott's Reassessment
- D. Farnsworth's Process of Interpretation and Inference

V. CONCLUSION

"The developing role of the courts in filling gaps is one of the more interesting stories in the history of contract law during the twentieth century."

H.O. Hunter, Modern Law of Contracts - Formation, Performance, and Relationship of Parties (Boston: Warren, Gorham & Lamont, 1987).

I. INTRODUCTION

In order to understand the concept of implied terms in voyage charterparties one must examine not only the rules and principles of maritime law, but also those pertaining to the general law of contract. The rules of law with respect to implied terms are as applicable to voyage charterparties as they are to other kinds of contracts.

The subject will be treated from the point of view of Civil and Common law. It will, at the same time, demonstrate the similarities between the two systems in order to establish a basis for the further development of the legal notions that flow from the general law of contract into the specific rules which concern charterparties and, ultimately, into voyage charterparties and the terms implicit therein.

The notion of implied terms in the Civil law identifies terms implied by the nature of the contract, terms implied by equity, terms implied by usage and terms implied by law. Similarly, the Common law approves terms implied in fact, terms implied in law and terms implied by custom, usage and practice. However, one must contrast the approach between the systems. The Civil law proceeds from codified rules applicable to the various types of contract and construes the intention of the parties and, hence, the object and consideration of and for the contract within the context of these legislated precepts. The Common law, on the other hand, starts at the other end of the affair, by firstly examining the factual

circumstances so as to arrive at, even by assumption, an understanding of the intention of the parties. Thus, the implied terms of a contract may be, and indeed generally are, the same whether the contract is being approached from the discipline of the Civil law or the Common law. It is gratifying to know that different legal systems generally arrive at similar conclusions although approached from different directions.

In addition, specific and different approaches to the process of interpretation and implication in the law of contract will be analyzed. These different approaches include: the traditional objective textual approach, the younger subjective contextual approach, modern ideas of reassessing old methods or of revealing the process of interpretation and inference, and finally some thoughts in respect of the abolition and avoidance of the use of implied terms.

As a conclusion, it will be argued that implication in contracts necessarily is less precise and less certain than the actual expression of the term and that, as a result, an international convention should be adopted to consecrate the rules. Indeed, many of the implied terms of voyage charterparties are so well settled that there is no reason to be shy of formally acknowledging their existence.

II. DEFINITION OF IMPLIED TERMS AND THEIR PLACE IN THE LAW OF CONTRACT

The word "imply" is derived from the Latin word implicare which means "to have as a necessary part, condition, or effect; to contain, include, or involve naturally or necessary...".¹ "Implication" is "that which is implied, from which an inference may be drawn".²

According to the Black's Law Dictionary the word "implied" is used in contrast to the word "express", and is used to denote "the intention in regard to the subject-matter"... "gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties".³

The implications which can arise appear to be limitless. For example, one may think of an implied abrogation, an implied agreement, an implied assumpsit (a promise or engagement by which one person assumes or undertakes to do some act or pay something to another), an implied condition, an implied confession, an implied consent, an implied consideration, an implied contract, an implied covenant, an implied dedication, an implied easement, an implied invitation, an implied malice, an implied notice, an implied obligation, an implied power, an implied promise, an implied trust,

¹ Webster's New Universal Unabridged Dictionary, Deluxe Second Edition (New York: Dorset & Barber, 1983) at 914.

² Ibid.

³ Black's Law Dictionary, Fifth Edition (St. Paul: West Publishing Co., 1979) at 679.

an implied use, an implied waiver and an implied warranty.⁴

However, the implication must necessarily derive from the circumstances, general language or conduct of the parties. In other words, an implication may not, to have legal validity, be fanciful, imaginary or remote.

Conversely, "express" means that the intention is manifested by explicit and direct words.

In the Common law, implied terms are sometimes called "gap-fillers",⁵ i.e. terms supplied by the court either because the court feels that the parties would have agreed upon the term if it had been brought to their attention or because it is a term which is in harmony with community standards of fairness and policy.

Similarly, the Civil law recognizes obligations implied by the nature of the contract, obligations implied by equity, obligations implied by usage, and obligations implied by law. As stated above, however, the Civil law proceeds from rules and the

⁴ See Black's Law Dictionary, supra, note 3 at 8, 62, 112, 265, 278, 292-293, 328, 969, 1417, 1423 etc.

⁵ See, e.g. the court citations to the first Restatement of Contracts, para. 253 (definition of "constructive condition"), paras. 266-290 (constructive conditions, frustration), paras. 454-469 (impossibility) and paras. 245-249 (usage); and the court citations to Restatement of Contracts, Second, para. 5 (terms of promise, agreement or contract - no caselaw), para. 204 (supplying an omitted essential term), para. 205 (duty of good faith and fair dealing), paras. 219-223 (usage), paras. 224-230 (conditions and similar events), and paras. 261-272 (impracticability of performance and frustration of purpose) - The American Law Institute, Restatement of the Law, Second, Contracts 2d, Appendix (St. Paul: American Law Institute Publishers, 1982). The Restatement of the Law of Contracts was approved and promulgated by the American Law Institute in May 1932. Restatement, Second, of the Law of Contracts was begun in 1962 and completed by the same institute in 1979.

Common law starts from the intention of the parties as found by construction of the contract. The Common law judge will therefore imply a term not by virtue of a civil code or other piece of legislation (except in the case where he is bound by a "codification" of certain implied terms) but because of some belief as to the business efficacy of the contract, policy, etc.

There is an interaction in the law of contract amongst implied terms, interpretation of contract, problems of indefinite contract, good faith, unconscionability (e.g. an oppressed or unfairly surprised party), doctrine of fundamental breach, doctrine of frustration, and disputes over omissions in contracts.⁶

Problems of indefinite contract arise primarily where the parties have purported to agree upon a contractual material term (e.g. freight, quantity of cargo, voyage to be performed) but have left it indefinite; or where the parties are silent as to a material term, and such a term may be implied from the surrounding circumstances or supplied by the courts; or where the parties have agreed to agree later as to a material term.

Disputes over omissions in contract (casus omissi) arise when the parties disagree over what they did not say in a contract, or disagree over the effect of their contract on a situation for

⁶ See, e.g. S.M. Waddams, The Law of Contracts, Second Edition (Toronto: Canada Law Book Inc., 1984) at 365-376; E.W. Patterson, "The Interpretation and Construction of Contracts" 64 Colum. L. Rev. 833 (1964); R. Powell, "Good Faith in Contracts" Curr. Legal Problems 16 (1956); R.S. Summers, "The General Duty of Good Faith - Its Recognition and Conceptualization" 67 Cornell L. Rev. 810 (1982).

which they have failed to provide.⁷ Such cases often appear in areas of constructive (implied in law) conditions of exchange and under the doctrines of impracticability and frustration.⁸

Both the concept of fundamental breach and the doctrine of frustration, which is now said to be developing into "a labyrinth, rather than just one principle, of law"⁹, originated in the fiction of an implied term. The doctrine of frustration evolved from an implied term into a principle of law. The doctrine of fundamental breach used to be subject to the criticism that it did not allow the courts to consider whether an exemption clause was, in all of the circumstances, fair or harsh and unconscionable. That criticism is now moot by reason of the legislation known as the United Kingdom Unfair Contract Terms Act in 1977. The courts should perhaps have control over such clauses on the basis of unconscionability.¹⁰

⁷ E.A. Farnsworth, "Disputes Over Omission in Contracts" 68 Colum. L. Rev. 860 (1968); Restatement (Second) Contracts, para. 204 (Supplying an Omitted Essential Term): "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court".

⁸ J.D. Calamari, J.M. Perillo, The Law of Contracts, Third Edition (St. Paul: West Publishing Co., 1987) at 183.

⁹ R. Colinvault, Carver's Carriage by Sea, Thirteenth Edition (London: Stevens & Sons, 1982) at para. 893 [hereinafter Carver]; Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361 (H.L.); Harbutt's 'Plasticine' Ltd. v. Wayne Tank and Pump Co. Ltd., [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A.); Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827, [1980] 1 All E.R. 556 (H.L.); Hunter Engineering Co. Inc. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426.

¹⁰ See Hunter Engineering Co. Inc. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426.

III. IMPLIED TERMS IN CIVIL AND COMMON LAW

A. Civil Law

1. Introduction

It has already been noted that the Civil law and the Common law approaches to the question of implied terms in contracts differ. It is, however, also important to note that the notion of implied terms in contracts originally belongs to the Civil and not to the Common law tradition. A typical example of the Civil law notion is art. 1024 C.C.L.C. which article poses a problem of its own, not uncommon in the bilingually legislated Quebec Code, in that the French text reads differently from the English. The English version is based upon art. 1135 of French Code civil or Code Napoleon (1804) [hereinafter C.N.] which states that:

Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature.¹¹

¹¹ See M. Pailliet, Manuel de droit français, Paris, T.H. Desqer, 1818 aux pp. 362-363; G.A. Bermann, H.P. De Vries, N.M. Galston, French Law (Ardsley-on-Hudson: Transnational Juris Publications, Inc., 1989) at paras. 4-67. See also, with respect to art. 1024 C.C.L.C. Bussièrès c. Syndicat des employés du Centre hospitalier Robert Giffard et annexes, [1986] R.J.Q. 586 à la p.588 (C.S.) (re droit du travail): "Au stade où nous sommes, il serait donc hasardeux, au plan contractuel, de prétendre que la convention est la seule et unique source des obligations de l'employer"; Glassman & Maislin Fur Matching & Trading Corp. c. Continental Insurance Co., [1981] C.P. 7 (re assurance); Dattner c. Guardian Insurance Co. of Canada, [1957] I.L.R. 342; Société nationale de fiducie c. Comité de protection des détenteurs de débentures série D-1 de credit M.G. Inc., [1989] R.J.Q. 584 (C.A.) (re sûretés) etc.

The English text of art. 1024 C.C.L.C. reads as follows:

The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.

There are thus, and apparently, only three sources of implied terms according to the English text: equity, usage and law. The French version of art. 1024 is, however, more generous in that it provides a fourth source, namely the nature of the contract:¹²

Les obligations d'un contrat s'étendent non seulement à ce qui y est exprimé, mais encore à toutes les conséquences qui en découlent, d'après sa nature, et suivant l'équité, l'usage ou la loi.

The discrepancy between the French and English versions of article 1024 can be resolved by the rules of statutory interpretation. For instance, when the text is clear, it should be applied purely and simply; when it is obscure, the court must discover the intention of the legislator by examining the legislation as a whole, and may refer to the preparatory studies, general principles of law and to the rules of logic.¹³

Article 12 C.C.L.C. stipulates that when a law is doubtful or ambiguous it is to be interpreted to fulfil the intention of the legislature, and to attain the object for which it was passed.

It is also worth noting that "l'article 1024 du Code civil

¹² See P.A. Crépeau, "Le contenu obligationnel d'un contrat" (1965) 43 R.du B. Can. 1 aux pp. 3-4.

¹³ See W. Tetley, Marine Cargo Claims, Third Edition (Montreal: International Shipping Publications BLAIS, 1988) at 47-48, describing Mazeaud's and Mignault's rules of interpretation.

n'est pas de droit nouveau: il reproduit l'ancien droit".¹⁴

Presently before the Quebec National Assembly is a bill, Bill 125,¹⁵ which when passed will effect a massive updating of the C.L.C.C.. The equivalent article in Bill 125 to article 1024 C.C.L.C. will be article 1430 which provides for the four sources presently enumerated in the French text of article 1024 and will, therefore, eliminate the inconsistency unless, of course, one text is translated from the other with a casus omissi. Then again, and by then, we may be only legislating in one language in Quebec which would be the simplest way of removing legislated ambiguities arising from sloppy legislative translations. Article 1430 of Bill 125 reads as follows:

A contract validly formed binds the parties who have formed it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law.

Thus, and to continue in the Civil law idiom, contracts contain two categories of contractual obligations:

1. express obligations; and
2. obligations implied (whether by the nature of the contract, equity, usage, or law) these being, of course,

¹⁴ Crepéau, supra, note 12 à la p.4; see also Dame Mary Mc Carthy ès qual. v. The Thomas Davidson Manufacturing Co., (1900) 18 C.S. 272 à la p. 276 (re patron et ouvrier): "La garantie peut être formelle, expresse, ou résulter de la simple interprétation légale. A défaut de stipulations expresses, en effet, il faut se rappeler les dispositions de l'article 1024 C.C., qui constitue la règle générale dans notre droit moderne...".

¹⁵ Bill 125, Civil Code of Quebec, 1st Sess., 34 Leg. Que., 1990.

the subject of this thesis.

2. Terms Implied by the Nature of the Contract

The Civil law recognizes three categories of contractual terms: essentialia negotii, accidentalialia negotii and naturalia negotii. Pothier put it that the distinction made by a number of lawyers of the seventeenth century (recognizing the three different categories in each contract) was a development creating more accuracy and precision of definition than the earlier jurists, such as Cujas in the sixteenth century¹⁶, who referred on occasion to only two kinds of contractual terms.

The first, essentialia negotii, comprises things which are of the essence of a contract in that without them a contract cannot subsist.

The second, accidentalialia negotii, comprises things which are accidental to a contract, i.e. non-essential terms expressly included in the agreement which by their absence do not invalidate the contract.¹⁷

The third (and the only one of relevance to this thesis),

¹⁶ M. Pothier, Traité des Obligations, Paris, Librairie de l'oeuvre de Saint-Paul, 1883 à la p. 5; V. Korosec, Rimsko pravo [Roman Law] (Ljubljana: Univerza v Ljubljani - Pravna fakulteta, 1972) at 57.

¹⁷ See the following case, depending to a large degree on the distinction between things of the nature of, and those accidental to a contract: The King v. Leighton, 4 T.R. 732, cited in M. Pothier, A Treatise on the Law of Obligations, or Contracts (by W.D. Evans) (Philadelphia: Robert H. Small, 1853) at 109, note (a).

naturalia negotii, comprises things which are only of the nature of the contract and which, though not expressly mentioned, are included ipso iure, their inclusion following naturally upon the conclusion of the contract. They differ from essentialia negotii inasmuch as the contract may exist without them, and they may be excluded by the express agreement of the parties. For instance, in a contract of sale, the seller's obligation of warranty is of the nature of the contract. For further example, where something is lent to be specifically returned, it is of the nature of contract that the borrower shall be answerable for the least negligence in respect of the article lent. It is also of the nature of the "contrat de prêt à usage" that the loss of the thing lent, when it arises from force majeure, falls upon the lender.¹⁸

It will become apparent in the second part of this chapter, that Civil terms implied by the nature of the contract, naturalia negotii, are very similar to Common law terms "implied in fact".

¹⁸ Pothier, supra, note 16 aux pp. 6-7. See Crépeau, supra, note 12 à la p.7, who argues that "tout contrat est susceptible d'imposer aux parties des obligations implicites, soit à titre de clause naturelle, soit a fortiori à titre de clause essentielle". For example, he distinguishes the essential clauses of security (e.g. in "le contrat de soins médicaux") and the natural clauses of security (e.g. in "le contrat de transport de personnes"). See also Houle v. Paquette, [1961] C.S. 197 (re art. 1530 C.C.L.C.); Levine v. Frank W. Horner Limited, [1962] S.C.R. 343 (re art. 1522 C.C.L.C.); Samson & Fillion v. The Davie Shipbuilding & Repairing Co., [1925] S.C.R. 202 (re art. 1053 C.C.L.C.-delictual fault; art. 1522-breach of legal warranty against latent defects, coupled with a legal presumption of knowledge of such defects -art.1527); Dodds c. Shierz, [1986] R.J.Q. 2623 à la p. 2630 (C.A.) (re responsabilité médicale): "L'obligation d'obtenir le consentement du patient est de nature contractuelle. Il faut rattacher du contenu médical l'obligation de renseigner et de conseiller".

3. Terms Implied by Equity

The word "equity" (ex aequo et bono) derives from the Roman law and means the principles of natural justice and fairness:¹⁹

Item in his contractibus alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet.

Translation:

Moreover, in contracts of this description [purchases, sales, hirings, leases, partnerships, and mandates] each of the parties is bound to the others for whatever should be done, consistent with justice and good faith.²⁰

It has been held that agreements must be performed in good faith because there are no longer, as in Roman law, contracts bonae fidei and contracts stricti iuris. In other words, it is implied in all contracts that one party owes good faith to the other party, with all the consequences which equity may demand.²¹ As will be discussed on further pages of this thesis, this is also a rule of Common law.

For instance, in Marwood v. Canadian Credit Corporation²² it was held that where by written agreement an employee is entitled

¹⁹ Gai. D. 44,7,2,3.

²⁰ S.P. Scott, The Civil Law, Vol. IX (Cincinnati: The Central Trust Company, 1973) at 77. Art. 1134 C.N., for example, states that agreements must be performed in good faith: "Elles doivent être exécutées de bonne foi".

²¹ See National Bank v. Soucisse et al., [1981] 2 S.C.R. 339 at 356-357, where Mr. Justice Beetz cites Mignaut and Donat.

²² (1928) 66 C.S. 378 at 385.

to a bonus to be calculated on net profits, the employer is justified in first deducting bad debts resulting from discounts of notes which had been dishonored. It was further held that it is repugnant to equity, made relevant by art. 1024 C.C.L.C., for one party to rely on the error of the other party, in circumstances where the former had contributed to the error.

It was held in Berthiaume & Al., v. The Great-West Life Assurance Co.²³ that parties to a contract of insurance are bound by the consequences imposed by equity because "le contrat d'assurance est un contrat exceptionnellement de bonne foi..." (uberrimae fidei).²⁴ Such a view has also been upheld in several court decisions concerning contracts for the sale of goods, contracts of hire of services and others.²⁵

Some scholars and judges find a relationship between the doctrine of abuse of rights and equity in contracts.²⁶ The former has been limited for a long time to non-contractual matters,

²³ (1942) 48 R. de J. 16 à la p. 28.

²⁴ Ibid.

²⁵ See Crete v. Canadian Vickers, Limited, (1928) 66 C.S. 45 (re vente); Lachance & Morel (ltée) v. Cantin, (1937) 75 C.S. 235 (re action en payement du prix de marchandises); Buzz Shamrock Brand Limited v. Lizette Fashions Limited, [1962] C.S. 341 (re action pour marchandises vendues et livrées, bonne foi du défendeur); Robichaud c. Panneton, [1989] R.J.Q. 1267 à la p. 1269 (C.S.): "Toutes les conventions doivent être exécutées de bonne foi entre les contractants..."; Process Piping Specialties Inc. c. Banque canadienne impériale de commerce, [1986] R.J.Q. 2429 à la p.2431 (C.S.) (the bank must use diligence and good faith and art.1024 C.C.L.C. "sanctionne cette obligation de diligence") etc.

²⁶ See, e.g. Crépeau, supra, note 12 aux pp.24-26; J.L. Baudouin, Les obligations, 3e éd., Cowansville, Blais, 1989, aux pp.242-243, citing recent judicial decisions at para.366, note 24.

subsumed in the elemental art.1053 C.C.L.C..²⁷ However, the court decision in Quaker Oats Co. of Canada Ltd. v. Cote²⁸ opened the gates to a new understanding of abuse of rights, indicating the possibility of its application to the field of contract. For example, the Supreme Court of Canada held in Houle v. Banque Nationale du Canada that:²⁹

In summary, although contractual and delictual liability may coexist even in the context of a contract, delictual liability must arise independently of contractual obligations and all the elements required to give rise to such liability must be found. In the context of an abuse of contractual rights, it is the rights arising out of the contract itself which are exercised, and only the contracting parties possess these rights and the correlative obligation to exercise them reasonably. This obligation is derived exclusively from the contract. Consequently, when the fault alleged arises strictly from the abuse of a contractual right, then the liability must have its source in the contract.

²⁷ Art. 1053 C.C.L.C.: 1. French text: "Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabileté". 2. English text: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill". See arts. 1382 and 1383 C.N.

²⁸ [1949] B.R. 389 (re louage de services).

²⁹ (1990) 114 N.R. 161 at 212. See A. Perrault, "La critique des arrêts: La théorie de l'abus des droits" (1949) 9 R. du B. 361; Drouin c. Électrolux Canada ltée Division de les produits C.F.C. ltée, [1988] R.J.Q. 950 aux pp.952-953 (C.A.): "Fondée sur les notions de bonne foi et d'équité à la base de tous contrats, cette théorie met en cause l'abus de droit, compte tenu des dispositions de l'article 1024 du Code civil..."; "Une telle appréciation de la bonne foi tient compte de la nature de la convention et de son contexte social...".

4. Terms Implied by Usage

It is a well known principle of the Civil law and, as will be argued in section III B of this chapter of the Common law, that customary clauses must be supplied in contracts although they are not provided expressis verbis.³⁰

A trade custom or usage, in order to be binding upon the public generally, must be proved to be known to all persons whose interests require them to have knowledge of its existence.³¹ It must be:

1. uniforme,
2. public,
3. general,
4. frequent,
5. ancien.³²

It was held, for instance, in The Provincial Insurance Company of Canada v. James Connolly,³³ that parol evidence could be admitted to explain the language of a marine policy of insurance

³⁰ Art. 1017 C.C.L.C., art. 1160 C.N. See also art. 2416: "If the time of loading and unloading the ship, and the demurrage be not agreed upon, they are regulated by usage".

³¹ See J.J. Parson and Others v. Francis J. Hart, (1900) 30 S.C.R. 473 at 480, where the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, prevailed against such custom.

³² Steinberg-Katz c. Empire Life Insurance Co., [1982] C.P. 1 à la p.2 (re assurance), citing G. Trudel, Traité de droit civil du Quebec, t.7., Montreal, Wilson & Lafleur, 1946, à la p.288.

³³ (1882) 5 S.C.R. 258. See art. 2617 C.C.L.C.: "Marine policies in cases of doubtful meaning are construed by the established and known usage of the trade to which the policy relates; such usage is held to be a part of the policy when it is not otherwise expressly provided".

according to the known usage of trade. Usages of trade are local and general, and are known, or presumed to be known, by everyone engaged in any particular trade to which they are applicable.³⁴

5. Terms Implied by Law

Crépeau explains that the word "law", as used in article 1024 C.C.L.C., refers as much to provincial as to federal legislation, including "les obligations implicites supplétives et les obligations implicites impératives".³⁵ Usually, contractors are free to expressly exclude any term, supplied by "law" (ius dispositivum), but on the other hand, they cannot contract out of the terms implied by law, being of an imperative nature (ius cogens).³⁶

³⁴ The Provincial Insurance Company of Canada v. James Connolly, (1882) 5 S.C.R. 258 at 269. See also Gilbert v. Taylor, (1940) 78 C.S. 18 (re louage de services); Fugere v. Tremblay, [1944] B.R. 673 à la p.682 (arts. 1016-1017 put "the stamp of approval on local customs" concerning the measure of volume of lumber in Quebec); Dame Mermelstein v. Rosenbrier, [1959] C.S. 135 (there was no custom or usage amongst taxicab operators and chauffeurs in Montreal requiring such drivers to open and close the car doors for the convenience of their passengers); Richards v. Brossard, [1945] C.S. 179 (le mandat est gratuit, s'il n'y a une convention ou un usage reconnu au contraire - art. 1702 C.C.L.C.); Crépeau, supra, note 12 à la p.27.

³⁵ Crépeau, supra, note 12 aux pp.27-29; compare to Baudouin, supra, note 14 à la p.242.; Demenagements Tremblay Express ltée c. Audet, [1981] C.P. 138 (re louage d'ouvrage, art. 1675 C.C.L.C.); Mungham c. Lariviere, [1983] C.P. 119 (re louage de choses, arts. 1659-1659.8 C.C.L.C.); Banque de Montreal c. P.G. du Québec, [1979] 1 S.C.R. 565; Pouliot c. Allstate du Canada compagnie d'assurance, [1985] C.P. 200 (re assurance).

³⁶ See A. Romac, Rjecnik latinskih pravnih izraza [Dictionary of Latin Legal Terminology] (Zagreb: Informator, 1985) at 167.

For instance, consent, being one of four requisites to the validity of a contract, may be either express or implied (art. 988 C.C.L.C.). Legal warranty (e.g. warranty against the eviction of the thing sold, warranty against latent defects) is implied by law in the contract of sale (art. 1507 C.C.L.C.).

It is an implied warranty in every contract of marine insurance that the ship shall be seaworthy at the time of sailing (art. 2629 C.C.L.C.). In hull insurance it is an implied warranty that the ship shall be properly documented, navigated and managed in accordance with the laws and treaties of the country in which it is registered, as well as in accordance with the laws of all nations within the territorial limits of which it navigates (art. 2630 C.C.L.C.). A total loss may be either absolute or constructive, the latter being a matter of fact to be implied from the circumstances of the situation (arts. 2647, 2663, 2671 C.C.L.C.).

It will become clear in the text which follows that the Civil law terms implied by law are similar to the Common law terms "implied in law". However, the former are generally not based on judicial decisions.

6. Conclusion

Although it has been said by some that implied terms are

one of the differentiating characteristics of the Common law³⁷, it is not easy to see any difference between implied terms in Common law and the Civil law "implied" obligations regulated, for example, by the French and Quebec Civil Codes.

The Civil law approach also, like that of the Common law, enables the judge to avoid the appearance of imposing rules on the parties. As Nicholas put it, the judge "has only to categorize the contract into which they have entered, and the rest will necessarily follow from a correct analysis of the essence and nature of that contract".³⁸

B. Common Law

1. Terms Implied in Fact

a. Definition of Terms "Implied in Fact"

The Common law recognizes terms "implied in fact" as being ones added by the courts to express the terms of a particular contract in circumstances where they are so obvious that they go "without saying"; or where they are implied in order to give such business efficacy to a contract as must have been intended by the parties.

³⁷ B. Nicholas, "Rules and Terms - Civil Law and Common Law" (1974) 48 Tul. L. Rev. 946 at 950.

³⁸ Ibid. at 952.

The Common law terms implied in fact are similar to the Civil law category naturalia negotii, discussed above, in that they are of the nature of the contract. Their inclusion follows naturally ("without saying") from the construction of the contract, unless they are excluded by the express agreement of the parties.

In other words, a term is implied in fact only where it is necessary to give effect to the presumed intention of both parties to the contract. Sometimes the whole of the contract is implied in fact, particularly when it is inferred from the actions or conduct of the parties, instead of being expressed in written or spoken words.

Two major and famous formulations of the test for ascertaining whether implication ought to be effected dominate the field: the "business efficacy" test, and the "officious bystander" test. However, it is submitted that both of the tests should be utilised together, in a complementary fashion.

b. The "Business Efficacy" Test

The first and earlier test is the "business efficacy" test formulated in The Moorcock³⁹ where Lord Justice Bowen said:

Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously

³⁹ (1889) 14 P.D. 64 at 68.

have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side... In business transactions... what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men...⁴⁰

It was held in Trollope & Colls Ltd. v. North West Metropolitan Hospital Board⁴¹ that a contractual term could only be implied if the court found that the parties must have intended that term to form part of their contract. It must have been a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the agreement of the parties. However, if the express terms were clear those terms were to be applied even if the court thought that some other term would have been more appropriate.

c. The "Officious Bystander" Test

The second formulation is the "officious bystander" test invented by Lord Justice MacKinnon in Shirlaw v. Southern Foundries (1926) Ltd. where he stated: ⁴²

⁴⁰ The principle was applied, for instance, in Merryweather v. Pearson, [1914] 3 K.B. 587, and Bruce, Marriott v. Houlder Line, [1917] 1 K.B. 72.

⁴¹ [1973] 2 All E.R. 260 at 268.

⁴² [1939] 2 K.B. 202 at 227, aff'd [1940] A.C. 701; Luxor (Eastbourne), Ltd. v. Cooper, [1941] 1 All E.R. 33 at 52; [1941] A.C. 108 at 137. G.H. Treitel, An Outline of The Law of Contract, Third Edition (London: Butterworths, 1984) at 63-64. It is

If I may quote from an essay which I wrote some years ago, I then said: "Prima facie that which is any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

The above-mentioned test was applied, for example, in Gardner v. Coutts & Co.⁴³ where the court held that it was implicit in the grant of a right of first refusal, that the person who had to offer the right should not give the property away without offering it and so defeat the right of first refusal.⁴⁴

interesting that Cheshire and Fifoot present different categorization of implied terms than Treitel: 1. Terms implied by custom, 2. Terms implied by statute, 3. Terms implied by the courts - M.P. Furmston, Cheshire and Fifoot's Law of Contract, Tenth Edition (London: Butterworths, 1981) at 125-128 [hereinafter Cheshire & Fifoot]. This thesis has adopted Treitel's classification of terms implied in fact, terms implied in law and terms implied by custom or usage, taking into consideration the common American notion of implied conditions, promises and warranties.

⁴³ [1967] 3 All E.R. 1064.

⁴⁴ See, however, Spring v. National Amalgamated Stevedores and Dockers Society, [1956] 2 All E.R. 221. Compare to KC Sethia (1944) Ltd. v. Partabmull Rameshwar, [1950] 1 All Rep. 51, aff'd [1951] 2 All E.R. 352; Lister v. Romford Ice and Cold Storage Co. Ltd., [1957] A.C. 555; Luxor (Eastbourne) Ltd. v. Cooper, [1941] A.C. 108; Shell (U.K.) Ltd. v. Lostock Garages Ltd., [1976] 1 W.L.R. 1187.

d. Both Tests Should be Applied Together

Phang⁴⁵ contends that the two tests should be utilised in a complementary and cumulative fashion.

For instance, the Judicial Committee of the Privy Council applied both tests, although in the Australian context, in BP Refinery (Westernport) Pty Ltd. v. President, Councillors and Ratepayers of the Shire of Hastings,⁴⁶ setting out the criteria which have to be satisfied for a term to be implied. Thus, an implied term must be:

- (a) reasonable and equitable;
- (b) necessary to give "business efficacy" to the agreement of the parties;
- (c) so evident that "it goes without saying";
- (d) capable of clear expression; and
- (e) not be out of harmony with any express term of the agreement.

e. Conditions Implied In Fact

The word "term" has a general and broader meaning than the word "condition". The word condition is often used in the law of contract in a confusing variety of senses, e.g. as synonymous with

⁴⁵ A.B.L. Phang, "Implied Terms Revisited" [1990] The J. of Business Law 394 at 396.

⁴⁶ (1977) 16 A.L.R. 363 at 376.

"term", "provision", "covenant" or "clause".⁴⁷ It is worth noting Corbin's opinion that the above-mentioned words adequately supply the need of expression and accord with the most common usage. On the other hand, there is no word other than "condition" to express an act or event which, unless it is excused, affects a contractual obligation.

Thus, a condition is a term which, if not performed, entitles the other party to treat the contract as being at an end. However, the other ("innocent") party can, if he prefers, elect to maintain the contract in existence and content himself with proceeding for damages in respect of his loss.⁴⁸

⁴⁷ The meaning of the terms "warranty" and "condition" is dissimilar in American and English law. Aaby v. States Marine Corp., 181 F. 2d 383, 1950 A.M.C. 947 (2d Cir. 1950). See classification of contractual terms to conditions, warranties and innominate terms in A.A. Mocatta, M.J. Mustill, S.C. Boyd, Scrutton on Charterparties and Bills of Lading, Nineteenth Edition (London: Sweet & Maxwell, 1984) at 75; Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha, [1962] 2 Q.B. 26 and comment in J. Swan, B.J. Reiter, Contracts, Third Edition (Toronto: Emond Montgomery Publications Limited, 1985) at 320-321, 325-327; Bunge Corporation v. Tradax, [1981] 2 Lloyd's Rep. 1 at 7 [HL]: "A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate or entitle the other party to terminate the contract. An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach" [emphasis added]. See G. Applebey, F. Meisel, "Hongkong Fir" Revisited: The House of Lords and Certainty in Contracts" (1982) LMCLQ 592.

⁴⁸ A.L. Corbin, Corbin on Contracts (St. Paul: West Publishing Co., 1960) at para. 627 [hereinafter Corbin on Contracts]; Calamari & Perillo, supra, note 8 at 438; H.O. Hunter, Modern Law of Contracts: Breach and Remedies (Boston: Warren, Gorham & Lamont, 1986) at para. 5-2; Treitel, supra, note 42 at 24.

Conditions may be classified⁴⁹ in relation to a particular point of time (conditions precedent, conditions concurrent and conditions subsequent)⁵⁰ or upon the manner in which the condition arises (express conditions and implied conditions).

Amongst implied conditions are those that arise from an implication of fact (conditions implied in fact) and others that are pure constructions of law (conditions implied in law or constructive conditions).⁵¹

One may question why the courts, when asked to resolve disputes arising out of problems relating to the interpretation of or omissions from a contract, sometimes do not limit the agreement to its express terms, but rather include also conditions that are implicit from the context of the matter or that arise from the

⁴⁹ Calamari & Perillo, supra, note 8 at 439. Restatement (Second) of Contracts does not follow the old terminology, distinguishing "conditions precedent" and "conditions subsequent", which has been criticized (para. 224, Comment e).

⁵⁰ Civil law, for instance, distinguishes casual conditions, mixed conditions, potestative conditions, resolutive or dissolving conditions and suspensive conditions, subsuming condicio under accidentalia negotii. See Korosec, supra, note 16 at 69. Conditions can be also classified as possible-impossible, lawful-unlawful, consistent-repugnant, affirmative-negative, positive-negative, single-copulative-disjunctive, independent-dependent-mutual, collateral, compulsory and inherent. See Black's Law Dictionary, supra, note 3 at 266.

⁵¹ A.L. Corbin, "Conditions in the Law of Contracts" 28 Yale L.J. 739 (1919); Corbin on Contracts, supra, note 48 at para. 563. See Restatement (Second) of Contracts, para. 5, Comment b: "Much contract law consists of rules which may be varied by agreement of parties. Such rules are sometimes stated in terms of presumed intention, and they may be thought of as implied terms of an agreement. They often rest, however, on considerations of public policy rather than on manifestation of the intention of the parties".

operation of the law itself. Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts, stated in 1897 in a speech at the dedication of a new building at Boston University:⁵²

You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.

The answer relating to conditions "implied in fact" may be found in the "business efficacy" and "officious bystander" tests. Moreover, a court may find a condition implied in fact from the usual meaning of the words in a contract, or by interpretation of parties' acts, or by a combination of these processes.

Calamari and Perillo⁵³ are of the opinion that conditions implied in fact are actually express (true) conditions, gathered from the terms of the contract as a matter of interpretation. Having such a character, they are similar to the Civil law terms implied by the nature of the contract.⁵⁴

⁵² O.W. Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at 466. See The Moorcock, (1889) 14 P.D. 64 at 68, 70.

⁵³ Calamari & Perillo, supra, note 8 at 444. Implied condition was originally an historical fiction, since it disguised the slow departure from the original conception of a condition as a term of a contract. L. Fuller, "Legal Fictions" (1930) 25 Ill. L. Rev. 513.

⁵⁴ See section III A (2) ("Terms Implied by Nature of the Contract") of this chapter.

Patterson⁵⁵ includes conditions implied in fact in constructive conditions of co-operation. He limits the meaning of constructive conditions to exchange, co-operation and frustration.

Finally, a simple and succinct definition is provided by Williams⁵⁶ who describes Corbin's conditions implied in fact as terms the parties "probably had in mind but did not trouble to express".

f. Promises Implied in Fact

A contractual term or terms, for there are usually a number of them, may amount to a "promise" in a contract. There is a distinction to be made between conditions (express or implied) and promises (express or implied) in that one cannot be liable for a breach of contract unless one breaches a promise one has made. Whether a term is a promise or a condition depends upon the intention of the parties. It is also possible, however, that the express language of a condition may be the implied language of a promise.⁵⁷

⁵⁵ E.W. Patterson, "Constructive Conditions in Contracts" 42 Colum. L. Rev. 903 (1942) at 906, 928-942.

⁵⁶ G.L. Williams, "Language and the Law" (IV) 61 L.Q. Rev. 384 (1945) at 401.

⁵⁷ For example, one party has impliedly promised to use reasonable efforts to cause the condition to occur and if it does not do this it is guilty of a breach of that promise. See Calamari & Perillo, supra, note 8 at 445-446; Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc., 259 F.2d 137 at 140 (2d Cir. 1958), cert. den. 358 U.S. 946 (1959) re promissory condition (the appellant promised to give the notice and the respondent's duty to

The use of the concept of an implied promise has a long history in the law of assumpsit (indebitatus assumpsit) where implied promises to pay debts were used as a basis of liability.⁵⁸ Corbin treats an implied promise as a promise implied in fact ("tacit" promise in contrast to a promise or contract implied in law), i.e. "a promise that the promisor himself made, but a promise that he did not put into promissory words with sufficient clearness to be called an "express promise"". He gives us a useful explanation why and how a court can find a promise by implication:⁵⁹

When a court finds a promise by implication, its procedure may be nothing more than the ordinary interpretation of word symbols; it may be the interpretation of person's acts and other conduct not including words; it may be the judicial determination that a legal duty exists, stating the result in the language of promise without doing anything that can properly be called interpretation; or it may be a combination of any two of these or all three at once.

In other words, a promise implied in fact arises from the interpretation of the promisor's words or conduct.

For instance, a contract for the transportation of cargo shipped on board a barge with privilege to the carrier to reship in whole or in part, whether on steamboats or barges, and with the privilege also of towing two or more barges at the same time, was

ship was conditioned on the receipt of the notice. The nonoccurrence of that condition precedent entitled the respondent to rescind or to treat its contractual obligations as discharged).

⁵⁸ Cheshire & Fiffoot, supra, note 42 at 14.

⁵⁹ Corbin on Contracts, supra, note 48 at paras. 561 and 562.

held to be a contract of affreightment. It was implied in that contract that the barge, as a means of transportation, would be used in conjunction with a tug to be furnished by the carrier, the two constituting together the effective instrument of carriage.⁶⁰

The court held in E.I. Du Pont De Nemours & Co. v. Claiborne-Reno Co.⁶¹, that neither express words of covenant, nor any particular technical words, nor any special form of words, were necessary in a sales agency contract in order to charge a party with a covenant, i.e. a promise.

There are many cases in which contracts containing clearly expressed promises have been found to contain other promises by implication. Sometimes it is practically impossible to conclude whether a promise is implied in fact or whether it is implied in law (e.g. the promise of good faith). In Colgate v. James T. White & Co.⁶², where the complainant indicated that he would give facts concerning his life for use in a biography only if the biography were issued under the auspices of the federal government, it was held that there was an implied promise that they would not be otherwise used. It is surely apparent that such an implication arises necessarily from the fundamental assumption of the law (and not from facts) that all promises are to be presumed to be based on good faith.

⁶⁰ Sacramento Nav. Co. v. Salz, 273 U.S. 326 (1927) at 328.

⁶¹ 64 F.2d 224 (8th Cir. 1933) at 227. See also Hale v. Finch, 104 U.S. 261 (1881) (re sale of a steamboat).

⁶² 180 F. 882 (2d Cir. 1910) at 886.

Finally, the circumstances surrounding an express contract and what is to be performed thereunder may raise implied incidental agreements or promises not directly involving the subject-matter expressly dealt with.⁶³

g. Contracts Implied in Fact

An entire contract, i.e. one generally comprising several promises (e.g. a promise to carry goods, a promise to pay freight, a promise to proceed without deviation), may be implied in fact when it is inferred from an act or the conduct of the parties, rather than from the expressly written or spoken words.⁶⁴ The parties have acted as if there were an agreement, but they have not expressed various portions of the contract other than by their actions.

Thus, a contract implied in fact is merely a factual

⁶³ Wheeling & L.E.R. Co. v. Carpenter, 218 F. 273 (6th Cir. 1914). It was held in Charlotte Aircraft Corp. v. Braniff Airways, Inc., 497 F.2d 1016 (5th Cir. 1974) at 1017, that there was an implied agreement that the plaintiff would be paid a reasonable commission. Similarly, under New York law, the mere silence of a sales agreement as to price does not render the agreement uncertain and unenforceable since, by implication, the agreement is held to be for a price at market or current rates; A.M. Webb & Co. v. Robert P. Miller Co., 157 F.2d 865 (3d Cir. 1946) at 867.

⁶⁴ Calamari & Perillo, supra, note 8 at 19; Baltimore Mail S.S. Co. v. U.S., 76 F.2d 582 (4th Cir. 1935) at 585; Baltimore & Ohio R.R. v. United States, 261 U.S. 592 at 597 (an agreement implied in fact is founded upon a meeting of minds, which, although not embodied in an express contract, is inferred as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding).

description⁶⁵ although it may have important legal effects.

For instance, it was determined on the basis of the Brandt v. Liverpool⁶⁶ doctrine, that the title to sue on a contract can be established where the claimant is a party to an implied contract with the shipowner. In this case, Lord Justice Scrutton said that:

while it could not as a matter of law be said that by presenting a bill of lading the person who presented it became liable to the terms of the bill of lading, there might as a matter of fact be inferred a contract from presenting the bill of lading and taking the goods. In every case that has been reported the question which was discussed seems to have been, Was the person who presented the bill of lading and took the goods bound to comply with the conditions which had to be performed by the owner of the goods; was he bound to pay freight, or demurrage, or any other specific charge mentioned in the bill of lading?
[Emphasis added]

This doctrine has been extended to cases where no bill of lading was presented, but merely an undertaking to do so was given⁶⁷, or where the receiver presented a delivery order which referred to the bill of lading.⁶⁸

In the case of The Aramis⁶⁹, the Court of Appeal imposed certain limits on the facility with which one should imply a contract, with all of its remedies, from a pure situation of fact.

⁶⁵ Hunter, supra, note 48 at para. 9-4.

⁶⁶ [1924] 1 K.B. 575.

⁶⁷ The Elli 2, [1985] 1 Lloyd's Rep. 107.

⁶⁸ The Dona Mari, [1974] W.L.R. 341.

⁶⁹ [1987] 2 Lloyd's Rep. 58. See G.H. Treitel, "Bills of Lading and Implied Contract" [1989] 2 LMCLQ 162.

However, that decision has been now distinguished by a further Court of Appeal judgement in The Captain Gregos (No. 2)⁷⁰, where the contract was implied even though there was no evidence of what had in fact happened at the discharge port.

Thus, it seems that the Brandt v. Liverpool principle is now a well accepted legal rule supporting the proposition that contracts may be implied solely from factual circumstances and without there being any requirement of expression in an oral or verbal sense.⁷¹

2. Terms Implied in Law

a. Definition of Terms "Implied in Law"

Some conditions, warranties and promises implied in law are based on judicial decisions. Others owe their origin to statutes. Terms are implied "in law" by the courts on the basis of principles of fairness or policy or in consequence of rules of law. Such implications usually have nothing to do with the intention of the

⁷⁰ [1990] 2 Lloyd's Rep. 395 [C.A.]. See also Mitsui & Co. Ltd. v. Novorossiysk Shipping Co. (The "Gudermes"), [1991] 1 Lloyd's Rep. 456 [Q.B. (Com. Ct.)] where The Elli, The Aramis and The Captain Gregos were applied. The court held that no implied contract could be inferred unless it was necessary to give reality to the commercial transaction. However, it was necessary in this case to imply a direct contractual relationship between the plaintiffs and the defendants.

⁷¹ See "Title to Sue - The "Captain Gregos (No. 2)"", Clifford Chance Maritime Review, October 1990 No.5.

parties.⁷²

As stated on page 41 of this thesis, Common law terms implied in law are similar to Civil law terms implied in law but the latter are generally not based on judicial decisions.

The leading British authority with respect to terms implied in law is the House of Lords' 1976 decision of Liverpool City Council v. Irwin⁷³ which develops the distinction between "terms implied in fact" and "terms implied in law".⁷⁴ The Court utilised broad policy reasons premised upon the criterion of reasonableness in order to ascertain whether a term should be implied in a particular class of contracts, even if this would be contrary to the actual or presumed intention of the parties.

In the recent judgement of the Court of Appeal in The Bank of Nova Scotia v. Hellenic Mutual War Risks Associates Ltd. (The "Good Luck")⁷⁵ both categories of implied terms were considered and

⁷² Williams, supra, note 56 at 401.

⁷³ [1977] A.C. 239. The House of Lords implied several covenants regarding the contractual relationship between landlord and tenant. The Court utilised the criterion of "reasonableness", refusing to impose an absolute obligation upon the landlords themselves.

⁷⁴ "Terms implied in law" were first referred to in Lister v. Romford Ice and Cold Storage Co. Ltd., [1957] A.C. 555, which is, according to Phang, stronger authority than the Liverpool City Council decision. See Phang, supra, note 45 at 404.

⁷⁵ [1989] 2 Lloyd's Rep. 238 [C.A.]. The Court of Appeal held that the defendants, who were mutual war risks insurers, were under no implied duty to disclose to the plaintiff bank (which had provided finance for the borrower shipping group who were the assured and owners of the "Good Hope") the fact that the defendants knew that the shipowners were dishonestly jeopardising the cover provided by them in fraud of the plaintiff bank.

it would appear that where a party fails to obtain a term "implied in law" (the broader category) he would almost certainly fail to obtain a term "implied in fact" (the narrower category). It is interesting to note the line drawn by the Court between the law, on the one hand, and mere moral considerations, on the other hand, to the effect that immorality does not by itself provide a basis for implying a term in a contract but merely serves as an incentive to a court to imply the term.⁷⁶

Phang⁷⁷ warns that when policy factors are involved, legal uncertainty is perforce increased. He also argues that:

in so far as "terms implied in law" are concerned, the courts ought, in view of the enormous potential "legislative" power wielded as well as the manifold problems of (especially) application, to be extremely reluctant to imply terms of this nature. It might even be better that this broad category be abolished altogether. This would not, it is submitted, be a retrogressive step since the courts would still be free to imply terms under either the "business efficacy" and/or "officious bystander" tests.⁷⁸ [Emphasis added]

b. Codification of Terms Implied in Law

There has been an increasing tendency over the years for

⁷⁶ Ibid. at 269.

⁷⁷ Phang, supra, note 45 at 409.

⁷⁸ Phang, supra, note 45.

the legislators to codify into statutes the implied terms.⁷⁹ Obvious examples are the provisions of the United Kingdom Marine Insurance Act (1906) and the Sale of Goods Act (1979), the United States Uniform Commercial Code, and the Ontario Sale of Goods Act (1980).⁸⁰

Generally, terms implied in law can be excluded by express contrary provisions. However, at least in the United Kingdom, the power to exclude terms implied in law is now restricted by the Unfair Contract Terms Act (1977)⁸¹ which refers to the Sale of

⁷⁹ Treitel, supra, note 42 at 64.

⁸⁰ Cheshire & Fifoot, supra, note 42 at 118.

⁸¹ It is to be noted that the Act expressly exempts, inter alia, charterparties from the effects of its provisions, except for two stipulations:

1. Modification of the Misrepresentation Act, 1967, section 3, which is now:

3. If a contract contains a term which would exclude or restrict:

- (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made to him before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such a misrepresentation;

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act, 1977; and it is for those claiming to show that it does.

2. (1) A person cannot by reference to a contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other types of loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirements of

Goods Act (1979) which latter act amended the earlier Supply of Goods (Implied Terms) Act (1973). The implied terms as amended by the 1979 Act have been extended to all contracts of hire/purchase, and the new comprehensive provisions prohibit or limit the power of the seller (owner) to exclude these implied obligations.

For example, section 6(1) of the Unfair Contract Terms Act provides that liability in respect of a breach of section 12 of the Sale of Goods Act cannot be excluded or restricted by a term in a contract. Section 12 stipulates that there is an implied condition on the part of the seller that in the case of sale, he has the right to sell the goods, and in the case of an agreement to sell, he will have the same right at the time when title in the property is to pass. Section 6(1) also applies to the corresponding implied condition in hire/purchase contracts. Section 6(2)(3) provides that no exclusion of the seller's duties under sections 13-15 of the Sale of Goods Act is permissible "as against a person dealing as a consumer", and is only permissible subject to the test of reasonableness in other cases.⁸²

reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence, a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

See F.M. Ventris, Tanker Voyage Charter Parties (Bradford-on-Avon: Kluwer Law Publishers, 1986) at 3-4.

⁸² See P.S. Atyah, The Sale of Goods, Sixth Edition (London: Pitman, 1980) at 159 et seq., and also at 66, 136 (implied warranties), 397 (implied conditions in hire/purchase), 126 et seq. (implied terms in sale of goods by sample), 114 et seq. (implied warranty that goods fit for purpose) etc.

Treitel⁸³ states that an implied term which cannot be excluded has nothing to do with the intention of the parties and is therefore very different in its legal nature from a term implied in fact. Atiyah⁸⁴ submits that "for no apparent reason some contractual obligations are treated as legal duties, created by law, while others are treated as implied terms, theoretically created by the intention of the parties".

c. Conditions Implied in Law (Constructive Conditions)

i. Definition

Conditions implied in law or constructive conditions are conditions that are such because of a rule of law, and are not based on the interpretation of a promise or agreement.⁸⁵

⁸³ Treitel, supra, note 42 at 64; Liverpool City Council v. Irwin, [1977] A.C. 239. See English and Canadian jurisprudence concerning implied terms in Waddams, supra, note 6 at 365 et seq. who says that the power to imply terms in contracts is a flexible judicial tool (at 366). A term is implied when the court thinks the implication necessary to avoid an agreement that would be unfair (at 370).

⁸⁴ P.S. Atiyah, An Introduction to the Law of Contract, Third Edition (Oxford: Clarendon Press, 1981) at 177. The controversy between the proponents of the implied term theory, and the positive rule of law theory has come to a head in the law of frustration (at 176-183). Compare to A.J. Kerr, The Principles of the Law of Contract (Durban: Butterworths, 1967) at 5, who argues that terms or obligations imposed by law which the parties cannot escape should be distinguished from those which are determined by law only if the parties make no other agreement.

⁸⁵ See (first) Restatement of Contracts at para. 253. The distinction between "express" and "constructive" conditions, formerly set out in paras. 252 and 253, as well as the distinction

The use of the term "constructive" rather than "implied in law" was urged by Corbin in 1919 in order to emphasize that the courts construct a condition in the interests of justice even though the condition was not put into the contract by the parties either expressis verbis or implicite.⁸⁶

ii. The Sale of Goods Act (1979)

There are three primary implied conditions laid down in sections 13, 14(2), and 14(3) of the Sale of Goods Act (1979).

Firstly, there is the implied condition that the goods must correspond with their description. The next implied condition is that the goods must be in a condition which permits of their sale. Finally, the goods must be fit for the purpose for which they were sold. In addition, the Act contains implied conditions in sales by sample (s. 15), and implied conditions arising by trade usage (s. 14(4)).

Normal remedies to the innocent party, where there is a breach of condition are (a) repudiation of the contract, and/or (b)

between conditions implied in fact and constructive conditions, is now dealt with in Restatement (Second) of Contracts at para. 226, Comment c: "Whether a court is inferring a condition from the parties' unclear expression of intention or constructing one as a matter of lawmaking is often unclear, because the processes overlap: the values that encourage a court to construct a condition were usually present when the parties were negotiating and thus support inferences about their actual intentions'.

⁸⁶ A.L. Corbin, "Conditions in the Law of Contracts" 28 Yale L.J. 739 (1919); Calamari & Perillo, supra, note 8 at 451.

a claim for damages.⁸⁷

d. Promises and/or Contracts Implied in Law

i. Definition

Promises implied in law can be described as a legal duty created otherwise than by assent and without any words or conduct that may be interpreted as promissory. Similarly, a contract implied in law (constructive or quasi contract) is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended.⁸⁸ It is an intellectual construction and its principal function is the prevention of unjust enrichment.⁸⁹

ii. Duty of Good Faith

A good example of a promise or covenant implied in law is the duty of good faith which is now favoured in American law, by

⁸⁷ See Atiyah, supra, note 82 at 85-129.

⁸⁸ See Baltimore Mail S.S. Co. v. U.S., 76 F.2d 582 (4th Cir. 1935) at 585; Balt. & Ohio R.R. v. United States, 261 U.S. 592 (1923) at 597 (an agreement "implied in law" is more aptly termed a constructive or quasi contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress); Corbin on Contracts, supra, note 48 at para. 561; S. Williston, Wald's Pollock on Contracts (Littleton: Rothman, 1988) at 10.

⁸⁹ Hunter, supra, note 48 at para. 9-4; Calamari & Perillo, supra, note 8 at 20.

paragraph 205 of the Restatement (Second) of Contracts, adopted by the American Law Institute in 1979 and published in final form in 1981:⁹⁰

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

It was accepted many years ago that every contract contains the implied term that neither party will do anything to destroy or injure the other party's right to receive the fruits of the contract. In other words, in every contract there exists an implied covenant of good faith and fair dealing⁹¹, i.e. an implied obligation not to engage in conduct which might be classified as being in "bad faith".⁹²

The Common law duty of good faith probably has its origin in the Civil law doctrine of equity or, in other words, the

⁹⁰ See Summers, supra, note 6 at 810 et seq., where he provides the reader with a comprehensive study of the general duty of good faith.

⁹¹ Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79 (1933) at 85-87; Uproar Co. v. National Broadcasting Co., 81 F.2d 373 (1st Cir. 1936) at 377; Manners v. Morosco, 252 U.S. 317 (1920) at 326.

⁹² Tymshare, Inc. v. Covell, 727 F.2d 1145 (D.C. Cir. 1984). See also Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co., 668 F. Supp. 906 (D. Del. 1987) at 920 (duty of good faith is a contract term implied by courts in Common law to prevent one party from unfairly taking advantage of the other); Bailey v. Chattem, Inc., 684 F.2d 386 (6th Cir. 1982) (re implied contractual duty to use "best efforts"); Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258 (S.D.N.Y. 1978), aff'd 601 F.2d 609 (2nd Cir. 1979) (re "best efforts").

principles of natural justice and fairness. By contrast, Hunter⁹³ argues that the doctrine that every contract includes an implied term of good faith derives from Mr. Justice Cardozo's opinion in Wood v. Lucy, Lady Duff-Gordon.⁹⁴

e. Warranties Implied in Law

i. Adoption into Statutes

The law of implied warranty has evolved, similarly to the Civil law, from the law of sale and the law of marine insurance. Implied warranties are either imposed by the operation of law or they develop from common trade practices.⁹⁵

There are various statutes which have codified most of the law of implied warranty. For example, section 12(2) of the Sale of Goods Act (1979) provides that (except where a limited interest is sold) there is an implied warranty that (a) the goods are free, and will remain free until the time when the property passes, from any

⁹³ H.O. Hunter, Modern Law of Contracts: Formation, Performance, and Relationship of Parties (Boston: Warren, Gorham & Lamont, 1987) at para. 20.

⁹⁴ 222 N.Y. 88, 118 N.E. 214 (1917) (a promise to use reasonable efforts to place the defendant's indorsements and market her designs is fairly to be implied, it may be "instinct with an obligation").

⁹⁵ The word "warranty", in its most common application, is used to describe the quality or quantity of goods delivered in a typical chattel sale. See R.E. Scott, D.L. Leslie, Contract Law and Theory (Charlottesville: The Michie Company, 1988) at 575; Hunter, supra, note 48 at paras. 4-2, 4-14.

charge or encumbrance not disclosed or known to the buyer before the contract is made, and (b) the buyer will enjoy quiet possession of the goods as against the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

"Warranty" is defined as an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such a contract, the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated (s. 61).

Warranties of fitness, merchantability and title of goods are to be found in the United States Uniform Commercial Code, the Ontario Consumer Protection Act and the Sale of Goods Act, and others.⁹⁶

ii. Examples of Case Law

The first judicial decision dealing with implied warranties

⁹⁶ See U.C.C. at ss. 2-314 (Implied Warranty: Merchantability; Usage of Trade); 2-315 (Implied Warranty: Fitness for Particular Purpose); Hawkland U.C.C. Series at para. 2-314:01 et seq. (re bibliography and jurisprudence on implied warranties); Collins Co., Ltd. v. Carboline Co., 7 U.C.C. Rep. Serv. 2d 616, 125 Ill. 2d 498, 532 N.E. 2d 834 (1988), In re Repco Products Corp., 8 U.C.C. Rep. Serv. 2d 950, 100 B.R. 184 (B.C. E.D. Pa. 1989) (the court indicated that under circumstances both in express and implied warranty of merchantability could be found to exist); Ingram River Equipment, Inc. v. Pott Industries, Inc., 3 U.C.C. Rep. Serv. 2d 977, 816 F.2d 1231 (8th Cir. 1987) (re fitness of goods). See the Consumer Protection Act, R.S.O. 1980, c.87, s. 34(2); the proposed draft of the Uniform Sales of Goods Act, ss. 5.13, 5.14(1),(2), of the Uniform Law Conference of Canada, which expands considerably the Sale of Goods Act, R.S.O. 1980, c.462; Swan & Reiter, supra, note 47 at 396-400; Waddams, supra, note 6 at 305-306.

was probably Gardiner v. Gray⁹⁷ in 1815, where the court found an implied warranty that the goods should be of a merchantable quality of the denomination mentioned in the contract. The purchaser had a right to expect a saleable article answering the description in the contract. Without any particular warranty, this was an implied term in every such contract. Where there was no opportunity to inspect the commodity, the maxim of caveat emptor did not apply.

In Brown v. Edgington⁹⁸ an implied warranty arose out of the contract that the commodity (rope) was fit and proper for the purpose for which it had been ordered. To invoke an implied warranty, it was not necessary that the vendor should have also been, or should have represented itself to be, the manufacturer when it had been told of the purpose for which the goods were required, and where the purchaser did not select them itself, but relied on the skill and judgement of the vendor.⁹⁹

⁹⁷ (1815) 4 Camp. 144, 171 E.R. 46. This decision was applied in Jones v. Bright, (1829) 5 Bing. 533; Powell v. Horton, (1836) 2 Bing. N.C. 668; Shepard v. Pybus, (1842) 3 Man. & G. 868; Jones v. Just, (1868) L.R. 3 Q.B. 197; and it was explained and applied in Randall v. Newson, (1877) 2 Q.B.D. 102, etc.

⁹⁸ (1841) 2 Man. & G. 279, 133 E.R. 751.

⁹⁹ See also Archbolds (Freightage) Ltd. v. S. Spanglett, Ltd., [1961] 1 Q.B. 374, [1961] 1 All E.R. 417 [C.A.] at 427, where Lord Justice Devlin put it (notwithstanding that the issue of warranty was not raised in the pleadings or at trial) that in a case of transportation there was, unless the circumstances excluded it, an implied warranty that the van was properly licensed for the service for which it was required. See Swan & Reiter, supra, note 47 at 674-679; Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 266 SE 2d 534 (1976); Algoma Truck & Tractor Sales Ltd. v. Bert's Auto Supply Ltd., 68 D.L.R. (2d) 363 (1968) (the oral assurance given by a seller of a reconditioned cylinder head that it is guaranteed is a sufficient foundation for the implied inclusion by implication of the conditions of s. 15 of the Ontario Sale of Goods Act, that the

iii. Difference Between English and American Law

The meaning of the term "warranty" as it relates to charterparties is different in American law than in English law. The general American view is that a "warranty" is a guaranty that a certain fact is true.

For instance, when a shipowner warrants that a certain situation exists, it promises that it does exist, and the obligation of the charterer is conditioned upon the existence of that situation. Any breach of warranty under American law permits rescission of the contract, as well as an action for damages.¹⁰⁰

Conversely, the English law defines "warranty" as a term, breach of which gives rise to a claim in damages but does not terminate or entitle the other party to terminate the contract. Unless the contract makes it clear, either by express provision or by a necessary implication arising from its nature, purpose or circumstances that a particular stipulation is a warranty (or a condition), it is an "innominate term", the remedy for a breach of which depends upon the nature, consequences, and effect of the breach.¹⁰¹

goods will be reasonably fit for the intended purposes and of merchantable quality).

¹⁰⁰ See Aaby v. States Marine Corp., 181 F. 2d 383, 1950 A.M.C. 947 (2d Cir. 1950); G. Gilmore, C.L. Black, The Law of Admiralty, Second Edition (Mineola: The Foundation Press, Inc., 1975) at 200-201.

¹⁰¹ Bunge Corporation v. Tradax, [1981] 2 Lloyd's Rep. 1 at 7 [H.L.]; Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha, [1962] 2 Q.B. 26.

3. Terms Implied by Custom, Usage and Practice

It has long been settled, in both Common and Civil law, that in commercial and other transactions, extrinsic evidence of custom and usage is admissible to add implied incidents to written contracts in matters with respect to which they are silent, provided that if expressed in the written contract they would not make its terms or its tenor insensible or inconsistent.

Terms implied by custom, usage and practice must serve to reinforce the express terms and assist their general purpose and policy. They come not to destroy but to fulfil the law. This is based upon the presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but rather create a contract relying upon established and prevailing usages.¹⁰²

Thus, the contractual terms, which the custom or the usage imports, are already tacitly incorporated as a part, though unexpressed part, of the agreement between the parties: In contractibus, tacite insunt quae sunt moris et consuetudinis.¹⁰³

However, it is a well established principle of law that terms which are expressed snuff out those which are implied:

¹⁰² Hutton v. Warren, (1836) 1 M. & W. 465 at 474-475; London Export Corp'n. Ltd. v. Jubilee Coffee Roasting Co., [1958] 2 All E.R. 411 at 420. Treitel is of opinion that customary terms are best regarded as incorporated on grounds of convenience, irrespective of the intention of the parties; see Treitel, supra, note 42 at 65-66.

¹⁰³ Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co. Ltd., [1916] 1 A.C. 314 at 331.

Expressum facit cessare tacitum.

It was held, for instance, in Les Affreteurs Reunis Societe Anonyme v. Walford¹⁰⁴, that a custom by which a commission was payable only if hire was earned under the time charter, could not be set up by the shipowner as an answer to the broker's claim, inasmuch as it was inconsistent with the terms of the clause in the time charterparty.

In Kum v. Wah Tat Bank Ltd.¹⁰⁵ it was held that a document of title might be created by local custom, but that the endorsement "not negotiable" on the document defeated the custom.

A custom may override a rule of law (ius dispositivum) which would otherwise apply. However, custom in itself is not law for it depends for its operation upon contract.¹⁰⁶

For practice to amount to a usage recognized by the courts, it must be certain¹⁰⁷ (clearly established), notorious (so well known in the market in which it is alleged to exist that those who conduct business in that market¹⁰⁸ contract with the usage as an

¹⁰⁴ [1919] A.C. 801.

¹⁰⁵ [1971] 1 Lloyd's Rep. 439.

¹⁰⁶ Carver, supra, note 9 at para. 906.

¹⁰⁷ For example, under New York law, custom and usage evidence, to supply a term omitted from an agreement, must establish that the omitted term is fixed and invariable in the particular industry; Hutner v. Greene, 734 F. 2d 896 (2d Cir. 1984).

¹⁰⁸ In Robinson v. Mollet, (1875) L.R. 7 H.L. 802, for example, a custom or usage in the tallow market of London was held not binding on a purchaser of tallow who resided in Liverpool; see Goodwin v. Roberts, (1876) 1 App. Cas. 476.

implied term) and reasonable. The burden, of course, lies on those alleging the usage to establish it, i.e. to prove it by way of expert evidence.¹⁰⁹

Finally, a course of dealing that has been established as being normal and expected will also be incorporated into a contract by way of implication.

The Supreme Court of Canada held in F.W. Pirie Co. v. Canadian National Railway Co.¹¹⁰ that, in determining whether a practice amounted to a contractual provision, the governing characteristics of the practice were notoriety, certainty, reasonableness, and reliability.

It was held in Ocean Transp. Line, Inc. v. American Philippine Fiber Indus., Inc.¹¹¹, that the parties' interpretation of the contract in practice, prior to litigation, was compelling evidence of the parties' intent. The obligation to pay a reasonable rate of discharge port demurrage was implied in the contract of

¹⁰⁹ Cunliffe-Owen v. Teather & Greenwood, [1967] 3 All E.R. 561, [1967] 1 W.L.R. 1421; Georgia Const. Co. v. Pac. Great Eastern Ry. Co., [1929] S.C.R. 630.

¹¹⁰ [1943] S.C.R. 275. See also Premier Lumber Co. v. Grand Trunk Pacific Railway Co., [1923] S.C.R. 84; Western Can. Flour Mills Co. v. Can. Nor. Ry., [1927] 3 D.L.R. 569 (Man. C.A.); Tymshare, Inc. v. Covell, 727 F. 2d 1145 (D.C. Cir. 1984) (historical interpretation given to a contract by the parties is strong evidence of its meaning); National Farmers Organiz. v. Kinsley Bank, 731 F. 2d 1464 (10th Cir. 1984) (if parties mutually intend to make a contract, their agreements may be enforced even if they have left matters to be determined in the future, provided that such matters may be determined either by virtue of their contract, by custom between parties, or by standard commercial practice).

¹¹¹ 743 F. 2d 85 (2d Cir. 1984).

affreightment which specifically provided for loading port demurrage.

IV. DIFFERENT APPROACHES TO INTERPRETATION AND IMPLICATION IN THE LAW OF CONTRACT

A. Objective Textual Approach

The origin of the objective textual approach goes back to the seventeenth century when the courts sought to confine themselves to the bare framework provided by the parties through the letter of their contract language.¹¹²

The "four corners" doctrine and the "traditional plain-meaning" rule barred parties from using extrinsic evidence to aid interpretation. The contract should be taken as it was ("objectively" and "textually") and if it appeared clear and unambiguous in its terms, its meaning was to be determined from the four corners of the instrument, without resort to extrinsic evidence.¹¹³

¹¹² See Chandelor v. Lopus, 79 Eng. Rep. 3 (Ex Cham. 1603); Nichols v. Raynbred, 80 Eng. Rep. 238 (K.B. 1615); Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1647).

¹¹³ C.J. Goetz, R.E. Scott, "The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms" 73 Calif. L. Rev. 261 (1985) at 273; Chevron USA, Inc. v. Belco Petroleum Corp., 755 F. 2d 1151 (5th Cir. 1985) at 1154 (under Louisiana's four corners rule, regulated by art. 2046 C.C. La., the fact that both parties signed an explicit, unambiguous contract is conclusive evidence of their mutual intent); NRM Corp. v. Hercules, Inc., 758 F. 2d 676 (D.C. Cir. 1985); Brobeck, Phleger & Harrison v. Telex Corp., 602 F. 2d 866 (9th Cir.), cert. denied,

The Common law courts merely interpreted the consensus ad idem (the meeting of the minds) of the parties and, in order to give effect to promises, adopted the Latin doctrine pacta sunt servanda, by which agreements were to be binding in law ("agreements and stipulations of the parties to a contract must be observed").¹¹⁴ Freedom of contract was the natural consequence of "laissez-faire", the freedom to agree.

The approach is sometimes referred to as "intentionalism", especially with respect to international trade obligations, to the effect that the commercial contract itself "is surely a more direct test of mercantile hopes and aspirations than is the judicial imagination".¹¹⁵

It is to be noted, however, that the Common law parol evidence rule only excludes extrinsic evidence as to the express terms of a written contract. On the other hand, such evidence is admissible to show that a term ought to be implied.¹¹⁶

444 U.S. 981 (1979).

¹¹⁴ L.E. Trakman, The Law Merchant: The Evolution of Commercial Law (Colorado: Littleton, 1983) at 63.

¹¹⁵ See Trakman, supra, note 114 at 71, and at 170-171 (see note 51), where he states that the "intentionalist" approach can be traced to the school of analytical positivism (e.g. Kelsen). The court, in order to be truly "scientific" ("pure") in terms of Kelsen's logic, was obliged to reflect only upon the terms of the contract itself in determining the significance of business agreements.

¹¹⁶ Treitel, supra, note 42 at 67; Scott & Leslie, supra, note 95 at 472-491.

B. Subjective Contextual Approach

It is submitted that Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.¹¹⁷ supports the objective textual approach. However, it also contains "the seeds of a much more expansive approach to contract interpretation, i.e. contextualism, in which a court takes into account evidence extrinsic to the agreement".¹¹⁸

A contract therefore includes not only promises set forth in express words but, in addition, all such implied provisions as are indispensable to make effective the intention of the parties and which arise from the language of the contract and the circumstances under which it was made.¹¹⁹

Similarly, the Common law approach towards the non-performance of international trade obligations evolves from "intentionalism" into creative "constructionalism", which construes promises in accordance with judicial standards that transcend the literal framework of commerce.¹²⁰

Moreover, it is an old maxim of English law that the words of a contract must be interpreted so as to give them meaning, that

¹¹⁷ 235 N.Y. 338, 139 N.E. 470 (1923).

¹¹⁸ Hunter, supra, note 93 at para. 20-5.

¹¹⁹ Hickman, Williams & Co. v. Ingram Coal Co., 601 F. Supp. 5 (M.D. Term. 1984) at 6, citing Sacramento Nav. Co. v. Salz, 273 U.S. 326 (1927); Karatsos v. Cheung, 670 F. Supp. 111 (S.D.N.Y. 1987) at 113 (a contract need not be fixed with complete and perfect certainty in order to have legal effect).

¹²⁰ Trakman, supra, note 114 at 69-70.

the subject-matter may rather be given life than be ignored, or in other words, that the contract must have effect, where at all possible: Verba ita sunt intelligenda ut res magis valeat quam pereat.¹²¹ The maxim, however, does not mean that the court must fabricate a contract for the parties.¹²²

The subjective contextual approach inspired the drafters of the Uniform Commercial Code and the Restatement (Second) of Contracts.¹²³

To summarize,¹²⁴ if there are ambiguities or omissions in a contract, the court when applying the subjective contextual approach will probably look to:

1. The course of the performance between the parties;
2. Trade usage;
3. The mutual obligation of good faith;
4. "Best-efforts" clauses, and
5. The views of the commentators.

¹²¹ Hillas v. Arcos, (1932) 147 L.T. 503 at 514; Adamastos Shipping Co., Ltd. v. Anglo-Saxon Petroleum Co., Ltd., [1959] A.C. 133 at 161, 186.

¹²² Ibid.

¹²³ See Goetz & Scott, supra, note 113 at 274.

¹²⁴ See, e.g. Hunter, supra, note 93 at para. 20.

C. Goetz and Scott's Reassessment ¹²⁵

According to Goetz and Scott, the purpose of contract interpretation is neither to determine the fixed, objective meaning of a written agreement ("textualism") nor to ascertain the true or subjective understanding of individual contracting parties ("contextualism").

Thus, we need a new approach which requires a reassessment of traditional notions about the purpose of contractual interpretation. The state must motivate contracting parties into taking sufficient precautions against the risk of their own formulation errors (administrative errors, ambiguities, errors of incompleteness, inconsistent terms).

In other words, the underlying objective of contractual interpretation and formulation is the development of both express and implied terms that will reduce the costs of contracting and the risk of formulating errors. On the other hand, there are tensions between implied and express terms and between standard and unconventional forms of expression which cannot be solved by the expanded choice postulate (implied terms expand contractors' choices by providing standardized preformulations; atypical parties may replace the state-supplied terms).

In resolving a dispute concerning terms between two parties, courts strive to reach a decision that allocates the loss

¹²⁵ The following comment is a short summary of Goetz and Scott's article, supra, note 113.

as the parties seem to have meant it to be allocated when they originally agreed to the contractual terms. Such a decision also provides proper precedent to future parties who will write their contracts with the court's decision in mind. Thus, courts implicitly employ both contextualist and textualist methods because either the former or the latter standing alone is necessarily incomplete.¹²⁶

D. Farnsworth's Process of Interpretation and Inference ¹²⁷

Farnsworth advocates an approach that avoids the use of implied terms for all "disputes over omission in contracts". He assumes that the parties form expectations with respect to only a limited number of situations, and that only some of these expectations are, in turn, formulated as terms and reduced to contract language.

The process of determining whether there is a casus omissi is that of interpretation. The process of resolving such a case is that of inference, based either on actual expectations or on general principles of fairness and justice. Farnsworth is convinced that "[i]t would be a significant contribution to clarity of thought in this important area of contract law if courts would abandon the facade of the implied term and expose the process of

¹²⁶ See the interpretation of Goetz and Scott's article in Scott & Leslie, supra, note 95 at 517.

¹²⁷ Farnsworth, supra, note 7.

inference that lies behind it".¹²⁸

V. CONCLUSION

The parties to a contract may state their undertakings in express words in the contract itself, but in practice a commercial contract never states all of the primary obligations exhaustively. Many of them are left to be incorporated by implication. The rules of law relating to the process of implication, i.e. to implied terms, are as applicable to voyage charterparties (and to maritime law generally) as to other kinds of contract.

The notion of implied terms of contract appears to derive from Civil law (based on Roman law) which recognizes obligations implied by the nature of the contract, obligations implied by equity, obligations implied by usage and obligations implied by law. It is to be noted, however, that the Civil law proceeds from rules and the Common law from the intention of the parties as found by the construction of the contract. Apart from different judicial approaches, and a slight difference in terminology which is present even within Common law countries, it is not easy to see any dissimilarity between Common law implied terms and Civil law implied obligations.

Firstly, the inclusion of terms which are only of the nature of the contract follows naturally upon the conclusion of the contract, unless they are excluded by the express agreement of the

¹²⁸ Farnsworth, supra, note 7 at 879.

parties. Such terms are similar to Common law terms which are implied in fact in order to give such business efficacy to a particular transaction as must have been intended by the contracting parties, or they are implied because they are so obvious that they go "without saying".

Secondly, it is implied in all contracts, under both Civil and Common law, that one party owes good faith to the other party, with all the consequences which equity may demand. Such obligation should not be excluded by the parties.

Thirdly, it has long been settled, in both Civil and Common law, that contracts in cases of doubtful meaning are construed by the established and known usage of the trade, and that such usage is held to be a part of the contract when it is not otherwise expressly provided.

Fourthly, Common law terms implied in law are similar to Civil law terms implied by law. However, the latter are usually not based on judicial decisions. Generally, all implied terms including terms implied in law can be excluded by express contrary provisions.

Notwithstanding the same origins and foundations of the law of implied terms and of the maritime law in Civil and Common law countries, the general principles of both legal systems do not receive identical expression or development in Civil as opposed to Common law courts. Since it can be argued that the purpose of contract interpretation is neither to determine a fixed, objective meaning of a written agreement nor to ascertain the true or

subjective understanding of the contracting parties, we need a new approach to interpretation and implication in the general law of contract as well as in maritime law. This new approach would avoid the use of implied terms for all disputes over omissions in contracts or, on the other hand, employ both contextualist and textualist methods, because either the former or the latter standing alone is necessarily incomplete. If the courts still find it necessary to imply terms, they should apply both the "business efficacy" and the "officious bystander" test in a complementary and cumulative fashion.

The Common law courts should be especially reluctant to find "terms implied in law", because terms of this nature yield an enormous potential of "legislative" power. It is often unclear whether a court is inferring a term from the contractual parties' ambiguous expression of intention or constructing one as a matter of law making. Moreover, the presence of too many publicly imposed rules may lead to a standstill and may influence the freedom of the parties to contract.

A number of Common law judicial decisions dealing with implied terms have already been codified by statutes, and it is not impossible to argue that this has been inspired by the Civil law which supplies many implied terms in the form of legislation. In both legal systems some of the implied terms, due to their importance, actually became rules of law which cannot not be excluded by express agreement.

In addition, there are several "general implied duties"

which apply to all contracts, being: the implied term or duty that each party will not take an action which he knows will substantially hinder performance by the other party; the implied term or duty that work will be done competently and not negligently; the implied duty that a contractual party should not be required to do an unlawful act, etc.

It is hoped, therefore, that it will become apparent throughout this thesis that some of the implied terms of voyage charters have been and are of the fundamental legal structure of the voyage charterparty. As a result, they should become express rules of international law, not subject to exclusion by contract, so as to remove the uncertainty and confusion which can result from the requirement to employ statutory rules of interpretation to give effect to the intention of the parties and so as to avoid the temptation to substitute (fabricate) terms by relying on implication. Codification would contribute to predictability, uniformity and justice in maritime law.

PART II

IMPLIED UNDERTAKINGS OF THE SHIPOWNER

Chapter 3

IMPLIED UNDERTAKING OF SEAWORTHINESS

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VI. CONCLUSION

"The Law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty."

Lord Mansfield in Jones v. Randall,
(1774) 1 Cowp. 37.

1. INTRODUCTION

There is poetry, irony and great truth in Hughes' saying that a vessel "is made to plow the seas, not to rot at the piers", but "with the exception of those which are used as toys by the rich, they do not plow the seas for amusement".¹

In order to accomplish its task, a ship must be fit to face the hazards of the sea and to receive, carry and care for the cargo. It is a general principle of the law of contract that the object in question be reasonably fit for its intended use. In the following pages, an attempt will be made to demonstrate that the obligation to provide a vessel in the state commonly known as "seaworthiness" is the most fundamental obligation of a shipowner under a voyage charterparty. Such an obligation is an absolute implied undertaking in both the Common law and certain Civil law systems.

However, modern international conventions have influenced the practice of chartering vessels, by replacing the absolute obligation of seaworthiness with the shipowner's obligation to exercise due diligence to make a vessel seaworthy.

In face of the need for an international convention on charterparties, one may ask whether it is more appropriate to adopt the Common law approach, i.e. converting the absolute implied obligation of seaworthiness into international law, or whether it

¹ R.M. Hughes, Handbook of Admiralty Law, Second Edition (St. Paul: West Publishing Co., 1920) at 155.

is better to adopt the exercise of due diligence approach as it is recognized in French legislation, international conventions regulating bills of lading and standard form voyage charterparties.

This chapter is primarily dedicated to a discussion of the general characteristics of the implied undertaking of seaworthiness, and an analysis of the above-mentioned question.

II. GENERAL CHARACTERISTICS OF [UN]SEAWORTHINESS

A. Definition of Seaworthiness

"Seaworthiness" is a rather strange term for the non jurist. Seaworthiness can be defined² as "fit to travel on the open sea, safe in rough weather and the quality or condition of being seaworthy". The maritime law definition of seaworthiness³ is much more precise: "This adjective [seaworthy], applied to a vessel, signifies that she is properly constructed, prepared, manned, equipped, and provided, for the voyage intended. A seaworthy vessel must, in general, be sufficiently strong and staunch and equipped with appropriate appurtenances to allow it to safely engage in trade for which it was intended".⁴

² Webster's New Universal Unabridged Dictionary, Deluxe Second Edition (New York: Dorset & Barber, 1983) at 1638.

³ See P.R. Brodie, Dictionary of Shipping and Shipbroking Terms (London: Lloyd's of London Press Ltd., 1980) at 171-172.

⁴ Black's Law Dictionary, Fifth Edition (St. Paul: West Publishing Co., 1979) at 1212.

In short, a ship is seaworthy if it is fit to encounter the hazards of the sea with reasonable safety.

A similar definition can be found in Sullivan's Marine Encyclopaedic Dictionary⁵ which states that in order for a ship to be seaworthy it must have a "sound hull", be "fully and competently crewed", and be "sufficiently fuelled and provisioned for the contemplated voyage". Moreover, all of its equipment "must be in proper working order", and if it carries any cargo, it must be cargoworthy.

Conversely, an unseaworthy vessel would be one that could not withstand the perils of an ordinary voyage at sea. It might have defective hatches and vents, and non-functioning engines, boilers and generators. It might be manned by an incompetent crew and lack the proper navigational charts and equipment, etc.⁶

B. Seaworthiness in Maritime Contract and Tort Law

The term "seaworthiness" frequently occurs expressis verbis or implicite in contracts for the hire of a ship (time,⁷ voyage and

⁵ E. Sullivan, The Marine Encyclopaedic Dictionary (London: Lloyd's of London Press Ltd., 1988) at 383.

⁶ See the examples of [un]seaworthiness in W. Tetley, Marine Cargo Claims, Third Edition (Montreal: International Shipping Publications BLAIS, 1988) at 381-388.

⁷ See M. Wilford, T. Coghlin, J.D. Kimball, Time Charters (London: Lloyd's of London Press Ltd., 1989) at 64-69; see The Toledo, 122 F. 2d 255, 1941 A.M.C. 1219 (2d Cir. 1941) certiorari denied 314 U.S. 698, 62 S. Ct. 302 (1941) (the obligation to furnish a seaworthy vessel is the same in the case of a private carrier and in the case of common carrier); Work v. Leathers, 97

demise or bareboat⁸ charterparties), in contracts of carriage of goods by sea (e.g. under bills of lading),⁹ in contracts of marine insurance (especially voyage policies)¹⁰ and in towage contracts.¹¹ In principle, seaworthiness has a similar meaning in all of these contracts.

The vessel and its owner are also under the absolute duty

U.S. (7 Otto) 379 (1878); Coca Cola Co., Tenco Division v. SS Norholt, 333 F. Supp. 946 (S.D.N.Y. 1971); E.A.S.T., Inc. of Stanford, Conn. v. M/V Alaia, 673 F. Supp. 796, 1988 A.M.C. 1396 (E.D. La. 1987), etc.

⁸ A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., 852 F. 2d 493 (9th Cir. 1988); Zidell, Inc. v. Cargo, Etc. of Barge ZPC 404, 661 F. Supp. 960, 1987 A.M.C. 2494 (W.D. Wash. 1987), etc.

⁹ See discussion about carriage of goods by sea under bills of lading, and due diligence to make the vessel seaworthy in Tetley, supra, note 6 at 369-396 (Chapter 15).

¹⁰ See, e.g. E.R.H. Ivamy, Marine Insurance, Third Edition (London: Butterworths, 1979) at 324-336; R.M. Fernandes, Marine Insurance Law of Canada (Toronto: Butterworths, 1987) at 53-60; G. Gilmore, C.L. Black, The Law of Admiralty, Second Edition (Mineola: The Foundation Press, Inc., 1975) at 63-67. For instance, there are two implied warranties of seaworthiness set out in the United Kingdom Marine Insurance Act 1906. The first is a warranty of seaworthiness of the ship (s. 39). Second implied warranty applies to voyage policies on goods, requiring that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that it is reasonably fit to carry the goods to the destination contemplated by the policy (s. 40(2)). Compare to R.W. Pritchett, "The Implied Warranty of Seaworthiness in Time Policies: the American View" [1983] 2 LMCLQ 195. See Stetson v. Insurance Co. of North America, 215 F. 186 (E.D. Pa. 1914); New Orleans, T. & M.R. Co. v. Union Marine Ins. Co., 286 F. 32, 1923 A.M.C. 183 (5th Cir. 1923); Eagle Star & British Dominions Ins. Co. v. George Moore & Co., 9 F.2d 296, 1926 A.M.C. 126 (9th Cir. 1925); Hanover Fire Ins. Co. v. Holcombe, 223 F.2d 844, 1955 A.M.C. 1531 (5th Cir. 1955); L&L Marine Serv. v. INA, 1987 A.M.C. 2283 (8th Cir. 1986).

¹¹ See L.J. Kovats, The Law of Tugs and Towage (Chichester and London: Barry Rose (Publishers) Ltd., 1980) at 28-29, 61-63, 229-231; Consolidated Grain & Barge Co. v. Marcona Conveyor, 716 F. 2d 1077, 185 A.M.C. 117 (5th Cir. 1983), etc.

to furnish a seaworthy vessel to the members of the crew. Such a duty is imposed by tort law and is far greater than the seaworthiness duty owed to shippers, charterers, insurers and others.¹²

On this point it is interesting to note that the Supreme Court of the United States has confirmed the aforementioned duty in many decisions¹³. It has held that the vessel and its owners are, both in English and American law, liable to indemnity for injuries suffered by seamen in consequence of the unseaworthiness of ships, or the failure to supply and keep in proper order the appurtenances

¹² See, e.g. F.L. Maraist, Admiralty in a Nutshell, Second Edition (St. Paul: West Publishing Co., 1988) at 196-206; T.J. Schoenbaum, Admiralty and Maritime Law (St. Paul: West Publishing Co., 1987) at 164 et seq. Such an obligation to secure seaworthiness, for example, is provided by the Canada Shipping Act, R.S.C. 1985, c. S-9 (as amended R.S.C. 1985, c.31, R.S.C. 1985, c.27, R.S.C. 1985, c.6, R.S.C. 1985, c.40, R.S.C. 1989, c.3, R.S.C. 1989, c.17) s.391(1):

In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep the ship in a seaworthy condition for the voyage during the voyage.

¹³ See, e.g. The Osceola, 189 U.S. 158 (1903); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); McAllister v. Magnolia Petro. Co., 357 U.S. 221 (1958); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Morales v. City of Galveston, 370 U.S. 165 (1962).

of vessels.

The origin of a seaman's right to recover damages for injuries caused by an unseaworthy vessel can be found in the earliest codifications of maritime law which provided certain benefits for a mariner who was wounded or became ill while in the service of the ship.¹⁴

III. HISTORICAL BACKGROUND

A. Introduction

The purpose of citing and examining the ancient codifications of maritime law has been previously mentioned. It is sufficient here to reiterate the fact that the ancient maritime law to be discussed in this and subsequent chapters, has been received with enthusiasm in the courts of both Civil and Common law countries. This is because it sheds light on the true origins of the present maritime law rules applicable in different legal systems.

¹⁴ The Osceola, 189 U.S. 158 at 175, 169 (1903); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 at 543 (1960). See The Laws of Oleron, promulgated about 1150 A.D. by Eleanor, Duchess of Guienne (arts. VI, VII); The Laws of Wisbuy, published in the following century (arts. XVIII, XIX, XXXIII); The Laws of the Hanse Towns, which appeared in 1597 (arts. XXXIX, XLV); and The Marine Ordinances of Louis XIV, published in 1681 (arts. XI, XII), and excellently commented by R.J. Pothier, A Treatise on Maritime Contracts of Letting to Hire (Boston: Cummings and Hilliard, 1821) at 97-136 ("Hiring of Seamen"). Text of the above-mentioned codifications was published in 30 Fed. Cas. 1171 et seq.

B. The Byzantine/Rhodian Sea-Law and Medieval Legislation

According to Ashburner¹⁵, clause 11 of the Rhodian Sea-law (seventh or eighth century A.D.) provides that merchants who wished to load great and valuable cargoes were recommended to determine whether the vessel had a complete set of tackles, a sufficient number of sailors, and was watertight.¹⁶ This clause probably derived from Byzantine charterparties. Similarly, medieval charterparties and ancient statutes relating to maritime law often contained provisions to the effect that the ship was to be bene concia, calcata (fit for the voyage).

In addition, one of the characteristics of Mediterranean legislations (e.g. the Venetian statutes of the thirteenth century A.D.) was the considerable concern for the seaworthiness of a ship. Such a concern was explicit in the provisions which dealt with the internal arrangements of the ship, i.e. ballasting, loading of goods on board, the stowing of goods in holds, and overloading.¹⁷ Furthermore, the ship had to have a strong mast.

Medieval charterparties and statutes also stipulated that vessels should have a certain number of masts, sails, anchors,

¹⁵ W. Ashburner, The Rhodian Sea-Law (Oxford: Clarendon Press, 1976). I agree with Professor Tetley, that it would be better to name the code which appeared during the seventh or eighth century A.D., the Byzantine/Rhodian Sea-Law "to avoid confusion with the purported Rhodian law of 900 B.C. referred in the Digest [of Justinian]". - W. Tetley, Maritime Liens and Claims (Montreal: International Shipping Publications BLAIS, 1985) at 4.

¹⁶ Ashburner, supra, note 15 at clxxxii.

¹⁷ Ibid. at clvi-clviii.

anchor-cables, barques, tillers and other equipment, and specified the number of mariners boni et sufficientes that were to be on board.¹⁸

C. The Laws of Oleron

The Laws of Oleron, which were proclaimed about 1150 A.D. by Eleanor, Duchess of Guienne¹⁹, contained several provisions relating to seaworthiness. By virtue of article X, for example, the master of a ship, when chartering a vessel to merchants, had to show them the vessel's cordage, ropes and slings with which the cargo was to be hoisted aboard or ashore. Such an act would allow the merchants to observe any latent defects in the equipment of the ship. If the master of the ship omitted to show the equipment to the merchants and there was an accident, he would be held liable for damages. However, if the master of the ship showed the equipment to the merchants, and they approved the state of the same, in the event of an accident the parties would have to divide the damages between them.

If the merchants, after the inspection of the vessel, required the master of the ship to repair the ship's equipment, he would have to do so. If he did not, in case of an accident, he would be held solely responsible.

Article XIII of the same codification set out the master's

¹⁸ Ibid. at clxxxiii-clxxxvi.

¹⁹ 30 Fed. Cas. 1171.

obligation to provide a sufficient crew. Thus, if the master of the ship discharged one of his mariners, he would have to replace him with another competent mariner. If he omitted to do so, and an accident ensued, he would be liable for damages.

It may also be mentioned, that article XVII stipulated the general rule that the vessel had to be victualled and specified the number of meals required daily.

Similar provisions are to be found in the Laws of Wisbuy, published in the thirteenth century.²⁰

D. The Laws of Wisbuy

In parallel to art. X of The Laws of Oleron, art. XXII of The Laws of Wisbuy stipulated that the master of the ship and the mariners were obliged to show the merchant the cordage that was used for hoisting the cargo in and out of the ship. If they omitted to do so, and the merchant did not see or approve the cordage, they would be liable for damages in case of an accident.

Other provisions similar to those of articles XIII and XVII of The Laws of Oleron which dealt with sufficiency of the members of the crew and the number of meals can be found in articles XXV and XXIX of The Laws of Wisbuy.

It is interesting at this point to quote Welwood who, in the year 1613, summarized and annotated the ancient codifications of maritime law in "An Abridgement of all Sea-Lawes: gathered forth

²⁰ 30 Fed. Cas. 1189.

of all Writings and Monuments, which are to be found among any people or Nation, upon the coasts of the great Ocean and Mediterranean Sea":

No Ship should be fraughted without a chartter-partie written & subscribed, contayning both the Master and Merchant, and the name of the ship, that no doubt may arise; and likewise, that the Master shall find a sufficient Steirsmen, Timberman, Shipman, and Mariners convenient, Shippetycht, masts, sayles, tewes, strong anchors, and boat fit for the shippe, with fire, water, and salt, on his own expences.²¹

E. The Marine Ordinances

Provisions concerning the undertaking of seaworthiness were also found in The Marine Ordinances of Louis XIV, published in 1681. These provisions were subsequently received with respect by the courts of both England and the United States.²² An example is article VIII of the First Book entitled "Mariners and Ships" (Title First). Article VIII stipulated that a master of a ship "must take care before he puts to sea, that the ship be right ballasted and laded, and well provided with anchors and tackle, and all things necessary for the voyage".

The Second Book of The Marine Ordinances of Louis XIV is entitled "Maritime Contracts". This book dealt with "Charter Parties and Freightage of Ships", "Bills of Lading" and "Freight",

²¹ W. Welwood, An Abridgement of all Sea-Lawes (London: Humfrey Lowne, 1613) at 22.

²² 30 Fed. Cas. 1203.

etc. Articles XI and XII of the Title Third section which dealt with unseaworthiness and freight pro rata read as follows:

XI. If a master is obliged to cause his ship to be refitted during a voyage, the freighter shall be obliged either to wait or pay the whole freight; and if the ship cannot be rigged out, the master shall forthwith hire another; and if none can be found, he shall only be paid in proportion to the part he has performed on the voyage.

XII. However, if the merchant prove that when the ship put to sea she was unfit for sailing, the master shall lose his freight, and pay the other damages and losses.

In other words, the master was to guarantee his vessel against any defects which when put to sea could render the ship incapable of conveying the goods to their destination. In light of the above, if for any reason the conveyance was retarded or delayed, the master of the ship would be responsible for any damages suffered by the charterer.

Pothier²³ found this provision to be in accordance with the general principles found in "contracts of letting to hire". An example mentioned, is the warranty against any defect found in the thing hired which could prevent its use.

F. Conclusion

To conclude this short historical background on the concept

²³ Pothier, supra, note 14 at 17-18.

of seaworthiness, it is appropriate to refer to Lawes²⁴ who argued that the vessel should be:

1. Tight, staunch and strong (relating to the hull of the ship);
2. Furnished (relating to the ship's furniture, which includes the rigging, tackle, etc.);
3. Manned (relating to the sufficiency of the crew);
4. Victualled (relating to the sea stock)
5. "[I]n every way fitted, as is usual for vessels in merchants' service, and necessary for the voyage" (anything else which may be usual or necessary to render the ship outfit for the voyage).

IV. CIVIL LAW

A. France

Law No. 66-420 of June 18, 1966²⁵ which in general applies to chartering and affreightment, as well as to the domestic carriage of goods by sea, contains basic provisions as to "affretement au voyage", providing a priori responsibility of the shipowner for the goods received on the ship by the master in

²⁴ E. Lawes, A Practical Treatise on Charter-Parties of Affreightment, Bills of Lading and Stoppage in Transitu (London: Reed and Hunter, 1813) at 21-34.

²⁵ As amended by Law No. 79-1103 of December 21, 1979 and by Law No. 86-1292 of December 23, 1986.

accordance with the charterparty.

The second paragraph of article 6 lays down the principle of negligence as it pertains to the shipowner's duties and responsibilities. It appears from this paragraph²⁶, that the shipowner is exonerated in case of loss or damage of the cargo resulting from the unseaworthiness of the ship, if it is proved that he has exercised due diligence to make the ship seaworthy:

[Le fréteur] se libère de cette responsabilité en établissant soit qu'il a satisfait à ses obligations de fréteur précisées par décret, soit que les dommages ne tiennent pas à un manquement à ces obligations, soit que le dommage est dû à la faute nautique du capitaine ou de ses préposés.[Emphasis added]

More specific provisions regarding voyage charters are found in Decree No. 66-1078 of December 31, 1966²⁷. The shipowner's obligations are set out in article 6:

Art. 6 - Le fréteur s'oblige:

1. à présenter à la date et au lieu convenus et à maintenir pendant le voyage le navire désigné en bon état de navigabilité, armé et équipé convenablement pour accomplir les

²⁶ R. Rodière, E. du Pontavice, Droit maritime, Dixième édition, Paris, Dalloz, 1986 aux pp.366-367.

²⁷ As amended by Decree No. 69-679 of June 19, 1969 as amended by Decree No. 87-922 of November 12, 1987. According to Le Clère, "[l]orsque le navire n'est pas livré en bon état, l'affrètement se trouve devant deux possibilités: ou exiger la réparation des avaries, ou résilier la charte". Si la réparation est de courte durée...l'affrètement ne peut résilier la charte. Il a seulement la possibilité de demander des dommages-intérêts pour retard, s'il démontre que ce retard lui a causé un préjudice certain". ..."Au contraire, si le mauvais état du navire est tel qu'il est évident qu'il n'est pas apte à effectuer la navigation envisagée, alors l'affrètement résiliera la charte, aux torts de l'armateur". J. Le Clère, Les chartes-parties et l'affrètement maritime, Paris, Libraries techniques, 1962 à la p. 96.

opérations prévues dans la charte-partie;

2. à faire toutes diligences qui dépendent de lui pour exécuter le ou les voyages prévus à la charte-partie.

It is submitted that article 6 can be interpreted in at least two ways. Firstly, it can be argued that the first paragraph, which provides the shipowner's obligation to present a seaworthy ship and to so maintain it during the voyage, is to be supplemented by and read together with or interpreted in the light of the second paragraph which requires the shipowner to exercise "toutes diligences" in the carriage of the goods. One may therefore gather that the shipowner is obliged to exercise due diligence to provide a seaworthy ship at the beginning and throughout the voyage, as well as being obliged to exercise due diligence in the executing of the voyage.

This first interpretation of article 6 is supported by Rodière and du Pontavice²⁸, the majority of standardized voyage charterparties, and by court decisions. It is worth noting that the provisions of this article "ont un caractère suppletif" and will be implied (by law) in the contract only in the case of casus omissi, i.e. when the parties disagree over what they did not say in their charterparty. Article 1 of Decree No. 66-1078 is clear about ius dispositivum (the law which can be subject to exclusion by contract):

Les conditions et les effets de l'affrètement
sont définis par les parties au contrat et, à

²⁸ Rodière & du Pontavice, supra, note 26 aux pp.354-355, 366-369.

défaut, par les dispositions du titre Ier de la loi susvisée du 18 juin 1966 et celles du présent titre.[Emphasis added]

Since the parties to the contract usually choose one of the various standardized voyage charterparties which in their majority contain the due diligence provision concerning seaworthiness²⁹, the application and interpretation of this French legislation is primarily of academic interest only.

In various judgements, French Courts of Appeal have ruled it to be the duty of shipowners to prove that they have exercised due diligence during the voyage in equipping and properly maintaining their vessel for the carriage of the goods.³⁰

The Court of Appeal of Aix-en-Provence has also ruled that in order for a shipowner to invoke the benefit of clause 2, paragraph 2 of the GENCON charterparty (which provides an exoneration of liability in the case of the unseaworthiness of his vessel) he must as a prerequisite prove that he exercised the due diligence required to maintain the vessel in a seaworthy

²⁹ See Appendix A - Express Terms of Standardized Voyage Charterparties Regarding Seaworthiness.

³⁰ M.P. Tsekos et M.P. Papachristou c. La Cie d'assurances La Foncière, Cour d'appel de Montpellier, 15 janvier 1982, D.M.F. 1982, 480; Société meunière alimentaire Vitaflor c. Capitaine du navire "Kymi" et Société Cousin Shipping Co., Cour d'appel a'Aix-en-Provence, 28 février 1984, D.M.F. 1985, 402; M.P. Tsekos et M.P. Papachristou c. Cie d'assurances La Foncière, Cour de cassation, 29 mai 1984, D.M.F. 1985, 151; J. Warrot, "Highlights in French Maritime Law: Legislation and Jurisprudence in 1985" 1985-1986 II YML 189 at 193.

condition.³¹

The second somewhat less persuasive interpretation of article 6 is that the first paragraph supplies an absolute and implied by law undertaking of the shipowner to provide a seaworthy vessel. This is the shipowner's first and basic obligation, which is only supplemented by the additional obligation stated in the second paragraph, namely to prosecute with diligence the voyage or voyages contemplated by the contract.

This second interpretation is supported by Common law, which distinguishes the undertaking of providing a seaworthy vessel from the undertaking of commencing and carrying out the voyage with reasonable diligence. Thus, these two duties can be viewed as different (but nonetheless implied) obligations of the shipowner or carrier.³²

B. Quebec

Article 2423 of the Civil Code of Lower Canada [hereinafter C.C.L.C.] sets out the shipowner's absolute obligation to provide a seaworthy vessel at the beginning of and during the voyage. However, as in all provisions concerning charterparties, this

³¹ Decision of Court of Appeal of Aix-en-Provence, 28 February 1984, cited in J.Warot, "Highlights in French Maritime Law: Legislation and Jurisprudence in 1984" (1984) 1 YML 199 at 203.

³² A.A. Mocatta, M.J. Mustill, S.C. Boyd, Scrutton on Charterparties and Bills of Lading, Nineteenth Edition (London: Sweet & Maxwell, 1984) at 81 et seq. [hereinafter Scrutton]. Similar distinction is adopted in the Quebec Draft Civil Code of 1977, art.597.

obligation is "supplétive" in character and would thus apply only in the absence of express provisions in the contract to the contrary. This conclusion can also be reached by virtue of article 1024 C.C.L.C.

A charterparty usually specifies the name and tonnage of the ship, with a stipulation that it is tight, staunch, well furnished and equipped for the voyage (art. 2415 C.C.L.C.). More specifically, article 2423 C.C.L.C. provides that:

Le fréteur est obligé de fournir un bâtiment du port stipulé, étanche et bien conditionné, garni de tous agrès et appareils nécessaires pour le voyage, avec un maître compétent et un nombre suffisant de personnes habiles et capables de le conduire, et il doit le tenir en cet état jusqu'à la fin du voyage. Le maître est obligé de prendre à bord un pilote, lorsque la loi du pays l'exige.³³

However, in actual practice, the parties to voyage charters generally adopt standard forms of charterparties (e.g. the GENCON) which forms take into account the customs and usage in force in the particular trade involved.³⁴ Perhaps it was this commercial experience and the Hague Rules solutions applying to bills of

³³ English text reads as follows: "The lessor is obliged to provide a vessel of the stipulated burthen, tight and staunch, furnished with all tackle and apparel necessary for the voyage, and with a competent master and a sufficient number of persons of skill and ability to navigate her, and so to keep her to the end of the voyage. The master is obliged to take on board a pilot, when by the law of the country one is required."

³⁴ Report on the Quebec Civil Code, Commentaries (Quebec: Editeur officiel Quebec, 1978) at 570.

lading³⁵ which inspired the Civil Code Revision Office to prepare the Draft Civil Code in 1977, proposing, amongst others, significant changes relating to contracts of affreightment.³⁶

Article 597 of the 1977 Draft Civil Code which deals with seaworthiness, provides the obligation of exercising diligence, and recognizes the difference between the undertaking of seaworthiness and the undertaking of performing the voyage:

The lessor is bound to:

1. present the ship at the place and within the period of time agreed upon;
2. exercise diligence, before and at the beginning of the voyage, to make the ship seaworthy, and properly manned and equipped for the services contemplated in the contract;
3. prosecute with diligence the voyage or voyages contemplated in the contract.

Similarly to some criticism regarding the Hague Rules,³⁷ it might be argued that proposed article 597 should require seaworthiness throughout the voyage, and not only before and at the commencement thereof.

Unfortunately, the authors of the last proposed version of

³⁵ See articles 3 and 4(1) of the International Convention for the Unification of Certain Rules of Law Relating to Bills of lading signed at Brussels, August 25, 1924 and entered into force June 2, 1931.

³⁶ Report on the Quebec Civil Code, Draft Civil Code, Vol. I (Quebec: Editeur officiel Quebec, 1978) at 422-426 (arts. 574-604).

³⁷ H.M. Kindered et al., The Future of Canadian Carriage of Goods by Water Law (Halifax: Dalhousie Ocean Studies Programme, 1982) at 127.

the Quebec Civil Code of 1987 and of Bill 125 of 1990 ³⁸ drafted the following but ambiguous provision dealing with the obligation of seaworthiness in voyage charters which again appears to be absolute:

Le fréteur présente, au lieu et au moment convenus, le navire en bon état de navigabilité, armé et équipé convenablement pour accomplir le voyage prévu.

Il s'oblige, en outre, à maintenir le navire en bon état de navigabilité et à faire toutes diligences qui dépendent de lui pour exécuter ce voyage.

This provision is obviously taken from the aforementioned French legislation (Law No. 66-420 of June 18, 1966 and Decree No. 66-1078 of December 31, 1966, see pages 95 and 96 of this thesis). However, it will be noted that there are significant differences between the text of the French law and the proposed new article of Quebec law. Whereas in respect of the French law we noted the obligation upon the shipowner to exercise due diligence to provide a seaworthy ship at the beginning and throughout the voyage, no such obligation is apparent within the proposed Quebec.

Thus, the fundamental and absolute obligation of the lessor (i.e. the shipowner, demise, bareboat, or time charterer) is to present the ship in a seaworthy condition, properly manned and equipped for the voyage, at the agreed place and time. In addition, the owner is bound to maintain the ship in a seaworthy condition

³⁸ Avant-projet de loi, Loi portant réforme au Code civil du Québec du droit des obligations, 1^e sess., 33^e Leg. Que., 1987, art. 2079; Bill 125, Civil Code of Quebec, 1st Sess., 34th Leg. Que., 1990, art. 2011.

and to use all diligence within his means to perform the voyage.

V. COMMON LAW

A. Extent of Shipowner's Duty to Provide a Seaworthy Ship

1. Implied Absolute Obligation

The shipowner's warranty of seaworthiness is implied by the English general law of contract³⁹ and American general maritime law⁴⁰ in a voyage charter party, unless express provision has been made to the contrary. Thus, the parties may contract themselves out of this duty, but unless they prove such an exception the obligation remains.⁴¹

The duty to provide a seaworthy ship is absolute in the sense that the shipowner is liable if the ship is in fact not

³⁹ J. Bes, Chartering and Shipping Terms, Seventh Edition (London: Barker & Howard Ltd., 1970) at 161; Scrutton, supra, note 32 at 82; E.R.H. Ivamy, Payne and Ivamy's Carriage of Goods by Sea, Eleventh Edition (London: Butterworths, 1979) at 14.

⁴⁰ M.M. Cohen et al., Benedict on Admiralty - Carriage of Goods by Sea: Charter Parties; Commentary and Forms, Vol. 2B, Seventh Edition (Revised) (New York: Matthew Bender, 1985) at 1-23 [hereinafter Benedict on Admiralty]; Gilmore & Black, supra, note 10 at 207-208; Schoenbaum, supra, note 12 at 134. It appears that Poor argues that the obligation of seaworthiness is implied only in time charters - W. Poor, American Law of Charter Parties and Ocean Bills of Lading, Fifth Edition (New York: Matthew Bender, 1968) at 16-18. Conversely, in English law the warranty of seaworthiness at the beginning of the voyage probably does not apply to time charters - see Scrutton, supra, note 32 at 371-373.

⁴¹ Nelson Line (Liverpool), Limited v. James Nelson & Sons, Limited [1908] A.C. 16 at 19-20.

reasonably fit for the intended voyage, even if he used all reasonable diligence to ensure that the ship was seaworthy. The warranty also covers latent defects.⁴² The rule was expressed briefly and clearly by the Second Circuit and affirmed by the Supreme Court of United States in The Silvia⁴³:

It had long been determined that in every contract for the carriage of goods by sea there is an implied warranty that the vessel is seaworthy at the time of beginning her voyage, unless this is superseded by some express condition in the contract. The very term "warranty" imports an absolute undertaking that the fact is as represented; and it was the settled meaning of the term as implied in contracts of affreightment or of insurance that it is an undertaking by the shipowner not only that he will exercise due diligence to have the vessel seaworthy, but that she shall really be so.

Conversely, it was held in a recent American case, Dant & Russell v. Dillingham Tug⁴⁴, that an owner of a bareboat chartered barge is not liable to a voyage charterer for negligence which occurred prior to the delivery of the barge under the charterparty. Because the bareboat charterer had full knowledge of the vessel's unseaworthiness and had therefore assumed all risks, it was held by the court that when he took the risk of postponing the repairs, he

⁴² See Lord Blackburn in Steel v. State Line Steamship Co., (1877) 3 App. Cas. 72 at 86; Halsbury's Laws of England, Shipping and Navigation, Vol. 43 (London: Butterworths, 1983) at para. 555; C.F.H. Cufley, Ocean Freights and Chartering (London: Staples Press, 1966) at 148; Benner Line v. Pendleton, 217 F. 497 at 500 (2nd Cir. 1914); The Edwin I. Morrison, 153 U.S. 199 (1894).

⁴³ 68 Fed. 230 (2nd Cir. 1895) affirmed 171 U.S. 462 (1898).

⁴⁴ 1990 A.M.C. 1372 at 1376 (9 Cir. 1989).

waived the shipowner's liability. Furthermore, the shipowner owed no warranty of seaworthiness to the voyage charterer, because there was no privity of contract between them.

2. Test of Seaworthiness

The general test of seaworthiness requires that the vessel be reasonably fit for the intended service.⁴⁵

Another test has been posited by the English courts: would a prudent shipowner, had he known of the defect, have required that it be made good before sending his vessel to sea.⁴⁶ If so, the courts will find the ship unseaworthy.

3. Seaworthiness as a Variable and Relative Standard

It is important to keep in mind that seaworthiness is a variable and relative standard⁴⁷ which depends on the nature of the ship, the particular voyage, the particular stages of that voyage, the particular season, the geographical regions in which the voyage is to be made, the cargo which the ship is to carry, and other

⁴⁵ Benedict on Admiralty, supra, note 40 at 1-26.

⁴⁶ McFadden v. Blue Star Line, [1905] 1 K.B. 697 at 706.

⁴⁷ As Lord Collins put it in The Vortigern, (1899) P. 140 at 158-159, that "[t]he warranty of seaworthiness has always been relative, varying standards at different stages".

relevant factors.⁴⁸

The factors to be taken into consideration in determining whether or not the vessel is seaworthy are not limited to those directly affecting the state of the ship itself.

For instance, inefficiency of the master or crew due to illness, drunkenness or other causes, insufficiency of provisions or medicines, or even bad stowage which endangers the safety of the ship, may constitute unseaworthiness.⁴⁹

When the shipowner had taken on board an unnecessary quantity of bunker coal, it was held that he had not been entitled to limit the use of the vessel by the charterer by using the space reserved to the latter for a purpose which had no connection with the voyage on which the vessel had been engaged. The additional coal was held to have been beyond a reasonable necessity for the seaworthiness of the ship. The court found an implied term in the contract that the ship should be used only for the purposes of the charterer.⁵⁰

⁴⁸ Stanton v. Richardson (1872) L.R. 7 C.P. 421 affirmed (1874) L.R. 9 C.P. 390; Scrutton, supra, note 32 at 83, Gilmore & Black, supra, note 10 at 208. The ship is to be efficient as an instrument of transportation and as a storehouse for its cargo - O.C. Giles, Chorley and Giles' Shipping Law, Seventh Edition (London: Pitman, 1980) at 132.

⁴⁹ Scrutton, supra, note 32 at 85-86; J. Ridley, The Law of The Carriage of Goods by Land, Sea and Air, Fifth Edition (London: Shaw & Sons Ltd., 1978) at 87-88.

⁵⁰ Darling v. Raeburn, [1907] 1 K.B. 845 at 850. See Kish v. Taylor, [1912] A.C. 604 where the master overloaded the deck to such an extent as to render the ship unseaworthy.

4. Cargoworthiness

Fitness to carry a particular cargo is of major importance in voyage charterparty cases. This obligation, being different from the obligation of proper stowage, is sometimes referred to as a warranty of seaworthiness for the cargo and it was formulated by Lord Ellenborough in 1804.⁵¹ Both the vessel and the furniture and equipment shall be reasonably fit for receiving the contract cargo and carrying it across the sea.⁵² The ship's duty of seaworthiness comprises a duty to have its loading and discharging tackle available for the ordinary purposes of loading and discharging.⁵³

The test of seaworthiness may therefore be whether the ship is reasonably fit to load, carry and discharge the cargo which it has undertaken to transport.⁵⁴

⁵¹ Lyon v. Mells, (1804) 5 East 428, cited in Elder, Dempster & Co., Ltd. v. Paterson, Zochonis & Co., Ltd., [1924] All E.R. Rep. 135 at 139. In the Paterson case some casks of palm oil were stowed on board a vessel which had no "tween decks". After they had been stowed, a quantity of palm kernels was stowed on top of them. The casks were damaged and much of the oil was lost. The House of Lords held that the vessel was fit to receive the oil and carry it, and that it was therefore seaworthy.

⁵² Ibid.

⁵³ Hang Fung Shipping Co., Ltd. v. Mullion & Co., Ltd., [1966] 1 Lloyd's Rep. 511 [Q.B. (Com. Ct.)] at 523.

⁵⁴ The Silvia, 171 U.S. 462 at 464-465. See Church Cooperage Co. v. Pinkney, 170 F. 266 at 268 (2d Cir. 1909), certiorari denied 214 U.S. 526 (1909), where the charterparty expressly warranted the fitness of the vessel for carrying the cargo and a similar warranty was also implied in the law. A ship which is fit for the carrying of an article is one which will carry such an article without injury. The liability of a shipowner for breach of a warranty of fitness is not limited to such injury to the cargo as is apparent before its delivery, but extends to a latent injury.

An illustration of the "cargoworthiness" obligation can be found in Stanton v. Richardson⁵⁵, where the charterparty provided that the ship should load a full and complete cargo of sugar. The usual words concerning the vessel being tight, staunch, and strong were not included. A cargo of wet sugar was provided by the charterer and the the master loaded it as he was bound to do. He then discovered that the ship's pumps, though fit for the ordinary purposes of the ship, were inadequate for this cargo. Consequently, the cargo had to be discharged. The shipowner was held to have been bound under the charterparty to have his ship fit for the carriage of wet sugar, but since it was not, he had breached his contractual obligation.⁵⁶

It appears that the implied warranty of cargoworthiness will be construed in light of the technical efficiency of the ship both in design and equipment.⁵⁷

B. When Seaworthiness is Necessary

1. Time of Loading and Sailing

In American law, there is an implied warranty that the

⁵⁵ (1874) L.R. 9 C.P. 390.

⁵⁶ Ibid. at 392.

⁵⁷ B. Vandeventer, "Analysis of Basic Provisions of Voyage and Time Charter Parties" (1975) 49 Tul. L. Rev. 806 at 838.

vessel is seaworthy at the beginning of its voyage.⁵⁸ English law is more specific, stating that the ship must be seaworthy as soon as it starts loading and at the time of sailing. In other words, it must be fit and safe for the reception, carriage, and preservation of the cargo.⁵⁹ If it is not seaworthy at this moment in time, it cannot be considered ready to load. The owner of the goods is then justified in refusing to load the cargo and may take action against the shipowner for breach of the undertaking.⁶⁰

The implied warranty of seaworthiness extends to fitness for the cargo not only at the time of loading, but also at the time of sailing, i.e. when the perils of the intended voyage commence. The ship must be fit to encounter the ordinary perils of navigation on the intended voyage. This warranty is broken if the ship is unfit to face these dangers, although it may have been seaworthy when leaving its anchorage, when arriving at the place of loading, and when commencing to take on board the cargo.⁶¹

However, in both English and American law there is no implied undertaking that the ship will continue to be seaworthy

⁵⁸ The Silvia, 68 Fed. 230 at 232 (2nd Cir. 1895) affirmed 171 U.S. 462 (1898); Benner Line v. Pendleton, 217 F. 497 at 500 (2nd Cir. 1914).

⁵⁹ McFadden v. Blue Star Line, [1905] 1 K.B. 697; E.R.H. Ivamy, Dictionary of Shipping Law (London: Butterworths, 1984) at 150.

⁶⁰ Halsbury's Laws of England, supra, note 42 at para. 553.

⁶¹ Cohn v. Davidson, (1877) 2 Q.B.D. 455 at 461-462; Elder, Dempster & Co., Ltd. v. Paterson, Zochonis & Co., Ltd., [1924] A.C. 522 at 532; Bes, supra, note 39 at 161; The Westmoreland, 14 F. Supp. 762, 1936 A.M.C. 353 (S.D.N.Y. 1936); Vandeventer, supra, note 57 at 836.

during the entire voyage.⁶²

2. Doctrine of Stages

Where a voyage is divided into "stages", the vessel must be seaworthy at the commencement of each "stage".

In The Vortigern⁶³, the plaintiffs steam-vessel left the Philippines for England with cargo belonging to the defendants, shipped under a charterparty and bill of lading, giving liberty to coal at ports on the way, and excepting the negligence of the master and engineer. The voyage was divided into stages. The vessel called at Colombo but did not take on sufficient coal for the next stage to Suez. When near a convenient coaling station, the master did not take on more fuel because he had not been warned by the engineer that the vessel was running short. As a result, some of the cargo had to be burned as fuel to enable the vessel to get to Suez.

⁶² Vandeventer, supra, note 57 at 836; Cufley, supra, note 42 at 149; Bes, supra, note 39 at 161.

⁶³ (1899) P. 140. See also Northumbrian Shipping Co. v. E. Timm & Son, Ltd., [1939] A.C. 397 at 403, 408, where Lord Wright recognized the doctrine of stages which has been laid down by the Court of Appeal in Thin v. Richards & Co., [1892] 2 Q.B. 141, The Vortigern, [1899] P. 140, McIver & Co. Ltd. v. Tate Steamers, Ltd., [1903] 1 K.B. 362 and in Greenock Steamship Co. v. Maritime Insurance Co., Ltd., [1903] 2 K.B. 657. He then described a "conditional seaworthiness", stating that, although the bunkers in question were insufficient for the stage, they became sufficient when the condition was fulfilled and they were replenished at the intermediate coaling station before harm could ensue. If the condition is fulfilled, seaworthiness is actually or retrospectively secured.

The Court of Appeal held that the shipowners could not plead the exception clause, because they had not made their vessel seaworthy at the commencement of each stage of the voyage. Lord Smith dealt with the question of seaworthiness in the following words:

In my judgment when a question of seaworthiness arises between either a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that, at the commencement of each stage, the ship had on board a sufficiency of coal for that stage, in other words, was seaworthy for that stage. If he fails in this he fails in defeating the issue of unseaworthiness which *prima facie* has been established against him.⁶⁴

The doctrine of seaworthiness by stages derives from the law of marine insurance⁶⁵. There is no difference in the implied warranty of seaworthiness at the commencement of the voyage between an assured shipowner under a contract of marine insurance and a

⁶⁴ (1899) P. 140 at 155.

⁶⁵ Giles, *supra*, note 48 at 141-143; Bouillon v. Lupton, (1863) 33 L.J. C.P. 37. The vessel must, in cases where several distinct stages of navigation involve the necessity of a different equipment or different states of seaworthiness, be properly equipped, and in all respects seaworthy for each of the stages respectively at the time when it enters upon each stage. Otherwise the warranty of seaworthiness is not complied with - Quebec Marine Insurance Co. v. Commercial Bank of Canada, (1870) L.R. 3 P.C. 234.

shipowner under a voyage charter.⁶⁶

In the case of a charter for consecutive voyages the shipowner is obliged to provide a seaworthy ship at the commencement of each voyage.⁶⁷

C. Evidence of Unseaworthiness

The burden of proving unseaworthiness is upon the party who alleges it and the party intending to rely upon unseaworthiness must plead it with sufficient particularity.⁶⁸ There is no presumption of law that a ship is unseaworthy because it breaks down from an unexplained cause.

Nevertheless, according to Ivamy, in rare cases the facts may raise an inference of unseaworthiness and so shift the burden of proof.⁶⁹

⁶⁶ The Vortigern, (1899) P. 140 at 157. In Albert E. Reed & Co. v. Page, Son & East Lim. and Another, (1927) 17 Asp. Mar. Law Cas. 231 [Ct. of App.], the court held that at the beginning of the new stage of the adventure (lightering), there was a renewed warranty of seaworthiness of the barge for the next stage. With respect to American law see Luckenbach v. W.V. Mc Cahan Sugar Ref. Co., 248 U.S. 139 (1918); Vandeventer, supra, note 57 at 837.

⁶⁷ Anglo Saxon Petroleum Co. v. Adamastos, [1957] 2 Q.B. 255; Scrutton, supra, note 32 at 83.

⁶⁸ Scrutton, supra, note 32 at 86. For instance, Supreme Court of Canada held in The Oak Hill, [1975] 1 Lloyd's Rep. 105, that the trial Judge was correct in finding that the stranding was solely caused by an error in navigation on the part of the vessel's pilot and no causal connection had been shown between any unseaworthiness and the stranding.

⁶⁹ Ivamy, supra, note 39 at 18, citing Fiumana Societa di Navigazione v. Bunge & Co., Ltd., [1930] 2 K.B. 47, where an unexplained fire in the coal bunkers occurred, and it was held that

D. Legal Effects of Unseaworthiness

1. English Law

Under English law, the undertaking of seaworthiness is neither a "condition" nor a "warranty". It appears to be an "innominate or intermediate" obligation. The effect of non-performance will depend upon the nature and the consequences of the breach. In other words, the breach of the innominate obligation may give rise to an event which relieves a charterer, if he so elects, of further performance on his part of the contract or it may give rise to an event which entitles him to claim damages.⁷⁰

2. American Law

Under American law, the undertaking of seaworthiness is a "warranty", the breach of which permits rescission of the contract, as well as an action for damages.⁷¹ However, both in English and

there was a presumption that this was due to the unfitness of the bunker coal at the time of loading the cargo, and that this amounted to a breach of the undertaking of seaworthiness. Since the ship was unseaworthy, the plaintiffs could not recover a general average contribution from the cargo owners for sacrifice due to their own fault and breach of contract. See A. Waring, Charterparties (Cape Town: Juta & Co., Ltd., 1983) at 21.

⁷⁰ Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha, [1962] 2 Q.B. 26; Bunge Corporation v. Tradax, [1981] 2 Lloyd's Rep. 1 at 7 [H.L.].

⁷¹ Vandeventer, supra, note 57 at 829-830. It is to be noted again that the meaning of the term "warranty" is different in American and English law. In English law, a warranty is a term, the

American law, the right to repudiate arises only when a breach is so substantial as to defeat or frustrate the object of the voyage charter.⁷²

For instance, if the charterer discovers that the vessel is unseaworthy and the defect cannot be remedied within a reasonable time, he may refuse to load. After the voyage has begun, he may only claim damages if the vessel is unseaworthy.⁷³

E. Exception Clauses

1. Common Law and Contractual Exemptions

The exemption of the dangers of the seas in contracts of affreightment does not exonerate the shipowner from responsibility for injury to the goods which results from a breach of his implied obligation to provide a seaworthy vessel.⁷⁴ Thus, breach of this implied term of a voyage charterparty results automatically in the

breach of which sounds in damages but does not terminate or entitle the other party to terminate the contract.

⁷² Aaby v. States Marine Corp., 181 F. 2d 383 at 386 (2d Cir. 1950); Vandeventer, supra, note 57 at 830; Benedict on Admiralty, supra, note 40 at 1-25.

⁷³ Stanton v. Richardson, (1874) L.R. 9 C.P. 390; Ivamy, supra, note 59 at 150.

⁷⁴ The Silvia, 68 Fed. 230 at 233 (2nd Cir. 1895) affirmed 171 U.S. 462 (1898). It was held in The Glenfruin, (1885) 10 P.D. 103 at 108-109, that the exceptions in the bill of lading had not the effect either of limiting the implied warranty or of otherwise exempting the shipowner from liability to the owners of cargo for damage or loss occasioned by the breaking of the shaft.

shipowner losing all rights in respect of the Common law exemptions.

Nevertheless, a shipowner will be entitled to exempt himself from liability for unseaworthiness if he does so expressis verbis⁷⁵, i.e. in clear and unambiguous language.⁷⁶

Clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits⁷⁷, otherwise they will be read as not applying to breaches of the implied obligation.⁷⁸

⁷⁵ If the seaworthiness is not expressly excepted, the shipowner cannot excuse himself by any specific exception for a loss for which he is himself responsible, because he is responsible for unseaworthiness. Monarch Steamship Co., Ltd. v. Karlshamns Oljefabriker, [1949] A.C. 196 at 227.

⁷⁶ It was held in Jordan, Inc. v. Mayronne Drill Service, 1954 A.M.C. 1807 (5th Cir. 1954), 214 F. 2d 410, that the charter of the barge contained an implied warranty of seaworthiness, and that, under the circumstances, known to both parties, the provision "that the Charterer has had the barge inspected and found same to be in first-class condition" was not so clear and unequivocal as to constitute a waiver of such warranty and the right to recover damages resulting from its breach.

⁷⁷ Church Cooperage Co. v. Pinkney, 170 F. 266 (2d Cir. 1909), certiorari denied 214 U.S. 526 (1909) at 269-271. The fact that the cleaning of the vessel's holds was done under direction of the charterer's agent and to his satisfaction, and that the charterer thereafter accepted and loaded the vessel and refused to cancel the charter as offered by the owners, did not constitute a waiver of the seaworthiness. See The Carib Prince, 170 U.S. 655 (1898) at 659-660.

⁷⁸ Scrutton, supra, note 32 at 87-88. In Nelson Line (Liverpool) Ltd. v. James Nelson & Sons Ltd., [1908] A.C. 16, [1904-1907] All E.R. Rep. 244, frozen meat had been shipped under an agreement which stated that the shipowner would not be liable for any damage "which is capable of being covered by insurance". The meat arrived in a damaged condition because of the unseaworthiness of the vessel. The House of Lords held that the clause was not sufficiently clear to exempt the shipowners from being liable to supply a seaworthy ship. Compare to Bank of

Although the vessel is unseaworthy, the shipowner can still rely on the exemption clauses, so long as the loss has not been caused by unseaworthiness.⁷⁹

2. Statutory Limitation of Liability

An interesting question may arise when statutory provisions relieve the shipowner from liability. It was held in Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping Company⁸⁰, that section 502 of the United Kingdom Merchant Shipping Act, 1894, which provides that the shipowner shall not be liable for "any loss or damage happening without his actual fault or privity", exonerates the shipowner from both Common law liability in cases of loss from fire and from liability for loss of

Australasia v. Clan Line Steamers, Ltd., [1916] 1 K.B. 39 at 55, where Lord Bankes argued that the implied contract was free from conditions. If it was written into the contract, it had to be written in such a way to make it plain that the conditions contained in the contract do not apply to it.

⁷⁹ In The Europa, [1908] P. 84, [1904-1907] All E.R. Rep. 394, the action was brought by the charterer against the shipowner in respect of goods which had been damaged by one of the perils of the sea excepted by the charterparty, not by the unseaworthiness, which was admitted. It was held that the charterparty, notwithstanding the unseaworthiness, was not displaced and the shipowner, despite its breach of warranty, was protected under the clause excepting perils from liability for the injury done to the goods. See Kish v. Taylor, [1912] A.C. 604 where the court followed and approved The Europa. In Baumvoll Manufactur von Scheibler v. Gilchrest & Co., [1892] 1 Q.B. 253 at 257, it was held that it was not a sufficient breach of a bill of lading that the ship had gone to sea in an unseaworthy condition. It had to be shown that the unseaworthiness was the cause of loss. See also Smith Hogg & Co. v. Black Sea Insce. Co., [1940] 3 All E.R. 405 at 409-411.

⁸⁰ [1912] 1 K.B. 229.

goods from fire, even though the cause of the fire may be the unseaworthiness of the ship. In other words, the said provision relieves the shipowner not only from his liability as an insurer but also from his liability under an implied warranty of seaworthiness.⁸¹

Similarly, in Louis Dreyfus & Co. v. Tempus Shipping Co.⁸², the plaintiffs, being relieved by virtue of section 502 of the same Act from liability for providing bunker coal unfit for the voyage, were entitled to a general average contribution.

It seems that where there is an exception of fire on board in the voyage charter or bill of lading, it does not protect the shipowner when the fire was due to unseaworthiness. It is different in the case of a statutory exception.⁸³

F. Statutory Provisions Relating to Seaworthiness

Common law is supplemented by the legislation to be found in several shipping acts and regulations, generally based on

⁸¹ Ibid. at 241. However, the effect of a bill of lading containing the exception clause was to preclude the shipowner from setting up the above-mentioned provision as an answer to a claim for the loss of goods caused by the unseaworthiness of the ship. It was intended that the shipowner should be liable in case it had failed to take reasonable means to provide against unseaworthiness - supra, note 80 at 237.

⁸² [1931] A.C. 726.

⁸³ Compare to Societe Anonyme Des Minerais v. Grant Trading Inc. (The "Ert Stefanie"), [1989] 1 Lloyd's Rep. 349 [C.A.], where the court did not apply the limitation of liability provision of the Merchant Shipping Act.

international conventions, and which provide certain standards with respect to the seaworthiness of vessels.⁸⁴

It is submitted that the implied obligation of seaworthiness should include all of the standards, with respect to the protection of the marine environment from pollution, set out by international conventions, domestic legislation and Common law. For example, the United States Oil Pollution Act of 1990 represents a substantial legislative undertaking to promote tanker safety and oil spill prevention, amending tanker construction standards. Double hulls are required on new tank vessels, and existing vessels must be retrofitted with double hulls under a transition schedule, depending upon the age and size of the vessel. It is submitted that a chartered vessel should not be considered seaworthy if it does not comply with the new oil pollution standards.⁸⁵

⁸⁴ The most important international convention relating to seaworthiness is International Convention for the Safety of Life at Sea, 1960 (SOLAS), which has been amended in 1966, 1967, 1968, 1969, 1971 and 1973. The amendments are not yet in force. SOLAS 1960 has been superseded by SOLAS 1974, which entered into force in 1980. Nevertheless, many of the SOLAS 1960 provisions will continue to be applicable for some time - E. Gold, Handbook on Marine Pollution (Arendal: Assuranceforeningen Gard, 1985) at 49. See also the Merchant Shipping Acts 1894-1988, supplemented by a number of Statutory Instruments; sections 301-421 of the Canada Shipping Act, R.S.C. 1985, c. S-9 (as amended) and Hull Construction Regulations, C.R.C. 1978, c. 1431 (and amendments), Life Saving Equipment Regulations, C.R.C. 1978, c. 1436 (and amendments), and Navigating Appliances and Equipment Regulations, SOR/84-689 (am. SOR/87-175, SOR/87-353); etc.

⁸⁵ See T.J. Wagner, "The Oil Pollution Act of 1990: An Analysis" (1990) 21 JMLC 569 at 578-579, 583.

Furthermore, it is worth noting that the United Kingdom Merchant Shipping Act 1988 adopted new safety provisions in response to the "HERALD OF FREE ENTERPRISE" disaster of March 1987. These provisions provide that the shipowner, charterer, manager, or master are liable for a ship which is unsafe to go to sea due to (1) the condition of the ship, its machinery or equipment; (2) undermanning; (3) overloading or unsafe/improper loading; (4) any other matter relevant to the safety of the ship.⁸⁶

The penalty is 50,000 pounds sterling on summary conviction or an unlimited fine and/or up to two years in imprisonment upon indictment. It is a good defence to establish that appropriate arrangements had been made to ensure that the ship was fit to go to sea, or that the relevant responsibilities had been wholly assumed by another party. A defendant in such a case must show that he exercised due diligence to ensure that his responsibilities in respect of seaworthiness were properly discharged.⁸⁷

The breach of regulations for securing the seaworthiness of the vessel need not at the same time constitute a breach of the voyage charter. However, regulations of this type indicate a standard of seaworthiness which ought to be observed.⁸⁸

⁸⁶ Section 30.

⁸⁷ See R.A. Powell, New Directions in Maritime Law: An Update (Canadian Bar Association, 1989) at 29; see secs. 31, 32 and 51 of the Merchant Shipping Act 1988.

⁸⁸ Rederi A/b "Unda" v. Burdon & Co., (1937) 57 Ll. L.R. 95, cited in Giles, supra, note 48 at 134-135.

VI. CONCLUSION

The origin of the undertaking to provide a seaworthy ship is to be found in the earliest codifications of maritime law which motivated the modern Civil and Common law jurisdictions.

A ship, in order to be seaworthy, must be fit to encounter the hazards of the sea and to receive, carry and preserve the cargo. It has to be tight, staunch and strong, properly and sufficiently manned, fuelled and provisioned for the contemplated voyage.

Seaworthiness is a variable and relative standard which depends on the nature of the vessel, the particular voyage and the particular stages of that voyage, the particular season, the geographical regions in which the voyage is to be made, the cargo which the ship is to carry, and on other relevant factors which are not limited to those directly affecting the state of the ship itself. Fitness to carry the particular cargo is of significant importance in voyage charterparty cases.

French law seems to exonerate the shipowner in the case of loss or damage to the cargo due to the unseaworthiness of the ship under the voyage charter, if it is proved that the shipowner has exercised due diligence to make the ship fit. However, it might be argued that an absolute obligation, and one implied by law, of the shipowner to make the vessel seaworthy is provided. In any event, the provisions dealing with seaworthiness are only ius dispositivum.

The C.C.L.C. adopted the absolute obligation of seaworthiness at the beginning and during the voyage, which is implied by law unless the parties have expressly excluded or modified it.

Common law also stipulates the absolute (implied) obligation of the shipowner to provide a seaworthy ship. This obligation includes latent defects. An important distinction between an express obligation of seaworthiness and an implied one is that the former generally refers to the time of sailing for the port of loading and a breach of it may entitle the charterer to refuse to load. The latter refers to the time of sailing from the loading port, being an "innominate" term of the contract in English law, and a "warranty" in American law. Both English and American law enable the voyage charterer to repudiate the contract only when a breach is so substantial as to defeat or frustrate the object of the voyage charter.

The ship must be seaworthy as soon as it starts loading and at the time of sailing. If it is not fit at the time of loading, the owner of goods may refuse to put the cargo on board and may claim damages from the shipowner for breach of the contractual undertaking. The implied warranty of seaworthiness extends to fitness for the cargo at the time of sailing and it is broken if the ship is unfit to encounter the ordinary perils of navigation on the intended voyage. There is no implied warranty, however, that the ship will continue to be seaworthy during the entire voyage.

Where a voyage is divided into stages, the vessel must be

seaworthy at the commencement of each stage. Onus probandi concerning unseaworthiness is upon the party who alleges it. A shipowner will be entitled to exempt himself from liability only if he does so expressis verbis in quite clear and unambiguous language. However, although the vessel is unseaworthy, the shipowner can still rely on the exception clauses, if the loss has not been caused by unseaworthiness.

Common law is supplemented by legislation found in several shipping acts and regulations and generally based on international conventions which provide certain standards with respect to seaworthiness. The breach of these provisions need not constitute a breach of the voyage charter. Nevertheless, statutory seaworthiness in both Common and Civil law indicates a standard which ought to be observed. In addition, it is submitted that a shipowner's implied obligation to provide a seaworthy ship should include all standards of environmental protection from pollution provided by international conventions, domestic legislation and Common law.

Having examined more than ninety standard form voyage charterparties used in coal, fertilizer, grain, livestock, meat, ore, salt, scrap, steel, sugar, tanker and wood trades, and for general purposes (see Appendix A), one may state that a vast majority provide the shipowner's obligation to exercise due diligence to make a vessel seaworthy, thus replacing the absolute warranty of seaworthiness. This is done either by incorporation of the Hague or Hague/Visby Rules through a paramount clause into the

charterparty, by national enactments of these conventions in the country of shipment or destination, or by inclusion of an express clause modelled on certain provisions of these conventions.⁸⁹

The standard contracts set out the rules for those things which are inherent to the chartering and shipping transactions and vital to their fulfilment, codifying the usages of transporting the goods under voyage charters.⁹⁰ Thus, in order to satisfy the need for standardization, harmonization, and improvement of implied and express charterparty terms, and in order to contribute to the uniformity, clarity, and justice of maritime law with respect to charters, it might be suitable to abandon the implied absolute obligation of seaworthiness and to adopt the following provision⁹¹ in a new international convention:

The lessor (a shipowner, bareboat, demise, or time charterer) is bound to exercise due diligence, before and at the beginning of the voyage, to make the ship seaworthy, and properly manned and equipped for the services contemplated in the contract, and shall exercise due diligence to maintain such condition during the whole of the period of the contract.

The provision, of course, should not be subject to exclusion by contract.

⁸⁹ See UNCTAD, Charter Parties - A Comparative Analysis, TD/B/C.4/ISL/55, 27 June 1990 at para. 302 et seq.

⁹⁰ See A. Slabotzky, Grain Contracts and Arbitration - for Shipments from the United States and Canada (London: Lloyd's of London Press Ltd., 1984) at 14-15.

⁹¹ The recommended provision is taken from the Quebec Draft Civil Code 1977, supra, note 34, however, extending the exercise of due diligence throughout the voyage.

Chapter 4

IMPLIED UNDERTAKING TO PROCEED WITH REASONABLE DESPATCH AND
TO EXERCISE REASONABLE CARE

I. INTRODUCTION

II. SHORT HISTORY

III. CIVIL LAW

A. France

B. Quebec

IV. COMMON LAW

A. Introduction

B. Reasonable Despatch

1. Express and Implied Undertaking
2. Remedies of Charterer
 - a. English Law
 - b. American Law

C. Reasonable Care and Skill

D. Exceptions

V. CONCLUSION

"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

O.W. Holmes, Common Law 1 (1881)

I. INTRODUCTION

The next implied obligation of the shipowner is to proceed with reasonable despatch to the port of loading, and to exercise reasonable care and skill in performing his duties of loading, stowage, carriage and discharge, of navigating, and of caring for the cargo. The master, as a general rule, is the shipowner's agent for these purposes.

The following chapter will briefly describe the historical background of the said undertakings, and it will examine and compare the French, Quebec, English, and American law. It will then propose a provision regarding these obligations for a new international convention.

II. SHORT HISTORY

It has long been a customary provision of voyage charterparties that the vessel should with all convenient speed, sail and proceed to a designated port (or so near thereto as it might safely get), and that it should be ready to sail by a certain day.

It is interesting to note that as early as August 10, 1263, a charterparty was made in Pisa which provided for the shipowner to sail from Porto Pisano within ten days from the date of the

contract.¹

The shipowner normally agreed to have his ship ready to load at the prescribed place and time, to load the goods with despatch, and to stow them with a view to their safety and the safety of the ship. Furthermore, he promised not to carry cargo in excess of the prescribed quantity or be liable to confiscation.²

When the time for sailing was not determined by the contract, it was left to the courts to decide according to the usage of commerce.

In order to enable the ship to proceed to the port of loading, the master had to obtain the requisite clearances and licences for the voyage. He was also required, unless it was otherwise provided by the charterparty, to pay the necessary port and other charges to enable him to sail. This obligation was implied in the covenant to sail according to the provisions of the charterparty, which meant a lawful sailing and which obliged the party to do everything to accomplish it.³

Sometimes the charterparty provided that the ship should

¹ W. Ashburner, The Rhodian Sea-Law (Oxford: Scientia Verlag Aalen, 1976) at clxxix-clxxx. Welwood put it in 1613 as follows: "If the Ship be not ready at the day appointed in the charterpartie to goe to sea, the Merchant may not onely free himselfe of her, except hee hold his peace and discharge her not (for then by his silence hee appears to consent of new) but also shal or may obtaine all charges, scathes and interest..". W. Welwood, An Abridgement of All Sea-Lawes (London: Humfrey Lownes, 1613) at 22.

² Ashburner, supra, note 1 at clxxxvi-clxxxvii.

³ E. Lawes, A Practical Treatise on Charter-Parties of Affreightment, Bills of Lading and Stoppage in Transitu (London: Reed and Hunter, 1813) at 34, 40.

sail with the first fair or favourable wind.⁴ By virtue of article II of The Laws of Oleron⁵ and article XIV of The Laws of Wisbuy⁶, for instance, the master had to consult his company before his departure and ask them, "Gentlemen, what think you of this wind?" It was "general sea law" that a master of a ship should never sail without the advice of his company and the consent of the owners of the goods he was transporting.⁷

Another time-honoured provision of charterparties was to sail with the first convoy.⁸

In addition to the obligations discussed above, the master of the ship was bound, both before the ship sailed and during the voyage, to use reasonable care in the preservation of the goods on board.⁹ According to the principles of the contract of letting to hire, he was responsible for even the slightest negligence. In addition, he was required to keep the charterparty, and other

⁴ Lawes, supra, note 3 at 43-44.

⁵ 30 Fed. Cas. 1172.

⁶ 30 Fed. Cas. 1190.

⁷ See The Marine Ordinances of Louis XIV, Book I, Title First, Article XV - 30 Fed. Cas. 1204. In Bornmann v. Tooke, (1808) 1 Camp. 377, the charterer bound himself by the charterparty to load the ship with the greatest expedition with a full and fit cargo, and the captain was to sail with the first favourable wind direct to the port of Portsmouth. The plaintiff's covenant to sail direct to Portsmouth was held not to be a condition precedent. Deviation could not be given in evidence, either as a bar to the action, or to diminish the damages.

⁸ Lawes, supra, note 3 at 44-49.

⁹ R.J. Pothier, A Treatise on Maritime Contracts of Letting to Hire (Boston: Cummings and Hilliard, 1821) at 18.

documents concerning the cargo, on board his ship.¹⁰

Similarly, the members of the crew were obliged to their utmost capability to keep, watch, save, and preserve the cargo. In return, they were to be paid their wages.¹¹

It appears that the shipowner's obligation to exercise reasonable care is a synthesis of the above-mentioned duties. It derives from the principle of equity or good faith, growing out of "the law of nature, which, commanding us to cherish mutual goodwill, and exercise beneficence, forbids our doing a thing, which, although in itself permitted, would cause considerable loss to another without affording us any considerable advantage".¹²

III. CIVIL LAW

A. France

The 1966 reform of the French legislation with respect to voyage charters¹³ creates "une présomption favorable à

¹⁰ See The Marine Ordinances of Louis XIV, Book II, Title First, Article X - 30 Fed. Cas. 1207.

¹¹ See The Laws of Wisbuy, Articles XV, XXXVI and XLVII - 30 Fed. Cas. 1190.

¹² Pothier, supra, note 9 at 9.

¹³ See article 6 of the Law No. 66-420 of June 18, 1966 as amended by Law No. 79-1103 of December 21, 1979 and by Law No. 86-1292 of December 23, 1986; and the same article of the Decree No. 66-1078 of December 31, 1966 as amended by Decree No. 69-679 of June 19, 1969 as amended by Decree No. 87-922 of November 12, 1987.

l'affréteur".¹⁴ The lessor (a shipowner, bareboat, demise, or time charterer) is responsible a priori for the goods received on the ship by the master in accordance with the charterparty. In the case of loss or damage to the cargo, he is exonerated if it is proved that he has exercised "toutes diligences qui dépendent de lui pour exécuter le ou les voyages prévus à la charte-partie".

It would be logical to conclude that the lessor's obligation to exercise all diligence includes a duty to proceed without delay to the port of loading, and to undertake with diligence the voyage or voyages contemplated in the contract.

The charterparty usually contains the stipulation that the ship will proceed as fast as possible to the port of loading (les délais indicatifs), and a reasonable delay is permitted. However, it may provide an express provision that the ship will be at the port of loading and ready to load by a given date (les dates impératives). If there is a breach of this condition the charterparty is terminated.¹⁵

¹⁴ R. Rodière, E. du Pontavice, Droit maritime, Dixième édition, Paris, Dalloz, 1986 aux pp. 366-367.

¹⁵ J. Le Clère, Les chartes-parties et l'affrètement maritime, Paris, Libraries techniques, 1962 à la p. 101. The author argues that in the case of the contract being silent with respect to "date prévue", "l'obligation de l'armateur serait potestative". It is submitted that the purpose of the 1966 reform was to provide ius dispositivum which is of a suppletive character. Thus, if the charterparty is silent as to the time and speed of proceeding to the port of loading, the law will supply a general duty to exercise all diligence.

B. Quebec

In contrast to French law, ius positivum (the present law) of Quebec does not stipulate the shipowner's general obligation to exercise all diligence in the execution of the voyage. However, some articles of the C.C.L.C. deal with the different duties of the master and lessor of the ship which contribute to the diligent prosecution of the voyage.

For instance, the master is obliged to receive the goods, to carefully arrange and stow them in the ship, and to sign such bills of lading as may be required by the charterer (art. 2424 C.C.L.C.). However, the goods must not be stowed on deck without the consent of the latter, unless in a particular trade (e.g. lumber) or in inland or coasting voyages, where there is an established usage to that effect (art. 2425 C.C.L.C.).

In addition, the master is bound to sail on the day appointed and to pursue his voyage without delay (art. 2398 C.C.L.C.). In other words, the ship must sail on the day determined by the voyage charterparty, or, if no day is stipulated, within a reasonable time, according to circumstances and usage. If the ship is delayed by the fault of its master, the latter is liable in damages (art. 2426 C.C.L.C.).

In the case of McShane & Hall¹⁶, according to the charterparty, a steamship was to be dispatched by the shipowners

¹⁶ 4 D.C.A., 330; M.L.R., 2 Q.B., 42; cited in J.J. Beauchamp, The Civil Code of the Province of Quebec Annotated, Vol. II (Montreal: C. Theoret, 1905) at 1349.

and to proceed with all convenient speed to the port of Montreal to arrive there at the beginning of the 1879 navigation season. The ship arrived at the port on May 18, 1879, although the season, as was then usual, had begun on the first day of May. The charterer had the right to consider the charterparty at an end, by refusing as he did to load the steamship.¹⁷

The master of the ship is also obliged to exercise all needful care of the cargo and, in the case of any danger during the voyage, to use the diligence and care of a prudent administrator in the preservation of the cargo (art. 2427 C.C.L.C.). On the completion of the voyage, he must deliver the goods without delay to the consignee (art. 2428 C.C.L.C.).¹⁸

Quebec will probably adopt, de lege ferenda, the French approach, providing the lessor's obligation to use all diligence within his means to perform the voyage. The lessor will be responsible, within the limits stipulated in the voyage charterparty, for loss or damage of the cargo received on board, unless he is relieved from liability by proving that the damage did not result from his failure to perform his obligations.¹⁹

¹⁷ See Thompson v. Allan, 32 L.C.J. 69, cited in supra, note 16 at 1349-1350, where the loss from deterioration of the remainder of the cattle had not been proved to be caused by the delay of the vessel in sailing.

¹⁸ See Beauchamp supra, note 16 at 1347-1348, 1350-1352; W.P. Sharp, Civil Code of Lower Canada, Vol. II (Montreal: A. Periard, 1889) at 485-487.

¹⁹ See Bill 125, Civil Code of Quebec, 1st Sess., 34th Leg. Que. 1990, arts. 2011-2012.

IV. COMMON LAW

A. Introduction

As in the Civil law systems discussed above, the shipowner implicitly promises under both English and American law, that he will commence and carry out his duties with reasonable diligence. He shall undertake the preliminary voyage to the port of loading with due or reasonable despatch, exercise due care and skill in performing his duties of loading and discharge, of navigating, of caring for the cargo, and complete the voyage with all reasonable despatch.

The law was stated and explained concisely in the case of Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co., which was, however, reversed on other grounds.²⁰ A tanker was chartered by an oil company under a contract which was to remain in force for as many consecutive voyages as the vessel could be presented for loading within an eighteen month period. It was provided that the ship would carry cargoes of oil all over the world at specified rates (of freight per ton per voyage) or carry a return cargo of fresh water at a lump sum. The charterparty contained a provision that the vessel would, with all convenient despatch, sail and proceed to a nominated port, where it would load a cargo of oil.

²⁰ [1957] 2 Q.B. 233, reversed on other grounds [1959] A.C. 133; A.A. Mocatta, M.J. Mustill. S.C. Boyd, Scrutton on Charterparties and Bills of Lading, Nineteenth Edition (London: Sweet & Maxwell, 1984) at 90-92.

Due to the incompetence of the engine-room crew, amounting to unseaworthiness, the vessel broke down on the first voyage to its load port and other similar incidents followed, with the result that the charterers lost the services of the vessel for one hundred and six days.

The court found, prima facie, that the shipowners had breached the following obligations:

1. The express or implied obligation to sail and proceed with all convenient despatch to the nominated port of loading for each successive voyage and to prosecute and complete such voyage with all reasonable despatch;
2. The implied duty, subject to the express exceptions, to carry out their part of the charterparty with reasonable care and skill.²¹

In addition, the court referred to the shipowner's expressed or implied obligation to ensure that the vessel was in a seaworthy condition at the beginning of each successive voyage, as well as to his express obligation to maintain the vessel in a seaworthy condition during each of the successive voyages.

²¹ See per Lord Denning, supra, note 20 at 265, and per Lord Parker at 273.

B. Reasonable Despatch

1. Express or Implied Undertaking

The business of chartering requires the utmost efficiency and speed in the carriage of the goods. In order to ensure speed in expedition, the following clause was developed and can be found in most of standard form voyage charterparties:

That the said Vessel..., shall, with all possible dispatch [with all convenient speed, without undue delay, with reasonable speed, with all speed, forthwith] sail and proceed to ... and there load ..., and being so loaded, shall therewith²² proceed, with all possible dispatch to ...

Whenever a party to a voyage charter undertakes to do something (the performance of which depends entirely on himself) and the contract is silent as to time, the law implies a promise to complete that obligation within a reasonable time. Thus, where there is no express stipulation in a charterparty as to time, it is implied by law that there shall be no unreasonable or unusual

²² See coal charterparties: e.g. AMWELSH 1953, 1979 (Cl. 1), BALTCOON (Cl. 1), NIPPONCOAL (Cl. 1); fertilizer charterparties: e.g. FERTICON (Cl. 1), FOSFO (Preamble), HYDROCHARTER (Cl. 1); general charterparties: e.g. BRITCONT (Cl. 1), MULTIFORM 1982 (Cl. 1), NUVOY (Cl. 1); grain charterparties: e.g. AUSBAR (Cl. 1,2), BALTIMORE FORM C -1976 (Preamble), CENTROCON (Cl. 2,4); meat charterparty: PLATE-MEAT A (Cl. 1); ore charterparties: e.g. BULK ORE CHARTER PARTY (F.I.O.) (Cl. 1), CEMENCO (Cl. 1); steel charterparty: STEEL CHARTER PARTY (Cl. 1); sugar charterparties: e.g. BULK SUGAR CHARTER-U.S.A. (Cl. 3), SUGAR CHARTER PARTY (Cl. 5,6); tanker charterparties: e.g. ASBATANKVOY (Cl. 1), BEEPEEVOY 2 (Cl. 3); and wood charterparty: BEIZAI 1964 (Cl. 1). Some charterparties are silent with respect to reasonable dispatch: e.g. LIVESTOCK CHARTER PARTY, COASTSALT, GENJAPSCRAP, BALTIPLUP.

delay in commencing the voyage, or if it has been commenced, in the performance of it, in loading or discharging.²³

In the case of a charterparty for consecutive voyages, the shipowner is obliged to proceed with despatch in each voyage.²⁴

Thus, it is the implied obligation of the shipowner to use reasonable diligence not only in bringing the vessel to the port of shipment²⁵ but also in conveying the cargo to the port of discharge.

In one case²⁶, a ship was chartered to proceed to one port and there load a cargo of tar. After it was loaded it had the opportunity of sailing, yet due to the negligence of the master in not having provisions on board, it did not sail and was

²³ M'Andrew v. Adams, (1834) 1 Bing. N.C. 29 at 38, summarized in E.R.H. Ivamy, Casebook on Carriage by Sea, Fourth Edition (London: Lloyd's of London Press Ltd., 1973) at 5-6; Ford v. Cotesworth, (1868) L.R. 4 Q.B. 127 at 133-134; Giuseppe v. Manufacturers' Export Co., 124 F. 663 at 666 (S.D. Ala. 1903); Olsen v. Hunter-Benn & Co., 54 F. 530 at 531 (S.D. Ala. 1892); B. Vandeventer, "Analysis of Basic Provisions of Voyage and Time Charter Parties" (1975) 49 Tul. L. Rev. 806 at 839.

²⁴ Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1966] 2 All E.R. 61; [1967] 1 A.C. 361.

²⁵ In Schooner Mahukona Co. v. Charles Nelson Co., 142 F. 615 at 617 (N.D. Cal. 1906), the shipowner was not guilty of any breach of the said implied obligation, since the vessel was delayed by storms and adverse winds, and without any fault on the part of shipowner, in reaching the port where it was to receive its cargo. See R.M. Hughes, Handbook on Admiralty Law, Second Edition (St. Paul: West Publishing Co., 1920) at 171, 173.

²⁶ The Wilhelm, (1866) 14 L.T. 636 at 637. The decision is probably only justified upon the ground that the shipowner ought reasonably to have contemplated that at the relevant time the vessel was in danger of being frozen in, unless it sailed promptly. See Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B), [1949] A.C. 196 at 215.

consequently frozen in.

The celebrated Dr. Lushington held the shipowners liable for breach of contract in failing to deliver the cargo to the port of discharge with all due diligence and expedition. Thus, it was held that the shipowners had to pay damages to the owners of the cargo.

In Antola v. Gill & Fisher²⁷, the stipulation that the vessel should proceed to Baltimore "without delay" implied that there was nothing in the existing engagements of the vessel to prevent it from its obligations under the new contract. Thus, when the ship was delayed due to its obligations to a previous charter, it was held that such a delay was unreasonable.²⁸

In Olsen v. Hunter-Benn & Co.²⁹, one of the conditions implied in the voyage charterparty was that the vessel would commence and carry out the voyage contracted for with reasonable diligence. However, this implied condition was violated when the ship waited over four months to carry out a previous contract before beginning the new one.

In another case³⁰, it was held to be no defence that the port agreed on had been in a state of blockade causing the vessel's

²⁷ 7 F. 487 at 488-489 (D. Md. 1881).

²⁸ See Giuseppe v. Manufacturers' Export Co., 124 F. 663 at 666 (S.D. Ala. 1903), where delay was found to be unusual and unnecessary, and Tarabochia v. Hickie, (1856) 1 H & N 183, where the jury found that the vessel did not proceed to the port of loading within a reasonable time.

²⁹ 54 F. 530 at 531 (S.D. Ala. 1892).

³⁰ Medeiros v. Hill, (1832) 8 Bing. 231 at 234-235.

delay, since the defendant had knowledge of this fact at the time of entering into the charterparty.

However, in Schooner Mahukona Co. v. Charles Nelson Co.,³¹ the shipowner was not held guilty of any breach of the implied obligation of reasonable despatch, since the ship's late arrival was caused by storms and adverse winds, and not due to any fault of the vessel or its navigation.

Some voyage charterparties stipulate that the vessel will arrive at the port of loading by the expected readiness date. In these cases, it is implied that the ship will proceed from its last port of call at a date when, by proceeding with reasonable despatch, it will arrive on time at the port of loading.³²

When no date of tendering the vessel is named in a charterparty, the shipowner promises to present his ship with reasonable despatch. Such a promise is not affected by the presence of a cancelling clause. Thus, even if a voyage charterparty gives the charterer the option to cancel the contract if the ship does not arrive at the port of loading by a specific day, it does not imply a promise by the shipowner to present the ship on or before that day. Unless the shipowner expressly promises to present his

³¹ 142 F. 615 at 617 (N.D. Cal. 1906).

³² For example, the expression "about the 15th/18th November" means upon some day not earlier than the 15th nor later than the 18th. The elasticity of "about", if there is any elasticity in it, must extend the expected date from the 18th to the 22th. See Louis Dreyfus & Co. v. Lauro, (1938) 60 Ll. L.R. 94 at 97 [K.B.]; Blackgold Trading Ltd. v. Almare S.p.A. Di Navigazione (The "Almare Seconda" and "Almare Quinta"), [1981] 2 Lloyd's Rep. 433 at 435 [Q.B. (Com. Ct.)]; Mitsui O.S.K. V. Garnac Grain (The "Myrtos"), [1984] 2 Lloyd's Rep. 449 at 454 [Q.B. (Com. Ct.)].

ship by the cancelling date, he is not obligated to expediency beyond reasonable despatch.³³

2. Remedies of the Charterer

a. English Law

If the shipowner breaches his implied undertaking of reasonable despatch, the charterer's remedy depends upon various factors. The remedy will be determined by whether the delay was such as to go to "the whole root of the matter" depriving the charterer of the whole benefit of the contract, or whether it entirely frustrated³⁴ the object of the charter or the commercial purpose of the venture.³⁵

Stated differently, the issue is whether or not the obligation amounts to a condition precedent. Thus, the court must ascertain the intention of the parties as it appears from the

³³ Sanday v. U.S. Shipping Board Emergency Fleet Corp., 6 F. 2d 384 at 385 (2d Cir. 1925), certiorari denied 269 U.S. 556 (1925).

³⁴ It will become clear in Chapter 8 that this rule of law is distinct from the doctrine of frustration, whereby a contract may be dissolved by implication on account of the frustration of the adventure due to unforeseen events totally unconnected with any breach of the contract by either party. E.R.H. Ivamy, Payne and Ivamy's Carriage of Goods by Sea, Eleventh Edition (London: Butterworths, 1979) at 19.

³⁵ MacAndrew v. Chapple, (1866) L.R. 1 C.P. 643 at 648; Universal Cargo Carriers Corporation v. Citati, [1957] 2 Q.B. 401, affirmed [1957] 3 All E.R. 234 at 426, 431-432.

contract and the surrounding circumstances.³⁶

Generally, time is not of the essence of the contract in the case of delay in proceeding on a voyage.³⁷ However, the court will require precise compliance with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties.³⁸

In a number of cases, English courts have held that the express or implied obligation to proceed with reasonable despatch was not a condition precedent, and the breach of it did not entitle the charterer to repudiate the contract. The stipulation amounted only to a warranty the breach of which entitled the charterer to damages. However, it must be reemphasised that the question depends upon the intention of the parties which must be gathered from the terms of the contract and from the subject matter to which it relates.³⁹

The courts' reluctance to find reasonable despatch as a condition precedent in a voyage charterparty can be explained by the argument given by Mr. Justice Byles in 1866.⁴⁰ He stated that if a stipulation concerning reasonable despatch was held to be a

³⁶ Kidston v. Monceau Ironworks, (1902) 7 Com. Cas. 82 at 86 (sale of goods).

³⁷ Universal Cargo Carriers Corporation v. Citati, [1957] 2 Q.B. 401, affirmed [1957] 3 All E.R. 234 at 431-432.

³⁸ United Scientific Holdings Ltd. v. Burnley Borough Council, [1978] A.C. 904.

³⁹ Forest Oak Steam Shipping Co. v. Richard, (1899) 5 Com. Cas. 100 at 104.

⁴⁰ MacAndrew v. Chapple, (1866) L.R. 1 C.P. 643 at 648.

condition precedent, every actionable delay would then avoid the contract, and a large number of charterparties would thus be defeated.

In Tarrabochia v. Hickie⁴¹, the charterparty contained the "lax and ambiguous" stipulation that the vessel should sail with all convenient speed to the port of loading. The court held that this was not a condition precedent unless the object of the voyage would be frustrated by the breach of this contractual term. The jury found that although the vessel did not proceed to the port of loading within a reasonable time, the object of the voyage was not frustrated. Accordingly, the charterer who had refused to load lost the case.

Also in the case of Clipsham v. Vertue⁴², the charterer refused to load and pleaded that the vessel did not arrive at the port of loading within a reasonable and proper time after the charterparty had been concluded. The court upheld a demurrer to the defendant's plea on the ground that he did not show that the object of the voyage was lost by the alleged delay.

Where the voyage charterparty provides that the vessel shall sail on a particular day, or imposes a final date by which the vessel must reach its port (the "cancelling date"),⁴³ time is

⁴¹ (1856) 1 H & N 123 at 185-188.

⁴² (1843) 5 Q.B. 265.

⁴³ Clauses regulating the earliest date for loading to start (laydays) and the cancelling date appear, in most standard voyage charterparty forms, to set out the earliest date on which the charterer is obliged to start loading at the load port, and the last date on which it is bound to accept the vessel for loading.

unambiguously expressed and is a condition precedent. If this condition is breached, the charterer is entitled to treat the contract as repudiated and refuse to load. He is also entitled to damages, unless the breach was caused by an excepted peril which would excuse the shipowner for failing to reach the port of loading by the agreed date.⁴⁴

b. American Law

The voyage charterparty under American law is to be construed according to the intention of the parties which is to be gathered from the language of the particular contract and which, in turn, determines which stipulations are conditions precedent.

The principle is similar to the one in English law. However, the American courts generally consider the express or implied obligation to proceed with all possible despatch or without

The following is a common type of cancelling clause:

Should the vessel not be ready to load (whether in berth or not) latest by noon on the ..., charterers have the option of cancelling this contract. Such option to be declared latest on notice of readiness being given.

See HYDROCHARTER (Cl. 18); UNCTAD Report on Charter Parties, U.N. Doc. TD/B/C.4/ISL/13 (1974) at paras. 157-163.

⁴⁴ Tarrabochia v. Hickie, (1856) 1 H & N 183 at 185-188; Shadforth v. Higgin, (1813) 3 Camp. 385; O.C. Giles, Chorley and Giles' Shipping Law, Seventh Edition (London: Pitman, 1980) at 160-162. In Greenwich Marine Inc. v. Federal Commerce & Navigation Co. Ltd. (The "Mavro Vetranc"), [1985] 1 Lloyd's Rep. 580 [Q.B. (Com. Ct.)], the shipowners failed to nominate vessels within the "laycan" period and that was held to be a breach of condition.

delay to be a condition precedent.⁴⁵

In Davison v. Von Lingen⁴⁶, a stipulation in the charterparty that the steamer was "now sailed, or about to sail, from Benizaf, with cargo, for Philadelphia" implied that the vessel was loaded and ready to sail. It was held to be a warranty or a condition precedent, not a mere representation, and its breach by one party justified a repudiation of the contract by the other party, unless the contract had been partially executed in his favor. Time and the situation of the vessel were material and essential parts of the contract.

Conversely, in Massari v. Forest Lumber Co.⁴⁷, applying the

⁴⁵ Lowber v. Bangs, 69 U.S. (2 Wall.) 728 at 736 (1864) (a stipulation in a charterparty that the vessel would proceed from one named port to another port of loading "with all possible despatch" was a warranty and a condition precedent); Olsen v. Hunter-Benn & Co., 54 F. 530 at 531 (S.D. Ala. 1892) (the provision that the vessel chartered should proceed to the port of loading "with all convenient speed" was a condition precedent); Antola v. Gill & Fisher, 7F. 487 at 488-489 (D. Md. 1881) (the stipulation that the vessel should proceed to Baltimore "without delay" was a condition precedent, and due to unreasonable delay the charterers were absolved from loading the vessel when it was tendered to them); Giuseppe v. Manufacturers' Export Co., 124 F. 663 at 666 (S.D. Ala. 1903) (the provision that the vessel should "proceed with all possible dispatch" was a warranty and a condition precedent to a right of recovery); Hughes, supra, note 25 at 171, 173; W. Poor, American Law of Charter Parties and Ocean Bills of Lading, Fifth Edition (New York: Matthew Bender, 1968) at 57-61; G. Gilmore, C.L. Black, The Law of Admiralty, Second Edition (Mineola: The Foundation Press, Inc., 1975) at 201; A.L. Corbin, Corbin on Contracts, Vol. 3A (St. Paul: West Publishing Co., 1960) at para. 685 (see the cases in which time was held to be of the essence, and the cases where the non performance by one party was held not to go to the essence of the contract); C. A. Anderson, "Time and Voyage Charters: Proceeding to Loading Port, Loading, and Related Problems" (1975) 49 Tul. L. Rev. 880.

⁴⁶ 113 U.S. 40 at 49-50 (1884).

⁴⁷ 290 F. 470 at 472 (S.D. Fla. 1923).

principle of Lowber v. Bangs, the court held that there was no condition precedent for the vessel to go to the loading dock with "all possible dispatch in ballast to enter upon this charter".

If the vessel does not arrive by the date specified by the cancelling clause, the charterer may refuse to load and cancel the contract, even if the delay was due to excepted perils. He cannot, however, recover damages solely because of the shipowner's failure to present the ship on or before a specified day.⁴⁸

However, it has been held that if the vessel does not arrive within a reasonable time, it is liable for damages, even if it arrives before the cancelling date.⁴⁹

C. Reasonable Care and Skill

In a case where the thing to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, it is implied by law that each promises to use reasonable diligence in performing his part.⁵⁰ When, in any particular instance, the parties have not expressed their

⁴⁸ Sanday v. U.S. Shipping Board Emergency Fleet Corp., 6 F. 2d 384 at 385 (2d Cir. 1925), certiorari denied 269 U.S. 556 (1925).

⁴⁹ Hughes, supra, note 25 at 174.

⁵⁰ Ford v. Cotesworth, (1868) L.R. 4 Q.B. 127 at 133-134. In all contracts which are to be mutually performed, the party who claims performance must be ready to perform his part of the contract, and cannot compel the opposite party to take something substantially different from that which was contracted to be given. Tully v. Howling, (1877) 2 Q.B.D. 182 at 188.

intentions, but have left these to implication, the court must assume that they intended to stipulate that which is fair and reasonable,⁵¹ having regard to their mutual interests and to the main object of the contract.⁵²

Since the express provisions of a contract generally include and govern only cases of usual occurrence and not unusual events, it is implied that if such events occur, the parties shall act in a reasonable manner, having regard to the character of the contract, the usage in similar cases, and the general principles of the law.⁵³

It may be argued that an implied obligation to exercise reasonable care also arises from a duty of good faith and fair dealing which is imposed, under American law, by every contract upon each party. Thus, every contract contains the implied covenant that neither party shall do anything to destroy or injure the other party's right to receive the fruits of the contract.⁵⁴

⁵¹ According to Carver, "the requirement of a reasonable performance may be understood in two distinctly different ways. The standard may be that of suitability and fairness under the circumstances which ordinarily exist, when acts of the kind in question have to be performed; or it may be that of suitability and fairness under the circumstances which actually obtain, when the particular act in fact comes to be performed". R. Colivaux, Carver's Carriage by Sea, Thirteenth Edition (London: Stevens & Sons, 1982) at para. 899.

⁵² Per Lord Watson in Dahl v. Nelson, Donkin, & Co., (1881) 6 A.C. 38 at 59.

⁵³ Per Mr. Justice Willes in Hanson v. Royden, (1867) L.R. 3 C.P. 47 at 50.

⁵⁴ See Restatement (Second) of Contracts, para. 205; Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79 at 85-87 (1933); Uproar Co. v. National Broadcasting Co., 81 F. 2d 373 at 377 (1st

It is, therefore, an implied term of every voyage charterparty, subject to express exceptions, that the shipowners and their servants will carry out their part of the contract with reasonable care and skill.⁵⁵ However, the breach of this duty gives the charterer a right to rescind the contract only if the breach is material.⁵⁶

Where the shipowner performs services beyond the requirements of the charterparty (i.e. he exercises "too much care"), he is still only entitled to recover reasonable remuneration and this on the basis of an implied contract that remuneration would be commensurate only to the extent of the reasonableness required.⁵⁷

An interesting example of "reasonable care" is to be found in the recent case of Rudolf A. Oetker v. International Frachtagentur A.G. (The "Almak")⁵⁸. One of the questions raised in connection with the dispute was whether or not it was implied that the disponent owners of a vessel who had sub-chartered it, had

Cir. 1936); Tymshare, Inc. v. Covell, 727 F. 2d 1145 (D.C. Cir. 1984).

⁵⁵ Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd., [1957] 2 Q.B. 233 at 265, 273, reversed on other grounds [1959] A.C. 133; Nelson Line (Liverpool) Ltd. v. James Nelson & Sons Ltd., [1908] A.C. 16, 24 T.L.R. 114.

⁵⁶ See A. Waring, Charterparties (Cape Town: Juta & Co., Ltd., 1983) at 22.

⁵⁷ Greenmast Shipping Co. S.A. v. Jean Lion et Cie S.A. (The "Saranikos"), [1986] 2 Lloyd's Rep. 277 at 278 [Q.B. (Com. Ct.)]; Steven v. Bromley & Son, [1919] 2 K.B. 722 at 725-727.

⁵⁸ [1985] 1 Lloyd's Rep. 557 [Q.B. (Com. Ct.)].

promised that reasonable care would be taken to ensure that the bill of lading, presented to the master for signature, would bear the correct date.

The court decided, inter alia, that such a promise could not be implied unless it was required in order to give business efficacy to the contract. In this case, it could not accept that any such implication was needed in order to make the sub-charter operate effectively.⁵⁹ The inclusion of the wrong date in the bill of lading presented for signature must have involved want of care on the part of the charterer. In order to imply the owners' promise of reasonable care, the charterer had to show that the voyage charter would not have business efficacy without it. Furthermore, the charterer had to prove that the charterparty implied that the owner would take reasonable care to protect him against the consequences of his own mistake. The court held that the commercial view was that if the charterers suffered damage through the misdating of the bill of lading, they had only themselves to blame.⁶⁰

D. Exceptions

It is a general rule that exceptions in charterparties do not apply to matters which may happen before the ship has entered upon the voyage dealt with by the charterparty. That is to say,

⁵⁹ Ibid. at 559.

⁶⁰ Ibid. at 560.

exceptions do not apply to events which occur before the ship heads for the port of loading, unless the contract so provides by express words or by necessary implication.⁶¹

The obligation to proceed with all convenient speed to the port of loading and then to the port of discharge starts at the beginning of the specified contract voyage. Thus, exceptions are not confined to the time when a vessel loads under the charterparty but rather include the period of time when the vessel is proceeding with all convenient speed to arrive at the port of loading.⁶²

The purpose of applying an exception clause to the voyage preliminary to the port of loading is that if something unexpected happens in the course of this voyage, the ship would be excused.⁶³

V. CONCLUSION

It has been a common rule for centuries, that the vessel should with all convenient speed, or with the first fair wind, or with the first convoy, or by a certain day, sail and proceed to a port of loading. In addition, the shipowner has normally promised to load the goods with despatch and was bound, both before the ship sailed and during the voyage, to use reasonable care in the

⁶¹ Transworld Oil Ltd. v. North Bay Shipping Corporation (The "Rio Claro"), [1987] 2 Lloyd's Rep. 173 at 179 [Q.B. (Com. Ct.)].

⁶² See Monroe Brothers, Ltd. v. Ryan, [1935] 2 K.B. 28 at 38-41.

⁶³ Evera S.A. Comercial v. North Shipping Co. Ltd., [1956] 2 Lloyd's Rep. 367 at 373 [Q.B.].

preservation of the goods on board.

French legislation, subject to derogation by the express agreement of the parties, provides a general obligation for the shipowner to exercise all diligence. It is submitted that this includes the duty to proceed without delay to the port of loading.

Ius positivum of Quebec does not stipulate the shipowner's general obligation, but deals with the particular duties of the master and the lessor (a shipowner, demise, bareboat or time charterer) concerning loading, stowage, carriage and delivery of the goods, which are necessary for the diligent execution of the voyage. Quebec will probably adopt, de lege ferenda, the French approach, providing the lessor's general obligation to use all diligence within his means to undertake the voyage.

Similarly, both English and American law recognize the shipowner's implied undertaking to commence and carry out his duties with reasonable diligence. The shipowner shall undertake the preliminary voyage to the port of loading with due or reasonable despatch, exercise due care and skill in performing his duties of loading and discharge, of navigating, of caring for the cargo, and complete the voyage with all reasonable despatch. If the shipowner breaches such an implied undertaking, the charterer's remedy depends upon whether or not the delay was such as to go to "the whole root of the matter", thus depriving the charterer of the whole benefit of the contract and entirely frustrating the object of the charter or the commercial purpose of the venture.

In other words, whether or not such an implied obligation

amounts to a condition precedent depends upon the intention of the parties, which must be gathered from the terms of the voyage charterparty and from the subject-matter to which it relates. English courts are more reluctant than American courts to find that such an implied obligation amounts to a condition precedent in a voyage charterparty.

Bearing in mind the generally recognized implied undertaking of the shipowner to proceed with reasonable despatch and to exercise reasonable care, it is submitted that the following (or similar) should become a rule of international law which cannot be excluded by the parties:

The lessor shall undertake the preliminary voyage to the port of loading with reasonable despatch, and shall exercise reasonable care and skill [or all diligence] in performing his duties of loading and discharge, of navigating, of caring for the cargo, and shall complete the voyage with all reasonable despatch.

Chapter 5

IMPLIED DUTY TO PROCEED WITHOUT DEVIATION

I. INTRODUCTION: DEFINITION AND ORIGIN OF THE PRINCIPLE OF DEVIATION

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IV. CONCLUSION

"The sea is no place for cutting corners."

DENHOLM (Fairplay)

I. INTRODUCTION: DEFINITION AND ORIGIN OF THE PRINCIPLE OF
DEVIATION

A. Definition of Deviation

The word "deviate" has its roots in Latin (devius), and it means to be "out of the way", "to turn aside" or "wander from the common or right way, course or line", "to diverge" or "to differ".¹

In law, it can denote, amongst others, a departure from the established or usual conduct or ideology; a change made in the progress of a work from the original terms, design, or method agreed upon; a departure of an employee from his course of employment and his duties to his employer for an entirely personal purpose; and a variation from the terms of the trust where the circumstances are such that the purposes of the trust would otherwise be defeated.²

This chapter, however, will deal with yet another legal meaning of "deviation", one which describes a departure from an anticipated route, or from the course stated or implied in a voyage charterparty.³

¹ Webster's New Universal Unabridged Dictionary, Deluxe Second Edition (New York: Dorset & Barber, 1983) at 499.

² Black's Law Dictionary, Fifth Edition (St. Paul: West Publishing Co., 1979) at 406-407.

³ See E.R.H. Ivamy, Dictionary of Shipping Law (London: Butterworths, 1984) at 34; P.R. Brodie, Dictionary of Shipping and Shipbroking Terms (London: Lloyd's of London Press, Ltd., 1980) at 124; E. Sullivan, The Marine Encyclopaedic Dictionary, Second Edition (London: Lloyd's of London Press, Ltd., 1988) at 129.

B. Origin of the Principle of Deviation

The concept of deviation is deeply rooted in maritime law and existed long before the enactment of modern national shipping laws, the adoption of international conventions, or the birth of standardized voyage charterparties. A Sumerian tablet from circa 1800 B.C., for example, contained a provision to the effect that "[i]f a boat captain violated the itinerary to which it was committed, and thereby brought about the loss of the boat, he shall measure out to its owner as much as the boat..., and its hire...".⁴

More than 3000 years later, The Laws of Wisbuy⁵ provided for the obligation of the master of the ship and his chief mariners, in the case when a ship loaded for one port entered another, to swear that it was by constraint and necessity that they went out of their way (art. LIII).

Another old codification provided that if the master of the ship changed his voyage and steered a course other than the one originally intended, he had to have the consent of his mariners, or pay them additional wages.⁶

⁴ S.F. Friedell, "The Deviating Ship" (1981) 32 *Hast. L.J.* 1535. The tablet is fragmentary and parts of the translation are speculative.

⁵ See 30 *Fed. Cas.* 1189 at 1194. See also The Marine Ordinances of Louis XIV, Book I, Title I, arts. XXIV and XXXV.

⁶ Art. XXIV of The Laws of the Hanse Towns, 30 *Fed. Cas.* 1197 at 1199.

A famous charterparty⁷, made at Pisa on August 10, 1263, stipulated that the shipowners would make the voyage "directly from Porto Pisano to Bugea and back". They promised not to alter the voyage nor to make any other voyage until the cargo loaded at Bugea had been brought back to Porto Pisano.

In 1613, Professor Welwood gathered all existing "Sea-Lawes", amongst which was a provision concerning the liability of the master in the case when he "holds not forth his due rout, and damage happen thereby".⁸

C. The Modern Doctrine of Deviation

The modern doctrine of deviation in maritime law arose from the principle that a marine insurer was deemed to have assumed only those risks inherent in the contemplated voyage. If the carrier made a voluntary and unexcused departure from the intended course, then the insurance contract was "ousted" and the insurers were relieved of their obligation with respect to any loss which might occur thereafter.

The Marine Ordinances of Louis XIV were published in 1681. They were probably the first maritime law codification stating that if the changing of the course or voyage happened by the order of the insured, without the consent of the insurers, they

⁷ W. Ashburner, The Rhodian Sea-Law (Oxford: Scientia Verlag Aalen, 1976) at clxxxii.

⁸ W. Welwood, An Abridgement of all Sea-Lawes (London: Humfrey Lownes, 1613) at 25.

were to be discharged from the risk.⁹

The Marine Ordinances had a considerable influence on American and British law. The Supreme Court of the United States established the doctrine of deviation in marine insurance in 1813 in the case of Oliver v. Maryland Ins. Co.¹⁰. A deviation was defined to be a "term of art", belonging mainly to the law of marine insurance, and to be interpreted by that law. It was held to be a voluntary departure, without necessity or reasonable cause, from the regular and usual course of a voyage; in other words, from the course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminus to the other, in reference to the terms of a policy of marine insurance. It was not considered deviation, in respect to such a voyage, to touch and stay at a port out of the ship's course, if such a departure was within the usage of the trade.

The same doctrine was held to be applicable to a shipper in the case of a bill of lading¹¹, and such a principle is also applicable to voyage charterparties.¹²

⁹ See arts. XXVI and XXVII of Book II, Title Sixth ("Of Insurances"). 30 Fed. Cas. 1203 at 1212.

¹⁰ 11 U.S. (7 Cranch) 487 (1813); see Hearne v. Marine Ins. Co., 87 U.S. (20 Wall.) 488 (1874); G. Gilmore, C.L. Black, The Law of Admiralty, Second Edition (Mineola: The Foundation Press, Ltd., 1975) at 66.

¹¹ Hostetter v. Park, 137 U.S. 30 at 40 (1890); The Citta di Messina, 169 F. 472 at 474-476 (S.D.N.Y. 1909).

¹² See E.R.H. Ivamy, Casebook on Carriage by Sea, Fourth Edition (London: Lloyd's of London Press Ltd., 1979) at 8-10 (notes 19, 20, 23).

The British law of deviation in marine insurance has been codified by the Marine Insurance Act of 1906 which sets out the old rule that if a ship deviates without lawful excuse from the voyage contemplated by the marine policy, the insurer is discharged from liability from the time of the deviation. In contracts of marine insurance, an absolute condition not to deviate is implied. Deviation will only be excused, for instance:

- where it is authorized by any special term in the policy;
- where it is caused by circumstances beyond the control of the master and his employer;
- where the deviation is reasonably necessary in order to comply with an express or implied warranty;
- where it is reasonably necessary for the safety of the ship or the subject matter insured;
- where it is necessary for the purpose of saving human life, or aiding a ship in distress;
- where it is reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship.¹³

As a result of strict marine insurance law, shippers were left uninsured for their losses in the case of unexcused deviation. The courts held that the contract for the transportation of goods was "ousted", and the carrier precluded from relying on any

¹³ See sections 46 and 49 of the Marine Insurance Act 1906; E.R.H. Ivamy, Marine Insurance, Third Edition (London: Butterworths, 1979) at 140-146; R. Colinvaux, Arnould's Law of Marine Insurance and Average, Sixteenth Edition (London: Stevens & Sons, 1981) at 320-355.

provisions in the bill of lading or in the charterparty purporting to limit his liability.

Thus, the carrier became the insurer for any loss or damage resulting after the deviation.¹⁴

It appears that since there is "nothing peculiarly nautical" about the concept of deviation, it should also be applied to carriers other than ships.¹⁵

American courts also extended the concept of "geographic" deviation to cover other material breaches of the contract of carriage, sometimes referred to as "quasi-deviations", "material deviations", or "carrier misconduct deviations".¹⁶

For instance, carriage of cargo on deck constitutes a

¹⁴ The Willdomino, 272 U.S. 718 (1927). The earliest reported case that held shipowners liable for cargo lost or damaged as a result of an unjustified deviation from the agreed route was Davis v. Garrett, (1830) 6 Bing. 716. However, the question of deviation had been considered in some earlier cases. For example, in Bornmann v. Tooke, (1808) 1 Camp. 377 at 378, the shipowner's covenant in the charterparty to sail directly to Portsmouth was held not to be a condition precedent. Deviation could not be given in evidence, either as a bar to the action, or to diminish the damages. Lord Ellenborough was of the opinion that to hold that any short delay in setting sail or trifling departure from the direct course of the voyage would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would be going inter apices facti. See Max v. Roberts, (1810) 104 K.B. 36; Parker v. James, (1814) 171 K.B. 37; Bond v. The Cora, 3 F. 838 (C.C.D. Pa. 1807) (No. 1621).

¹⁵ Tate & Lyle Ltd. v. Hain S.S. Co., (1934) 151 L.T.R. 249 at 253 [C.A.], reversed on other grounds, [1936] 2 All E.R. 597 [H.L.]; Farr v. Hain S.S. Co. (The Tregenna), 121 F. 2d 940 at 944 (2d Cir. 1941); Friedell, supra, note 4 at 1565.

¹⁶ See Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7 at 24 (1858); W. Tetley, Marine Cargo Claims, Third Edition (Montreal: International Shipping Publications Blais, 1988) at 102; J.R. Lee, "The Law of Maritime Deviation" (1972) 47 Tul. L. Rev. 155 at 158-159.

deviation in the absence of an agreement specifying that mode of carriage;¹⁷ overcarriage (i.e. proceeding to a port beyond the port of discharge) and delay each constitute a deviation;¹⁸ and carriage by a vessel other than the one named is a deviation.¹⁹

Finally, both the Hague²⁰ and Hague/Visby²¹ Rules permit geographic deviation in order to attempt to save life or property or for any other reasonable purpose. They provide sanctions for unreasonable and unjustified deviation, and for historic quasi-deviations, including unjustified deck carriage, overcarriage, and excessive delay. The Rules do not apply ex proprio vigore to

¹⁷ The Sarnia, (1921) 278 F. 459 (2nd Cir. 1921) (when a shipowner issues a bill of lading which calls for shipment under deck, and then carries the goods on deck, and by reason of their exposed position they are damaged, its breach of the contract deprives the shipowner of the benefit of the valuation clauses in the bill of lading); Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer, 422 F. 2d 7 (2d Cir. 1969), cert. denied, 397 U.S. 964 (1970).

¹⁸ Atlantic Mut. Ins. Co. v. Poseidon Schiffahrt (The Herman Schulte), 313 F. 2d 872 (7th Cir. 1963), cert. denied, 375 U.S. 819 (1963); Niles-Bement-Pond Co. v. Dampkiesaktieselskabet Balto et al., (1922) 282 F. 235 at 237 (2d Cir. 1922) (the failure to deliver the goods at the port named in the bill of lading and carrying them further to another port, is an overcarriage, and constitutes a deviation, and is a breach of contract (negligence) for which the carrier is liable).

¹⁹ Sidney Blumenthal & Co. v. United States, 30 F. 2d 247 (2d Cir. 1929), cert. denied, 279 U.S. 847 (1929).

²⁰ See art. 4(4) of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and entered into force June 2, 1931.

²¹ See arts. 4(4) and 4(5)(e) of the Protocol to Amend the 1924 Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, February 23, 1968 and entered into force June 23, 1977.

charterparties. However, since a number of standard forms of voyage charterparties incorporate the Rules or a particular national enactment of them, the Rules and, of course, their provisions with respect to deviation, may also become directly applicable to the voyage charterparty as part of its terms.²²

II. CIVIL LAW

A. France

The "new" French legislation of 1966²³ makes no mention of the question of deviation in respect to transport under charterparties. It is submitted that the lessor's obligation to use all diligence within his means to undertake the voyage implies his duty to proceed without unjustified and unreasonable deviation.²⁴

²² The questions of justifiable deviation and the effect of unjustifiable deviation under the Rules will be discussed later. However, a comprehensive interpretation of the Rules with respect to deviation is beyond the purpose of this thesis, and it has been already dealt with by many authorities: see Tetley, supra, note 16 at 99-131; W. Tetley, B. Cleven, "Prosecuting the Voyage" (1971) 45 Tul. L. Rev. 807 at 810-820; A.A. Mocatta, M.J. Mustill, S.C. Boyd, Scrutton on Charterparties and Bills of Lading, Nineteenth Edition (London: Sweet & Maxwell, 1984) at 263-267; 452-454 [hereinafter Scrutton]; W. Poor, American Law of Charter Parties and Ocean Bills of Lading, Fifth Edition (New York: Matthew Bender, 1968) at 195-207; Gilmore & Black, supra, note 10 at 176-183; etc.

²³ Law No. 66-420 of June 18, 1966 as amended by Law No. 79-1103 of December 21, 1979 and by Law No. 86-1292 of December 23, 1986; Decree No. 66-1078 of December 31, 1966 as amended by Decree No. 69-679 of June 19, 1969 as amended by Decree No. 87-922 of November 12, 1987.

²⁴ See art. 6 of Law of June 18, 1966, and art. 6 of Decree of December 31, 1966.

Three requirements have to be met in order to hold a shipowner responsible for deviation:

First, a deviation must be due to the shipowner's fault. Deviation will be a priori attributed to the shipowner's fault, if there is no express provision in the charterparty giving the shipowner the right to deviate.

Second, the charterer has to prove that the cargo became damaged due to deviation, because "[l]e déroutement en soi ne constitue pas un délit".

Third, there has to be a causal connection between the damage and the fault (la relation de cause à effet).²⁵

Generally, a strict view seems to be taken in French law concerning the extent of permitted deviations.²⁶ The effect of deviation is different from that in Common law, as is explained by Rodière²⁷:

Le contrat demeure et la situation contractuelle ne peut pas se transformer en situation extra-contractuelle; notre règle du non-concours des responsabilités s'y oppose. Le contractant du transporteur qui déroute à tort reste lié par le contrat et réclame réparation sur la base du contrat.

²⁵ R. Rodière, Traité général de droit maritime, affretements & transports, tome II, Paris, Librairie Dalloz, 1967 aux pp.162-164.

²⁶ UNCTAD Report on Charter Parties, U.N. Doc. TD/B/C.4/ISL/13 (1974) at 53, note 451.

²⁷ Rodière, supra, note 25 aux pp. 165-166. See C. Katsigeras, Le déroutement en droit maritime comparé, Paris, Librairies techniques, 1970 à la p. 12.

B. Quebec

The C.C.L.C. imposes a duty on the owner of a vessel carrying cargo to have it proceed to its destination without unnecessary deviation. This is also the master's obligation, and he is liable in damages if by his fault the ship is delayed during the voyage (arts. 2398 and 2426 C.C.L.C.).

However, it is the duty of the master of the ship to assist ships in distress at sea. A vessel may go out of its regular course for this purpose, but after having rescued those on board the distressed vessels, the master has no right to risk his own cargo to render salvage services.²⁸ In the absence of evidence to show that weather, the safety of the vessel or crew, or other similar circumstances justified the violation of express written instructions as to his course, the master of the ship was responsible to the owners for the damages caused thereby.²⁹

In Peters & The Canada Sugar Refining Co.³⁰, the charterparty described the voyage as being from Havana, Cuba, "to Montreal direct via the river St. Lawrence". A printed clause declared that the steamship should "have liberty to tow and to be

²⁸ Tarr v. Desjardins, 13 L.C.R., p. 394, cited in W.P. Sharp, Civil Code of Lower Canada, Vol. II (Montreal: A. Periard, 1889) at 472.

²⁹ Sylvain & The Canadian Forwarding & Export Co., R.J.Q., 10 C.S., 195; R.J.Q., 7 C.S., 256, cited in J.J. Beauchamp, The Civil Code of the Province of Quebec Annotated (Montreal: C. Theoret, 1905) at 1322-1323.

³⁰ M.L.R., 2 Q.B., 420; 31 L.C.J., 72; 10 L.N., 47; 16 R.L., 184, cited in Beauchamp, supra, note 29 at 1322, 1349.

towed, and to assist vessels in all situations, also to call at any port or ports for coals or other supplies".

It was held that the steamship's calling at the port of Sydney, for coal in the course of the voyage was not a deviation. Therefore, the increased insurance premium paid by the charterer in consequence of the vessel calling at Sydney, could not be deducted from the freight.

Bill 125 concerning the Civil Code of Quebec³¹ omits the articles dealing specifically with deviation, and adopts a catch-all provision to the effect that the lessor is bound to use all diligence within his means to execute the voyage. It appears that he is prima facie responsible for loss or damage of the cargo caused by deviation, but he may be relieved from liability by proving that the damage did not result from a failure on his part to perform his obligations.

III. COMMON LAW

A. Implied Duty

There is an implied term in all charterparties that the shipowner shall undertake the voyage without deviation.³² A vessel,

³¹ Bill 125, Civil Code of Quebec, 1st Sess., 34th Leg. Que., 1990, arts. 2011 and 2012.

³² Per Lord Justice Mac Kinnon in the Compagnie Primera de Navagaziona Panama v. Compania Arrendataria de Monopolio de Petroleos S.A., [1940] 1 K.B. 362 at 374-375.

in the absence of any special contract, is under the legal obligation to proceed from its port of loading to the contractual port of destination by the most direct and practical course.³³

In Davis v. Garrett³⁴, the master of a barge deviated unnecessarily from the usual course. During the deviation a violent storm wetted the cargo of lime. The barge caught fire and was lost.

Mr. Justice Tindal held, probably for the first time, the owner of the barge liable for the loss caused by deviation. It was held that the master's duty was to carry the goods by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure. He stated that the law implied the shipowner's duty to proceed without unnecessary deviation in the usual and customary course.³⁵

B. Usual Course of Voyage

It is the duty of a ship, when sailing upon an ocean voyage from one port to another, to take the usual course (route) between those ports. That course is presumed to be the direct and shortest geographical route to the port of delivery, but it may be modified

³³ The Marianne, 24 F. Supp. 786 at 788 (E.D. La. 1938); Western Lumber Mfg. Co. v. United States, 9 F. 2d 1004 at 1007 (N.D. Cal. 1925) (in contracts of affreightment there is an implied warranty against deviation).

³⁴ (1830) 6 Bing. 716.

³⁵ Ibid. at 725; see Halsbury's Laws of England, Fourth Edition, Vol. 43 (London: Butterworths, 1983) at para. 431; R.M. Hughes, Handbook on Admiralty Law, Second Edition (St. Paul: West Publishing Co., 1920) at 171, 173.

for navigational or other reasons. Unless a specific route is prescribed, evidence may be given to show what the usual course is.³⁶

A number of cases recognize the necessity of ascertaining, by appropriate evidence, the understanding of businessmen on the matter.³⁷ The test of what is usual and reasonable in a commercial sense is to be decided by the application of sound business considerations and by determining what is fair in the interests of the parties concerned.

Even a contractual liberty to follow the course taken by virtue of the "liberty clause" ("deviation clause", or "contractual voyage clause") which may be proved by the carrier, must be restricted to ports which are in a "business sense" on the way to the port of destination.³⁸

A common type of deviation clause gives the vessel liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and assist vessels in all situations, and

³⁶ Per Lord Porter in the Reardon Smith Line, Ltd. v. Black Sea and Baltic General Insurance Co., [1939] A.C. 562 at 584; The Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7 at 22-24 (1858).

³⁷ See Frenkel v. MacAndrews, [1929] A.C. 545; Evans, Sons & Co. v. Cunard Steamship Co., 18 T.L.R. 374; Glynn v. Margetson & Co., [1893] A.C. 351.

³⁸ See Morrison & Co. v. Shaw, Savill, and Albion Co., [1916] 2 K.B. 783 at 789 (to "call" at a port is a well-known sea term; it means that the ship may call at such ports as would naturally and usually be ports of call on the voyage named).

also to deviate for the purpose of saving life or property.³⁹

In addition, the liberty clauses may specify other purposes for which deviation is permitted, as for instance, bunkering purposes⁴⁰, "to make trial trips"⁴¹, or "to adjust compasses".⁴²

The printed deviation clause of the charterparty or the bill of lading must not be construed so as to defeat the main object and intent of the contract.⁴³ However, the general tendency

³⁹ See GENCON (Clause 3), BISCOILVOY 86 (Clause 21), NORGRAIN 89 (Clause 34), CEMENTVOY (Clause 29), NUVOY-84 (Clause 41), BISCOILVOY 86 (Clause 21), etc.

⁴⁰ See SOVCOAL (Clause 14); POLCOALVOY (Clause 26); CEMENCO (Clause 3); CENTROCON (Clause 29); AUSTRAL (Clause 27), etc. Sometimes a special "P. & I. Bunker Clause" is inserted in the voyage charterparty, as for instance in the NORGRAIN 89 (Clause 33):

The vessel shall have the liberty as part of the contract voyage to proceed to any port or ports at which bunker oil is available for the purpose of bunkering at any stage of the voyage whatsoever and whether such ports are on or off the direct and/or customary route or routes between any of the ports of loading and discharge named in this Charterparty and may there take oil bunkers in any quantity in the discretion of Owners even to the full capacity of bunker tanks and deep tanks and any other compartment in which oil can be carried whether such amount is or is not required for the chartered voyage.

⁴¹ See SOVCOAL (Clause 13), FERTICON (Clause 12), etc.

⁴² See CEMENCO (Clause 3), FERTICON (Clause 12), FERTIVOY 88 (Clause 25), etc. See UNCTAD Report on Charter Parties, supra, note 26 at 55-56.

⁴³ Leduc & Co. v. Ward, (1888) 20 Q.B.D. 475 at 481 (where the bill of lading gave "liberty to call at any ports in any order and to deviate for the purpose of saving life or property", the voyage being from Fiume to Dunkirk, the ship was taken out of its course to Glasgow on the shipowner's private business, and it was lost in a storm in the Clyde. The Court of Appeal held that the clause merely gave a right to call at any ports in the ordinary course of

seems to be to construe it in a restrictive sense, and vague as general terms will not be taken to confer an unlimited right to turn aside.⁴⁴

The propriety of any particular deviation is a question of fact in each case. It is a question of "inherent reasonableness", relevant to which may be the following circumstances:⁴⁵

- the commercial adventure which is the subject of the contract, or the circumstances of trade and navigation;⁴⁶
- the character of the vessel;
- the usual and customary route;
- the natural and usual ports of call (calling at weather stations to enquire about ice; going to some station for a Government pass through territorial waters, or to pick

the voyage, and the shipowner was guilty of a breach of contract); Glynn v. Margetson & Co., (1893) A.C. 351 at 355-356 (oranges were shipped on board a steamship under a bill of lading containing a deviation clause. The ship went out of its course and the oranges were delivered in a damaged condition owing to delay. The deviation in question was not justified, and the shipowner was held liable); Morrison & Co. v. Shaw, Savill & Albion Co., [1916] 2 K.B. 783 at 798, 800 (bills of lading contained a liberty to call and stay at any intermediate port. When the steamship was about eight miles from Le Havre it was torpedoed by a German submarine, and it sank with its cargo. The Court of Appeal held that Le Havre was not an "intermediate port" within the meaning of the bills of lading at which the steamship had liberty to call, and in proceeding thereto there had been a wrongful deviation from the named voyage).

⁴⁴ See UNCTAD Report on Charter Parties, supra, note 26 at 55; E.R.H. Ivamy, Payne and Ivamy's Carriage of Goods by Sea, Eleventh Edition (London: Butterworths, 1979) at 22.

⁴⁵ Per District Judge Partridge in the W.R. Grace & Co. v. Tovo Kisen Kabushiki Kaisha, 7 F. 2d 889 at 892 (N.D. Cal. 1925), affirmed 12 F. 2d 519 (9th Cir. 1926).

⁴⁶ Glynn v. Margetson & Co., [1893] A.C. 351.

up a pilot; calling at a preliminary port to lighten the ship in order that it might finish the voyage with less draught, etc.);⁴⁷

- the location of the port to which the deviation was made; and
- the purpose of the call thereat.

It is to be noted that parol evidence is always admissible to prove intention in contracts of doubtful meaning. Thus, where the contract contains no statement of the regular route, i.e. the course of the customary voyage, resort may be had to extrinsic evidence to establish proof of custom.⁴⁸ It is not necessary, however, to prove a custom in the strict sense, if the evidence given is admissible and sufficient to establish the particular voyage as a usual route.⁴⁹

Parties who contract on a subject matter concerning which known usages prevail incorporate, if nothing is said to the contrary, such usages by implication into their agreements. Therefore, it is not a deviation, in respect to the regular and usual course of a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade.⁵⁰

⁴⁷ Morrison & Co. v. Shaw, Savill & Albion Co., [1916] 2 K.B. 783 at 797.

⁴⁸ The Marianne, 24 F. Supp. 786 at 789 (E.D. La. 1938).

⁴⁹ See Reardon Smith Line Ltd. v. Black Sea and Baltic General Insurance Co., [1939] A.C. 562 at 588.

⁵⁰ Hostetter v. Park, 137 U.S. 30 at 40 (1890).

C. When Deviation is Justifiable

1. Introduction

Every unjustifiable departure from the contract course, unless involuntary, constitutes a deviation.⁵¹ Common law allows a ship to deviate where deviation is for the purposes of saving life; where the ship cannot safely keep to its course due to weather, or where it is attempting to avoid imminent danger (e.g. an enemy, pirates); where deviation is due to the default of the charterer; and in the case of involuntary deviation.⁵²

A deviation from the direct route may also be excusable if necessary to make repairs for the preservation of the ship, even when necessitated by the ship's unseaworthiness at the commencement of the voyage. Moreover, it is excusable for the purpose of obtaining necessary supplies of water, provisions, and fuel for the the voyage (the lack of which may also constitute unseaworthiness).⁵³

Furthermore, deviation may be justified where there is a "deviation clause" entitling the ship to leave the contractual route.

⁵¹ Rio Tinto Co. v. Seed Shipping Co., (1926) 42 T.L.R. 381 (where the master, who was ill, unintentionally steered a wrong course, it was held that there had been no deviation); Scrutton, supra, note 22 at 260.

⁵² C.F.H. Cufley, Ocean Freights and Chartering (London: Staples Press, 1966) at 151-152.

⁵³ See The Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7 at 22-24 (1858).

The Hague and Hague/Visby Rules permit reasonable deviation, including one to save or to attempt to save property. In addition, it is submitted that the shipowner should be allowed to deviate from the proper course in the case of an accident at sea, in order to exercise due care to protect or minimize damage to the environment.

2. Saving Life

In the case of Scaramanga v. Stamp⁵⁴, the ship was chartered to carry a cargo of wheat from Cronstadt to the Mediterranean. During its voyage, it sighted and went to the assistance of a vessel in distress, and the master agreed to tow that vessel into a port which was out of his direct course. While so doing, his ship was stranded, and ultimately, together with its cargo, was totally lost.

American courts had decided, earlier than their English counterparts, upon the question of how far a deviation for the purpose of saving life or property was justifiable as against the owner of the goods or insurer. Such a problem had incidentally arisen in the United States in cases of salvage. Chief Justice Cockburn, obviously aware of the need for uniformity of maritime law, referred to American law when he stated:

although the decisions of the American Courts
are of course not binding on us, yet the sound
and enlightened views of American lawyers in

⁵⁴ (1880) 5 C.P.D. 295.

the administration and development of the law - a law, except so far as altered by statutory enactment, derived from a common source with our own - entitle their decisions to the utmost respect and confidence on our part.⁵⁵

It was held that deviation was always justified, and in fact a moral duty, in order to save human life, but not to save property, unless this was expressly stipulated.

Lord Bramwell added that the right to deviate to save property could not be implied on the ground of public policy. If public policy required that such a right should exist, a charterparty which expressly denied this right would be illegal and all its provisions void. However, public policy only required that contracts should not be illegal nor immoral; that they should not be in restraint of trade, nor of personal freedom; and that they should not invite the commission of crime.

3. The Hague and Hague/Visby Rules

Article 4(4) of the Hague and Hague/Visby Rules go further, permitting every reasonable deviation, including deviation in saving or attempting to save property.⁵⁶

A well-known statement of the law on the subject was made

⁵⁵ Ibid. at 302.

⁵⁶ It is interesting to note that there is an additional proviso in the United States Carriage of Goods by Sea Act 1936, which states that "if the deviation is for the purpose of loading or unloading cargo or passengers, it shall, prima facie, be regarded as unreasonable".

by Lord Atkin in the Stag Line v. Foscolo Mango (The Ixia)⁵⁷, to the effect that the true test of reasonableness is:

what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive.⁵⁸

Problems may arise when the voyage charterparty contains both an incorporation of the rules and a deviation clause.⁵⁹

Under English law it was held that a deviation clause should be regarded merely as defining and extending the scope of the contract voyage, and that the liberty to deviate under the clause should therefore not be affected by article 4(4) of the Rules. The Rules are to be construed merely as giving an additional

⁵⁷ [1932] A.C. 328 at 343. See Lee, supra, note 16 at 166-180; Tetley, supra, note 16 at 99-131.

⁵⁸ The same test was applied, for example, in the American Cynamid Company v. Booth S.S. Co., 99 F. Supp. 232 at 237 (S.D.N.Y. 1951); and in the Parnass Intern. Trade & Oil v. Sea-Land Service, 595 F. Supp. 153 at 156 (S.D.N.Y. 1984) (because the majority of ocean-going carriers used a relay system such as that used by the defendant carrier, there was credible evidence suggesting that use of the relay system constituted a custom of the trade, and consequently, there was no deviation within COGSA which would render the carrier liable for damages allegedly incurred due to delay in delivery. Even if the defendant carrier's relay system constituted a deviation, the deviation was not unreasonable, a short delay of eighteen days not being in and of itself unreasonable).

⁵⁹ See POLCOALVOY, CEMENCO, BALTCO, FERTICON, AUSTRAL, AUSTWHEAT, etc.

protection to shipowners.⁶⁰

Conversely, American law appears to support the conclusion that the concept of reasonable deviation, as adopted in the Rules, may be taken as being equivalent to a reasonable departure from the normal route or contract course, as defined by a reasonable construction of the deviation clause. In other words, the test of reasonableness laid down by the Rules will be applied in order to interpret a deviation clause.

A problem may occur, however, when, in a deviation clause, a shipowner is given wider liberties than in the Rules. If the deviation clause confers liberties which go beyond the test of reasonableness, it comes into conflict with article 4(4).⁶¹

4. Saving the Environment

In light of the present endangered state of the marine environment and recent international conventions⁶² requiring all

⁶⁰ See Renton v. Palmyra Trading Corp., [1956] 1 Q.B. 462; [1957] A.C. 149, cited in UNCTAD Report on Charter Parties, supra, note 26 at 56; Scrutton, supra, note 22 at 452 et seq.

⁶¹ Gilmore & Black, supra, note 10 at 178; UNCTAD Report on Charter Parties, supra, note 26 at 56; UNCTAD Charter Parties - A Comparative Analysis, TD/B/C.4/ISL/55, 27 June 1990, at 81-82.

⁶² See, for instance, Part XII of the United Nations Convention on the Law of the Sea adopted on December 10, 1982 in Montego Bay; and the International Convention on Salvage approved on April 28, 1989 which caused the amendment of Rule VI of the York-Antwerp Rules, 1974, in 1990 (expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimizing damage to the environment).

appropriate measures to prevent, abate, and combat pollution of the seas, the shipowner should be allowed to deviate in the case of an accident at sea. This is in order to be able to exercise due care to prevent or minimize damage to the environment. It would be more than "reasonable" to save the "property" of humankind, if the meaning of the Hague and Hague/Visby Rules was to be expanded to incorporate the liberty to deviate for such a purpose.

This argument is supported by the new International Convention on Salvage, approved on April 28, 1989, which clearly emphasizes the increased concern for the protection of the environment. The Convention also stresses the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger, as well as to the protection of the environment.⁶³

The Convention provides the salvors', the shipowners', the masters', and the other property owners' duty to exercise due care to prevent or minimize damage to the environment (art. 8). A criterion which is taken into account in fixing the reward is the skill and effort of the salvors in preventing or minimizing damage

⁶³ I.M.O. Document LEG/CONF. 7/26; see J.B. Wooder, "The New Salvage Convention: A Shipowner's Perspective" (1990) 21 JMLC 81. The Convention is not likely to come into force, having been ratified by only one state (Nigeria). Fifteen states are needed to bring the convention into force. It is worth noting, however, that a revised version of Lloyd's Form of Salvage Agreement to be known as L.O.F. 1990, has been approved and published by the Council of Lloyd's, incorporating the provisions of the new convention which apply to the relationship between salvors and the owners of salvaged property. The main consequence of that is to empower arbitrators to award special compensation in certain cases where the salvaged property threatened to damage the environment or while damage was prevented or minimized while the salvage operation was in progress.

to the environment (art. 13).

Moreover, the Convention does not affect the right of the coastal state concerned to take measures, in accordance with generally recognized principles of international law, to protect its coastline or related interests from pollution or the threat of pollution (art. 9).

5. Deviation due to Unseaworthiness

The shipowner's liability for deviation under the voyage charter must be distinguished from the consequences of his failure to provide a seaworthy ship. The former renders the shipowner liable as an insurer and imposes an obligation upon him beyond the terms of the contract, while the latter merely entitles the charterer to repudiate the contract.⁶⁴

Another problem arises, of course, when the vessel has deviated due to its unseaworthiness. A deviation required to remedy unseaworthiness does not amount to unjustifiable deviation. Nor does it destroy the right to rely upon the terms of the contract of carriage unless it is established that the shipowner knew of the vessel's state on sailing.⁶⁵

⁶⁴ Compare to Iligan International Corp. v. S.S. John Weyerhaeuser, 372 F. Supp. 859 (S.D.N.Y. 1974), affirmed 507 F.2d 68 (2d cir. 1974).

⁶⁵ Per Lord Porter in the Monarch Steamship Co., Ltd. v. Karlshamns Oljefabriker (A/B), [1949] A.C. 196 at 212. It is worth noting that Lord Wright, recognizing the same origin and foundation of the law in both the United States and Britain, said that it was desirable that as far as possible there should be uniformity

The rationale of this rule was explained by Lord Atkinson in Kish v. Taylor Sons & Co.⁶⁶ He stated that it is the presence of the peril and not its cause which determines the character of the deviation. The master, when finding his ship in peril as a result of his own negligence or the breach of contract by his owner, cannot be obliged to choose between continuing the voyage and seeking safety under the penalty of forfeiting the contract of affreightment. Such a law would increase the dangers to which life and property are exposed at sea.

In S.S. Willdomino v. Citro Chem. Co.⁶⁷, a steamship, bound from Messina, Sicily, to New York, stopped at the Azores for repairs, and then sailed for New York with a supply of bunker coal known by the shipowners and officers of the vessel to be insufficient for the voyage. The vessel sailed for some days on a course for New York until it became apparent that the vessel would not make that port with the remaining fuel on board. Course was changed for North Sydney, Nova Scotia, where the vessel refueled before proceeding to its destination.

The United States Supreme Court held that there was an inexcusable deviation from the permitted course which rendered the shipowner liable as an insurer for any damage suffered by the cargo. An emergency sufficient to excuse a deviation could not arise out of circumstances deliberately planned nor from gross

between the law merchant in both countries (at 231).

⁶⁶ [1911-13] All E.R. Rep. 481 at 486.

⁶⁷ 272 U.S. 718 (1927).

negligence.⁶⁸

Thus, where the shipowner actually knew of the unseaworthiness in advance and deliberately sent the ship to sea, knowing that a change of route increasing the risk to the cargo was inevitable, the deviation was voluntary and the shipowner was liable as an insurer for the resulting cargo damage.⁶⁹

The Willdomino case was distinguished in The Malcolm Baxter, Jr.⁷⁰, where it was held that the master did not set sail with the knowledge that a deviation from the voyage would ensue, nor with the purpose and intent to deviate as in The Willdomino. It was again the presence of the peril and not its cause which justified the deviation. The rule that a voluntary deviation from the prescribed voyage displaces the contract of affreightment is not to be extended to an involuntary deviation in order to avoid perils of the sea. The same would apply, even in a case where the deviation would not have been necessary if the shipowner had used reasonable diligence to start the voyage with a seaworthy vessel.⁷¹

⁶⁸ Ibid. at 725, 727.

⁶⁹ The Waalhaven, 36 F. 2d 706 (2d Cir. 1929), cert. den., 281 U.S. 747 (1930). In The Louise, 58 F. Supp. 445 (D.Md. 1945), the carrier was held liable as an insurer, and obligated to refund prepaid freight despite contract terms to the contrary, where the geographic deviation was caused by its gross negligence. The carrier had specific knowledge of the unseaworthy condition of the ship, and knew that successful completion of the contracted voyage was impossible. See Royal Ins. Co. v. United States, 87 F.2d 714 (2d Cir. 1937).

⁷⁰ 277 U.S. 323 (1928).

⁷¹ Ibid. at 332-333.

D. Legal Effects of Unjustified Deviation

1. Reasons for Holding Deviating Carriers Liable

Friedell postulates four grounds as a justification on which to hold carriers liable for deviation:⁷²

a. The Wrongdoer Principle

The first is "the wrongdoer principle" under which the deviating carrier is held liable when the damages resulting from deviation would not have happened had he followed the prescribed course. The deviation, once determined as being in breach of the carrier's duty to proceed directly upon the appropriate course, makes the carrier liable for all of the consequences of the deviation, except where the same loss would necessarily have occurred even if the carrier had not deviated.

The principle is similar to "The Pennsylvania Rule" which provides that if a ship violates a statutory navigational rule and causes a collision, the violation is presumed to be the cause of the collision. The burden then rests upon the shipowner to show not merely that the violation might not have been, or was not, one of the causes, but that it could not have been one of the causes.⁷³

Professor Tetley considers the Pennsylvania Rule to be

⁷² See Friedell, supra, note 4 at 1538-1547.

⁷³ The Pennsylvania, 86 U.S. (19 Wall.) 125 at 136 (1874).

erroneous and provides, in his article "The Pennsylvania Rule - An Anachronism?, The Pennsylvania Judgement - An Error?"⁷⁴, persuasive arguments suggesting its abolition.

Similarly, Friedell argues that the law "should be based on reason, not emotion", and since the wrongdoer principle is based on emotional arguments, it does not provide a rational justification for the deviation doctrine.⁷⁵

b. The Contract Approach and Concept of Fundamental Breach

Friedell's second explanation for holding deviating carriers liable is that the parties have contracted for one voyage only, that described in the bill of lading. There is, therefore, no contract for the voyage created by the deviation. He argues that this second explanation appears more rational than the first one.

However, according to Friedell, the "contract approach" is unsatisfactory in several respects as it does not explain why a deviation is so fundamental that it deprives a carrier of the protection for which it contracted. Moreover, if the entire

⁷⁴ For instance, he states that the Pennsylvania Rule is "a very heavy presumption of causation..." and that "[j]ust as legal presumptions of fault were found to be unnecessary if not incompatible with the proportionate fault doctrine at the time of the 1910 Brussels Collision Convention and were accordingly abolished, so the Pennsylvania Rule should be abolished by Congress in the light of Reliable Transfer. Another solution would be renunciation of the Rule by the United States Supreme Court". See W. Tetley, "The Pennsylvania Rule - An Anachronism?, The Pennsylvania Judgement - An Error?" (1982) 13 JMLC 127 at 145-146.

⁷⁵ Friedell, supra, note 4 at 1540.

contract is voided, the charterer has no basis on which to establish his rights against the shipowner.⁷⁶

According to Carver,⁷⁷ the principle of deviation began as a limitation to Common law exceptions, then graduated into an overriding obligation, and finally evolved into a new concept of "the fundamental breach",⁷⁸ which originated with the fiction of an implied term. That is to say, it is a fundamental condition that in the absence of express liberties, the vessel shall proceed by the ordinary and customary route, and an unjustified deviation is therefore a fundamental breach of a contract of affreightment.

Clarke⁷⁹ is of the opinion that fundamental breach and deviation⁸⁰ are only similar, not the same. Both, if established, tend to the elimination of exemption clauses. However, there are

⁷⁶ Ibid. at 1541-1543.

⁷⁷ R. Colivaux, Carver's Carriage by Sea, Thirteenth Edition (London: Stevens & Sons, 1982) at para. 893.

⁷⁸ The terminology had been coined by Lord Wright in the Hain Steamship Co. v. Tate & Lyle, Ltd., [1936] 2 All E.R. 597 at 607-608. See Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361 (where the House of Lords adopted "constructive" fundamental breach as opposed to "substantive" fundamental breach); Harbutt's "Plasticine" Ltd. v. Wayne Tank Co., [1970] 1 Q.B. 447, overruled by Photo Production Ltd. v. Securicor Transport, [1980] A.C. 827; Tetley, supra, note 16 at 100-102.

⁷⁹ M. Clarke, "Fundamental Breach of Charter-Party" [1978] LMCLQ 472 at 475-476.

⁸⁰ There is also a presumption in maritime law that exemption clauses are not intended to apply to cases of breach of (1) an overriding obligation of the carrier to take reasonable care of the cargo in its charge; and (2) an overriding duty imposed on the carrier to provide a ship that is seaworthy at the beginning of the voyage. Clarke, supra, note 79 at 474-475.

some differences between the two. First, deviation, in its strict form, is confined to cases of carriage of goods, while fundamental breach is found throughout the law of contract. Second, fundamental breach requires a greater degree of seriousness in its consequences than deviation. Third, fundamental breach must cause the loss in question, while deviation does not need this causal connection. Fourth, deviation must be proved by the plaintiff.

The position today appears to be that all exemptions will stand or fall on their true construction, considering all of the circumstances of the contract. Fundamental breach as a rule of law seems to have been eliminated by the British Unfair Contract Terms Act 1977 and various judicial decisions⁸¹. Perhaps it would be appropriate to cite Mills⁸² who suggests that deviation, as a substantive rule of law, died alongside fundamental breach:

My own opinion is that the doctrine of deviation does not stand up to logical analysis as a rule of law in the face of well drafted liberty to deviate clauses, bearing in mind the intention of the parties, in exactly the same way as fundamental breach proved lacking.....What is seen to be needed is a test case at common law which would go to appeal with the plaintiffs having suffered an appreciable loss caused by deviating carriers. The contract would contain a well-drafted exemption clause which, upon pure construction, would cover the breach adequately. The bargaining position of the parties, and their opportunities to insure, would be equal. The case would turn purely upon the question of whether deviation still

⁸¹ See, for example, the recent Canadian case of Hunter Engineering Co. Inc. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426.

⁸² C.P. Mills, "The Future of Deviation in the Law of the Carriage of Goods" [1983] 4 LMCLQ 587 at 595-596.

exists as a substantive rule of law, with the plaintiff arguing the long time of deviation authorities and the defendant carriers relying upon the new doctrine of reasonableness as laid down in the Unfair Contract Terms Act and Photo Production. [Emphasis added]

c. The Insurance Factor Theory

Friedell's third explanation for holding a deviating carrier liable is the insurance factor theory. The rationale for this explanation used to be that the cargo lost its insurance when the vessel deviated. The owners of the goods were then unjustly left without remuneration. In order to remedy this problem, the courts decided to make the shipowner responsible for the loss due to deviation.

However, the insurance factor theory does not provide a basis for continuing the deviation rule, since modern cargo insurance policies usually provide that the cargo will remain insured in case of deviation upon payment of a premium.⁸³

d. The Risk Approach

Finally, Friedell argues the fourth, and best, "risk approach" to the deviation doctrine. This approach is based on the proposition that deviations are wrongful because they expose the cargo to a greater risk of loss than that permitted by the

⁸³ Friedell, supra, note 4 at 1543-1546.

contract.

Thus, the best reason for continuing to hold deviating ships liable is to deter them from creating unauthorized risks. In other words, deviating carriers should be liable only when the deviation increases the risk of the loss that actually occurred.⁸⁴

2. Legal Effects

The breach of the shipowner's implied duty of care, discussed in the previous chapter, gives the charterer a right to rescind the contract only if the breach is material. However, the breach of the implied duty to proceed without deviation gives rise to an automatic right to cancellation.⁸⁵

In the leading British case of Hain Steamship Co. v. Tate & Lyle Ltd.⁸⁶ which concerned the legal effects of unjustified deviation, Lord Atkin held that the shipowner's departure from the contractual voyage was a breach of the voyage charter. He deemed this breach to be of such a serious character that, however slight

⁸⁴ Ibid. at 1546-1547, 1565.

⁸⁵ See A. Waring, Charterparties (Cape Town: Juta & Co., Ltd., 1983) at 22.

⁸⁶ [1936] 2 All E.R. 597. In Ballian v. Joly Victoria, (1890) 6 T.L.R. 345, the action was brought to recover for damage to certain bales of tobacco shipped by the plaintiffs on board the defendants' steamship at Lagos for London. There was a deviation in a double sense. The voyage was different from that agreed upon, and the goods were carried in a ship different from that contemplated. The Court of Appeal held that deviation deprived the shipowner of the protection which he had expressly reserved to himself with regard to excepted perils. The deviation put an end to all stipulations in favour of the shipowner in regard to the carriage.

the deviation, the other party was entitled to treat it as going to the root of the contract and therefore, he should not be bound by any of its terms.⁸⁷

Thus, the voyage charterer can exercise an option to accept the deviation as a breach and to give notice thereof, or to continue with the contract and claim such damage for delay as the deviation causes.

If the charterer elects to continue with the contract, i.e. to continue the voyage, he waives the deviation.

If the ship deviates without justification, the shipowner cannot rely on the exception clauses in the voyage charterparty. Nevertheless, he is entitled to the exceptions available to a common carrier⁸⁸ provided that he can prove that the loss would have occurred even if no deviation had taken place.

In Morrison & Co. v. Shaw, Savill, and Albion Co., Ltd.⁸⁹, the bills of lading contained the liberties to deviate (to call and stay at any intermediate port) and an "exception of the King's enemies". When the steamship was about eight miles from Le Havre it was torpedoed by a German submarine and sank with its cargo.

The Court of Appeal held that Le Havre was not an "intermediate port" within the meaning of the bills of lading at

⁸⁷ Hain Steamship Co. v. Tate & Lyle Ltd., [1936] 2 All E.R. 597 at 601.

⁸⁸ The shipowner has to show that the loss or damage was occasioned either by the act of God, or by the King's enemies, or by inherent vice of the goods. Scrutton, supra, note 22 at 262.

⁸⁹ [1916] 2 K.B. 783.

which the steamship had liberty to call, and in proceeding thereto had wrongfully deviated from the named voyage. The shipowners could not rely upon the exception of the King's enemies in the bills of lading. In addition, as they were breaking their contract as carriers, they could not rely upon the implied Common law exception of the King's enemies. They were liable, not having shown that the loss would have occurred even if they had not deviated.⁹⁰

The American courts adopted a similar position with respect to the legal effects of unjustified deviation.⁹¹ Deviation was held to be a breach of contract which goes to the essence of the venture and which defeats the purpose of the contract.⁹² It is the highest form of negligence, depriving a shipowner of all exemptions in the charterparty or in the statute,⁹³ and it imposes upon him at least the liability of a common carrier, which is the liability of an

⁹⁰ Ibid. at 798.

⁹¹ See D.I. Gilchrist, "Proceeding With the Chartered Voyage" (1975) 49 Tul. L. Rev. 922 at 927-935.

⁹² See The Sarnia, (1921) 278 F. 459 at 461 (2d Cir. 1921) (the general rule is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in his favor); Hildebrand v. Geneva Mill Co., 32 F. 2d 343 (M.D. Ala. 1929) (the right of cancellation of a charterparty does not arise out of any breach. In order to justify the rescission of a charterparty, the character of the breach must be such as to defeat the purpose of the contract). Compare to MacAndrew v. Chapple, (1866) L.R. 1 C.P. 643 at 648.

⁹³ In Fass v. United States Shipping Board Emergency Fleet Corporation, 9 F. 2d 1004 (N.D. Cal. 1924), deviation deprived the carrier of exemption from liability under Harter Act. Similarly, in Western Lumber Mfg. Co. v. United States, 9 F. 2d 1004 at 1007-1008 (N.D. Cal. 1925), the master's negligent operation of vessel during deviation did not bring the loss within section 3 of the Harter Act, relieving the shipowner of liability for errors in navigation.

"insurer".⁹⁴

However, where a charterer has the right to declare the voyage charterparty at an end, and to recover the consideration (i.e. freight), he will not free himself if, upon learning of the breach, he fails to warn the shipowner that the contract is at the end. His right to damages, however, is not affected by such conduct.⁹⁵

Furthermore, in the case of unjustified deviation, the shipowner cannot claim the contractual freight and a general average contribution⁹⁶, nor can he claim demurrage⁹⁷. It appears, however, that if the goods are nevertheless carried to their destination, the shipowner will be entitled to recover a reasonable sum as freight on an implied contract to pay a quantum meruit. He will not be entitled to this sum, however, if the circumstantial facts are such as to defeat this implication.⁹⁸

⁹⁴ The Citta di Messina, 169 F. 472 at 474-476 (S.D.N.Y. 1909); S.S. Willdomino v. Citro Chem. Co., 272 U.S. 718 at 725 (1927).

⁹⁵ Farr v. Hain S.S. Co. (The Tregenna), 121 F. 2d 940 at 944 (2d Cir. 1941).

⁹⁶ Hain Steamship Co. v. Tate & Lyle, Ltd., [1936] 2 All E.R. 597 at 603.

⁹⁷ United States Shipping Board v. Bunge y Born, (1924) 40 T.L.R. 541, affirmed (1924) 41 T.L.R. 73, affirmed (1925) 42 T.L.R. 174, cited in Scrutton, supra, note 22 at 263.

⁹⁸ Scrutton, supra, note 22 at 262; Hain Steamship Co. v. Tate & Lyle, Ltd., [1936] 2 All E.R. 597 at 603-604 (per Lord Atkin), 611-614 (per Lord Wright), 616 (per Lord Maugham).

In one case of consecutive voyages,⁹⁹ a clause in a charterparty provided that the charterparty should remain in force "for two consecutive voyages at the same rate of freight and upon the same terms and conditions" as therein provided. The charterparty also included a deviation clause. Upon the true construction of the charterparty, the Court of Appeal found that there was one indivisible contract for the purposes of two voyages. In light of the circumstances, an unauthorized deviation of the ship on its first voyage was held to free the charterers, if they elected to repudiate the contract, from their obligation to fulfil the contract with the shipowners as to the second voyage.¹⁰⁰

Finally, under the Hague Rules, an intentional deviation which causes loss or damage results in very heavy sanctions, depriving the carrier of all benefits under the contract and the Rules. According to Professor Tetley, the Visby Rules go too far in adopting "the unbreakable package/kilo limit". This right to limit liability is lost only if the breach occurs with the carrier's intent to cause damage, or with recklessness and knowledge of the probable consequences. The burden of proof is on the claimant.¹⁰¹

It is worth considering Friedell's argument concerning the sanctions provided in the American enactment of the Hague Rules, i.e. Carriage of Goods by Sea Act 1936, in the case of unjustified

⁹⁹ Compagnie Primera de Navagazione Panama v. Compania Arrendataria de Monopolio de Petroleos S.A., [1940] 1 K.B. 362.

¹⁰⁰ Ibid. at 370-371.

¹⁰¹ See Tetley, supra, note 16 at 111-112, 122-123.

deviation. Friedell¹⁰² argues that it makes no more sense

to oust the \$ 500 limitation of COGSA than it did to oust the \$ 100 valuation clauses found in bills of lading. COGSA preserves the shipper's right to declare a higher value and pay a higher freight. When the shipper elects not to do so, it should not have the benefit of recovering the full value of goods when they are lost or damaged.

IV. CONCLUSION

The concept of deviation in maritime law arose from the principle that a marine insurer was deemed to have assumed only those risks inherent in the contemplated voyage. If the carrier made a voluntary and unjustified departure from the intended course, then the marine policy was "ousted" and the insurer relieved of his obligations concerning any loss which might occur thereafter.

In contracts of marine insurance, there is an implied absolute condition not to deviate. This condition has been gradually recognized by Common law courts in contracts for the carriage of goods by sea and in contracts for the hire of a ship. Thus, in the case of unjustified deviation, the voyage charterparty was held to be ousted itself, and the carrier precluded from relying on any provisions in the contract purporting to limit his liability.

According to Friedell, the "insurance factor" theory does

¹⁰² Friedell, supra, note 4 at 1558.

not provide a basis for continuing the deviation principle, since modern cargo insurance policies usually stipulate that cargo will remain insured in case of a deviation, upon payment of a premium. The "wrongdoer principle" and the "contract approach" are also unsatisfactory in not giving an acceptable rationale for holding deviating carriers liable. Furthermore, the doctrine of fundamental breach does not allow the courts to consider whether the exemption clause was fair in all the circumstances or whether it was harsh and unconscionable. This doctrine should therefore be abandoned and replaced by a fair system of marine cargo claims similar to those in Civil law.

Thus, one should accept Friedell's argument that perhaps the best reason for holding deviating carriers liable is the "risk approach", based on the idea that deviations are wrongful because they expose the cargo to greater risk of loss than permitted by the voyage charterparty.

The doctrine of deviation in its geographical sense is also applied to carriers other than ships, and it is extended to cover other material breaches of the contract of carriage, such as unjustified carriage of cargo on deck, overcarriage, delay, etc.

It is an implied duty of a shipowner to take the usual course between two or more ports. This course is presumed to be the direct and shortest geographical route to the port of delivery. If no specific route is prescribed, the test of what is the usual and reasonable course in a commercial sense should be decided by the application of sound business considerations and by determining

what is fair in the interests of the parties concerned.

Even a contractual liberty to follow the course taken by virtue of the "liberty clause" must be restricted to ports which are in a "business sense" on the way to the port of destination. However, such a clause must not be construed so as to defeat the main object and intent of the voyage charter.

Common law allows a ship to deviate in order to save life and to avoid the perils of the sea. It also allows deviation when it is due to the fault of the charterer. Deviation may also be excusable when necessitated by the ship's unseaworthiness, or when permitted by a clause of the voyage charterparty which would entitle the ship to leave the contractual route.

The Hague and Hague/Visby Rules permit every reasonable deviation including one required to save or attempt to save property.

It is submitted that the shipowner should also be allowed to deviate from the proper course in the case of an accident at sea involving a threat of pollution to the environment, in order to exercise due care to protect or minimize damage to the environment.

The French legislation of 1966 makes no mention of the question of deviation in respect to voyage charters. It may be argued, however, that the owner's obligation to use all diligence within his means to undertake the voyage implies his duty to proceed without unjustified and unreasonable deviation.

The same can be said for the new proposed Civil Code of Quebec which omits the articles dealing specifically with

deviation. The shipowner will be prima facie responsible for loss or damage to cargo caused by deviation, but he will be relieved from liability by proving that the damage did not result from his negligence.

To conclude, if an international convention on charterparties were to be adopted, then it should necessarily deal with the subject of deviation. That is not to say that the rules to be formulated in such a convention would be different from the principles applicable under the Hague and Hague/Visby Rules. However, the latter do not apply by force of law to charterparties; hence the need to enshrine the principles in the convention.

Apart from sanctions for unjustified deviation, the new provision might read as follows:

Any deviation to save or in an attempt to save life or property at sea, or to exercise due care to protect or minimize damage to the environment, or any other reasonable deviation, shall not be deemed to be an infringement or breach of this convention or of the charterparty, and the lessor shall not be liable for any loss or damage resulting therefrom.

PART III
IMPLIED UNDERTAKINGS OF THE VOYAGE CHARTERER

Chapter 6

IMPLIED DUTY TO NOMINATE A SAFE PORT AND/OR SAFE BERTH

I. INTRODUCTION

II. DEFINITION OF PORT AND BERTH

- A. Introduction
- B. Definition of Port
- C. Definition of Berth

III. WHEN THE PORT IS SAFE

- A. Question of Fact
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- D. Examples of Physically Safe Ports
 - 1. Introduction
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"May the charterer send the good ship to a safe port excluding all unsafe ports - Amen."

A. Diamond, Charter-Parties Conference (1982)

I. INTRODUCTION

One of the voyage charterer's most important obligations is to nominate a safe port and safe berth. He also has other principal obligations, namely to load the ship with the stipulated cargo and within the time specified by the contract, to pay the freight, and to pay demurrage if any is due. This chapter will, however, discuss the first mentioned undertaking only. In particular, it will deal with some of the problems of the charterer's obligation to nominate a safe port. The notions of physically, politically, environmentally, and sanitarily safe ports, the implied undertaking, the guarantee interpretation of express or implied charterer's duty, the concept of prospective safety, and the due diligence approach, will be examined. Finally, a proposal for incorporation within a new international convention will be made.

Unless the context requires otherwise, the words "port" or "safe port" will be used interchangeably with the words "berth" or "safe berth".

The safe port obligation, typical in contracts for hiring ships, is either expressly stated or implied in both voyage and time charterparties. In general, the same criteria apply to both types of contract.¹ However, it is submitted that the time charterer should have a greater responsibility than the voyage

¹ See, e.g. Kodros Shipping Corporation v. Empresa Cubana de Fletes (The "Evia" No. 2), [1982] 2 Lloyd's Rep. 307 at 319 [H.L.]; G.W. Grace & Co. v. General Steam Navigation Co., [1950] 2 K.B. 383 at 396.

charterer for ensuring that he orders the vessel to safe ports and berths.

II. DEFINITION OF PORT AND BERTH

A. Introduction

A particular port may be defined by law or by custom, and its extent may be different for administrative, fiscal, geographical, and commercial purposes. Its limits, for instance, are extremely important in calculating the laytime of a particular vessel. This period of time commences when the vessel reaches the port or berth specified in the voyage charterparty, is ready to load, and the notice of readiness to load is given.

The definition of port, however, is also essential for determining its safety, as well as for determining the charterer's obligation to nominate a safe port or berth.

B. Definition of Port

According to Charterparty Laytime Definitions 1980² the

² These definitions were formerly known as the Rio Laytime Definitions, "Rio" having been the place where the Comité Maritime International (CMI) had agreed on them. They were issued jointly by The Baltic and International Maritime Conference (BIMCO) (Copenhagen), CMI (Antwerp), The Federation of National Associations of Ship Brokers and Agents (FONASBA) (London), and the General Council of British Shipping (GCBS) (London), December 1980. They have no force of law, however, they can be agreed upon by the parties to a contract, as with, e.g. the York - Antwerp Rules. The

word "port" means "an area within which ships are loaded with and/or discharged of cargo, and includes the usual places where ships wait for their turn or are ordered or obliged to wait for their turn no matter the distance from that area".

The word "port" has many connotations. It is said to be quid aggregatum (the combination of several elements), consisting of at least three categories: natural, artificial, and civil or administrative ones.

The natural category constitutes a port in its geographical sense. It is an access of the sea and a shelter in the coast, whereby vessels may conveniently sail, find protection, lie safely afloat (or sometimes aground), be loaded, and unloaded. This category can also be denoted as "harbour".

The artificial group of elements includes wharves, cranes, warehouses, buildings for the convenience of mariners and merchants, as well as other facilities for safe-guarding the goods and supplying the ships. It is submitted that a port should also have adequate facilities for the reception of residues and oily mixtures, sewage, and garbage.

The civil or administrative group comprises privileges and franchises given to a port by a civil authority.³ For

text of definitions is reproduced, for example, in J. Schofield, Laytime and Demurrage (London: Lloyd's of London Press, 1986) at 395-398.

³ See per Lord Halsbury L.C. in Hunter v. Northern Marine Insurance Co., [1888] 13 App. Cas. 717 at 722-723, citing Sir Matthew Hale's Hargraves Law Tracts. See also Midland Navigation Co. v. Dominion Elevator Co., (1904) 34 S.C.R. 579, affirming 6 O.L.R. 432; Homan v. Green, (1881) 6 S.C.R. 707; Hamburg-American Steam

administrative purposes, a port is a place where loading and unloading operations are authorized by law.

The word "port" is also used to designate an agency, i.e. a port authority in charge of planning, constructing, developing, operating, and even policing the area of a certain port.⁴

In commercial documents, such as charterparties and policies of marine insurance⁵, a "port" has no fixed meaning, but is to be considered in its ordinary, business, commercial, and popular sense, i.e., as applying to what would be understood by shipowners, charterers and underwriters.⁶

Thus, in the commercial sense, and by the most ancient definitions, a port is an enclosed place where vessels customarily load or unload goods for export or import. An anchorage (station) may also be called a port when it is inclosed and made safe: Portus est locus coclusus quo importantur et unde exportantur merces; idem

Packet Co. v. United States, 250 F. 747 at 762-764 (2d Cir. 1918); Packwood v. Walden, 7 Mart. N.S. (La.) 81 at 88 (1828); Cockey v. Atkinson, 2 Barn. & Ald. 460 (1819); Ins. Co. of Scotland v. Gavin, 4 Bligh (N.S.) 578 (1829); and Sailing Ship Garston Co. v. Hickie & Co., 15 Q.B.D. 580 (1855).

⁴ J.G. De Matons, "Ports as a Public Service: The Evolution in France and in the United States" (1971) 2 JMLC 571 at 572.

⁵ See, in Canadian context, The Saint Paul Fire and Marine Insurance Company v. Troop, (1895) 26 S.C.R. 5 at 7.

⁶ See Price v. Livingstone, [1882] 9 Q.B.D. 679 at 681; Sailing Ship "Garston" Co. v. Hickie & Co., (1885) 15 Q.B.D. 580; Hunter v. Northern Marine Insurance Co., [1888] 13 App. Cas. 717 at 722-723; Goodbody v. Balfour, (1899) 5 Com. Cas. 59; Manchester Liners v. Virginia - Carolina Chemical Co., 204 F. 564 (4th Cir. 1913).

et statio dicitur conclusus ac firmate.⁷

Courts may, of course, apply other criteria in order to determine whether or not a particular place can be considered a port. For example, in Johnston v. Saxon Queen Steamship Company⁸, the court found four characteristics which defined the port. First, the port in question was not merely a quay on a beach. Second, public money had been spent on it. Third, there were regulations under an Act of Parliament and orders of The Board of Trade with regard to this port. Fourth, it had a pilot and a harbour master.

C. Definition of Berth

A "berth" means the specific place where the ship is to load and/or discharge,⁹ and may include a dock, anchorage, offshore mooring, and even the approaches to a berth. Sometimes it may be alongside another vessel or lighter.¹⁰

⁷ Devato v. 823 Barrels of Plumbago, 20 F. 510 at 515-516 (S.D.N.Y. 1884); Digeste, 50, 15, 59. The old codifications of maritime law dealt with in the previous chapters provide neither a definition of "port", "berth", "safe port", "safe berth", nor the charterer's obligation to nominate a safe port and/or berth.

⁸ 108 L.T. 564 at 565. See G.W. Grace & Co. v. General Steam Navigation Co., [1950] 2 K.B. 383.

⁹ See the Charterparty Laytime Definitions 1980, section 3.

¹⁰ J.B. Smith, "Time and Voyage Charters: Safe Port/Safe Berth" (1975) 49 Tul. L. Rev. 860 at 861. See Clause 3 of the BISCOILVOY 86 Charter Party.

III. WHEN THE PORT IS SAFE

A. Question of Fact

Whether or not a port or berth is safe is a question of fact¹¹ for the jury. It depends on the particular vessel, the specified voyage charterparty, the particular time, the nature of the work to be done, and the circumstances then prevailing.¹² Questions of law, however, are also involved in determining the safety of the port and its consequences.¹³

Thus, in order to consider the safety of a particular port one must take a broad view, considering the nature of the voyage charterparty and the facts as a whole.¹⁴

Where the parties elect to refer disputes to arbitration, it is a question for the arbitrators as to whether or not the port is safe at the material time.¹⁵

¹¹ See, e.g. Vardinovannis v. The Egyptian General Petroleum Corporation (The "Evaggelos TH"), [1971] 2 Lloyd's Rep. 200 at 206 [Q.B. (Com. Ct.)].

¹² See, e.g. Smith v. Dart, [1884] 14 Q.B.D. 105; Axel Brostrom and Son v. Louis Dreyfus and Co., (1932) 38 Com. Cas. 79; J.M. Reynolds, "The Concept of Safe Ports" (1974) LMCLQ 179.

¹³ Kristiandsands Tankrederi A/S and Others v. Standard Tankers (Bahamas) Ltd. (The "Polyglory"), [1977] 2 Lloyd's Rep. 353 at 364 [Q.B. (Com. Ct.)].

¹⁴ G.W. Grace & Co. v. General Steam Navigation Co., [1950] 2 K.B. 383; Johnston v. Saxon Queen Steamship Company, (1913) 108 L.T. 564.

¹⁵ See, e.g. Reinante Transoceanic Navegacion S.A. v. The President of India (The "Apiliotis"), [1985] 1 Lloyd's Rep. 255 at 258 [Q.B. (Com. Ct.)].

B. Test of Safety

Apart from considering all of the legal aspects of the warranty of safety, which will be discussed later, it is appropriate, at this stage, to mention Lord Justice Sellers' general statement concerning the safety of a port in The "Eastern City",¹⁶ in which he adopted and explained the previous dictum of Lord Justice Morris in The "Stork"¹⁷:

If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship, it would probably meet all circumstances as a broad statement of the law. Most, if not all, navigable rivers, channels, ports, harbours and berths have some dangers from tides, currents, swells, banks, bars or revetments. Such dangers are frequently minimized by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling of a vessel in accordance with good seamanship.¹⁸

A port is not safe if, although safe within its geographical limits, a ship cannot safely reach it and return from

¹⁶ Leeds Shipping Company, Ltd. v. Societe Francaise Bunge, [1958] 2 Lloyd's Rep. 127 at 131 [C.A.].

¹⁷ Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp and Paper Mills, [1955] 2 Q.B. 68.

¹⁸ An almost identical definition of a safe port and berth has been adopted in Charterparty Laytime Definitions 1980, sections 2 and 4. See also E. Sullivan, The Marine Encyclopaedic Dictionary (London: Lloyd's of London Press Ltd., 1988) at 376; Axel Brostrom and Son v. Louis Dreyfus and Co., (1932) 38 Com. Cas. 79 at 85; Atkins v. Fibre Disintegrating Co., 2 Fed. Cas. 78 at 79 (No. 601) (E.D.N.Y. 1868), affirmed 85 U.S. (18 Wall.) 272 (1873).

it. It is immaterial where the danger may be located. Even a distant impediment in the route for reaching and returning from a port is capable of being a breach of the warranty of safety. It goes without saying, however, that the more remote the obstacle from the port, the less likely it is to interfere with the safety of the voyage.¹⁹

It is not every danger which will make the port unsafe. Firstly, if the danger is an "abnormal" one²⁰ (e.g. a storm of unprecedented violence), then the charterers are not answerable under their warranty of safety.

Secondly, if the hazard is merely a temporary one (e.g. neap tides²¹), it may not constitute lack of safety, nor make the port unsafe. The danger must be operative for a period which, having regard to the nature of the adventure and of the voyage charterparty, would involve inordinate delay.²²

¹⁹ G.W. Grace & Co. v. General Steam Navigation Co., [1950] 2 K.B. 383 at 391; The "Polyglory", [1977] 2 Lloyd's Rep. 353 at 363 [Q.B. (Com. Ct.)]; United States v. Atlantic Refining Co., 112 F. Supp. 76 at 80 (D.N.J. 1951).

²⁰ See Transoceanic Petroleum Carriers v. Cook Industries Inc. (The "Mary Lou"), [1981] 2 Lloyd's Rep. 272 at 278 [Q.B. (Com. Ct.)].

²¹ Aktieselskabet Eriksen v. Foy, Morgan & Co., (1926) 25 Ll. L. Rep. 442 at 445 [K.B.].

²² In Unitramp v. Garnac Grain Co. Inc. (The "Hermine"), [1979] 1 Lloyd's Rep. 212 at 219-220 [C.A.] an obstruction which merely caused delay did not render a port unsafe unless the delay was sufficient to frustrate the adventure. See G.W. Grace & Co. v. General Steam Navigation Co., [1950] 2 K.B. 383 at 392; S.S. Knutsford v. Tillmanns & Co., [1908] A.C. 406 at 407-408; Dahl v. Nelson, (1881) 6 A.C. 38; Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries and Food, [1962] 1 Q.B. 42 at 112, approved in part [1963] A.C. 691.

However, even a "temporary breakdown in the system" may put the charterer in breach of the contract.²³

To summarize, the safety of a port is to be determined with reference to the vessel and the circumstances surrounding that vessel's use of the port. It is suggested that, in order to consider a particular port as safe, the port must be physically, politically, sanitarily and environmentally safe.

C. Proving Safety: An Accident-Free History

The burden is upon the shipowner to prove that the damage to the vessel was caused by an unsafe port or berth.²⁴ The charterer may then, apart from other legal defences (e.g. that the port became unsafe after nomination due to an abnormal occurrence) prove that the port has had an "accident-free history" for at least a period of several years.²⁵

For example, in one recent arbitration case²⁶, the

²³ The "Mary Lou", [1981] 2 Lloyd's Rep. 272 at 279 [Q.B. (Com. Ct.)].

²⁴ See, e.g. Globe Shipping Co., Ltd. v. Munson Steamship Line (The "Brevnton"), 1934 A.M.C. 1473 at 1475 (Arb. N.Y. 1934).

²⁵ See the Alvenus Lim. Procs., 1990 A.M.C. 2113 at 2141 (S.D. Tex. 1990) where the fact that similarly situated vessels, properly navigated and handled, used berths without incident over a period of several years, was evidence that berth was actually safe for the vessel involved in casualty. See H. Schuldt v. Standard Fruit & S.S. Co., 1979 A.M.C. 2470 (S.D.N.Y. 1978); Trade Banner Line Inc. v. Caribbean S.S. Co., 1975 A.M.C. 2515 (5th Cir. 1975); Esso Standard Oil v. S.S. Sabrina, 1957 A.M.C. 691 (D.C.Z. 1957).

²⁶ The Cepheus, 1990 A.M.C. 1058 (Arb. N.Y. 1990).

shipowner asserted a comprehensive "list of dangers" as inherent to the port in question. He argued that the port in question was unsafe for his vessel, because the harbour was subject to unusual tidal ranges, swift tidal currents, sloppy ice conditions, frequent fog, short daylight hours in winter time, poor radar imaging, because of low lying terrain and ice distortion, and because there were no tugs available for turning and berthing manoeuvres.

It was proved by the charterer, however, that the port had a "long and impressive accident-free record" for all sizes of vessels entering and leaving during all seasons under all weather conditions. The arbitrators held that such an "accident-free history" of the port qualified it as a safe port.²⁷

D. Examples of Physically Safe Ports

1. Introduction

A physically safe port must provide shelter (from winds or hazards of navigation on the way to the port); technical equipment, such as properly functioning navigation lights; the services rendered by tugs, pilots and meteorological stations; and other facilities.

²⁷ Ibid. at 1066. See The Gazelle and Cargo, 128 U.S. 474 at 486 (1888) where the Supreme Court of the United States held that evidence of custom to determine whether a particular port was safe, when, in fact, it was not reasonably safe, would have directly contradicted the charterparty, and would have been inadmissible in law.

Similarly, for a berth to be safe, it may have to have, inter alia, the following adequate facilities: weather forecasting systems, pilots and tugs, searoom within which to manoeuvre, and systems for ensuring that searoom and room for manoeuvre is always available.

A port or berth can also be conditionally safe, i.e. it will be safe only if a particular system for securing its safety remains effectively in operation.²⁸

In other words, the port must be safe in its "set-up",²⁹ and the following are some of the deficiencies in set-up which may be held and, indeed, have been held to render a port unsafe.

2. Ice-Bound Port

The tendency of a port to be ice-bound during winter has been held to render a port unsafe.³⁰

In one case³¹, however, the clause of the time charterparty provided that the vessel was not to be ordered to any ice-bound port nor was it obliged to force ice. The clause was construed to

²⁸ See, e.g. Islander Shipping Enterprises S.A. v. Empresa Maritima Del Estado S.A. (The "Khian Sea"), [1979] 1 Lloyd's Rep. 545 [C.A.].

²⁹ See Lord Denning, M.R. in The "Evia" (No. 2), [1982] 1 Lloyd's Rep. 334 at 338 [C.A.].

³⁰ G.W. Grace & Co. v. General Steam Navigation Co., [1950] 2 K.B. 383.

³¹ Limerick Steamship Co. v. Stott & Co., [1921] 1 K.B. 568 at 573, affirmed [1921] 2 K.B. 613

mean that the charterers were not to send the vessel to a port that was blocked with ice. Nor were they to send the vessel to a port where, although it might get in, there was a risk that it would be caught in the ice and thus be unable to get away after completion of loading or discharging.

The port in question was not held to be an ice-bound port because artificial means were taken by authorities to prevent it from becoming ice-bound. Vessels could enter and leave at any time of the year, since the ice was constantly broken by icebreakers.³²

3. Adverse Weather Conditions

A port may be perfectly safe provided the sea is smooth, but it may become dangerous if a change of wind alters the weather conditions. Such a port may not be a safe port within the meaning of a particular charterparty.³³

The port's susceptibility to sudden storms, endangering vessels of a particular size in a particular bay may render a port

³² Ibid. at 574. Voyage charterparties may incorporate an "Ice Clause", providing an additional protection to shipowners. See, e.g. NORGRAIN 89 (Clause 31) and NUOVOY-84 (Clause 47).

³³ Johnston v. Saxon Queen Steamship Company, (1913) 108 L.T. 564. However, in Esso Standard Oil, S.A. v. The S.S. Sabrina, 154 F. Supp. 720 (D.C.Z. 1957) the berth was not proven unsafe in violation of the terms of the tanker voyage charterparty. It was the violent natural storm, one of the perils of the sea, which caused the damage to the cargo and to the ship.

unsafe. For instance, the port was found unsafe in The Stork³⁴ where the charterers, by virtue of the voyage charterparty, had the right to order the ship to load at two safe berths or loading places. They directed the ship to load at a place on the east coast of Newfoundland. The ship was unable to moor on the day it arrived at the port because an easterly wind was blowing. On the following day, it was successfully moored and loading commenced. Three days later, however, during a heavy wind in the night, it dragged its anchors, ran aground, and was severely damaged.

In addition, a port which is only safe in fair weather is not safe.³⁵ However, no port is a safe port under all possible weather conditions.³⁶

In one case, the vessel was ordered to a berth which was exposed to heavy swells during adverse weather conditions. At such times vessels would have to leave the berth in order to avoid damage. The Court of Appeal³⁷ held that a port or berth was not necessarily unsafe because a vessel might have to leave it in the

³⁴ [1955] 2 Q.B. 68. See Venore Transportation Co. v. Oswego Shipping Corp., 363 F. Supp. 1366 (S.D.N.Y. 1973), affirmed 498 F. 2d 469 (2d Cir. 1974).

³⁵ The "Evaggelos TH.", [1971] 2 Lloyd's Rep. 200 at 206 [Q.B. (Com.Ct.)].

³⁶ Europa Shpg. - Amerop. (The "Marathonian"), 1978 A.M.C. 821 at 825 (Arb. N.Y. 1977). The shipowner was not entitled to recover from the charterer under a safe berth clause of the voyage charterparty for detention and damage to vessel directed to the port in question for a two-week loading during hurricane season. See Trade & Transport, Inc. v. Caribbean Steamship Co., 384 F. Supp. 782 (S.D. Tex. 1974).

³⁷ See The "Khian Sea", [1979] 1 Lloyd's Rep. 545 [C.A.].

event of bad weather, if certain requirements were satisfied.

4. The Absence of Navigational Aids, Tugs or Pilots

A port was held unsafe when a hauling-off buoy, for use in keeping a vessel off the wharf in strong winds, as well as a fender on the wharf, were missing. During a storm the ship rolled and caused damage to itself and the wharf.³⁸

In The "Eastern Eagle"³⁹, the port in question was not a safe port for a vessel drawing almost 35 feet, since there were no buoy markers, and neither competent pilots nor accurate charts were available. The banks and the river bottom were constantly changing and no surveys were conducted to record such changes.

If tug assistance is required and is essential⁴⁰ to enable the chartered vessel to reach its loading or discharging port, and no such assistance is obtainable at the port itself, that port, as regards that vessel, is not safe within the meaning of the charterparty.⁴¹

³⁸ Reardon Smith Line Ltd. v. Australian Wheat Board (The "Houston City"), [1956] A.C. 266.

³⁹ Astrod. Comp. Nav. and Astrop. Comp. Nav., 1971 A.M.C. 236 at 238-239 (Arb. N.Y. 1970).

⁴⁰ In United States v. Atlantic Refining Co., 112 F. Supp. 76 (D.N.J. 1951) the court held that the use of a tug was not essential, and the delay was chargeable to the shipowner because of the master's lack of qualifications to take the vessel to the dock.

⁴¹ See Axel Brostrom and Son v. Louis Dreyfus and Co., (1932) 38 Com.Cas. 79 at 87; Palm Shipping Inc. v. Vitol S.A. (The "Universal Monarch"), [1988] 2 Lloyd's Rep. 483 [Q.B. (Com. Ct.)]. However, in Ore Carriers of Liberia, Inc. v. Navigen Corporation,

5. The Lack of Reliable Holding Ground in the Anchorage Area

In the often cited case of The Eastern City⁴² the Court of Appeal set out the following predominant factors which determined the unsafety of the port in question:

- the lack of reliable holding capacity for an anchor in the anchorage area;
- the lack of shelter and the liability to a sudden and unpredictable onset of high winds which might quickly cause an anchor to drag; and
- the restricted area of the anchorage and its close proximity to rocks and shallows.

6. The Absence of an Adequate Weather Forecasting System

If, in strong winds and seas, a particular place is unsafe for a particular vessel, then such a place is held to be unsafe. However, if the vessel is warned that it will receive no weather information from the shore and must therefore rely upon its own resources for obtaining weather forecasts, such a place could be

332 F. Supp. 72 (S.D.N.Y. 1969) the master and the pilot knew of the danger of going up the river without tug assistance but they proceeded nevertheless. With their knowledge concerning the non-availability of tugs before they reached the breakwater, they should not have proceeded into the harbor, and damages to the vessel involved in collision were therefore equally divided between the shipowner and the time charterers.

⁴² [1958] 2 Lloyd's Rep. 127 at 136 [C.A.].

held to be safe.⁴³

7. The Absence of Adequate Room to Manoeuvre in Bad Weather

In The "Khian Sea"⁴⁴, the vessel was ordered to a berth which was dangerous in bad weather. The berth was found to be unsafe as there was inadequate searoom within which to manoeuvre. In addition, there was no adequate system for ensuring that searoom and room for manoeuvre generally were always available in order to enable a ship to leave its berth.

3. Insufficient Water for Ingress or Egress

Voyage charterparties frequently contain a clause providing for a vessel to always be afloat.⁴⁵ The words "always lie safely

⁴³ Tage Berglund v. Montoro Shipping Corporation, Ltd. (The "Dagmar"), [1968] 2 Lloyd's Rep. 563 [Q.B. (Com. Ct.)].

⁴⁴ [1979] 1 Lloyd's Rep. 545 [C.A.].

⁴⁵ See, e.g. AMWELSH 1979 (Clause 1), FERTICON (Clause 1), GENCON (Clause 1), GENVOY (Clause 1), MULTIFORM (Clause 2), AUSBAR (Clause 1), GENORECON (Clause 2), BISCOILVOY 86 (Clause 3), NORGRAIN 89 (Clause 1), NUVOY-84 (Preamble), CEMENTVOY (Preamble), OREVOY (Clause 7.3). For instance, Clause 3 of the BISCOILVOY 86 voyage charterparty reads as follows:

Vessel shall proceed with all convenient despatch to a safe port, berth, dock, anchorage, submarine line, alongside a vessel or vessels or lighter or lighters or any other safe place whatsoever usual for loading the cargo in question, as ordered by Charterers...or so near thereto as she may safely get, lie at and depart from, always afloat...

afloat" are concerned exclusively with the marine characteristics of the place of loading or discharge. They require that a vessel shall at all times be water-borne and able to remain there without risk of loss or damage from wind, weather or other properly navigated vessels.⁴⁶

Thus, under a voyage charterparty requiring the charterer to select the place of loading and where the vessel could always lie afloat, the charterer was held liable to the shipowner for damage to the hull caused by resting on the bottom while at berth.⁴⁷

It was held in one of the oldest safe port cases, The Alhambra,⁴⁸ that the master of the ship was not bound to discharge at a port where the vessel could not, by reason of its draught, always lie and discharge afloat without being lightened. This was true even if it could be lightened with reasonable despatch and

⁴⁶ The "Evaggelos TH.", [1971] 2 Lloyd's Rep. 200 at 204 [Q.B. (Com. Ct.)]. Sometimes a charterer expressly guarantees a depth of water at berth or dock. In P. Dougherty Co. v. Bader Coal Co., 244 F. 267 (D. Mass. 1917) a charterparty of a barge to carry coal to be discharged at a certain dock by the charterer guaranteed 12 feet of water at the dock. The barge was too long to be discharged at the wharf in the ordinary manner, and it was necessary to turn it to reach the hatches at one end, and in doing so it stranded and was damaged, although its draught was less than 12 feet. The charterer was held to be bound to anticipate the probable necessity of such a turning, and the guaranty of depth applied to the water necessarily used in making the manoeuvre. See Universal Tramp Ship. Co. v. Irish Salt M. Co., 1970 A.M.C. 1783 (D. Mass. 1970).

⁴⁷ Cities Service Transp. Co. v. Gulf Refining Co. (The "Halo"), 9 F. Supp. 963 (S.D.N.Y. 1934), affirmed per curiam 79 F. 2d 521 (2d Cir. 1935).

⁴⁸ (1881) 6 P.D. 68.

safety in the immediate vicinity of the port or in the port itself. Thus, a port to which a vessel is ordered to go may not be a safe port for that ship, because it could not get there safely with a full cargo.⁴⁹

A vessel cannot be said to be afloat when the obstacle is a shoal or bar in a port over which it can not proceed, or a bridge under which it can not pass. Nor can a vessel be said to have safely reached a dock if, in order to do so, damage to its hull or its permanent masts is inevitable.⁵⁰

Sometimes a voyage charterparty provides that a vessel shall be employed between good and safe places where it can lie safely afloat or safely aground where ships of similar size and draught are accustomed to lie aground in safety.⁵¹ Unless a charterer proves that it is customary for similar size vessels to lie safely aground in berths at a particular port, he is liable for

⁴⁹ Reynolds & Co. v. Tomlinson, [1896] 1 Q.B. 586 at 590-591. See Treglia v. Smith's Timer Co., (1896) 1 Com. Cas. 360; The Gazelle and Cargo, 128 U.S. 474 (1888).

⁵⁰ Mencke v. Cargo of Java Sugar, 187 U.S. 248 at 253 (1902). It is worth noting that the Supreme Court of United States referred to two British cases, namely, to The Alhambra, *supra*, note 48, which had been already cited with approval by the same court in The Gazelle and Cargo, *supra*, note 49, and to Goodbody v. Balfour, (1899) 5 Com. Cas. 59 [C.A.] where it was proved that Manchester was not a safe port for the vessel in question, because it would have been necessary to dismast the ship to enable it to get under Runcorn Bridge, which was the first bridge vessels going up the Canal to Manchester had to pass.

⁵¹ See, e.g. FERTICON (Clause 1).

any damages arising therefrom.⁵²

E. Environmentally Safe Ports

Problems relating to "environmentally unsafe" ports might have been discussed under the heading of the physical safety of ports or berths. However, they are examined separately in order to emphasize their importance.

There are two major causes of marine pollution from ships: accidents in ports resulting from various deficiencies in port construction or poor vessel traffic control; and intentional oil pollution.

It is submitted that every port, in order to be safe, should have adequate facilities for the reception of residues and oily mixtures, noxious liquid substances, sewage and garbage from ships. The lack thereof may cause damage not only to the environment, but also places a vessel in the predicament of having to discharge pollutants into the sea, risking therefore liability under local legislation. Thus, appropriate facilities would diminish accidental and intentional, although perhaps necessary, pollution of the sea.

Furthermore, some voyage charterparties expressly stipulate the shipowner's obligation to indemnify the charterer, his agents,

⁵² The "Brevnton", 1934 A.M.C. 1473 at 1475 (Arb. N.Y. 1934). See Lensen Shipping, Ltd. v. Anglo-Soviet Shipping Co., Ltd., (1935) 52 Ll. L. Rep. 141 at 148 [C.A.]; The "Lagmar", [1968] 2 Lloyd's Rep. 563 [Q.B. (Com. Ct.)].

or any other party, against any liability which may be imposed on them or which they may incur under any statute regarding liability for pollution of navigable waters by oil. Any time lost on account of the vessel's non-compliance with statutes and regulations pertaining to water pollution may not count as laytime or time on demurrage.⁵³

The principle of nominating "environmentally safe ports" can be corroborated by the International Convention for the Prevention of Pollution from Ships [hereinafter MARPOL 73/78]⁵⁴ which is the most important marine pollution convention in maritime history. MARPOL 73/78 requires its parties to provide adequate facilities for the reception of residues and oily mixtures at oil loading terminals, repair ports, and other ports in which ships have oily residues to discharge.⁵⁵

The government of each party to MARPOL 73/78 undertakes to ensure that the provision concerning reception facilities, according to the needs of ships using its ports and terminals, is complied with. The provision stipulates that cargo loading and

⁵³ See, e.g. AUSBAR (Clause 13) and NORGRAIN 89 (Clause 28).

⁵⁴ The Convention and its 1978 Protocol entered into force in October 1983. It supersedes the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 [hereinafter OILPOL 1954] which will, however, remain effective for many states until they ratify MARPOL 73/78 and/or denounce OILPOL 1954. See IMO, International Conference on Marine Pollution, 1973. MARPOL 73/78 Regulations are also reproduced in E. Gold, Handbook on Marine Pollution (Arendal: Assuranceforeningen Gard, 1985) at 182-236.

⁵⁵ See Annex I (Regulations for the Prevention of Pollution by Oil), Chapter II (Requirements for Control of Operational Pollution), Regulation 12 (Reception Facilities).

unloading ports and terminals shall have facilities adequate for the reception of residues and mixtures containing noxious liquid substances.⁵⁶

In addition, sewage reception facilities⁵⁷ and reception facilities for garbage⁵⁸ shall be available in all ports.

The major problem with respect to reception facilities is that many developing countries do not have sufficient funds for the construction of such facilities. Consequently, most of their ports are inadequately equipped for the prevention of pollution. It is submitted that the international community can and should help these countries with financial assistance. However, until these ports can comply with MARPOL 73/78, such ports should not be considered safe from a legal perspective.⁵⁹

Port authorities, in order to ensure the environmental safety of ports, should regulate vessel size, speed, route, times of entry and departure under certain inclement weather conditions. They should also direct anchoring and moorings, require pilots, regulate procedures for handling dangerous articles and potential pollutants, establish safety equipment requirements, and inspect

⁵⁶ Annex II (Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk), Regulation 7 (Reception Facilities).

⁵⁷ Annex IV (Regulations for the Prevention of Pollution by Sewage from Ships), Regulation 10 (Reception Facilities).

⁵⁸ Annex V (Regulations for the Prevention of Pollution by garbage from Ships), Regulation 7 (Reception Facilities).

⁵⁹ M. Pavliha, Pravno varstvo morja [Legal Protection of the Sea], Ljubljana: CGP Delo - TOZD Gospodarski vestnik, 1989) at 101-

any ship to assure compliance with prescribed standards.⁶⁰

To conclude, it is argued that the charterer should not nominate an environmentally unsafe port.

F. Politically Safe Ports

The political safety of a port relates to "the action of man" which may render a port unsafe.⁶¹ This is an issue which is of great importance, particularly to tanker charters involving Middle Eastern ports of call, e.g. the Shatt-al-Arab safe port and frustration cases as a result of the large-scale hostilities which broke out between Iran and Iraq in September 1980.⁶² Similar problems followed the recent Gulf War in 1991 which caused many ships to be trapped, delayed and even destroyed.

Political risks might include, for example, warfare, blockade, civil unrest, politically-inspired "retaliation" against vessels of a specific flag (e.g. confiscation), terrorism, and

⁶⁰ See M.S. Davis, "The Ports and Waterways Safety Act of 1972: An Expansion of the Federal Approach to Oil Pollution" (1975) 6 JMLC 249 at 252.

⁶¹ See Palace Shipping Co. v. Gans Steamship Line, [1916] 1 K.B. 138.

⁶² See, e.g. The "Evia" (No. 2), [1982 2 Lloyd's rep. 307 [H.L.]; Uni-Ocean Lines Pte. Ltd. v. C-Trade S.A. (The "Lucille"), [1984] 1 Lloyd's Rep. 244 [C.A.]; Motor Oil (Hellas) v. Shipping Corp. (The "Kanchenjunga"), [1990] 1 Lloyd's Rep. 391, 108 N.R. 280 [H.L.]; A. Diamond, "The Shatt-al-Arab Safe Ports/Frustration/Blocking and Trapping" - the paper presented at Charter-Parties Conference, London, September 21 and 22, 1982; Smith, supra, note 10 at 874.

trade union boycotts.⁶³

G. Sanitarily Safe Ports

A port must also be sanitarily safe. For instance, The International Sanitary Regulations set out the measures to be applied to international traffic in order to protect the territory from quarantinable diseases, including yellow fever, plague, cholera, smallpox, typhus, and relapsing fever.⁶⁴

⁶³ C.G.C.H. Baker, P. David, "The Politically Unsafe Port" (1986) 1 LMCLQ 112 at 113. See, e.g. Ogden v. Graham, (1861) 1 B. & S. 773, 31 L.J.Q.B. 26 (a place which a vessel can only go to at a certain risk of confiscation is not a safe port); Pan Cargo Shipping Corporation v. United States, 234 F. Supp. 623 (S.D.N.Y. 1964), affirmed 373 F. 2d 525 (2d Cir.), cert. denied 389 U.S. (1967) (in the circumstances in this case a "safe port" should not be given the meaning "without risk of loading interference from the Arab boycott"); Arietta Compania Naviera, S.A., 1973 A.M.C. 1012 (Arb. N.Y. 1972) (evidence established that Libyan ports constituted a danger zone); D/S A/S Idaho v. Colossus Maritime S.A. (The "Concordia Fjord"), [1984] 1 Lloyd's Rep. 385 [Q.B. (Com. Ct.)] (the vessel was severely damaged by rockets in the Port of Beirut in July 1978).

⁶⁴ S. Mankabady, "The Concept of Safe Port" (1974) 5 JMLC 633 at 636. The regulations came into force on October 1, 1952 and are supervised by the World Health Organization (WHO).

IV. IMPLIED OBLIGATION TO NOMINATE A SAFE PORT

A. English Law

1. Introduction

Voyage charterparties usually contain an express clause that a charterer will order a vessel to proceed to safe ports.⁶⁵ The question is, however, if courts, in a case where the charterparty is silent, are prepared to imply such an obligation. Scrutton⁶⁶ admits that the law concerning the implied safety obligation is still unclear.

Probably the earliest case with respect to the implied obligation to nominate a safe port is Ogden v. Graham of 1861⁶⁷. The court found that it was agreed by parties to the charterparty that the vessel should sail to a safe port, and it followed by necessary implication that the charterers had to nominate a safe port to the shipowner.

Almost one hundred years later, Lord Justice Morris applied Ogden v. Graham in The "Stork"⁶⁸. He stated that the implication that the charterers should order the ship to go to at least one

⁶⁵ See, e.g. NORGRAIN 89 (Clause 1), BISCOILVOY 86 (Clause 3).

⁶⁶ A.A. Mocatta, M.J. Mustill, S.C. Boyd, Scrutton on Charterparties and Bills of Lading, Nineteenth Edition (London: Sweet & Maxwell, 1984) at 125 (see note 23).

⁶⁷ (1861) 1 B. & S. 773 at 780.

⁶⁸ [1955] 2 Q.B. 68.

place where it could load, necessitated the inclusion of a statement in the charterparty that the place named for loading had to be safe. He found that the contract implied that the charterers were going to order or direct the ship to the place where it would find the cargo which was to be loaded. He also noted an express or implied term that the place to which the ship would be directed would be safe.⁶⁹

2. Term "Implied in Fact": The Business Efficacy Test

It appears that whenever courts imply a charterer's duty to nominate a safe port and/or safe berth, they actually imply it "in fact" rather than "in law".

In Lensen Shipping, Ltd. v. Anglo-Soviet Shipping Co., Ltd.⁷⁰, Lord Justice Slesser was convinced that it was the intention of the parties, although not expressed in words, that the vessel should be employed not only between safe ports where it could lie safely afloat or aground, but also between safe berths with similar qualifications. He applied the decision in Hamlyn v. Wood⁷¹, where Lord Esher said:

I have for a long time understood that rule to

⁶⁹ Ibid. at 101-102.

⁷⁰ (1935) 52 Ll. L. Rep. 141 at 149 [C.A.].

⁷¹ [1891] 2 Q.B. 488 at 491. Compare to the "business efficacy" test formulated in The "Moorcock", (1889) 14 P.D. 64 at 68, and to the "officious bystander" test invented in Shirlaw v. Southern Foundries (1926) Ltd., [1939] 2 K.B. 206 at 227, aff'd [1940] A.C. 701.

be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation exists.

Lord Justice Greer,⁷² however, was of the opinion that it was not necessary to rely on an implied term in order to give commercial meaning to the charterparty. He felt that it was clear from the facts that the berth in question was not a place where vessels of similar size or draft were accustomed to lie in safety.

In The "A.P.J. Priti"⁷³ the Court of Appeal held that a safe port warranty had not been expressed. Furthermore, there were no grounds for implying such a warranty because the omission of the express warranty could have been deliberate. Such an implied term was not necessary for the business efficacy of the voyage charter.

3. Implied Obligation Not to Nominate an "Utterly Impossible Port"

There is an interesting obiter dictum in Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries and Food⁷⁴, where Lord Justice Willmer recognized a charterer's implied obligation not to

⁷² Lensen Shipping, Ltd. v. Anglo-Soviet Shipping Co., Ltd., (1935) 52 Ll. L. Rep. 141 at 148 [C.A.].

⁷³ Atkins International H.A. v. Islamic Republic of Iran Shipping Lines, [1987] 2 Lloyd's Rep. 37 at 39-40 [C.A.].

⁷⁴ [1962] 1 Q.B. 42 at 110, 112, approved in part [1963] A.C. 691.

nominate an "utterly impossible port". In other words, any limitation on the charterer's freedom to nominate the loading port can be implied only where there is sufficient danger at the nominated port to frustrate the commercial object of the voyage.⁷⁵

The obiter was accepted by Mr. Justice Staughton in the recent case of The "Epaphus"⁷⁶. He doubted, however, that the obiter was intended to apply in a case where the ship in question was inherently incapable of entering one of a number of named ports (the vessel's draught exceeded the allowable maximum).

The Court of Appeal stated that it had two tools available for denying that the parties had contracted to do the impossible. The first was the interpretation of the express terms used by the parties, and the second was the implication of a term which qualified, but did not contradict, the express terms. However, the Court affirmed the trial decision that it was impossible to imply, notwithstanding the express terms of the option, that the buyers could not choose the port in question or any port with a draught limitation of less than the vessel's draught on arrival.⁷⁷

⁷⁵ See Bulman v. Fenwick, [1894] 1 Q.B. 179 where the Court of Appeal held that the only limitation to the charterer's power to select a berth was that it had not to choose one that was so blocked that the obstacle could not be removed in a time consistent with the commercial adventure. The decision was approved by Lord Dunedin in Matheos (Owners) v. Louis Dreyfus & Co., [1925] A.C. 654 at 661.

⁷⁶ Eurico S.p.A. Philipp Brothers, [1986] 2 Lloyd's Rep. 387 at 391-392 [Q.B. (Com.Ct.)].

⁷⁷ The "Epaphus", [1987] 2 Lloyd's Rep. 215 at 219 [C.A.].

4. The Legal Nature of the Implied Safe Port Obligation

In The "Evaggelos TH."⁷⁸ Mr. Justice Donaldson held that the implied term should be limited to a warranty that the nominated port of discharge was safe at the time of nomination and should be expected to remain safe from the moment of the vessel's arrival until its departure.⁷⁹

However, a few years later the same judge recognized in The "Hermine"⁸⁰ that, where the nomination is made in advance, one should look at the time when the vessel is expected to use the port. In nominating a port under a voyage charterparty, the charterers implicitly warrant that it is a safe port. He stated that the warranty is absolute but contains within itself a qualification in relation to abnormal occurrences. Thus it would seem that in this situation the implied term is not less

⁷⁸ [1971] 2 Lloyd's Rep. 200 at 205 [Q.B. (Com. Ct.)]. The claim by the shipowner, however, failed on the ground that the express provision did not extend to events of a political nature; and that although there was an implied obligation wide enough to cover such events, it related only to the nomination of the port, and not to conditions when the vessel actually arrived there.

⁷⁹ This rule may be regarded as the ancestor of the concept of prospective safety. If, despite the fact that the nomination meets the above-mentioned requirements, the port is unsafe when the vessel arrives, no breach of contract is committed by the charterer, but the ship is not obliged to enter the port. Ibid. at 205. See Duncan v. Koster (The "Teutonia"), (1872) L.R. 4 P.C. 171.

⁸⁰ [1978] 2 Lloyd's Rep. 37 [Q.B. (Com. Ct.)]. This decision was subsequently reversed by the Court of Appeal on grounds which are not material to the problem of implied terms. See The "Hermine", [1979] 1 Lloyd's Rep. 212 [C.A.].

comprehensive than the express one.⁸¹

In another case, the charterer was held to undertake that, in the absence of some abnormal occurrence, the vessel would reach, use, and leave the port at the relevant times, without danger. This is, of course, subject to the vessel being managed and navigated with good seamanship.⁸²

The recent case of The "Kanchenjunga",⁸³ however, shows that the concept of prospective safety (which will be dealt with later), probably applies as much to the implied safe port obligation as to the express one. The House of Lords said that it could not challenge the arbitrators' finding that the port in question was, at the time of its nomination by the charterers, prospectively an unsafe port. The port was therefore not one which the charterers were entitled to nominate under the terms of the charterparty. In addition, through their nomination of the port the

⁸¹ Baker argues that there "seems no very good reason, if the implication of a safe port obligation is thought necessary, why such an implied obligation should be less absolute than that imported by the express word "safe"...". See C.G.C.H. Baker, "The Safe Port/Berth Obligation and Employment and Indemnity Clauses" (1988) LMCLQ 43 at 53; Mankabady, supra, note 64 at 638 (see note 25).

⁸² In The "Pass of Leny", (1936) 54 Ll. L. Rep. 288 at 293-294 [Adm.] the claim of the shipowners was in respect of damage suffered by them in consequence of the chartered vessel slipping off the berth alongside the wharf at a time when the ship was loading a cargo from the pipe line. The shipowners sued the occupiers of an oil wharf and of the berth, as well as the charterers. Mr. Justice Bucknill held that the charterers did not by the terms of the charterparty expressly or implicitly warrant the fitness of the berth, since they had even less means of knowledge of its condition than the shipowners.

⁸³ (1990) 108 N.R. 280 [H.L.].

charterers implicitly promised that it was prospectively safe for the vessel to reach, stay at, and in due course, leave.⁸⁴

B. American Law

It seems that American maritime law, in general, does not recognize an implied safe port obligation. Authorities, such as Poor,⁸⁵ Gilmore, Black,⁸⁶ and Schoenbaum⁸⁷ are silent on the subject.

The editors of the seventh edition of Benedict on Admiralty,⁸⁸ however, are of the opinion, when referring to the arbitration award in The "Atlantis",⁸⁹ that even in the absence of

⁸⁴ Ibid. at 286.

⁸⁵ See W. Poor, American Law of Charter Parties and Ocean Bills of Lading, Fifth Edition (New York: Matthew Bender, 1968) at 19-22, 66-67.

⁸⁶ See G. Gilmore, C.L. Black, The Law of Admiralty, Second Edition (Mineola: The Foundation Press, Inc., 1975) at 202-207.

⁸⁷ See T.J. Schoenbaum, Admiralty and Maritime Law (St. Paul: West Publishing Co., 1987) at 389-390. In the 1989 Pocket Part of his book, however, he refers to the Wong Wing Fai Co., S.A. v. United States, 840 F. 2d 1462 (9th Cir. 1988) where the court refused to imply the charterer's duty to direct the vessel to a safe port.

⁸⁸ M.M. Cohen et al., Benedict on Admiralty - Carriage of Goods by Sea: Charter Parties; Commentary and Forms, Vol. 2B, Seventh Edition (Revised) (New York: Matthew Bender, 1985) at 1-39 (see note 1).

⁸⁹ In the Matter of Petrol Shipping Corp., S.M.A. No. 788 (N.Y. Arb. 1972). The arbitrators said:

The Panel...believes that the safety of the port, even if not warranted verbatim, is always implied and the liability for damages

an express provision in the charterparty, the warranty of safety may be implied.

Similarly, Smith⁹⁰ argues that the charterer, even in the absence of his fault or negligence, may be liable under the implied warranty.

As previously mentioned, it is a general rule that the criteria of the safe port obligation, applicable to time charters, are also applicable to voyage charters⁹¹. It is appropriate to mention the recent case of Wong Wing Fai Co., S.A. v. United States⁹² where Senior District Judge Stephens refused to imply the charterer's duty to direct the vessel to a safe port:

In appropriate circumstances, British courts find that a "safe port" term is implied in a time charter, but in the United States the federal courts have never done so.

There was no express contractual provision with respect to a duty to direct the ship to a safe port, and the charterer was therefore not obliged to do so.

In light of this decision, it is likely that Federal courts will not imply a safe port obligation in cases relating to voyage charterparties. This is because shipowners are more in need of protection from a safe port promise when operating under a time

due to unsafety depends upon the knowledge of the parties...

⁹⁰ He cites, however, only English authorities with respect to an implied warranty. See Smith, supra, note 10 at 864-866.

⁹¹ See, e.g. The "Houston City", [1956] A.C. 266 [J.C.].

⁹² 840 F. 2d 1462 at 1467 (9th Cir. 1988).

charter (in accordance with which they may be required to go to ports worldwide), than when operating under a voyage charter with named or listed loading and discharging ports.⁹³

C. Conclusion

One may gather that British courts will from time to time imply a charterer's obligation to nominate a safe port or safe berth, while American courts probably will not.

One solution to this ambiguity would be to follow Baker's advice:⁹⁴

In many trades voyage charterparties are used which contain a wide option of discharging ranges at various different freight rates. In order to give necessary business efficacy to the contract, there is a strong argument for implying a term that the charterer cannot treat this option as a licence to order the ship to any port between these points, but must nominate one which is prospectively safe. [Emphasis added]

However, a better solution would be an international convention converting the implied safe port obligation into a binding international rule. A provision regarding this matter will be suggested at the end of this chapter.

⁹³ See The "A.P.J. Priti", [1927] 2 Lloyd's Rep. 37 at 40-41; M. Wilford, T. Coghlin, J.D. Kimball, Time Charters, Third Edition (London: Lloyd's of London Press Ltd., 1989) at 154; Reynolds, supra, note 12 at 182.

⁹⁴ Baker, supra, note 81 at 52.

V. THE "GUARANTEE INTERPRETATION" OF SAFE PORT OBLIGATION

A. Introduction

There was a tendency, which commenced in the mid-1930s and culminated in the mid-1970s, for British and American judges, because of their view that charterparties contained a safe port warranty, to explain safe port clauses in favor of the shipowners.⁹⁵ Diamond⁹⁶ calls such an approach "the guarantee interpretation" of the safe port obligation, according to which the charterer promises to nominate a port which, at the date of nomination, appears safe for the vessel. The charterer also promises that, while the vessel is complying with the order, the port will in fact be safe.

The concept of the charterer's obligation, amounting to a continuing and absolute guarantee of the safety of the port during the time it would be used, was abolished in English law by the House of Lords in The "Evia" (No. 2). However, it still appears to be the law of United States.

B. Prior English Law

Perhaps the best illustration of the warranty of safety is

⁹⁵ See L. Herman, S.E. Goldman, "The Master's Negligence and Charterers' Warranty of Safe Port/Berth" (1983) LMCLQ 615 at 617.

⁹⁶ See Diamond, supra, note 62.

provided by Mr. Justice Mustill in The "Mary Lou"⁹⁷. The chartered vessel, having loaded a cargo of grain at New Orleans, was proceeding through a channel in the Mississippi Delta. The voyage charterparty stipulated that the loading should be at "one safe port". The vessel grounded at the seaward end of the channel and remained aground at that point for nine days. The shipowners, relying on the safe port provision, claimed against the charterers for the damage to the vessel and for the expenses incurred as a result of the grounding.

The dispute was referred to arbitration and the arbitrators decided in favour of the shipowners. Mr. Justice Mustill upheld the award on the basis that the channel was considered unsafe within the meaning of the warranty. He concluded, after reviewing the leading authorities on the subject, that most unsafe port cases could be regarded as turning solely on issues of fact.

However, the next step was to ascertain the time to which the warranty of safety related. The court had to determine whether the obligation was simply to name a port which was safe at the moment when the nomination was made, or whether the obligation related to the time when the ship actually visited the port, or whether both points in time were relevant.

The court held that the obligation of the charterers was in the nature of a continuing warranty, and that a breach of the safety provision could occur at any time after nomination up to the time of the damage. Thus, the court proceeded on the basis that the

⁹⁷ [1981] 2 Lloyd's Rep. 272 [Q.B. (Com. Ct.)].

charterers' obligation in relation to the safety of the port to which they had ordered the vessel was absolute.

It was also held that the casualty did not necessarily imply a breach of the warranty. The charterers could have exonerated themselves from responsibility if the casualty had been proved to be of an abnormal or temporary nature, the result of simple bad luck⁹⁸, or caused by faulty navigation.⁹⁹ The charterers were not able to do so and the shipowners were entitled to the damages which flowed from the breach.¹⁰⁰

The pendulum of British maritime law relating to a safe port obligation has, however, swung from benefitting the shipowners towards serving the charterers. The House of Lords,¹⁰¹ as will be explained later, has overruled "the heresy" of the old absolute warranty construction which was embraced by Mr. Justice Mustill in The "Mary Lou", and adopted the new concept of prospective safety (see page 254 et seq. of this thesis).

⁹⁸ The new concept of "bad luck" was applied, for instance, in The "Apiliotis", [1985] 1 Lloyd's Rep. 255 [Q.B. (Com. Ct.)]. It appears, therefore, that a vessel might be damaged in an unsafe port due to a breach of the charterer's safe port promise, a vessel's own negligence, an abnormal occurrence, or due to simple bad luck.

⁹⁹ The "Mary Lou", [1981] 2 Lloyd's Rep. 272 at 276, 278-280 [Q.B. (Com. Ct.)].

¹⁰⁰ See, e.g. Lensen Shipping, Ltd. v. Anglo-Soviet Shipping Co., Ltd., (1935) 52 Ll. L. Rep. 141 at 149 [C.A.]; The "Stork", [1955] 2 Q.B. 68 at 98; The "Houston City", [1956] A.C. 266 [J.C.]; The "Eastern City", [1958] 2 Lloyd's Rep. 127 at 136 [C.A.]; The "Hermine", [1979] 1 Lloyd's Rep. 212 at 219 [C.A.].

¹⁰¹ See The "Evia" (No. 2), [1982] 2 Lloyd's Rep. 307 at 310, 315 [H.L.].

C. The Present American Law

In contrast to the present and similar to prior English law, the concept of warranty is still applied by the American courts. The charterer who nominates a port is held to warrant that the particular vessel can proceed to that port or berth without being subject to the risk of physical damage. Thus, the voyage charterer warrants a safe port and/or safe berth for the vessel, and his obligation under such a warranty is nondelegable.¹⁰²

The warranty rule has been criticized, it being suggested that the courts are placing an undeserved burden on the charterer who is usually a merchant with limited knowledge of the actual conditions, and with little control over the port or berth. It is the master of the ship who ordinarily has the best means of judging the safety of a port or berth. Furthermore, it is argued that the earlier cases, which provide that the charterer's obligation is only to exercise ordinary and reasonable care to nominate a safe port¹⁰³, reach a more equitable result with their rationale being

¹⁰² See, e.g. The "Halo", 9 F. Supp. 963 (S.D.N.Y. 1934), affirmed per curiam 79 F. 2d 521 (2d Cir. 1935); Park S.S. Co. v. Cities Service Oil Co., 188 F. 2d 804 (2d Cir. 1951), cert. denied 342 U.S. 862 (1951), rev'g 93 F. Supp. 201 (S.D.N.Y. 1950); Ore Carriers of Liberia, Inc. v. Navigen Corporation, 332 F. Supp. 72 at 73 (S.D.N.Y. 1969); Venore Transportation Co. v. Oswego Shipping Corp., 363 F. Supp. 1366 at 1371 (S.D.N.Y. 1973), aff'd 498 F. 2d 469 (2d Cir. 1974); Schoenbaum, supra, note 87 at 389; Smith, supra, note 10 at 864-867.

¹⁰³ See, e.g. Atkins v. Fibre Disintegrating Co., 2 Fed. Cas, 78 at 79 (No. 601) (E.D.N.Y. 1868) aff'd 85 U.S. (18 Wall.) 272 (1873). Although such decisions have not been overruled they are no longer followed.

realistic.¹⁰⁴

D. The Master's Act or Neglect

The harshest consequences of the warranty rule have been ameliorated by the charterer's legal defence based on the principle of novus actus interveniens.¹⁰⁵ It would be unreasonable and unjustifiable to extend the warranty of safety to a guarantee, however faulty the navigation, that the vessel would be free from risk in the port.

Thus, the charterer's order does not necessarily cause the damage¹⁰⁶ that results from an act following the original order. The decision of the master of the ship to obey the order may in

¹⁰⁴ Smith, supra, note 10 at 868-869. Gilmore & Black, supra, note 86 at 204-205, 207, conclude their discussion on safe ports and berths with the following words:

It is to be hoped that the Supreme Court will one day take up a case raising this question, and reaffirm the principle of the Atkins decision, confining charterer's liability to the case wherein his special knowledge or actions make it reasonable to charge him.

¹⁰⁵ See Herman & Goldman, supra, note 95 at 618 et seq.

¹⁰⁶ It appears now to be well settled under American law that the damages suffered by a vessel may be apportioned between the shipowners and the charterers by reference to the respective degrees of their "fault". See United States v. Reliable Transfer Co. Inc., 421 U.S. 397 (1975); Board of Commissioners v. M/V "Space King", 1978 A.M.C. 856 (E.D. La. 1978). However, the same division of damages in accordance with degree of fault will not be made by the English courts where there is an express safe port warranty of the kind found in the Baltimore, NYPE and Linertime charters. UNCTAD, Charter-Parties - A Comparative Analysis, 27 June 1990, TD/B/C.4/ISL/55 at 15.

certain circumstances amount to an intervening act which has the effect of breaking the causal connection.¹⁰⁷

The conduct of the master may be material¹⁰⁸ if it amounted to a deliberate ignoring of a known or recognizable risk. It would also be material if the vessel was navigated without reasonable care and skill,¹⁰⁹ and therefore succumbed to a hazard which better navigation might have avoided. In other words, to constitute an intervening act of negligence, the course followed by the captain must entail unreasonable risk.¹¹⁰

Although the intervening act is generally regarded as one of a third party, the act of the plaintiff (i.e. the shipowner) would be sufficient. This is connected with the principle of volenti non fit injuria¹¹¹, or contributory negligence, or the

¹⁰⁷ See, e.g. G.W. Grace & Co. v. General Steam Navigation Co., [1950] 2 K.B. 383 at 397-398; The "Halo", 9 F. Supp. 963 at 964 (S.D.N.Y. 1934), affirmed per curiam 79 F. 2d 521 (2d Cir. 1935).

¹⁰⁸ See The "Mary Lou", [1981] 2 Lloyd's Rep. 272 at 279-280 [Q.B. (Com. Ct.)].

¹⁰⁹ See, e.g. The "Polyglory", [1977] 2 Lloyd's Rep. 353 at 363 [Q.B. (Com. Ct.)]; United States v. Atlantic Refining Co., 112 F. Supp. 76 at 80 (D.N.J. 1951); Commissioners v. Gibraltar Pansy, 1977 A.M.C. 878 at 887 (E.D. La. 1977); The "Marathonian", 1978 A.M.C. 821 at 825 (Arb. N.Y. 1977).

¹¹⁰ American President Lines, Ltd. v. United States (The "President Arthur"), 208 F. Supp. 573 at 576 (N.D. Calif. 1961); Venore Transportation Co. v. Oswego Shipping Corp., 363 F. Supp. 1366 (S.D.N.Y. 1973), aff'd 498 F. 2d 469 (2d Cir. 1974).

¹¹¹ The maxim means that if one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. Black's Law Dictionary, Fifth Edition (St. Paul: West Publishing Co., 1979) at 1412. In The "Eastern City", [1958] 2 Lloyd's Rep. 127 at 137

duty to minimize damage.¹¹²

Finally, when a charterparty names a port and the master sails there without protest, the shipowner accepts the port as a safe port, and is bound to the conditions that there exist.¹¹³

Thus, in the recent case of Alvenus Lim. Procs.¹¹⁴, the voyage charterer was held not liable for a breach of the safe berth clause by his designation of the port nor by his instructions regarding the draught of the ship. This was because of the master's knowledge of the conditions, and because any objection to the designation or instructions was waived by the master of the ship.

[C.A.] the Court of Appeal held that there was nothing in the conduct of the master which was a voluntary assumption of risk. He and those on board were manoeuvring their ship without negligence and in pursuance of their ordinary duties, and therefore no question of competing causes arose. No act could be said in any way to have intervened between the breach of contract and the stranding. Similarly, in The "Stork", [1955] 2 Q.B. 68 at 98-99 the doctrine of volenti non fit injuria was not applicable.

¹¹² Per Lord Justice Ackner in Markappa Inc. v. N.W. Spratt & Son Ltd. (The "Arta"), [1985] 1 Lloyd's Rep. 534 at 537 [C.A.].

¹¹³ The "Maggie Moore", 8 F. 620 (C.C. Md. 1881); Tweedie Trading Co. v. New York & Boston Dyewood Co., 127 F. 278 (2d Cir. 1903); The "Brevnton", 1934 A.M.C. 1473 (Arb. N.Y. 1933). In Pan Cargo Shipping Corporation v. United States, 234 F. Supp. 623 (S.D.N.Y. 1964), aff'd 373 F. 2d 525 (2d Cir.), cert. denied 389 U.S. (1967) the shipowner carrying oil cargo for the U.S. Navy from one or more safe ports in the Persian Gulf was required to bear the loss occasioned by the refusal of Arab authorities to allow the vessel to load, because of the vessel's prior voyage to Israel, a fact known to the shipowner but not to the United States. It was also held that the charterparty did not prevent a decision dictated by fairness and equity. See The "Kanchenjunga", [1990] 1 Lloyd's Rep. 391, 108 N.R. 280 [H.L.] where the House of Lords held that the owner's conduct constituted a waiver of the charterer's breach. F.M.B. Reynolds, "Orders Under Charterparties: The Kanchenjunga; The Epaphus" [1987] LMCLQ 408; F.M.B. Reynolds, "Orders Under Charterparties: The Kanchenjunga" [1989] LMCLQ 415.

¹¹⁴ 1990 A.M.C. 2113 at 2139-2141 (S.D. Tex. 1990).

VI. THE CONCEPT OF PROSPECTIVE SAFETY: A VICTORY FOR CHARTERERS

A. Introduction: The Evia

The English concept of prospective safety was accepted by the House of Lords in the frequently cited Shatt-al-Arab case of The "Evia" (No. 2)¹¹⁵. This concept is that the charterer's liability is established only by reference to the time when the order is given, and if at that time the port is prospectively safe, the charterer's obligation in that regard is generally ended.

The Evia was time-chartered on a Baltime form for a period of eighteen months. The charterparty contained a common safe port clause, stipulating that the vessel had to be employed in lawful trades for the carriage of lawful cargo and between safe ports only. The charterers ordered the vessel to Cuba in March, 1980, to load a cargo of cement for carriage to Basra, the Iraqi port situated on the west bank of the Shatt-al-Arab waterway. The vessel left Cuba in May 1980 and arrived at the Shatt-al-Arab waterway on the July 1. Owing to congestion, it did not berth until August 20 and it completed discharge on September 22. By that date, hostilities had broken out between Iran and Iraq. The vessel was thus trapped and unable to leave for nearly six months.

The dispute between the charterers and the shipowners regarding hire was referred to arbitration which held that there had been no breach of the safe port provision, nor was there any

¹¹⁵ [1982] 2 Lloyd's Rep. 307 [H.L.].

breach of the "war" clause.¹¹⁶ It was further held that the charter was frustrated and that the war clause did not exclude frustration.

When the shipowners appealed, Mr. Justice Goff held that the natural and ordinary meaning of the safe port clause was that the vessel should only be used between safe ports, and that this was an absolute, continuing promise. The charterers were therefore in breach of the contract and could not rely on the defence of frustration.

The matter went to the Court of Appeal where a majority reversed Mr. Justice Goff and restored the decision of the

¹¹⁶ The War Clause (Cl. 21) stipulates as follows:

(A) The Vessel unless the consent of the Owners be first obtained not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone which is dangerous as the result of any actual or threatened act of war, war hostilities, warlike operations...

(B) Should the vessel...be...ordered within such zone or be exposed in any way to the said risks (1) the Owners to be entitled from time to time to insure their interests in the vessel and/or hire against any of the risks likely to be involved thereby on such terms as they shall think fit, the Charterers to make a refund to the Owners of the premium to demand; and (2) notwithstanding the terms...hire to be paid for all time lost including any lost owing to loss of or injury to the Master, Officers, or Crew or to the action of the Crew in refusing to proceed to such zone or to be exposed to such risks.

The charterers argued that the "war" clause provides a complete code, so that even if under the safe port clause they were in breach, the "war" clause cast upon the shipowners and their insurers all the risks of unsafety arising from conditions foreseen in the clause. The House of Lords accepted this argument and this was another ground for dismissing the shipowners' appeal.

arbitration. The shipowners sought leave to appeal from the House of Lords which granted leave probably because it wished to have an opportunity to lay down rules with respect to safe port cases.¹¹⁷

B. The House of Lords' Decision

The House of Lords held that there was no authority for construing the safe port clause as giving rise to an absolute and continuing promise of safety by the charterers. The order or nomination in question had been given subject only to the qualification of some subsequent, unexpected and abnormal occurrence. The following is the famous ratio decidendi stated by Lord Roskill:¹¹⁸

The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question, and in my view, means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course, leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial.

¹¹⁷ See L.T. East, "Notes on Recent Cases: Charter Parties: Charterer's Safe Port Warranty Inapplicable Where Port Becomes Unsafe After Arrival of Vessel" (1983) 14 JMLC 113 at 114.

¹¹⁸ The "Evia" (No. 2), [1982] 2 Lloyd's Rep. 307 at 315 [H.L.].

It was found that at the time of the order to go to Basra, Basra was a safe port and the charterers were not in breach of the time charter.

The House of Lords also held, probably in obiter dicta, that if the port, although prospectively safe when the order is given, becomes actually or prospectively unsafe at a later stage due to an unexpected and abnormal event, the charterer has a further and secondary obligation. If, while the vessel is still proceeding towards a port which was safe at the time of the charterer's order, such port becomes unsafe, then the charterer must cancel his original order and command the vessel to go to a different port which is prospectively safe at the time the new order is given. If the vessel is in a port which becomes unsafe, then, if the vessel can leave, the charterer must order it to do so. If it is not possible for the vessel to leave, then no obligation on the charterer arises.¹¹⁹

It is also worth noting that the House of Lords has stated that unless there is something unusual in the express language of a charterparty, the charterer's obligation regarding the prospective safety of a port at the time of nomination must apply equally to voyage charters¹²⁰ and time charters¹²¹. Unfortunately,

¹¹⁹ Ibid. at 320.

¹²⁰ See, e.g. The "Kanchenjunga", [1990] 1 Lloyd's Rep. 391 [H.L.], 108 N.R. 280; Batis Maritime Corporation v. Petroleos del Mediterraneo S.A. (The "Batis"), [1990] 1 Lloyd's Rep. 345 [Q.B. (Com. Ct.)]; The "A.P.J. Priti", [1987] 2 Lloyd's Rep. 37 [C.A.].

¹²¹ See, e.g. The "Lucille", [1984] 1 Lloyd's Rep. 244 [C.A.]; The "Concordia Fjord", [1984] 1 Lloyd's Rep. 385 [Q.B. (Com. Ct.)].

their Lordships declined to consider whether or not the same principles relating to the charterer's secondary obligation apply to voyage charterers.¹²²

C. Criticism

The concept of prospective safety appears to strike a balance between the shipowner and the charterer, but in fact probably favours the latter.¹²³ It also marks a difference between English and American law, which does not, of course, contribute to uniformity in maritime law. It is not clear whether or not American law would follow The "Evia" in holding that prospective safety at the time of nomination is sufficient.¹²⁴

In addition, it is submitted that the dichotomy now produced between time and voyage charterers with respect to the

¹²² The "Evia" (No. 2), [1982] 2 Lloyd's Rep. 307 at 319-320 [H.L.].

¹²³ Under time charters, the shipowners can find an alternative way of presenting claims for loss and damage resulting from their compliance with the charterers' orders to proceed to an unsafe port. The charterparty may incorporate the indemnity clause which provides that the master of the ship shall be under the orders and directions of the charterer regarding employment, agency, or other arrangements, and the charterer agrees to indemnify the shipowner for all consequences or liabilities that may arise from the master complying with such orders or directions. In the absence of an express indemnity, a wide indemnity will generally be implied by law in any time charter. See Baker & David, supra, note 63 at 125-126. Thus, the shipowner can recover under the employment and indemnity clause if it can prove that the proximate cause of the loss of the vessel was its or its master's compliance with the charterers' orders as to employment of the vessel. The "Evaggelos TH.", [1971] 2 Lloyd's Rep. 200 at 206 [Q.B. (Com. Ct.)].

¹²⁴ See, e.g. UNCTAD, supra, note 106 at 14.

charterer's secondary obligation is unwelcome and unhelpful.¹²⁵

Finally, the concept of prospective safety is open to criticism. For example, it does not necessarily follow that, because a charterer must nominate a port in advance, obligations concerning the port are primarily limited to the time of nomination. Another problem is that of determining the foreseeability of a particular danger and the likelihood of its occurrence.¹²⁶

VII. THE "DUE DILIGENCE" APPROACH

A. The Earlier American Cases

American law used to require the charterer to only exercise ordinary and reasonable care¹²⁷, to take such precautions as a reasonably prudent person would take,¹²⁸ or to use reasonable

¹²⁵ See Baker & David, supra, note 63 at 121; East, supra, note 117 at 117.

¹²⁶ Baker & David, supra, note 63 at 116-118; East, supra, note 117 at 116-118. It is not easy to understand Diamond, supra, note 62 at 8-9, who argues that the obligation on the charterer is "clearly an absolute one", but "it is now clear that the prospective safety of the port has to be judged at the date that the order is given". Furthermore, he thinks the test must be whether or not, on the existing facts, the port offers a reasonable prospect of safety.

¹²⁷ See, e.g. Northwestern Fire & Marine Ins. Co. v. Seaboard Sand & Gravel Corp., 2 F. Supp. 1019 (E.D.N.Y. 1932) and other cases cited in Smith, supra, note 10 at 862-863.

¹²⁸ See, e.g. Hastrof v. O'Brien, 173 F. 346 at 347-348 (2d Cir. 1909).

diligence¹²⁹ with respect to the safety of a port. The master is presumed to have the best knowledge of the navigable waters, ports, and capacities of his vessel. He would therefore be the proper person to determine whether or not his vessel can enter any particular port.¹³⁰

In Atkins v. Fibre Disintegrating Co.¹³¹, the master was aware of the danger, which ultimately caused the damage, before he entered the port. However, as he gave no sign of his intention to hold the charterers responsible for any injury that might arise from the unsafeness of the port, it was thus held that he had waived¹³² the right to protest. His action was held to bind the shipowners, who could not recover damages for harm done to the vessel when leaving the port.

In Hastrof v. O'Brien¹³³ a chartered scow sank due to penetration of its hull by a timber imbedded upright in the bottom of the river . The court held that the charterers were not insurers

¹²⁹ Clearly Bros., Inc., v. City of New York (The "Roslyn"), 93 F. 2d 278 at 280 (2d Cir. 1937).

¹³⁰ Atkins v. Fibre Disintegrating Co., 2 Fed. Cas. 78 at 79 (No. 601) (E.D.N.Y. 1868) aff's 85 U.S. (18 Wall.) 272 (1873).

¹³¹ Ibid. at 79.

¹³² See the recent English "prospective safety" case of The "Kanchenjunga", [1990] 1 Lloyd's Rep. 391, 108 N.R. 280 [H.L.] where the shipowner waived the safe port clause in the voyage charterparty and agreed to load in a war zone. After the ship arrived, the port came under air attack. Because of the danger, the ship left without loading, and the charterers sued for damages. The House of Lords held that the shipowner's conduct constituted a waiver of the charterers' breach. However, the shipowner was not liable because he could rely on the war risks clause.

¹³³ 173 F. 346 at 347-348 (2d Cir. 1909).

and were not obliged to adopt every known means to guard against an accident. They were only required to take such precautions as, under all circumstances, a reasonably prudent person or "men of ordinary prudence" would have taken. The charterers did their duty when they sent the scow to a place where their own vessel had lain in safety under similar conditions a few days before.

In The "Roslyn"¹³⁴ the court held that the charterer owed the shipowner reasonable diligence to ascertain conditions at the stakeboat, so that the scow would have a safe berth.

B. Duty of the Wharfinger

A "wharfinger" is the owner or occupier of a wharf where vessels are usually ordered to load or discharge.

A wharfinger must make his wharf safe. Alternatively, he must warn ships coming to the berth of the hidden defects of the wharf which are either known to him or discoverable by him through the exercise of due diligence.¹³⁵

¹³⁴ 93 F. 2d 278 at 280 (2d Cir. 1937). See Look v. Portsmouth, K. & Y. St. Ry., 141 F. 182 at 185-186 (D. Me. 1905).

¹³⁵ See Smith v. Burnett, 173 U.S. 430 at 433 (1899); Look v. Portsmouth, K. & Y. St. Ry., 141 F. 182 at 185-186 (D. Me. 1905); The "Roslyn", 93 F. 2d 278 at 280 (2d Cir. 1937); Paragon Oil Co. v. Republic Tankers, S.A., 310 F. 2d 169 at 173 (2d Cir. 1962) cert. den. 372 U.S. 967 (1963); Trade Banner Line, Inc. v. Carribbean Steamship Co., S.A., 1975 A.M.C. 2515 (5th Cir. 1975); Grace Line, Inc. v. Todd Shipyards Co., 1974 A.M.C. 1136 (9th Cir. 1974); Medomsley Steam Shipping Co. v. Elizabeth River Terminals, 1966 A.M.C. 903 (4th Cir. 1966); Bunge v. M/V Furness Bridge, 1975 A.M.C. 1444 (E.D. La. 1975); Comissioners v. Gibraltar Pansy, 1977 A.M.C. 878 at 885 (E.D. La. 1977). See also The "Pass of Leny", (1936) 54 Ll. L. Rep. 288 at 293-294 [Adm.].

In other words, the wharfinger, in the absence of an express contract creating a higher standard, does not guarantee the safety of vessels coming to his wharves, although he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat.

When both charterer and wharfinger are named as defendants, the usual rule is to hold the wharfinger primarily, and the charterer secondarily, liable.¹³⁶

It is arguable that the charterer, who has far less knowledge about conditions of ports, berths, or wharves than the wharfinger, should only be obliged to exercise reasonable or due diligence to ascertain the safety of a particular port.

C. Due Diligence Form of Safe Port Clause

Early American judicial decisions espouse principles which are consistent with the notion of the due diligence form of safe port clauses. Such could be incorporated into provisions within an international convention. The due diligence approach is well known and recognized in maritime law, and might contribute to more

¹³⁶ See Smith, supra, note 10 at 87. However, in Trade & Transport, Inc. v. Caribbean Steamship Co., 384 F. Supp. 782 at 787 (S.D. Tex. 1974) it was held that the wharfinger was not an insurer, but he had the obligation to exercise due care and diligence in furnishing a safe berth to the vessel and he did not. Even if the charterer was liable to the vessel, the ultimate tortfeasor was the wharfinger. In Athina Shipping Co. v. Amerada Hess Corp., 1972 A.M.C. 796 (M.D. Fla. 1971) an oil company in the dual capacity of wharf owner and time charterer which warranted a safe berth to the shipowner was held liable for damage to the ship caused by the collapse of a piling dolphin at the wharf.

equitable, practical and legal solutions for both shipowners and charterers.

The due diligence form of safe port clauses has been adopted, for instance, in some tanker voyage charterparties by The Baltic and International Maritime Conference (BIMCO), The Federation of National Associations of Ship Brokers and Agents (FONASBA), and The Documentary Committee of the Japan Shipping Exchange, Inc.. It customarily reads something along the following lines:¹³⁷

Charterers shall exercise due diligence to ascertain that any places to which they order the vessel are safe for the vessel and that she will lie there always afloat. Charterers shall, however, not be deemed to warrant the safety of any place and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid.

Thus, in this clause the charterer assumes a duty of diligence, but no absolute warranty of the port being safe under all circumstances. It is submitted that if the charterer had to give a warranty, he would have to insure the vessel's value, which is already insured by the shipowner. Furthermore, the shipowner may be protected by a contractual stipulation that he need not continue a voyage or remain at a port when this would be unsafe, as well as by the clauses dealing with ice risks and war risks.¹³⁸

¹³⁷ See INTERTANKVOY 76 (Clause 3), and SHELLVOY 2 (Clause 4).

¹³⁸ See P. Gram, "Intertankvoy 76 and Intertanktime 80"- the paper presented at Charter-Parties Conference, supra, note 62 at 13.

D. The Hague and Hague/Visby Rules

It has already been mentioned that The Hague¹³⁹ and Hague/Visby¹⁴⁰ Rules do not apply by force of law to charterparties. However, since a number of standard forms of voyage charterparties incorporate the Rules, or a particular national enactment of them, the Rules can become directly applicable to voyage charterparties as part of their terms.

Thus, it is argued¹⁴¹ that article 4(3) of the Rules, in addition to the earlier American cases, offers an acceptable solution to the safe port warranty problem, by adopting the due diligence approach. The article stipulates that the shipper (the charterer) shall not be responsible for loss or damage sustained by the carrier (e.g. the shipowner) or the ship, arising or resulting from any cause (e.g. unsafe port) without the act, fault or neglect of the shipper (the charterer), his agents, or his servants.

¹³⁹ The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and entered into force June 2, 1931.

¹⁴⁰ Protocol to Amend the 1924 Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at brussels, February 23, 1968 and entered into force June 23, 1977.

¹⁴¹ Smith, supra, note 10 at 875.

VIII. CIVIL LAW

A. France

The French legislation of 1966¹⁴² is silent with respect to the charterer's obligation to nominate a safe port (port sûr) and/or safe berth (poste sûr). It appears that the doctrine¹⁴³ accepts an approach similar to the earlier American cases and to the due diligence form of safe port clauses.¹⁴⁴ The due diligence approach, as it relates to voyage charterparties, can be demonstrated by comparing the responsibility which falls on the charterer under the time charter as opposed to the responsibility which falls on the voyage charterer under the voyage charter.

As previously stated, it is submitted that the time

¹⁴² See Law No. 66-420 of June 18, 1966 as amended by Law No. 79-1103 of December 21, 1979 and by Law No. 86-1292 of December 23, 1986; and Decree No. 66-1078 of December 31, 1966 as amended by Decree No. 69-679 of June 19, 1969 as amended by Decree No. 87-922 of November 12, 1987.

¹⁴³ See, e.g. J. Le Clère, Les chartes-parties et l'affrètement maritime, Paris, Libraries techniques, 1962 aux pp. 134-136. A port will be physically safe (techniquement sûr) and politically safe (politiquement sûr) "si le navire peut y entrer et en sortir, compte tenu de son pavillon, si ce port n'est pas pris par les glaces à l'époque de l'année où le navire y entre, s'il n'y a ni guerre civile, ni guerre étrangère dans la région, si les plans d'eau permettent au navire d'évoluer normalement, s'il n'y a pas de variation brusque du niveau des eaux".

¹⁴⁴ Note bene: It is worth noting that some other civil law countries treat the obligation of the charterer to nominate a safe port as one of due diligence. For instance, it seems that under Scandinavian and German law, if the nominated port turns out to be unsafe, the charterer will only be liable for the resulting damage if it was negligent or failed to exercise due diligence in nominating a safe port. UNCTAD, supra, note 106 at 15.

charterer should have a greater responsibility than the voyage charterer for ensuring the safety of ports and berths. As a time charter is a contract under which the shipowner transfers the employment and agency of the vessel to the charterer, it is only normal that the charterer should assume strict liability for the safety of the port.

However, such a rule would be too harsh in the case of a voyage charter under which a shipowner retains the employment and agency of the ship. The shipowner normally bears the risk for damage to the vessel.

In addition, the safe port clause should not constitute protection for the shipowner when he has failed to make proper investigations relating to the conditions of the place named in a voyage charterparty.¹⁴⁵

B. Quebec

Neither the C.C.L.C. nor the proposed reform¹⁴⁶ provide rules with respect to the charterer's safe port obligation. It is submitted that the conclusions regarding French law are also applicable to Quebec law.

¹⁴⁵ Le Clère criticizes the English case of The "Eastern City" as a typical example of "l'interprétation abusive de la notion de port sûr". See supra, note 143 aux pp. 136-137.

¹⁴⁶ See Bill 125, Civil Code of Quebec, 1st Sess., 34 Leg. Que., 1990, arts. 2010-2019.

IX. CONCLUSION

Whether or not a port or berth is safe is a question of fact which depends upon the vessel, the voyage charterparty, the time, the nature of the employment of the vessel, and the generally prevailing circumstances. As a general rule, a port will not be safe unless, at the relevant period of time, the vessel in question can reach it, use it, and leave it without danger. This is, of course, subject to the vessel being managed and navigated with good seamanship.

Thus, in order for a particular port to be considered as safe, it must be physically, politically and sanitarily safe. In addition, one could argue that the port must be "environmentally safe" in accordance with the International Convention for the Prevention of Pollution from Ships. Every port should have adequate facilities for the reception of residues and oily mixtures, noxious liquid substances, sewage, and garbage from ships. The lack of such equipment can cause damage not only to the environment but also create a potential liability under local legislation for a shipowner who, in absence of adequate port facilities, might discharge pollutants into the seas.

Thus, appropriate facilities would diminish accidental and intentional, although perhaps necessary, pollution of the sea.

Voyage charterparties usually contain an express clause that the charterer will order the vessel to proceed to safe ports. When the charterparty is silent, it appears that the British courts

are prepared to imply such an obligation when it is necessary for the business efficacy of the voyage charter.¹⁴⁷

American courts, however, are reluctant to imply the charterer's obligation to nominate a safe port when the charterparty is silent. American law still recognizes the concept of the warranty or guarantee interpretation of the safe port obligation. It requires the charterer's absolute, continuous, and nondelegable duty to nominate a port which at the date of the nomination can be foreseen to be safe, and which will de facto be safe.

The new English concept of prospective safety is more favourable to charterers, establishing the charterer's liability only by reference to the time when the order is given. If at that time the port is prospectively safe, the charterer's obligation in that regard is generally ended.

It is submitted that the present state of the law relating to the safe port obligation does not contribute to uniformity, certainty or justice in maritime law. The warranty rule, the

¹⁴⁷ According to the Clifford Chance Maritime Review, "[t]he position in relation to a voyage charter which is silent on the point is, however, more difficult. Where the charter contemplates loading or discharging at any port within a geographical range, so that the charterer is still required to nominate a port which may not be specifically named, the position is likely to be similar to that of a time charter and the charterer may therefore be held to warrant the safety of the port which he nominates....Where, however, the charter specifies a single named port, it is strongly arguable, in the absence of express words, that the owner is accepting an obligation to go to that port and must therefore satisfy himself that it is safe. It is hard to see the basis on which a warranty of safety on the part of the charterers could be implied in these circumstances." Clifford Chance Maritime Review, "Unsafe Ports", February 1990, No. 3 at 1.

concept of prospective safety, and the concept of implied term have been criticized.

The most suitable solution for a new international convention can therefore be found in the "due diligence" approach, which is well known and recognized in other fields of maritime law. The charterer should assume a duty of diligence instead of an absolute warranty of the port being safe under all circumstances. Since the master of the ship can be presumed to have the best knowledge of the navigable waters, ports, and the capacities of his vessel, he is therefore the proper person to determine whether his vessel can or cannot enter any particular port. Such a view is in accordance with Civil law.

It may be a normal and acceptable rule in the case of a time charter that the charterer assumes strict liability for the safety of the port. However, such a rule is too harsh in the case of a voyage charter under which the shipowner retains the navigation and employment of the ship.

Shipowners may still be protected by a contractual stipulation that they shall not have to continue a voyage or remain at a port when this would be unsafe, as well as by the clauses dealing with ice and war risks.

To conclude, a new international rule regarding the safe port obligation might provide as follows:

The charterer shall exercise due diligence to ascertain that any place to which he orders the vessel is physically, environmentally, politically, and sanitarily safe for the vessel. The charterer shall, however, not be deemed to warrant the safety of any place and

shall be under no liability in respect thereof except for loss or damage caused by his failure to exercise due diligence as aforesaid.

This provision is based on two standard form voyage charterparties, namely INTERTANKVOY 76 and SHELLVOY 2.

Chapter 7

IMPLIED UNDERTAKING NOT TO SHIP DANGEROUS GOODS

I. INTRODUCTION

II. GENERAL CHARACTERISTICS OF CARRIAGE OF DANGEROUS GOODS BY SEA

A. Definition of Dangerous Goods

1. Narrow Interpretation
2. Broad Interpretation

B. The Charterer's Liability Regarding "Environmentally Unsafe" Cargo

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"...the making of law is a never-ending process. It changes in accordance with the way in which man perceives his environment and the need to respond to the challenges embedded in it, in order to secure his well-being."

A.F.M. De Bièvre, "Liability and Compensation for Damage in Connection With the Carriage of Hazardous and Noxious Substances by Sea" (1986) 17 JMLC 61

I. INTRODUCTION

The voyage charterer's duties prior to loading include procuring a cargo of the quantity and nature contracted for, and conveying that cargo to the place of loading. This chapter will discuss the charterer's duty regarding the nature of the cargo.

Many parties may be involved in disputes concerning dangerous cargoes, such as suppliers, shippers, charterers, manufacturers,¹ barge lines, surveyors, stevedores, insurers, and governmental institutions. This chapter is, however, limited to the study of the voyage charterer's implied undertaking not to ship dangerous cargo.

There is today an increasing concern for environmental problems. The fact that more than fifty per cent of all cargo carried by sea has been classified as dangerous demonstrates the considerable threat to the environment which arises from such transportation. This chapter is therefore devoted also to the study of various international conventions and documents, as well as national statutes and regulations, which aim to decrease this threat.

In addition, this chapter will discuss the difference between English and American law regarding the implied undertaking

¹ On "products liability" see W. Tetley, Marine Cargo Claims, Third Edition (Montreal: International Shipping Publications Blais, 1988) at 469-477; J.R. Cunningham, "Principles of Canadian Law Relating to Products Liability in Admiralty" (1987) 62 Tul. L. Rev. 337; M. Nadon, "The Law of Negligence and Products Liability - A General Overview" in Meredith Memorial Lectures 1986 (Montreal: McGill, 1987) at 95.

of the charterer; the new approach adopted by the Hague and Hague/Visby Rules; some of the characteristics of the Civil law on the subject; as well as proposals for inclusion within a new international convention on charterparties.

II. GENERAL CHARACTERISTICS OF CARRIAGE OF DANGEROUS GOODS BY SEA

A. Definition of Dangerous Goods

1. Narrow Interpretation

Dangerous goods² can be defined stricto sensu (narrow interpretation) as "goods that by reason of their nature, quantity or mode of stowage, are either singly or collectively liable to endanger the lives of the passengers or imperil the ship".³ Such a definition implies that goods are physically dangerous.

Certain cargoes have been declared dangerous by national statutes, national and international regulations, when of an inflammable, explosive, or other hazardous nature (e.g. explosives, flammable liquids and solids, and radioactive materials). However, even goods that are not so declared to be of such a nature (e.g.

² It is submitted that "dangerous goods" should include hazardous, noxious and harmful substances. For further literature on dangerous goods, see A.E. Chircop, "The Marine Transportation of Hazardous and Dangerous Goods in the Law of the Sea - An Emerging Regime" (1987/88) 11 Dalhousie L.J. 612.

³ See, e.g. Canada Shipping Act, R.S.C. 1985, c. S-9 [as amended].

maize, coal, turnings), can in fact be dangerous .⁴

A voyage charterparty may expressly stipulate that the cargo is to consist, for example, of lawful⁵ general merchandise, "excluding acids, explosives, arms, ammunition or other dangerous cargo". Such a clause will probably be read eiusdem generis, i.e. that the words "dangerous cargo" are not to be construed in their widest extent, but are to be held as applying only to goods of the same general kind or class as those specifically mentioned.⁶

When a charterparty provides that no injurious, inflammable or dangerous goods, "such as acids, explosives, calcium carbide, ferro silicion, naphta, motor spirit, tar or any of their products" can be shipped, the words are intended by way of exemplification

⁴ See Atlantic Oil Carriers, Ltd. v. British Petroleum Company Ltd. (The "Atlantic Duchess"), [1957] 2 Lloyd's Rep. 55 at 95 [Q.B. (Com. Ct.)] where the cargo in question was declared to be a cargo of crude oil, and it was well known that crude oil was highly dangerous, stringent precautions had to be observed in carrying it.

⁵ On [un]lawful cargoes see W. Poor, American Law of Charter Parties and Ocean Bills of Lading, Fifth Edition (New York: Matthew Bender, 1968) at 18-19. See also Leolga v. Glyn, [1953] 2 Lloyd's Rep. 47 (ammunition and other explosives were not "lawful merchandise"); The Wismar, S.M.A. No. 1454 (Arb. at N.Y. 1980) (a cargo of direct reduced iron ore pellets was not dangerous); The Witfuel, S.M.A. No. 1381 (Arb. at N.Y. 1979) (the vessel was chartered under a tanker time form for the carriage of "crude oil and/or dirty petroleum products", and the charterer was in breach of the charter for failing to load a clean or refined product); The Maria K., S.M.A. No. 1324 (Arb. at N.Y. 1979) (petroleum coke was a lawful cargo); The Fernglén, 1971 A.M.C. 213 (Arb. at N.Y. 1970); The Mercandian Supplier II, S.M.A. No. 2509 (Arb. at N.Y. 1988) (marijuana is not lawful merchandise).

⁶ In Chandris v. Isbrandtson-Moller Co. Inc., [1951] 1 K.B. 240 at 244-246 Mr. Justice Devlin applied the eiusdem generis rule to such a clause and found that turpentine was a dangerous cargo.

and not by way of restriction.⁷

2. Broad Interpretation

The lato sensu (broad interpretation) definition of dangerous goods, however, does not proceed from the standpoint that the goods must be physically dangerous. It may suffice that they involve the risk of unusual danger or delay to the ship.

In one case,⁸ it was held that the carriage of a cargo in violation of law of the flag or the law of the place to which the goods were destined, thereby risking governmental interference which would cause delay and possibly also confiscation, was analogous to a shipment of dangerous goods which might cause the destruction of the ship.

The purpose of both the narrow and the broader interpretation of dangerous goods (which are fully detailed in various national statutes and national and international regulations), is basically to ensure the safety of the ship, its

⁷ Thus, in Micada Compania Naviera S.A. v. Texim, [1968] 2 Lloyd's Rep. 57 at 61 [Q.B. (Com. Ct.)] the cargo of iron ore concentrate was held to be dangerous.

⁸ Mitchell, Cotts & Co. v. Steel Bros., [1916-17] All E.R. Rep. 578 at 579. The decision was distinguished, for example, in The Domald, [1920] P. 56, and Transoceanica Societa Italiana di Navigazione v. H.S. Shipton & Sons, [1923] 1 K.B. 31; and referred to in The Lisa, [1921] P. 38, Burley, Ltd. v. Stepney Corpn., [1947] 1 All E.R. 507, etc. See R. Colinvaux, Carver's Carriage by Sea, Thirteenth Edition (London: Stevens & Sons, 1982) at para. 1113 [hereinafter Carver].

crew, and the cargo.⁹

However, as dangerous cargoes have come to be transported in increasing quantities, awareness of the risk of damage outside the immediate confines of the ship (e.g. to the environment) has progressively grown.¹⁰ Since "environmentally unsafe" goods may involve "the risk of unusual danger or delay to the ship", they not only cause damage to the environment, but also to the vessel and the shipowner.

One may ask, therefore, if a charterer, in the absence of express contractual provisions to the contrary, should be required to ship "environmentally safe" goods. Another interesting question is whether or not the charterer should be responsible for damage to the marine environment in the case of the transportation of "environmentally unsafe" cargo.

B. Charterer's Liability Regarding "Environmentally Unsafe" Cargo

Maritime law traditionally "channels" legal liability to the shipowner.¹¹ Thus, if a dangerous cargo shipped by the

⁹ See article 4 (6) of the Hague and Hague/Visby Rules ("dangerous nature to the shipment"; "a danger to the ship or cargo").

¹⁰ A.F.M. De Bièvre, "Liability and Compensation for Damage in Connection With the Carriage of Hazardous and Noxious Substances by Sea" (1986) 17 JMLC 61 at 64.

¹¹ See De Bièvre, supra, note 10 at 69. Article 3 of the International Convention on Civil Liability for Oil Pollution Damage 1969 provides, for instance, that "the owner of a ship at

charterer causes damage to the environment, whether with or without the shipowner's knowledge of its dangerous character, the liability will most likely fall upon the shipowner. It is therefore submitted that the charterer's undertaking not to ship dangerous cargo should include an obligation to provide "environmentally safe" goods, unless the parties expressly agree to ship and carry cargo which might be dangerous to the marine environment (e.g. oil). However, even in the case where the charterer and the shipowner are aware of the dangerous character of a particular cargo, the risk of damage to the environment and the liability vis-à-vis third parties should be placed on both.¹²

In 1970, the Legal Committee of the International Maritime Organization [then IMCO, hereinafter IMO] recognized the need to solve "as a matter of urgency" the problems raised by marine pollution resulting from substances other than oil.¹³ At the Committee's 36th session in June 1978, three alternative texts of draft articles for a new international convention dealing with

the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident". This convention (in force in 1975; protocol in 1976 entered into force in 1981; protocol in 1984 is not yet in force) is supplemented by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (in force in 1978; two protocols in 1976 and 1984, neither of which is yet in force).

¹² See, e.g. D.W. Abecassis, "Risk Sharing in LNG Shipping - Some Aspects of the Relationships Between Owners and Charterers of LNG Ships and Third Parties" (1982) LMCLQ 138.

¹³ De Bièvre, supra, note 10 at 63.

(strict) liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea were developed.

The first text proposed the joint and several liability of the shipper (who might also be the charterer) and the shipowner. The second included a two-tier system of liability providing for the primary liability of the shipowner and for the excess liability of the shipper. The third proposed the exclusive liability of the shipper.¹⁴

There were also two other texts, one allocating liability to the shipowner alone, and the other providing for the exclusive liability of the cargo interests as "product liability".¹⁵

It is worth noting that there was considerable support for some kind of shipper's liability, a relatively new development in maritime law.¹⁶ The second proposal, which was considered as a compromise and balance between shipowners and shippers, was eventually forwarded to the 1984 International Conference on Liability and Compensation for Damage in connection with the Carriage of Certain Substances by Sea. The latter had, amongst other things, to consider the adoption of the Draft Convention on

¹⁴ Ibid. at 69.

¹⁵ Ibid.

¹⁶ The 1963 Vienna Convention on Civil Liability for Nuclear Damage and the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials, however, extend the liability of the "operator" of a nuclear installation to damage caused by a nuclear incident during the transportation of nuclear substances by sea. De Bièvre, supra, note 10 at 70.

Liability and Compensation in connection with the Carriage of Noxious and Hazardous Substances by Sea.

The draft was so contentious as to cause the diplomatic conference to end in a stalemate. Many dilemmas emerged, such as the objection of insurers to shippers' liability, the issue of limitation of liability, and the definition of hazardous and noxious substances.¹⁷ Among the problems still to be overcome are those concerning who should make contributions to the fund to be formed for victims of pollution, and if such contributors should be limited to shipowners or extended to include cargo interests.

The next diplomatic conference on liability and compensation for damage in connection with carriage of dangerous goods by sea (formerly hazardous and noxious substances) will probably take place in late 1992. It is to be hoped that a new convention will finally be adopted by most nations, providing a fair and just balance of rights and responsibilities between shipowners and shippers (charterers) regarding carriage of dangerous goods, while contributing to the uniformity and certainty

¹⁷ De Bièvre, supra, note 10 at 72 et seq. According to the Report of the Liaison Sub-Committee - I.M.O. and Other International Organizations (Montreal: Canadian Maritime Law Association, 1991) the "Legal Committee of IMO is currently working on a set of draft articles for a convention on liability and compensation for the maritime carriage of hazardous and noxious substances (HNS). The regime would comprise two levels of compensation. The first level of compensation would be channelled to the shipowner. In the event that such compensation should prove insufficient, a second level of compensation would be triggered. An international scheme would supply this second level of compensation, financed out of contributions from shippers of HNS cargoes".

of law.¹⁸

C. SOLAS Convention

The International Convention on the Safety of Life at Sea [hereinafter SOLAS Convention 1974]¹⁹ contains the provisions concerning carriage of dangerous goods in packaged form as well as in bulk (Chapter VII). That is to say, the application of Chapter VII has been expressly extended from dangerous goods carried in packaged form, to those transported in solid bulk, liquid, and gas forms.²⁰

Chapter VII is subdivided into three Parts. Part A deals with the carriage of dangerous goods in packaged form or in solid form in bulk. Part B relates to the construction and equipment of ships carrying dangerous liquid chemicals. Part C lays down the requirements for the construction and equipment of ships carrying

¹⁸ See W. Tetley, "The Lack of Uniformity and the Very Unfortunate State of Maritime Law in Canada, the United States, the United Kingdom and France" (1987) LMCLQ 340.

¹⁹ In force in 1980, the SOLAS Convention 1974 incorporates the amendments of 1966, 1967, 1968, 1969, 1971 and 1973 to SOLAS 1960 which never came into force. The SOLAS Convention 1974 has had a protocol in 1978 (in force in 1981) and amendments in 1981 (including amendments to the protocol and in force in 1984) and 1983 (in force in 1986).

²⁰ Annex II of MARPOL 73/78 deals with the discharge of noxious liquid substances, exceptions, reception facilities, measures of control, requirements for minimizing accidental pollution, etc. Annex III of the same convention regulates the prevention of pollution by harmful substances carried by sea in packaged forms, or in freight containers, portable tanks or road and rail tank wagons.

liquid gases.²¹

Regulation 1(4) of Chapter VII provides that "to supplement the provisions of this part, each Contracting Government shall issue, or cause to be issued, detailed instructions on safe packaging and stowage of dangerous goods which shall include precautions necessary to other cargo". Detailed instructions must be based on the International Maritime Dangerous Goods Code [hereinafter IMDG Code] and the Code of Safe Practice for Solid Bulk Cargoes.²²

D. IMDG Code

The detailed provisions of the IMDG Code are designed to aid compliance with international legal requirements of the SOLAS Convention 1974 regarding the carriage of dangerous goods by sea. In addition, they are intended to be the basis for individual national requirements designed to provide harmonization between member countries.²³

²¹ See C.E. Henry, The Carriage of Dangerous Goods by Sea - The Role of the International Maritime Organization in International Legislation (London: Frances Pinter (Publishers), 1985) at 95-97.

²² Henry, supra, note 21 at 97. In addition, there are Emergency Procedures for Ships Carrying Dangerous Goods, Recommendations on the Safe Transport, Handling and Stowage of Dangerous Substances in Port Areas, and many other guidelines from non-governmental organizations. See Chircop, supra, note 2 at 626.

²³ According to Chircop, supra, note 2 at 636 over 40 states have now adopted the IMDG Code, including the leading maritime powers.

The IMDG Code was adopted by the Assembly of IMO in 1965, as a recommendation to its members for the adoption of regulations and guidelines concerning maritime safety, and concerning the prevention and control of marine pollution from ships. Although the Code is not binding as a matter of statute, and its binding legal force depends on its being incorporated into domestic law, the courts look upon it as a standard of reasonableness.²⁴

Provisions of the IMDG Code are arranged in five volumes which are devoted to a description of over one thousand substances. They provide ready access to information relating to the method of packing, packaging, stowage, segregation and handling of these substances. Furthermore, the 25th Amendment to the IMDG Code, which became effective on January 1, 1991, extends the application of the code to "marine pollutants" in order to facilitate the uniform implementation of Annex III of MARPOL 73/78.²⁵

The General Introduction, for instance, regulates application, classification, packing, marking and labelling, documents, temporary exceptions, stowage requirements (which now apply to marine pollutants), etc. The rest of the IMDG Code is devoted to details regarding each substance according to its class

²⁴ Henry, supra, note 21 at 108; L.C. Bulow, "Dangerous Cargoes: The Responsibilities and Liabilities of the Various Parties" (1989) LMCLQ 342 at 343. See, e.g. Ionmar Compania, etc. v. Central of Ga. R. Co., 471 F. Supp. 942 (S.D. Ga. 1979), vacated 666 F. 2d 897 (5th Cir.); Sucrest Corp. v. M/V Jennifer, 455 F. Supp. 371 (D. Me. 1978); Internav Ltd. v. Scanbulk Ltd. (The "Wismar"), (1980) S.M.A. No. 1454.

²⁵ See L. Davies, "Milestone Period for Hazardous Cargo Transport" (Fairplay 8th August 1991) at 19-20; Henry, supra, note 21 at 104.

grouping.

Class 1 brings together the most dangerous of the substances carried by sea (explosives); Class 2 covers gases; Class 3 relates to liquids emitting inflammable vapours at a certain temperature; Class 4 includes substances which, under certain conditions of transportation, are readily combustible and thus may cause fires, or contribute to them; Class 5 comprises oxidizing agents and organic peroxides; Class 6 includes poisonous (toxic) and infectious substances; Class 7 covers radioactive materials, and Class 8 corrosive materials. Those marine pollutants which are not covered by the above-mentioned classes will be included in Class 9.

E. Legislation Relating to Carriage of Dangerous Goods by Sea - A Resumé

The following are some of the British, American, and Canadian statutes and regulations concerning dangerous goods:

1. United Kingdom

*The Merchant Shipping Act 1894, ss.446-450²⁶: "Dangerous goods" mean aquafortis, vitriol, naphta, benzine, gunpowder,

²⁶ See Merchant Shipping Act 1979, Sch. 6, Part VII; Halsbury's Laws of England, Shipping and Navigation, Vol. 43 (London: Butterworths, 1983, 1990) at paras. 270-271; Carver, *supra*, note 8 at para. 1114. The Carriage of Goods by Sea Act 1971 (or the Hague/Visby Rules) will be dealt with later.

lucifer matches, nitro-glycerine, petroleum, any explosives within the meaning of the Explosives Act 1875, any other goods which are of a dangerous nature, and any goods declared by the rules made under the Merchant Shipping (Safety Convention) Act 1949, s. 23 to be dangerous in their nature.

Every shipper of dangerous goods is bound to mark the nature of the goods distinctly on the outside of the package containing them. He is also to give notice of their nature, as well as the name and address of the sender or carrier, to the master or the shipowner, upon or before sending the goods to be shipped, or taking them on board. A penalty may be imposed in the event of a breach of that duty, and a person who knowingly sends dangerous goods under a false description also incurs a penalty. Masters and shipowners may refuse to ship packages which they suspect of containing dangerous goods. If they find such goods on board not marked and declared, they may throw them overboard (which is, of course, an anachronism which will need to be changed to reflect current ecological thinking) or an Admiralty Court may direct how to dispose of them.

*The Explosive Substances Act 1883, s.8: The Act enables the master or shipowner to search the cargo for dangerous goods if he has reasonable grounds for suspecting that such goods are concealed on board.

*The Merchant Shipping (Safety Convention) Act 1949: Section 23 gives effect to matters relating to dangerous goods agreed at the International Convention for the Safety of Life at

Sea, which was signed in London in 1948.

*The Merchant Shipping (Dangerous Goods) Regulations 1981:²⁷ For the purpose of these regulations, "dangerous goods" means goods classified in the following publications as dangerous for carriage by sea: the Blue Book (The 1978 Report of the Department of Trade's Standing Advisory Committee on the Carriage of Dangerous Goods in Ships), the IMDG Code, or any other IMO publication. "Dangerous goods" also means any other substance the properties of which might be dangerous when that substance is carried by sea. It includes empty receptacles, residues in empty tanks, or cargo holds which have been used previously for the carriage of dangerous goods, unless they have been cleaned and dried, ventilated as appropriate, adequately closed, or in the case of radioactive substances both cleaned and adequately closed. The term "Dangerous goods" does not include goods forming part of the equipment or stores of the ship in which they are carried.²⁸

2. United States

*The Carriage of Explosives or Dangerous Substances Act:²⁹

²⁷ S.I. 1981 No. 1747 (amended by S.I. 1986 No. 1069). See also the Dangerous Goods in Harbour Areas Regulations 1987, S.I. 1987 No. 37, and the Merchant Shipping (Tankers) (EEC Requirements) Regulations 1981, S.I. 1981 No. 1077 (amended by S.I. 1982 No. 1637).

²⁸ See also Grain Regulations of 1980, the Diseases of Animals Act 1950, and the Diseases of Animals Act 1975 in Carver, supra, note 8 at paras. 1127-1135.

²⁹ 46 U.S.C. s. 170(1970).

This Act applies to all vessels using the navigable waters of the United States, and it governs the loading and carriage of explosives and dangerous substances. However, it was repealed in 1983³⁰ and new provisions were adopted to cover the carriage of dangerous or hazardous materials.³¹

*Coast Guard Regulations:³² These Regulations govern the loading, stowage and transportation of dangerous or hazardous materials. They cover the transportation and storage of military explosives on board vessels, the use of dangerous articles as ship's stores and supplies, dangerous solids in bulk, as well as dangerous liquid and gas cargoes.³³

3. Canada

*Canada Shipping Act:³⁴ ss. 389-390: This Act provides that no person shall send or attempt to send, carry or attempt to carry dangerous goods in a Canadian ship, except in accordance with

³⁰ Pub. L. 98-89, s.4(6), 97 Stat. 600-605.

³¹ 45 U.S.C., ss. 2101, 3701-3718. See M. Wilford, T. Coghlin, J.D. Kimball, Time Charters, Third Edition (London: Lloyd's of London Press Ltd., 1989) at 135.

³² 46 C.F.R. ss.30-40, 98, 146-154, 171-176. See Bulow, supra, note 24 at 343-344; Wilford, supra, note 31 at 135.

³³ The Carriage of Goods by Sea Act 1936 (or the Hague Rules) will be dealt with elsewhere.

³⁴ R.S.C. 1985, c. S-9, as amended R.S.C. 1985, c. 31, R.S.C. 1985, c. 27, R.S.C. 1985, c. 6, R.S.C. 1985, c. 40, R.S.C. 1989, c. 3, R.S.C. 1989, c. 17. The Carriage of Goods by Water Act (or the Hague Rules) will be discussed elsewhere.

Regulations³⁵ made by the Governor in Council. The Governor in Council may declare that goods, articles or materials to be carried in a ship are dangerous goods, and may prohibit their carriage. He may alternatively prescribe the method of packing and stowing of these goods, the precautions to be taken by persons engaged in their loading, unloading or stowing, as well as other requirements regarding these goods. The master or shipowner of a Canadian ship may refuse to take on board any package or parcel that he suspects of containing goods of a dangerous nature. The captain of a vessel improperly transporting dangerous goods is allowed to throw them overboard without fear of any civil or criminal liability (it has been previously mentioned that such a right is an anachronism which ought to be changed to reflect current ecological thinking). In addition, the Act contains provisions relating to the offence and punishment of persons who contravene its provisions, and provides that dangerous goods may be forfeited by order of the Admiralty Court.³⁶

³⁵ See Dangerous Bulk Materials Regulations (Regulations respecting the loading, stowing, unloading and inspection of dangerous materials in bulk on ships), SOR/87-24, SOR/89-333; and Dangerous Goods Shipping Regulations, SOR/81-951, SOR/82-1053, SOR/83-891, SOR/84-936, SOR/86-804, SOR/86-889, SOR/87-23, SOR/88-112.

³⁶ See also the Transportation of Dangerous Goods Act, R.S.C. 1980, c.36, as amended R.S.C. 1980-81-82-83, c. 165, R.S.C. 1984, c. 40, R.S.C., c. 26, which is generally inapplicable to any handling, offering for transport or transporting of dangerous goods in bulk in vessels within the meaning of the Canada Shipping Act. "In bulk" means for this purpose, confined only by the permanent structures of a ship or vessel, without intermediate containment or packing. Transportation of Dangerous Goods Regulations, SOR/85-77, SOR/85-314, SOR/85-585, SOR/85-609 do not apply to an international shipment of dangerous goods other than such shipments by aircraft if their handling, etc. is made in accordance with the IMDG Code.

III. EXPRESS UNDERTAKING OF THE CHARTERER

Sometimes voyage charterparties contain a clause, such as the following³⁷, which expressly prohibits the loading of dangerous cargo:

Charterers warrant that - unless otherwise specified in ... - the cargo referred to in ... is non-dangerous for carriage according to applicable safety regulations including IMO Code(s).

IV. IMPLIED UNDERTAKING OF THE CHARTERER

A. English Law

1. Duty "Implied in Law"

The leading English authority on the subject is Brass v. Maitland,³⁸ where bleaching powder and chloride of lime were carelessly and insufficiently packed, thus corroding the casks and damaging other goods carried on board the plaintiffs' ship. Lord

³⁷ See NUVOY-84 (Clause 19(a)) and OREVOY (Clause 5.1). However, a voyage charterer may be entitled by an express term to load dangerous goods provided that due notice is given to the master of the ship.

³⁸ (1856) 26 L.J.Q.B. 49 at 53. See A.A. Mocatta, M.J. Mustill, S.C. Boyd, Scrutton on Charterparties and Bills of Lading, Nineteenth Edition (London: Sweet & Maxwell, 1984) at 102-104; Carver, supra, note 8 at para. 1108; E.R.H. Ivamy, Payne and Ivamy's Carriage of Goods by Sea, Eleventh Edition (London: Butterworths, 1979) at 23-24; Wilford, supra, note 31 at 125 -127; A. Waring, Charterparties (Cape Town: Juta & Co., Ltd., 1983) at 24-25.

Campbell and Mr. Justice Wightman held that there was an implied undertaking (duty or warranty "implied in law") on the part of the shippers that they would not deliver goods of a dangerous nature. The shipowner's employees could not reasonably be expected to have known of the dangerous nature of these goods, unless they had been given notice to that effect.

The duty to give notice was considered so imperative that the law generally presumed it as performed, unless evidence to the contrary was provided.³⁹

In Hutchinson v. Guion⁴⁰ the plaintiffs (the shippers) delivered to the defendants (the shipowners) an article ("salt-cake") which they knew to be likely to cause damage to itself as well as to other goods with which it might come in contact. The shippers delivered the salt-cake to an officer of the vessel without warning him that it was of a dangerous nature. The salt-cake caused damage and the shippers were unable to successfully discharge the burden of proving that the shipowners knew or ought to have known (the article being well known in commerce) that it possessed deleterious properties.

The duty of a shipper not to ship dangerous goods has been

³⁹ See per Lord Ellenborough Ch.J. in Williams v. The East India Company, (1802) 3 East 192.

⁴⁰ (1858) 5 C.B. (N.S.) 149 at 163. The same principle was applied, for instance, in Farrant v. Barnes, (1862) 11 C.B. (N.S.) 553 where an action was brought by the carrier to recover damages for an injury sustained by him from the insufficient packing of a carboy of nitric acid which he was employed to carry by road for the defendant.

enlarged in Mitchell, Cotts & Co. v. Steel Bros..⁴¹ There is now an implied undertaking by the shipper that he will not ship goods which involve the risk of unusual danger or delay to the ship where that risk is unknown to the shipowner, without communicating to the latter the facts which are within his knowledge.

The shipper's obligation regarding the suitability of the goods for carriage and the giving of warnings concerning any dangerous characteristics of the cargo, is not confined to cases where the goods are tendered to a common carrier⁴². It is also possible to apply these obligations to all contracts for the transportation of goods by sea, including voyage charterparties.⁴³ It seems to have been assumed in many cases that there is no material difference, regarding shipment of dangerous cargo, between

⁴¹ [1916-17] All E.R. Rep. 578 at 579. The decision has been criticized on the grounds that Mr. Justice Atkin went "one step beyond the dangerous goods principle" and whether "the law may go further is a matter for consideration...". Transoceanica Societa Italiana di Navigazione v. H.S. Shipton & Sons, [1923] 1 K.B. 31 at 41.

⁴² See, e.g. Bamfield v. Goole and Sheffield Transport Company Limited, [1910] 2 K.B. 94 at 113 where Lord Justice Farwell held that where a consignor who delivered goods to a common carrier, for carriage by him in the performance of his common law obligation to carry, did not give notice to the carrier that the goods were dangerous, he had, unless the carrier knew, or ought to have known, the dangerous character of the goods, to be taken implicitly to warrant that the goods were fit for carriage in the ordinary way, and not dangerous. See G.N. Ry. Co. v. L.E.P. Transport and Depository, Ltd., [1922] 2 K.B. 742 where the railway company was entitled to recover from the forwarding agents, as upon an implied warranty that the carboys containing a corrosive fluid were fit to be carried, the amount he had paid to the owner of the felt goods for the damage done to his goods.

⁴³ Per Mr. Justice Mustill in The "Athanasia Comninos" and "Georges Chr. Lemos" (The "Athanasia Comninos"), [1990] 1 Lloyd's Rep. 277 at 282 [Q.B. (Com. Ct.)].

the duties of the charterer, those of the shipper of goods under a bill of lading, and those of a consignor⁴⁴ who entrusts goods to a common carrier.⁴⁵

Thus, under a voyage charter the above-mentioned Common law obligations fall upon the voyage charterers.⁴⁶

2. Whether Common Law Warranty is Absolute or Qualified

The precise scope of the shipper's duty not to ship dangerous cargo has long been and still is a source of controversy.

⁴⁴ However, it was held that Brandt v. Liverpool, [1924] 1 K.B. 575 and other reported cases from which the notion of an implied contract between the carrier and the consignee is derived do not provide grounds for extending the implication to embrace a warranty by the consignee as to the fitness of the goods for carriage. The "Athanasia Comminos", [1990] 1 Lloyd's Rep. 277 at 281 [Q.B. (Com. Ct.)].

⁴⁵ Halsbury's Laws of England, supra, note 26 at para 440 (note 5). See, e.g. Burley v. Stepney Corporation, [1947] 1 All E.R. 507 at 510-511.

⁴⁶ See in the Canadian context Heath Steel Mines, Ltd. v. The "Erwin Schroder", [1969] 1 Lloyd's Rep. 370 at 373 where by a voyage charterparty, the voyage charterer chartered the shipowner's vessel for a carriage of copper concentrate (processed ore). The charter provided that the carrier was responsible for the care of the cargo. The vessel took a list due to a shifting of the cargo and deviated. The master requested the voyage charterer to take delivery of the cargo prior to the port of destination on the grounds that the cargo was dangerous. The voyage charterer claimed damages for an alleged breach of the charterparty. The shipowner counter-claimed. Mr. Justice Pottier adopted the ration of the English case Brass v. Maitland, holding that the cargo was a dangerous one, and that the shipowner and master could not have known of the danger and what precautions should have been taken. The voyage charterer's claim was dismissed and the shipowner's claim allowed.

For instance, the majority in Brass v. Maitland⁴⁷ decided in favour of the absolute warranty, whereas Mr. Justice Crompton⁴⁸ favoured the qualified version. He said that it could be implied that the shipper, unless he gave notice, had the duty to take due and proper care and diligence not to deliver goods which appeared safe but were in fact dangerous. However, where no negligence was alleged, Mr. Justice Crompton doubted whether any right of action could exist.

It appears, according to Mr. Justice Mustill,⁴⁹ that the weight of English authority supports the absolute character of the warranty with respect to dangerous goods.

3. Charterer's Knowledge and Shipowner's Ignorance

In cases where the charterer had knowledge of the dangerous character of the cargo and the shipowner did not, the charterer has been held liable for the consequences of shipping such a cargo.⁵⁰

There is a dictum, however, in Burley v. Stepney

⁴⁷ (1856) 26 L.J.Q.B. 49 at 53-54.

⁴⁸ (1856) 26 L.J.Q.B. 49 at 57.

⁴⁹ The "Athanasia Comninos", [1990] 1 Lloyd's Rep. 227 at 282 [Q.B. (Com. Ct.)]. It was, however, unnecessary to decide the scope of the shipper's duty in this case, since it was clear that if the cargoes did have dangerous characteristics, this was something which the time charterer either knew or ought to have known.

⁵⁰ Bamfield v. Goole and Sheffield Transport Company Limited, [1910] 2 K.B. 94 at 104 [C.A.] (the cargo of ferro-silicion); Mitchell, Cotts & Co. v. Steel Bros., [1916-17] All E.R. Rep. 578 at 579 (the cargo of rice); Owners of Spanish S.S. Sebastian v. de Vizcaya, [1920] 1 K.B. 332 at 335 (the cargo of coal).

Corporation⁵¹ to the effect that an implied warranty exists that goods delivered for carriage are safe to be carried, irrespective of whether the person delivering the goods knows of the danger.

Yet where both parties agree that a specific cargo shall be shipped, the nature of which is known to both of them,⁵² and when the particular difficulty which might arise is also known to both the charterer and shipowner at the time the cargo is loaded, the charterer is not liable for any damage or delay which might arise through shipping the particular cargo.⁵³

⁵¹ Per Mr. Justice Hallett, [1947] 1 All E.R. 507 at 510-511.

⁵² The Donald, [1920] P. 56 at 62 (the cargo of fruit and sulphur). It was held in Acatos v. Burns, (1878) 3 Ex. D. 282 at 288 that even where the shipowner had an opportunity of examining the goods (the cargo of maize) shipped on board his vessel, no warranty on the part of the owner of the goods could be implied that they were fit to be carried on the voyage. See Transoceanica Societa Italiana di Navigazione v. H.S. Shipton & Sons, [1923] 1 K.B. 31 (the cargo of barley).

⁵³ Owners of Spanish S.S. Sebastian v. de Vizcaya, [1920] 1 K.B. 332 at 335. The shipowners had, through their agents, knowledge at the time the cargo of coal was loaded that it was necessary to obtain an export licence and that this could involve delay. Thus, the court held there was no breach of the charterparty by the charterer. In Ministry of Food v. Lamport & Holt Line, Ltd., [1952] 2 Lloyd's Rep. 371 at 381-382 [Q.B.] the court held that although it was to be implied that the shippers should have warned shipowners of the dangerous character of the cargo of tallow shipped, the shipowners in fact had notice of everything material regarding the tallow.

4. Distribution of Risks between the Shipowner and the Charterer

It is worth noting Mr. Justice Mustill's⁵⁴ test regarding the boundary between those risks which the shipowner contracts to bear and those which it does not. A shipowner who consents to carry goods of a particular description contracts to perform the carriage in a manner appropriate to goods of that description. He thereby assumes all risk of accident due to his failure to do so. If the shipowner proves that he has used the appropriate means, his claim succeeds, without having to engage in the often difficult task of establishing the precise character of the goods and the precise respect and degree⁵⁵ in which they deviated from the norm.

However, according to Mr. Justice Mustill, this analysis cannot be applied to cases where the nature of the cargo is such that even strict compliance with the accepted methods of carriage will not suffice to eliminate the possibility of an accident. That is to say, there may be cases where an accident is neither due to unusual cargo, nor to any act or neglect of the carrier, but to

⁵⁴ The "Athanasia Comninos", [1990] 1 Lloyd's Rep. 277 at 283 [Q.B. (Com. Ct.)].

⁵⁵ See The "Atlantic Duchess", [1957] 2 Lloyd's Rep. 55 at 96, 120 where the plaintiff could not prove that the vapour emitted by the butanized crude oil would be more persistent than the vapour emitted by the unbutanized crude oil. A mere difference in degree of danger was not enough unless it would be so great as to "approximate to a difference in kind".

"simple bad luck"⁵⁶. In such cases the risk must fall on the carrier.

5. Standard of Care in Carriage Required of the Shipowner

The shipowner has to perform the voyage in a manner appropriate to the cargo. He should take account only of those "modern alterations" in the characteristics of a particular cargo which a prudent shipowner, seeking to inform himself of the correct method of transporting it, could reasonably have been expected to know.⁵⁷

However, the shipowner may refuse to accept the goods if their shipment has been prohibited by law or if any statutory requirements with respect to packing or otherwise have not been complied with. He may also refuse to accept the goods if they are not tendered in a reasonably safe condition.⁵⁸

⁵⁶ The same principle of "simple bad luck" invented by Mr. Justice Mustill was applied in safe port cases. See The "Mary Lou", [1981] 2 Lloyd's Rep. 272 [Q.B. (Com. Ct.)], and The "Apiliotis", [1985] 1 Lloyd's Rep. 255 [Q.B. (Com. Ct.)].

⁵⁷ The "Athanasia Comninos", [1990] 1 Lloyd's Rep. 277 at 284 [Q.B. (Com. Ct.)].

⁵⁸ See, e.g. Holman & Sons v. Dasnières, (1886) 2 T.L.R. 607 [C.A.]; Halsbury's Laws of England, supra, note 26 at para 440.

B. American Law

1. Case Law Supporting the Absolute Warranty Rule

The earlier American judicial decisions seem to support the absolute warranty rule adopted by the English courts. In Pierce v. Winsor,⁵⁹ for instance, the shipowner's right to recover damages, occasioned by the melting of a cargo of mastic, was based on the general implied warranty that the shipper was obliged to furnish a safe cargo.

There are also some dicta in more recent decisions to the same effect. In Westchester Fire Ins. Co. v. Buffalo H. & Salvage Co.⁶⁰ District Judge Knight cited the thirteenth edition of Scrutton on Charterparties and Bills of Lading, which refers to an implied warranty by the shipper that the goods are fit for carriage in the ordinary way and not dangerous. He held, however, that this rule does not apply where the shipowner knows, or ought to know the dangerous character of the goods. Furthermore, no obligation to give notice rests upon the shipper when the shipowner or his agent have the opportunity of noticing the dangerous character of such

⁵⁹ 19 Fed. Cas. 646 at 651 (No. 11, 150) (C.C.D. Mass. 1861). See The Santa Clara, 281 F. 725 at 735-736 (2d Cir. 1922) (a cargo of copper concentrates).

⁶⁰ 40 F. Supp. 378 (W.D.N.Y. 1941), aff'd 129 F.2d 319 (2d Cir. 1942) (the cargo of turnings and borings).

goods.⁶¹

In Luckenbach Steamship Co. v. Coast Mfg. & Sup. Co.⁶² District Judge Bartels said that a distinction has to be made between implied warranties under contracts and implied indemnities for tort liability. The implied warranties which arise from the contractual relationship between the shipper and the carrier include:

1. an implied warranty of the suitability for shipment of the packages containing the goods;
2. an implied warranty that the goods are fit and safe for shipment, unless the shipper has notified the carrier to the contrary; and
3. warranties implied from the Carriage of Goods by Sea Act 1936.⁶³

It seems, however, that the judge's remarks as to the existence of implied warranties were unnecessary regarding the issue of jurisdiction which was before the court, and should therefore not have been included in the decision.⁶⁴

⁶¹ Ibid. at 381-382. See B. Vandeventer, "Analysis of Basic Provisions of Voyage and Time Charter Parties" (1975) 49 Tul. L. Rev. 806 at 811 where he says, probably with respect to both English and American law, that "charterers, either by their express terms or by implication, preclude the loading of dangerous goods unless there is a specific understanding between the parties".

⁶² 185 F. Supp. 910 (E.D.N.Y. 1960).

⁶³ Ibid. at 919.

⁶⁴ See Serrano v. United States Lines Company, 238 F. Supp. 383 at 388 (S.D.N.Y. 1965).

2. Charterer's Actual or Constructive Knowledge of Danger

Today, United States courts generally seem to accept that the cargo owner (e.g. the charterer) is not held to an absolute implied warranty that his goods are fit for ordinary carriage and not dangerous⁶⁵. The absolute warranty of the fitness of cargo is not implied simply to offset the implied absolute warranty of the seaworthiness of the ship.⁶⁶ Rather, the cargo owner's duty is based on his actual or constructive knowledge of danger.⁶⁷

Thus, under general maritime law a shipper has a duty to warn⁶⁸ the shipowner and the stevedore of inherent dangers in the cargo (the foreseeable hazards inherent in the cargo) of which he is or ought to be aware, and of which the shipowner is not and

⁶⁵ Aktieselskabet Fido v. Lloyd Brasileiro, 267 F. 733 at 736-773 (S.D.N.Y. 1919) affirmed 283 F. 62 (2d Cir. 1919), cert. denied 260 U.S. 237 (1922) (the cargo of coal).

⁶⁶ The William J. Quillan, 180 F. 681 at 684-685 (2d Cir. 1910), cert. den. 218 U.S. 682 (1910) (a cargo of garbage tankage). The court thought that in Pierce v. Winsor an erroneous view had been taken of the case of Brass v. Maitland. See also Poor, supra, note 5 at 193-194.

⁶⁷ Sucrest Corp. v. M/V Jennifer, 455 F. Supp. 371 at 384 (D. Me. 1978).

⁶⁸ The general maritime law that applies to duty-to-warn is set forth in Restatement (Second) of Torts, sec. 388. Martinez v. Dixie Carriers, Inc., 529 F. 2d 457 at 464-476 (5th Cir. 1976). However, a shipper of dangerous cargo has no duty, under sec. 388 or otherwise, to warn the shipowner where cargo documents identified the IMO (then IMCO) classification, proper warning labels were affixed, and the master had the IMO manual on board. Pitria Star Nav. v. Monsanto, 1986 A.M.C. 2966 at 2970-2971 (E.D. La. 1984).

cannot reasonably be expected to be aware .⁶⁹

The American attitude is thus different from the English one, since the former relies, according to Bullock:⁷⁰

much more on the warning by the shipper, on the actual knowledge of the vessel owner regarding the characteristics of the cargo and on whether or not one of the parties was negligent in the performance of some duty for which it was responsible, such as stowing and trimming the cargo, making the vessel seaworthy or properly ventilating.

V. THE HAGUE AND HAGUE/VISBY RULES

A. Introduction

It has already been seen that many voyage charterparties incorporate the Hague or Hague/Visby Rules or national enactments of them. Thus, when dangerous goods are loaded and carried under a voyage charterparty which contains the Paramount clause, the following provisions of the Rules will become applicable:

Article 4 (3):

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

⁶⁹ International Mercantile Marine Co. v. Fels, 170 F. 275 at 277 (2d Cir. 1909)(the cargo of "Fels-Naphta" soap); Sucrest Corp. v. M/V Jennifer, 455 F. Supp. 371 at 384-385 (D. Me. 1978); Ionmar Compania, Etc. v. Central of Ga. R. Co., 471 F. Supp. 942 at 952 (S.D. Ga. 1979); Ionmar Compania Naviera, S.A. v. Olin Corp., 666 F. 2d 897 at 904 (5th Cir. 1982).

⁷⁰ Bullock, supra, note 24 at 347.

Article 4 (6):

Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

B. The Effect of Article 4 (3)

One may ask if article 4 (3) of the Hague and Hague/Visby Rules operates to reduce the shipper's undertaking from that of an absolute warranty to a qualified warranty, i.e. to an obligation of due diligence.

Under American law, the answer is yes. The charterer's liability for damage to the vessel must be measured in terms of negligence rather than in terms of absolute liability. It was held that even if Pierce v. Winsor⁷¹ could be read to go as far as a recognition of the implied warranty of a shipper that the shipment is reasonably fit for the carriage, it has been overruled by the Carriage of Goods by Sea Act 1936, s. 1304 (3) (art. 4 (3) of the

⁷¹ 19 Fed. Cas. 646 (No. 11, 150) (C.C.D. Mass. 1861).

Hague or Hague/Visby Rules).⁷²

In addition, it appears that there is nothing in the Act indicating that the principle of negligence is limited to cases where the defect in the goods results in damage to other goods rather than to people.⁷³

It is doubtful, however, whether English law offers the same answer.⁷⁴ There is no reason why English courts should not follow the American approach. An authority for this proposition can be found, for example, in the leading English case of Brass v. Maitland⁷⁵ where Mr. Justice Crompton, in his dissenting opinion, favoured the obligation of due diligence regarding the shipment of dangerous goods.

C. The Effect of Article 4 (6)

The effect of article 4 (6) of the Carriage of Goods by Sea

⁷² Serrano v. United States Lines Company, 238 F. Supp. 383 at 388 (S.D.N.Y. 1965); Williamson v. Compania Anonima Venezolana de Navegacion, 446 F. 2d 1339 at 1341-1342 (2d Cir. 1971); General v. Consorcio Pesquero del Peru (The "Stylianios Restis"), 1974 A.M.C. 2343 at 2354 (S.D.N.Y. 1972). On negligence see also Poliskie Line Oceaniczne v. Hooker Chemical, 499 F. Supp. 95 (S.D.N.Y. 1980); The Kapetan Antonis, 1989 A.M.C. 551 at 566 (Arb. at N.Y. 1988).

⁷³ Serrano v. United States Lines Company, 238 F. Supp. 383 at 388 (S.D.N.Y. 1965).

⁷⁴ Mr. Justice Mustill, for example, in The "Athanesia Comminos", [1990] 1 Lloyd's Rep. 277 at 285 [Q.B. (Com. Ct.)] said that he would be for his part hesitant to answer this question, since it was not necessary to do so. See also Wilford, supra, note 31 at 128.

⁷⁵ (1856) 26 L.J.Q.B. 49.

Act was considered in the leading English voyage charter case on the subject, Chandris v. Isbrandtsen-Moller Co. Inc.⁷⁶. A voyage charterparty, which incorporated the provisions of article 4 (6), stipulated that the cargo was to consist of lawful merchandise, "excluding acids, explosives, arms, ammunition or other dangerous cargo". It was held that the master of the ship consented to a shipment of turpentine, with knowledge of its nature and character, but did not thereby waive any of the rights or remedies of the shipowner regarding the shipment. In addition, it was held that he did not have authority from the shipowner to do so. Because of the dangerous nature of the turpentine, the vessel was detained at the port of discharge.

The first question to decide was if turpentine was a dangerous cargo. Mr. Justice Devlin applied the eiusdem generis rule and found that it was.⁷⁷

The second question regarded the effect of article 4 (6). Mr. Justice Devlin explained that the article had to be divided into two parts, the second of which only was relevant to this case. That part provides that the goods may be landed or destroyed by the carrier if they become a danger to the ship or cargo. This right is subject to the carrier's liability for general average, if any. That part says nothing, however, about liability for damage.

The court held that the implication could not be drawn from second part that a shipper is not liable for damages resulting from

⁷⁶ [1951] 1 K.B. 240 [C.A.].

⁷⁷ Ibid. at 244-246.

a shipment of dangerous goods to which the master of the ship had consented.⁷⁸

Thus, there had been a breach of the voyage charterparty by the charterers, since upon the construction of that document as a whole, it prohibited the shipment of dangerous cargo not only where the master had not consented, but also where he had.⁷⁹

The third question in this case regarding article 4 (6) was whether or not the second part of the article could be used by shipowners for their claims against shippers. American law allows the shipowners to do so, and it is submitted that English courts should do the same.⁸⁰

American law also supports the view that article 4 (6) creates an exclusive code which supersedes the Common law implied warranty. It also holds that a cargo which is not "intrinsically" dangerous (such as abnormally gassy coal), falls within the words "goods of an inflammable, explosive or dangerous nature".⁸¹ The same

⁷⁸ Ibid. at 247-248.

⁷⁹ Ibid. at 251 et seq. However, notwithstanding the breach, the damages were governed by the demurrage clause, because the shipowner had affirmed the contract description (subject to its right to damages) with the result that all the clauses of the charterparty applied thereto. In other words, the result of the affirmation is that the breach of condition is to be treated as if it were breach of warranty.

⁸⁰ See Wilford, supra, note 31 at 128; The "Stylianios Restis", 1974 A.M.C. 2343 (S.D.N.Y. 1972). See also the Canadian case of Heath Steele Mines, Ltd. v. The "Erwin Schroder", [1969] 1 Lloyd's Rep. 370.

⁸¹ See American cases cited in The "Athanasia Comminos", [1990] 1 Lloyd's Rep. 277 at 285 [Q.B. (Com. Ct.)]. For further discussion on carriage of dangerous goods under the Hague and Hague/Visby Rules see Tetley, supra, note 1 at 461-468; and Bullock,

conclusion should, it is submitted, be reached in English law.

Finally, it is to be noted that article 4 (6) (because it dates to the beginning of the century when the environment was not in as much danger as it is today), unfortunately restricts its scope to dangerous goods which may endanger the ship, cargo and the crew, and contains no provisions regarding the environment. Since dangerous goods may be unloaded anywhere, it means that the lesser of two evils is chosen. Rather than accepting the damage that the cargo would inflict on the ship and its members, the law currently accepts damage to the environment.

VI. CIVIL LAW

A. France

Law No. 66-420 of June 18, 1966⁸² and Decree No. 66-1078 of December 31, 1966⁸³ provide for the charterer's obligation to load cargo in the agreed quantity, but they are unfortunately silent as to the agreed quality of the goods.⁸⁴

supra, note 24 at 345 et seq.

⁸² As amended by Law No. 79-1103 of December 21, 1979 and by Law No. 86-1292 of December 23, 1986.

⁸³ As amended by Decree No. 69-679 of June 19, 1969 as amended by Decree No. 87-922 of November 12, 1987.

⁸⁴ See Art. 8 of Decree No. 66-1078 of December 31, 1966 which reads as follows:

L'affrèteur doit mettre à bord la quantité de marchandises énoncée par la charte-partie. A

It is argued⁸⁵, however, that the shipper's (the charterer's) warranty as to the suitability of the goods for carriage arises from his obligation of security which is implicit in the contract of carriage (and probably also in the voyage charter). This is by virtue of article 1135 of the French Code civil which states that agreements are binding not only as to what is expressed, but also as to all the consequences which equity, usage or statute impose upon the obligation according to its nature.

The shipper's obligation would seem to be an absolute one, and the shipper also has the implicit contractual obligation to inform the carrier.⁸⁶

B. Quebec

In contrast to French law, the C.C.L.C. expressly provides that the lessee (the charterer) cannot put on board any prohibited or unaccustomed goods, through which the vessel may be subjected to detention or forfeiture. The lessee is prohibited from loading goods of a dangerous nature, without notice to the master or shipowner (art. 2438 C.C.L.C.).

The shipper's obligation to the carrier to tender goods

défaut, il paye néanmoins le fret prévu pour cette quantité.

⁸⁵ See Tetley, supra, note 1 at 463 (note 43) and 464.

⁸⁶ Ibid.

which are suitable for carriage appears to be absolute.⁸⁷ Furthermore, it arises from the obligation of security which is implicit in the contract of carriage by virtue of article 1024 C.C.L.C. In addition, the shipper has the implicit contractual obligation to inform the carrier of the nature of the cargo.⁸⁸

The reform of the C.C.L.C.⁸⁹ will probably provide a new provision which will be similar to the French one, yet more precise and complete. According to the new provisions, the charterer is bound to load cargo of the agreed quality in the agreed quantity. That is to say, the charterer cannot ship goods of a dangerous nature, without notice to the master or the shipowner.

⁸⁷ See obiter dictum of Quebec Superior Court in Shaw, Savill Co. v. Elec. Reduction, [1955] 3 D.L.R. 617 at 622 where the court seems to approve the Brass v. Maitland principle.

⁸⁸ Tetley, supra, note 1 at 463-464.

⁸⁹ Bill 125, Civil Code of Quebec, 1st Sess., 34 leg. Que., 1990, art. 2013.

VII. CONCLUSION⁹⁰

The purpose of generally accepted definitions of dangerous goods is basically to ensure the safety of the ship, its crew, and the cargo. A more comprehensive definition of dangerous goods should, however, also ensure the safety of the marine environment.

Further, "environmentally unsafe" goods involve the risk of unusual danger or delay to the ship. The ship can be arrested, and the shipowner can be liable for an offence, as well as for damages to the environment. Thus, such goods can cause damage not only to the environment, but also create liability upon the vessel and the shipowner. Environmentally unsafe goods should, therefore, be considered "dangerous goods".

The charterer's undertaking not to ship dangerous cargo should, therefore, include an obligation to provide "environmentally safe" goods, unless the parties expressly agree to

⁹⁰ It is to be noted that this thesis treats of the fundamental implied undertakings of the charterer and the shipowner only. There are, of course, some other implied undertakings, such as the charterer's implied obligation to indemnify the shipowner in certain circumstances. According to the Clifford Chance Maritime Review, for instance, "[i]n the absence of express provision in the charter, there is no longer a general predisposition to assume that a charterer will be liable to indemnify the owners, simply because he has presented a bill of lading for signature. It will be necessary to establish either a breach of contract by the charterers; or an implied term, necessary to give business efficacy to the contract, that the charterers should indemnify the owners against the consequences of presenting such bills." [Emphasis added] See Clifford Chance Maritime Review, "Charterparty Indemnity Claims", October 1990, No. 5 at 20; The C. Joyce, [1986] 2 Lloyd's Rep. 285; The Paros, [1987] 2 Lloyd's Rep. 269; The Nogar Marin, [1987] 1 Lloyd's Rep. 412; The Boukadoura, [1989] 1 Lloyd's Rep. 393.

ship and carry cargo which might be dangerous to the marine environment. In addition, even in the case where the charterer and the shipowner are aware of the dangerous character of a particular cargo, the risk of damage to the environment and the liability vis-à-vis third parties should be placed on both. The argument is supported by several international conventions, drafts and other documents.

Under English law, there is an absolute implied undertaking by a shipper of goods that he will not ship dangerous goods, or goods which involve the risk of unusual danger or delay to the ship, unless the shipowner knows or might reasonably be held to know of these facts. Otherwise, the shipper must warn the shipowner of the facts which are within his knowledge regarding such risks. The shipper's absolute warranty is not confined to cases where the goods are tendered to a common carrier, but applies to all contracts for the transportation of goods by sea, including voyage charters.

French and Quebec law also favour the absolute warranty rule, and there are some dicta in American judicial decisions to the same effect. However, it now appears to be generally accepted by American courts that the cargo owner (e.g. the charterer) is not held to an absolute implied warranty that his goods are fit for ordinary carriage and not dangerous. His duty to warn the shipowner of inherent dangers in the cargo is based rather on his actual or constructive knowledge of danger.

The American attitude appears to be similar to one adopted

by the Hague and Hague/Visby Rules which operate to reduce the shipper's undertaking from that of an absolute warranty to an obligation of due diligence.

It is difficult to see which solution, the absolute warranty or the due diligence, would seem better for a new international convention on charterparties. The absolute warranty is recognized by English law and Civil law countries, while the latter prevails in American law and is also adopted by the Hague and Hague/Visby Rules.

It is more likely that a greater number of states will accept the due diligence provision, which might read as follows:

The charterer shall exercise due diligence not to deliver dangerous goods, unless he gives notice to the lessor (the shipowner, demise, bareboat or time charterer).

The charterer shall be responsible for loss or damage sustained by the lessor arising or resulting from the act, fault or neglect of the charterer in delivering dangerous goods.

This provision is based on the Hague and Hague/Visby Rules.

PART IV
FRUSTRATION OF VOYAGE CHARTERS

Chapter 8

FRUSTRATION: IMPLIED TERM OR PRINCIPLE OF LAW

I. INTRODUCTION

II. DEFINITION AND GENERAL CHARACTERISTICS OF THE DOCTRINE OF FRUSTRATION

- A. Introduction
- B. Definition of Frustration
- C. General Characteristics of Frustration

III. THE IMPLIED TERM RATIONALE BEHIND THE DOCTRINE OF FRUSTRATION

- A. Introduction
- B. English Law
- C. American Law
 - 1. Case Law
 - a. Term Implied in Fact
 - b. Term Implied in Law
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IV. FRUSTRATION AS A PURE MATTER OF LAW: ENGLISH LAW

- A. Judicial Decisions
- B. Legislation
- C. Trakman's New Regime of Remedies

V. CIVIL LAW

- A. Impossibility of the Performance of the Obligation
- B. Irresistible Force Before the Departure of the Vessel

VI. CONCLUSION

"...the arguments of counsel and the decisions of some of the most reputable English judges demonstrate just how incomplete is our understanding and how uncertain is our application of the frustration doctrine..."

B.J. Hibbitts, "The Impact of the Iran-Iraq Cases on the Law of Frustration of Charterparties" (1985) 16 JMLC 441

I. INTRODUCTION

The previous chapters of this thesis are devoted essentially to the implied undertakings of the shipowner and the charterer. This chapter, however, treats of the principle of frustration which affects the undertakings of both parties to the voyage charterparty. It is not intended to examine the abundant caselaw and doctrine relating to frustration. Rather, this chapter studies how the doctrine of frustration evolved from the notion of implied terms into a principle of law.

This evolution supports the argument that implied terms of voyage charterparties should be abolished and adopted into an international convention. Thus, a new international rule of frustration will be suggested.

II. DEFINITION AND GENERAL CHARACTERISTICS OF THE DOCTRINE OF FRUSTRATION

A. Introduction

It has already been mentioned in Chapter 2 of this thesis that Common law courts adopted the Latin doctrine pacta sunt servanda, by which agreements were to be binding in law. It was Paradine v. Jane¹ in 1647 which was regarded as the foundation of the idea that contractual liability was absolute, i.e. there were

¹ (1647) 82 E.R. 897.

no excuses for non-performance. The court held in that case that when one party created by the contract a duty upon himself, he was bound to perform it, notwithstanding an accident beyond his control, unless he expressly excluded such liability in the contract.

Gradually courts began to qualify the absolute contractual liability principle and developed "a formidable body of non-performance doctrine, referred to variously, but not exhaustively, as impossibility, frustration, force majeure, or commercial impracticability".²

Today, American courts hold that something is "impossible" in legal contemplation when it is not practicable, and something is "impracticable" when it can only be done at an excessive and unreasonable cost.³ Similarly, it was held in English law that mere impracticability of performance of the contract was sufficient cause for frustration.⁴

The doctrine of "force majeure" may be limited to "Acts of

² L.E. Trakman, "Winner Take Some: Loss Sharing and Commercial Impracticability" (1985) 69 Minn. L. Rev. 471 at 473-474 (see a comprehensive list of authorities regarding the non-performance doctrine in note 4); S.W. Halpern, "Application of the Doctrine of Commercial Impracticability: Searching for 'The Wisdom of Solomon'" (1987) 135 U. Penn. L. Rev. 1123.

³ See Transatlantic Financing Corporation v. United States, 363 F. 2d 312 (D.C. Cir. 1966) at 315; Restatement (Second) Contracts, Chapter 11 (ss. 261-272), Introductory Note; U.C.C. para. 2-615.

⁴ See Sainsbury (H.R. & S.) Ltd. v. Street, [1972] 3 All E.R. 1126. See, however, Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, [1962] A.C. 93 at 115, where an increase of expense was held not to be a ground of frustration.

God", or may be extended to include strikes and breakdowns in machinery, as well as other problems which occurred without one party's intervention and could not have been prevented by his prudence, diligence, or care.⁵

The term "frustration" was developed in English law and will be explained in this chapter. It is to be noted that the doctrine of frustration applies to all contracts, including those respecting the carriage of goods by sea and especially to contracts for the hire of ships.⁶

B. Definition of Frustration

The frustration of a contract can be defined as an excuse for its non-performance. Frustration results in discharging both parties from their obligations.⁷

A particular contract may be "frustrated" when the assumed background to the commercial transaction has changed after the parties have commenced the performance of obligations under the contract. In order for the contract to be frustrated, a certain

⁵ Trakman, supra, note 2 at 474 (note 8).

⁶ See, e.g. Jackson v. Union Marine Insurance Co., (1874) L.R. 10 C.P. 125; Tamplin S.S. Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd., [1916] 2 A.C. 397; Bank Line Ltd. v. Arthur Capel & Co., [1919] A.C. 435; The "Evia" (No. 2), [1982] 2 Lloyd's Rep. 307 [H.L.]; Finelvet A.G. v. Vinava Shipping Co. Ltd. (The "Chrysalis"), [1983] 2 All E.R. 658.

⁷ Compare E.R.H. Ivamy, Dictionary of Shipping Law (London: Butterworths, 1984) at 45. The leading authority is Jackson v. Union Marine Insurance Co., (1874) L.R. 10 C.P. 125.

event must make further performance of the contract impossible, impracticable or illegal. In the alternative, such an event must be one which would change the performance of the contract to something radically different from that originally contemplated by the parties. In such cases, if the event is not caused by either party, both are excused from the further performance of their obligations.⁸

C. General Characteristics of Frustration

According to Treitel,⁹ a contract may be frustrated in three situations: if it becomes impossible to perform; if its underlying purpose is frustrated; or if its performance becomes illegal.¹⁰ In addition, and as previously mentioned, a contract may be frustrated due to "impracticability" (e.g. unreasonable cost of performance).

Impossibility, for example, may occur in the following cases:

- when the subject-matter of the contract is destroyed
(e.g. destruction of the intended cargo);¹¹

⁸ Davis Contractors Ltd. v. Fareham U.D.C., [1956] A.C. 696 at 729.

⁹ G.H. Treitel, An Outline of The Law of Contract, Fourth Edition (London: Butterworths, 1989) at 298 et seq.

¹⁰ Ibid. at 299.

¹¹ Ibid. Compare Canadian Government Merchant Marine v. Canadian Trading Co., (1922) 68 D.L.R. 544 (the plea of "impossibility" can only avail as an excuse for non-performance

- when a party who had undertaken a personal obligation dies;
- when the subject-matter ceases to be available for the purpose of performing the contract (e.g. the ship is detained); or
- when the intended method of performance becomes impossible.¹²

Frustration of the purpose may occur when the performance of one party is no longer of any use to the other party.¹³ Illegality occurs when the law forbids actions required for the performance of the contract.¹⁴

The application of the doctrine of frustration was held to be a matter of law¹⁵, although it would now appear that the question is one of both fact and law.¹⁶ The onus of proving that the contract was frustrated rests on the party alleging it.

where the event which causes the impossibility cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made).

¹² Treitel, supra, note 9 at 300-303.

¹³ See, e.g. Krell v. Henry, [1903] 2 K.B. 740 (C.A.).

¹⁴ Treitel, supra, note 9 at 304-305.

¹⁵ Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, [1962] A.C. 93.

¹⁶ See National Carriers v. Panalpina, [1981] A.C. 675 (the question whether or not delay is capable of frustrating a contract is a matter of law, but the question of whether or not it is of sufficient length to cause frustration is a matter of fact).

Frustration terminates the obligations of both parties.¹⁷ Neither party is entitled to damages for the breach and repudiation of the contract.

The operation of the doctrine of frustration may, however, be excluded by contractual provisions. This may occur if the parties foresee that a particular event (e.g. a strike) will (or is likely to) take place. Furthermore, the effect of frustration may be eliminated when the frustration was induced by the party alleging it ("self-induced frustration").¹⁸

In charterparties, frustration may also arise from the ship's delay due to stranding, war, requisition, or the constant breaking down of its engines. This delay must be such as to destroy the identity or the whole basis of the contract.¹⁹

¹⁷ See Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd., [1942] 2 All E.R. 122; [1943] A.C. 32. This decision has been, however, statutory altered in certain jurisdictions, such as the United Kingdom, Ontario and British Columbia.

¹⁸ Treitel, supra, note 9 at 307-311. See, e.g. E. McKendrick, "Self-Induced Frustration and Force Majeure Clauses" (1989) LMCLQ 3; E. McKendrick, "The Construction of Force Majeure Clauses and Self-Induced Frustration" (1990) LMCLQ 153.

¹⁹ See Ivamy, supra, note 7 at 46; R. Colinvaux, Carver's Carriage by Sea, Thirteenth Edition (London: Stevens & Sons, 1982) at para. 759 et seq. [hereinafter Carver]; B.J. Hibbitts, "The Impact of the Iran-Iraq Cases on the Law of Frustration of Charterparties" (1985) 16 JMLC 441.

III. THE IMPLIED TERM RATIONALE BEHIND THE DOCTRINE OF FRUSTRATION

A. Introduction

Lord Arnold McNair identified five principal theories of non-performance in English law.²⁰ (These can also be found (in similar or modified form) in American law.²¹) They are:

1. The theory of the implied term;
2. The non haec in foedera veni theory ("I did not agree to these terms") - the theory of the disappearance of the basis or foundation of the contract;²²

²⁰ Joseph Constantine S.S. Line Ltd. v. Imperial Smelting Corp. Ltd., [1942] A.C. 154 at 187; Heyman v. Darwins Ltd., [1942] A.C. 356 at 363; Denny, Mott & Dickson v. Fraser (James B.) & Co. Ltd., [1944] A.C. 265; W.J. Tatem Ltd. v. Gamboa, [1939] 1 K.B. 132.

²¹ See L.E. Trakman, The Law Merchant: The Evolution of Commercial Law (Colorado: Littleton, 1983) at 88 et seq.

²² See Krell v. Henry, [1903] 2 K.B. 740 (C.A.). The argument of "the foundation of the contract" is similar to Mr. Justice Streatfeild's statement in Morgan v. Manser. [1948] 1 K.B. 184 at 191:

If there is an event or change of circumstances which is so fundamental as to be regarded by the law as striking at the root of the contract as a whole and beyond what was contemplated by the parties and such that to hold the parties to the contract would be to bind them to something to which they would not have agreed had they contemplated that event or those circumstances, the contract is frustrated by that event immediately and irrespective of the volition or the intention or the knowledge of the parties as to that particular event, and even although they have continued for a time to treat the contract as still subsisting.

3. Lord Wright's theory of frustration to the effect that, the parties not having dealt with the matter, the courts must determine what is just (the "exceptions which justice demands" theory);²³
4. The theory of common mistake (both parties make the same mistake; each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact); and
5. The theory of supervening impossibility.

The purpose of the following analysis is to show how frustration evolved from an implied term into a principle of law.

B. English Law

The first case to depart from the absolute rule of Paradine v. Jane,²⁴ and to adopt the implied term theory of frustration was Taylor v. Caldwell in 1863.²⁵ In that case an agreement was made between the parties that the plaintiff would use the music hall for four days during the summer of 1861.²⁶ The defendant was the owner of the music hall. Less than one week before the first performance

²³ See, e.g. Denny, Mott & Dickson v. Fraser (James B.) & Co. Ltd., [1944] A.C. 265 at 275-276.

²⁴ Supra, note 1.

²⁵ (1863) 122 E.R. 309 (Q.B.).

²⁶ The short statement of facts of this case is taken from J. Swan, B.J. Reiter, Contracts, Third Edition (Toronto: Emond Montgomery Publications Limited, 1985) at 455.

the music hall was destroyed by fire, and the plaintiff sued for damages for breach of contract.

The court excused performance of the contract on grounds of impossibility. Mr. Justice Blackburn implied a condition in the contract (a condition "implied in fact"), namely, that the parties must have intended that the rental was dependent upon the continued existence of the music hall in an appropriate state. In the absence of any express or implied warranty that the thing (i.e. the music hall) should exist, the contract was not to be construed as a positive contract. It was to be viewed as subject to an implied condition that the parties should be excused in case performance became impossible from the perishing of the thing, due to circumstances beyond their control.

It is worth noting that Mr. Justice Blackburn made extensive reference to Civil law principles (which will be dealt with in section V of this chapter), and it was from them that he erroneously developed the notion of the implied term as the basis of the doctrine of frustration.

The implied term theory was applied (and sometimes modified) in a variety of circumstances, including the illegality of further performance of the contract, death, destruction of the subject-matter, impossibility of performance of the contract, etc.²⁷

²⁷ See A.A. Mocatta, M.J. Mustill, S.C. Boyd, Scrutton on Charterparties and Bills of Lading, Nineteenth Edition (London: Sweet & Maxwell, 1984) at 96-97.

In Re Badische Co.²⁸ Mr. Justice Russell explained the implied term rationale behind the doctrine of frustration in the following words:

The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract. [Emphasis added]

According to Carver,²⁹ courts occasionally suggested that the doctrine of frustration was a special application of the "business efficacy" test explained in Chapter 2 of this thesis.

The courts finally held that the theory of the implied term was not consistent with the true theory of frustration,³⁰ and was

²⁸ [1921] 2 Ch. 331 at 379; see also Horlock v. Beal, [1916] 1 A.C. 486; Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum, etc., Co. Ltd., [1916] 2 A.C. 397; Phillips v. Britannia, etc., Laundry, [1923] 2 K.B. 832; Bank Line Ltd. v. Arthur Capel & Co., [1919] A.C. 435; Dominion Coal, etc., Co. v. Maskinonge Steamship Co., [1922] 2 K.B. 132; Herji Mulji v. Cheong Yue Steamship Co., [1926] A.C. 497; French Marine v. Compagnie Napolitaine D'Eclairage, etc., [1921] 2 A.C. 494; Metthey v. Curling, [1922] 2 A.C. 180; Larrinaga v. Societe Franco-Americaine, (1923) 29 Com. Cas. 1; British Moveitnews Ltd. v. London & District Cinemas Ltd., [1951] 2 All E.R. 617.

²⁹ Carver, supra, note 19 at para. 752; e.g. Leiston Gas Co. v. Leiston Urban Council, [1916] 2 K.B. 428 at 438.

³⁰ Denny, Mott & Dickson v. Fraser (James B.) & Co. Ltd., [1944] A.C. 265 at 275-276.

therefore not representative of the truth.³¹

It appears that the greatest difficulty with the implied term approach lies in its uncertainty as a method of construction.³² It is the judge who determines when to imply terms into voyage charterparties and who establishes the criteria upon which to base the implication of terms. The judge may imply a right of nonperformance into a voyage charter because of some belief concerning the presumed intention of the parties, the practice of the shipping community, because of some opinion as to policy, or because of some other attitude.³³

It is argued, therefore, that frustration must be regarded as being outside the field of construction of contracts, being a pure matter of law.³⁴ In other words, the doctrine of frustration in English law is no longer based on the presumed intention of the parties, the business efficacy of the contract or the court's understanding of justice, but rather on a principle of law.

³¹ The Eugenia, [1964] 2 Q.B. 226 at 238.

³² Trakman, supra, note 21 at 91.

³³ Ibid.

³⁴ Carver, supra, note 19 at para. 752.

C. American Law

1. Case Law

a. Term Implied in Fact

American courts were much more reluctant than their English counterparts to adopt the doctrine of frustration and the implied term approach.³⁵

However, in Texas Co. v. Hogarth Shipping Co.³⁶ the Supreme Court of the United States clearly stated that the principle of an implied condition underlying the doctrine of frustration was recognized and applied to various classes of contracts in both English and American law. It was held that the shipowner was excused from performance when the ship was prevented from complying with the voyage charterparty due to requisition by the government. The Court also held that the voyage charter had been concluded subject to the implied condition that, in the event of requisition, it would dissolve and the parties would be absolved from further liability.³⁷

Later cases abolished the "implied in fact" approach, and adopted the excuse of performance which is based upon the interests

³⁵ See H.O. Hunter, Modern Law of Contracts, Breach and Remedies (Boston: Warren, Gorham & Lamont, 1986) at para. 12-42.

³⁶ 256 U.S. 619 (1921) at 629 et seq.

³⁷ Ibid. at 629, 631.

of justice (a constructive or "implied in law" condition).³⁸ Recent opinions regarding frustration seem to be that although the promise in the agreement is absolute, it was not intended to cover all situations that might arise. Courts are therefore free to imply a term which would justify the application of the doctrine of frustration in the interests of justice.³⁹

b. Term Implied in Law

The leading American case on frustration of voyage charters is Transatlantic Financing Corporation v. United States.⁴⁰ The case involved a voyage charter for the carriage of a cargo of wheat from a United States port to a safe port in Iran. The ship's operator filed an action against the charterer for costs which had occurred due to the ship's deviation (from the normal sea route) caused by the closing of the Suez Canal.

Circuit Judge Wright stated that the doctrine of impossibility of performance had gradually discarded earlier

³⁸ Transatlantic Financing Corporation v. United States, 363 F. 2d 312 (D.C. Cir. 1966). See E.A. Farnsworth, "Disputes Over Omission in Contracts" (1968) 68 Colum. L. Rev. 860, where he criticizes the rationale of an implied term and suggests an alternative rationale.

³⁹ Watson v. Kenlick Coal Co., 498 F. 2d 1183 at 1190-1191 (6th Cir. 1974), certiorari denied 422 U.S. 1012 (1975); Restatement (Second) Contracts, para. 272, Comment C and Introductory Note to Chapter 11; J.D. Calamari, J.M. Perillo, The Law of Contracts, Third Edition (St. Paul: West Publishing Co., 1987) at 574.

⁴⁰ 363 F. 2d 312 (D.C. Cir. 1966).

fictional and unrealistic theories, such as the implied term rationale based upon the parties' "contemplation". However, it seems that he departed from the implied "in fact" term principle in order to adopt the implied "in law" approach. It was held that when the issue of frustration is raised, the court has to "construct a condition of performance based on the changed circumstances". The doctrine of impossibility is invoked when the community's interest in having contracts enforced is outweighed by the commercial senselessness of requiring their enforcement. At least three requirements must be found satisfied by the court in order to accept the plea of impossibility:

1. A contingency - something unexpected must have occurred;
2. The risk of the unexpected occurrence must not have been regulated either by contract or by custom; and
3. Occurrence of the contingency must have rendered performance commercially impracticable.⁴¹

In the case in question, it was held that performance of the voyage charter was not rendered commercially impracticable by the closing of the Suez Canal. The goods shipped were not subject to harm from a longer, less temperate southern route, the vessel and the crew were fit to proceed around the Cape of Good Hope, and the vessel's operator was no less able than the government to purchase insurance to cover the risk of a contingency.

It appears that the excuse for the non-performance of a voyage charter in American law is now based upon a constructive

⁴¹ Ibid. at 315-316.

condition, i.e. one imposed by law in the interests of justice. In other words, this approach still favours terms "implied in law" (constructive conditions), thus making the American law of frustration less developed and certain than the English law. Some authors argue that this is also due to the custom of including force majeure and other exculpatory clauses in business contracts.⁴²

2. Legislation

Section 2-615 of the Uniform Commercial Code is an example of the codification and modification of the doctrine of frustration which is, unfortunately, still based on the implied term rationale. That section excuses a seller from the timely delivery of the goods, in cases where his performance has become commercially impracticable because of unforeseen supervening circumstances which were not within the contemplation of the parties at the time when the contract was made.

The central inquiry under the above-mentioned section is whether or not the nonoccurrence of the contingency was a "basic assumption on which the contract was made". This question involves a judgment as to which party assumed the risk for the occurrence of

⁴² See Hunter, supra, note 35 at para.12-45. See also G. Gilmore, C.L. Black, The Law of Admiralty, Second Edition (Mineola: The Foundation Press, Inc., 1975) at 223-229; T.J. Schoenbaum, Admiralty and Maritime Law (St. Paul: West Publishing Co., 1987) at para. 10-10; M. Wilford, T. Coghlin, J.D. Kimball, Time Charters, Third Edition (London: Lloyd's of London Press Ltd., 1989) at 340-347.

the contingency. The court must therefore examine all of the circumstances, including the terms of the contract.⁴³

It is submitted that the Uniform Commercial Code maintains the earlier practice of creating the doctrine of frustration by way of implied terms. A judicial finding of commercial impracticability reflects what the parties would have decided had they anticipated the intervening event. However, it is very difficult, and sometimes even impossible, to determine what the "basic assumptions" of the parties were at the time of contracting.⁴⁴

IV. FRUSTRATION AS A PURE MATTER OF LAW: ENGLISH LAW

A. Judicial Decisions

One of the leading cases on the subject of frustration is The "Nema",⁴⁵ which concerned a charterparty for consecutive voyages in the C. Ore 7 form. The vessel was chartered, between April and December 1979 for consecutive voyages, to carry a cargo

⁴³ See Restatement (Second) Contracts, Introductory note to Chapter 11, where it is said that the Restatement rejects the implied term rationale in favor of that of Uniform Commercial Code.

⁴⁴ Trakman, supra, note 2 at 477-478.

⁴⁵ B.T.P. Tioxide Ltd. v. Pioneer Shipping Ltd. and Armada Marine S.A., [1981] 2 Lloyd's Rep. 239 [H.L.]. See Hibbitts, supra, note 19 at 445 et seq. See also National Carriers v. Panalpina, [1981] A.C. 675; Neptune Maritime Co. v. Koninklijke Bunge B.V. (The "Argonaut"), [1982] 2 Lloyd's Rep. 214 [C.A.]; Compania Naviera General S.A. v. Kerametal Ltd. (The "Lorna"), [1983] 1 Lloyd's Rep. 373 [C.A.]; Sametiet M/T Johs Stove v. Istanbul Petrol Rafinerisi A/S (The "Johs Stove"), [1984] 1 Lloyd's Rep. 38 [Q.B. (Com. Ct.)].

from Quebec to France and England. After the first voyage, a strike began at the titanium plant at the port of loading, and when the vessel arrived there it was unable to load. The dispute was referred to arbitration which held that the whole of the voyage charter relating to the 1979 season had been frustrated. The decision was upheld by the House of Lords.

From this case we see that the House of Lords is of the opinion that it should be unnecessary in future frustration cases "to search back among the many earlier decisions in this branch of the law when the doctrine was in its comparative infancy".⁴⁶ The House of Lords feels that the legal concept of frustration can be expressed in the short and simple language used by Lord Radcliffe in Davis Contractors Ltd. v. Fareham U.D.C.⁴⁷:

...frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render a thing radically different from that which was undertaken by the contract. Non haec in foedera veni - it was not this that I promised to do.

In The Nema Lord Roskill⁴⁸ states that the doctrine of frustration can be invoked when the facts of the particular case justify the invocation. However, the doctrine should not relieve

⁴⁶ The "Nema", supra, note 45 at 253 (per Lord Roskill).

⁴⁷ [1956] A.C. 696 at 729. It appears that Canadian law has also abolished the implied term rationale of frustration. See Capital Quality Homes Ltd. v. Colwyn Construction Ltd., (1975) 61 D.L.R. (3d) 385 (C.A.).

⁴⁸ The "Nema", supra, note 45 at 253.

contracting parties of the normal consequences of imprudent commercial bargains.⁴⁹

Furthermore, it was held that there is no reason why a strike should not be capable of causing frustration by delay. Lord Roskill concludes with a statement to the effect that "[i]t is not the nature of the cause of delay which matters so much as the effect of that cause upon the performance of the obligations which the parties have assumed one towards the other".⁵⁰

B. Legislation

The Common law rule that frustration does not retrospectively annul the contract (e.g. freight paid in advance is not reversible if frustration supervenes)⁵¹ was altered by the United Kingdom Law Reform (Frustrated Contracts) Act 1943. This Act does not apply, however, to the frustration of a charterparty or any other contract for the carriage of goods by sea, except time and demise charterparties.

The Act contains some important provisions regarding the adjustment of the rights and liabilities of the parties to

⁴⁹ It is to be noted that the Court of Appeal held recently in J. Lauritzen A.S. v. Wiismuller B.V. (The "Super Servant Two"), [1990] 1 Lloyd's Rep. 1 [C.A.] that frustration operates to discharge a contract by operation of a rule of law and that therefore it must be kept within very narrow limits.

⁵⁰ The "Nema", supra, note 45 at 255.

⁵¹ E.R.H. Ivamy, Payne and Ivamy's Carriage of Goods by Sea, Eleventh Edition (London: Butterworths, 1979) at 60.

frustrated contracts. For instance, money due but not paid before frustration ceases to be payable. If the money has actually been paid, it must be paid back. If the party incurred expenses before the frustration, the court may (if it considers it just to do so having regard to all circumstances of the case) allow him to recover or retain the whole or any part of the sums paid or payable. However, the amount retained cannot be in excess of the expenses which the party incurred.⁵²

It is unfortunate that the Act does not cover voyage charterparties which are governed by Common law. Treitel is probably correct in stating that it was thought to be more important to preserve the certainty of the rules applying to voyage charterparties than to extend the powers of adjustment created by the Act. However, "[t]he argument is not wholly convincing...".⁵³

C. Trakman's New Regime of Remedies

It is interesting to note a somewhat new approach regarding the doctrine of frustration, which might also be applied to voyage charterparties. Trakman argues that both English and American enactments of the doctrine of frustration illustrate the

⁵² See also Ontario Frustrated Contracts Act, R.S.O. 1980, c.179, and British Columbia Frustrated Contracts Act, R.S.B.C. 1979, c.144 which, however, do not apply to voyage charterparties. With respect to Canadian law on frustration see S.M. Waddams, The Law of Contracts, Second Edition (Toronto: Canada Law Book Inc., 1984) at 265-284.

⁵³ Treitel, supra, note 9 at 313-314.

flexibility of a loss-sharing scheme, but provide only limited guidance in the actual allocation of loss.⁵⁴ Thus, there is a need for a new regime of remedies which can be summarized as follows:⁵⁵

When a party to a commercial agreement alleges that performance has become commercially impracticable, a court should consider first whether to divide performance losses between the parties as an alternative to the grant or denial of an absolute excuse from nonperformance. If the court determines that loss sharing is appropriate, and if the court believes that the contractors themselves are better able than the court to determine the scope of their settlement by their own means, it should encourage the parties to reach an interim settlement. If, however, the court determines that the parties are unlikely to reach an agreement in good faith, the court may require each party to present a "final offer" of contribution toward the loss and select the contribution figure of the preferred party. When a court concludes that neither interim settlement nor a final offer procedure is appropriate, it should allocate performance losses between the parties itself. The court-imposed allocation should vary in accordance with the capacity of each party to exercise control over the risk of loss.

V. CIVIL LAW

A. Impossibility of the Performance of the Obligation

The doctrine of frustration does not exist in Civil law. The only Civil law equivalent of frustration is the principle of "l'impossibilité d'exécuter l'obligation".

⁵⁴ Trakman, supra, note 2 at 481-48

⁵⁵ Ibid. at 519.

It was Roman law which developed the principle that there was no obligation to do an impossible thing (Impossibilium nulla obligatio est).⁵⁶ The principle was accepted by the French Civil Code [hereinafter C.N.] and by the C.C.L.C. For example, article 1302 C.N. or article 1200 C.C.L.C. provide that when the certain specific thing which is the object of an obligation perishes, or the delivery of it becomes otherwise impossible due to no fault of the debtor, the latter's obligation is dissolved.⁵⁷

In addition, the Romans invented casus (accident) and casus fortuitus (an inevitable accident), i.e. a loss happening in spite of all human effort and sound judgement, which were adopted into modern Civil law systems (e.g. art. 1148 C.N., art. 1072 C.C.L.C.). Article 17 (24) C.C.L.C. defines a "fortuitous event" (Fr. cas fortuit) as "one which is unforeseen, and caused by superior force which it was impossible to resist". For instance, the debtor is not liable to pay damages when the inexecution of his obligation is caused by a fortuitous event or by an irresistible force (Fr. force majeure) due to no fault on his part, unless he has obliged himself to do so by the special terms of the contract.

The basic difference between the Civil law notion of impossibility and the Common law doctrine of frustration is the breadth of the remedy. In Civil law, but not in Common law, the

⁵⁶ D. 50.17.185.; B. Nicholas, "Rules and Terms - Civil Law and Common Law" (1974) 48 Tul. L. Rev. 946 at 954.

⁵⁷ See J.L. Baudouin, Les obligations, Cowansville, Les Éditions Yvon Blais Inc., 1989 aux pp. 191-192, 290, 295-96, 398 et seq.

impossibility of the contract is crucial. It was held, for example, in the case of Canada Starch Co. v. Gill & Dufus (Canada) Ltd.⁵⁸ that "seule une impossibilité permet à une partie à un contrat de se libérer de ses engagements". It is not sufficient to establish that the performance of the contract would be extremely difficult. It must be shown that it is absolutely impossible.⁵⁹ Bohemier and Fox⁶⁰ are of the following opinion with respect to the principle of rebus sic stantibus and "l'impossibilité":

En principe, les changements de circonstances n'affectent pas un contrat. Mais lorsque l'exécution d'une obligation, née d'un contrat, devient absolument impossible à la suite d'un événement, raisonnablement imprévisible et irrésistible, le débiteur sera libéré si ce changement est survenu avant la mise en demeure et s'il n'y a concouru en aucune façon. Lorsque le débiteur est ainsi libéré dans un contrat bilatéral, le créancier de l'obligation de faire sera libéré contrairement au créancier de l'obligation de donner. Le fondement juridique de ces règles est l'intention présumée des parties. C'est pourquoi, lorsque les parties se sont exprimées sur les changements de circonstances, il faut suivre les termes du contrat.

Unfortunately, in some earlier English decisions the courts failed to recognize the aforementioned difference between Civil and Common law and made extensive reference to Civil law in order to

⁵⁸ (December 6, 1983) 500-05-001746-823 (C.S.), J.E. 84-88, aff'd on appeal (October 17, 1990) 500-09-000036-848 (C.A.), J.E. 90-1617.

⁵⁹ See Rivet v. La Corpo du Village St-Joseph, 1932 S.C.R. 1.

⁶⁰ A. Bohemier, F. Fox, "De l'effet des changements de circonstances sur les contrats dans le Droit civil québécois" (1962) 12 R.J.T. 77 aux pp. 99-100.

develop the notion of the implied term as the basis for excuse of non-performance of the contract.⁶¹

B. Irresistible Force Before the Departure of the Vessel

There is another principle regarding dissolution of the charterparty which is narrower than the Common law doctrine of frustration. The former applies only to accidents which occur before the departure of the vessel and derives from ancient maritime law.

The Marine Ordinances of Louis XIV⁶² stipulated that if the charterparty could not be performed due to an accident (e.g. embargo occasioned by war, reprisals or otherwise) which occurred before the departure of the vessel, and did not result from the fault of either of the parties, the charterparty would automatically legally dissolve. Neither of the parties could claim damages from the other for not executing the charter.⁶³

This rule can also be found in modern Civil law, including article 12 of French Decree No. 66-1078 of December 31, 1966⁶⁴ and

⁶¹ See, e.g. Taylor v. Caldwell, (1863) 122 E.R. 309 (Q.B.); Nicholas, supra, note 56 at 956; W.W. Buckland, "Casus and Frustration in Roman and Common Law" (1933) 46 Harv. L. Rev. 1281 at 1287.

⁶² Book II, Title First, Art. VII. 30 Fed. Cas. 1207.

⁶³ R.J. Pothier, Treatise on Maritime Contracts of Letting to Hire (Boston: Cumming and Hilliard, 1821) at 52-54.

⁶⁴ As amended by Decree No. 69-679 of June 19, 1969 as amended by Decree No. 87-922 of November 12, 1987.

article 2410 C.C.L.C., in addition to article 2018 of the proposed Civil Code of Quebec.⁶⁵ However, the voyage charterparty stands if the superior force only prevents the sailing of the vessel or the execution of the voyage for a limited time. In that case, no reduction of freight or damages may be claimed by reason of the delay.⁶⁶

Insofar as concerns "delay" (Fr. retard), Le Clère⁶⁷ set out the different approaches adopted by French law, and stated:

Alors on peut recourir à l'idée d'équilibre du contrat. En effet, l'armateur et l'affrèteur ont conclu le contrat en vue d'une opération commerciale convenant à l'un et l'autre. Si le navire a un retard tel que l'une des parties risque de se trouver dans une situation absolument onéreuse par rapport à l'autre du seul fait du maintien du contrat qui ne s'exécute pas dans les conditions sous-entendues lors de sa conclusion, celui-ci doit être annulé. On est proche de la notion de lésion (que le Code civil français n'admet qu'en matière immobilière), mais qui est une notion d'équité admise dans plusieurs législations étrangères. La jurisprudence anglaise applique la même idée sous le nom de "frustration"...

⁶⁵ Bill 125, Civil Code of Quebec, 1st Sess., 34th Leg. Que., 1990.

⁶⁶ See art. 2411 C.C.L.C., and second paragraph of article 2018 of the reformed Civil Code of Quebec; G. Ripert, Droit maritime, Paris, Librairie Arthur Rousseau, 1922 aux pp. 341 et seq.

⁶⁷ J. Le Clère, Les chartes-parties et l'affrètement maritime, Paris, Librairies techniques, 1962 à la p. 61.

VI. CONCLUSION

The simplest way of defining the frustration of a voyage charterparty is to describe it as an excuse for non-performance. The doctrine of frustration used to rest on an implication arising from the presumed common intention of the parties. However, it finally became clear in English law that the uncertain theory of implied term was not consistent with the true theory of frustration which must now be regarded as a pure matter, or rule, of law kept within very narrow limits.

The English Common law principles concerning frustration of contract were substantially modified by legislation. New provisions were adopted regarding the adjustment of the rights and liabilities of the parties to frustrated contracts. Unfortunately, the Law Reform (Frustrated Contracts) Act 1943 does not extend to voyage charterparties which continue to be governed by Common law.

Later American cases also abolished the "implied in fact" approach, and adopted the excuse which is based upon the interests of justice (a constructive or "implied in law" condition). It is submitted that the American law of frustration is less developed and less certain than English law, partially due to the notion of constructive conditions.

Furthermore, the American Uniform Commercial Code maintains the earlier practice of creating the doctrine of frustration by way of fiction. This Code provides the new principle of "a contingency the non-occurrence of which was a basic assumption on which the

contract was made".

The doctrine of frustration does not exist in Civil law. The only Civil law equivalent of frustration is the principle of "l'impossibilité d'exécuter l'obligation". The basic difference between the Civil law notion of impossibility and the Common law doctrine of frustration is the breadth of the remedy. In Civil law, the impossibility of the contract is crucial, not in Common law.

In order to eliminate the above-mentioned differences within Common law itself and between Common and Civil law, and in order to contribute to the unification and certainty of maritime law, it is submitted that the following provision should be adopted into an international convention on charterparties:

The parties (the lessor and the charterer) are discharged from further performance of their obligations whenever it is proved that some event has occurred during the currency of the voyage charter, due to no fault of either party, which makes further performance impossible or illegal, or which makes it something radically different from that which was originally contemplated.

The freight paid to the lessor in pursuance of the voyage charterparty before the parties were discharged is recoverable from him as money received by him for the use of the charterer; and the freight payable to him in pursuance of the voyage charterparty ceases to be payable.

If, before the parties were discharged, the lessor incurred expenses in connection with the performance of the voyage charter, the court shall allow him to retain or to recover the whole or any part of the freight paid or payable not exceeding the amount of the expenses.

This provision is based on the English court's decision in

Davies Contractors Ltd. v. Fareham U.D.C., the Ontario Frustrated Contracts Act and the United Kingdom Law Reform (Frustrated Contracts) Act 1943.

PART V
CONCLUSION

Chapter 9

CONCLUSION: IMPLIED TERMS OF VOYAGE CHARTERS AND INTERNATIONAL
LEGISLATIVE ACTION

I. THE NECESSITY FOR INTERNATIONAL LEGISLATIVE ACTION

A. Introduction

B. Efforts Made by UNCTAD

II. AN INTERNATIONAL CONVENTION BASED ON IMPLIED TERMS OF VOYAGE
CHARTERS

A. Introduction

B. New International Rules Recommended

1. Seaworthiness
2. Reasonable Dispatch and Care
3. Deviation
4. Safe Port and/or Berth
5. Dangerous Goods
6. Frustration of Voyage Charters

"...the object...is to contribute by all appropriate means and activities to the unification of maritime and commercial law, maritime customs, usages and practices."

Comité Maritime International, Constitution
(Amended in 1990), Art. 1.

I. THE NECESSITY FOR INTERNATIONAL LEGISLATIVE ACTION

A. Introduction

When one speaks of justice and the uniformity and certainty of law,¹ one may ask whether there is a necessity for a new international convention on charterparties (including voyage, time and demise charters), or whether it would be sufficient to adopt a "model charter".

O'Brien² argues that no international convention on charterparties is required or needed since both shipowners and charterers are able to bargain on equal terms.

Similarly, Vandeventer³ concludes that statutory regulation of charterparties is unnecessary since the present system of resolving charter disputes through arbitration and judicial decisions is "wholly adequate to effect needed changes without governmental interference".

Gram⁴ is of the opinion that uncertainty in the field of chartering may be reduced by continued efforts towards unification

¹ See W. Tetley, "The Lack of Uniformity and the Very Unfortunate State of Maritime Law in Canada, the United States, the United Kingdom and France" (1987) LMCLQ 340.

² F.J. O'Brien, "Freight and Charter Hire" (1975) 49 Tul. L. Rev. 956 at 969.

³ B. Vandeventer, "Analysis of Basic Provisions of Voyage and Time Charter Parties" (1975) 49 Tul. L. Rev. 806 at 844.

⁴ P. Gram, "Chartering Problems From an International Point of View" (1975) 49 Tul. L. Rev. 1076 at 1090.

by statute or by elaborate, standard clauses. He seems, however, to prefer the latter method, stating that, in practice there is no urgent need for the mandatory regulation of cargo responsibility under charterparties, although "mandatory regulation could do no great harm in this field".⁵

It is true that considerable efforts were made to standardize charterparties. The Federation of National Associations of Shipbrokers and Agents [FONASBA] has published its first MULTIFORM 1982 charterparty after several years of preparation. The "model" charterparty seeks to meet the need for a modern, concise, general purpose document which is fair to both shipowners and charterers.

Efforts toward standardization have also been made by the Baltic and International Maritime Conference [BIMCO], the International Association of Independent Tanker Owners [INTERTANKO], and a small segment of the private trade sector.⁶ However, problems regarding charterparties still arise, mainly from ambiguity and anomaly in terms which result in conflicting interpretations.

Morris⁷ says that unification of the law of charterparties, so far as it may be possible, is desirable but that it should be

⁵ Ibid. at 1092.

⁶ See, e.g. INTERTANKVOY 76, and UNICHARTER (Bulk Unicharter 1982).

⁷ A. Morris, "Non-Charters" - The Rider Syndrome BFC, CENTROCON, GENCON, C. ORE (7), BALTIME, NYPE" in Charter-Parties Conference (London: Lloyd's of London Press, 1982).

brought about by commercial men.

It is submitted, however, that one should accept Gilmore and Black's position⁸ that any truly practical solution with respect to charterparties will have to come from an international convention, comparable to the Hague Rules. This is also one of the conclusions of the recent report on charterparties prepared by the secretariat of the United Nations Conference on Trade and Development [hereinafter UNCTAD].

B. Efforts Made by UNCTAD

The Committee on Shipping of UNCTAD has established the Working Group on International Shipping Legislation [hereinafter the Group], which was recommended to include the subject of charterparties in its work programme.⁹

Taking into consideration that vessel chartering "is the warp and woof of the fabric of ocean shipping" the Group adopted a work programme in 1969 which included charterparties as a priority subject.

In 1975, the Group requested the UNCTAD secretariat to prepare studies on time charterparties (a comparative analysis of BALTIME, NYPE, and LINERTIME), and on voyage charterparties (a comparative analysis of the principal clauses), as well as a review

⁸ G. Gilmore, C.L. Black, The Law of Admiralty, Second Edition (Mineola: The Foundation Press, Inc., 1975) at 199.

⁹ UNCTAD, Charter Parties - A Comparative Analysis, TD/B/C.4/ISL/55, 27 June 1990.

of the principal clauses of time and voyage charters in order to determine their relative impact on the different parties.¹⁰

The secretariat was also requested to submit additional data to the Group in order to enable the latter to decide, among others, whether or not there were aspects of charterparties suitable for international legislative action.¹¹

In June 1990, the UNCTAD secretariat finished its report on charterparties. This excellent report is a comparative analysis consisting of six chapters:

- the first deals with the main types of voyage and time charterparties;
- the second provides an analysis of certain clauses of time charterparties;
- the third treats certain clauses of voyage charterparties (e.g. laytime and demurrage clauses, freight clauses, deviation clauses);
- the fourth is devoted to the effect of charterparty terms on third party bill of lading holders;
- the fifth discusses the difficulties and uncertainties arising from the application of mandatory legislation to charterparties; and
- the final chapter contains conclusions and recommendations regarding standardization, harmonization or improvement of charterparty clauses, necessity for

¹⁰ Ibid. at para. 2.

¹¹ Ibid. at para. 3.

international legislative action, and definitions of basic terms used in charterparties.

In addition, the report includes useful standard form voyage and time charterparties (e.g. NORGRAIN 89, MULTIFORM 1982 (Revised 1986)).

One of the most important conclusions of the report is that in order to apply a system of responsibilities for cargo to charterparties similar to the one in the Hague and Hague/Visby Rules, a set of "tailor-made" rules mandatorily applicable to charterparties is required.¹² With specific reference to charterparties, the Rules should be formulated to cover seaworthiness, care of cargo, obligations in regard to bills of lading issued under charterparties, limitation of actions, rights and immunities of the shipowner, deviation, limitation of liability, and dangerous cargo.¹³

The application of mandatory legislation to charterparties would not eliminate the flexibility of the contractual parties to make the charter they want. For instance, a new international convention or a modified and extended Hague and Hague/Visby Rules would cover only fundamental matters (e.g. seaworthiness, deviation). The parties would still be left to negotiate the special terms they require for their particular charter.¹⁴

It is believed that many of the arguments which justify the

¹² Ibid. at para. 414.

¹³ Ibid. at para 415.

¹⁴ Ibid. at para. 412.

mandatory application of the Hague or Hague/Visby Rules to bills of lading also apply to charterparties, including those regarding greater certainty, greater clarity, and greater uniformity of maritime law.¹⁵

The Group proposed, however, that further studies may be desirable in order to determine the impact of the mandatory rules if applied to voyage charterparties alone, or if applied to both voyage and time charterparties. They may also be important in studying the impact of such rules if applied only to the operations referred to in article II of the Hague Rules (i.e. loading, handling, stowage, carriage, care and discharge of goods), or if applied to all voyages and all operations under a charterparty.¹⁶

The convening of the twelfth session of the Working Group on International Shipping Legislation was therefore postponed to October 1990 in order to allow the secretariat to prepare the necessary documentation. Unfortunately, the meeting was not successful, because no consensus could be reached regarding the recommendations. UNCTAD continues, however, to include charterparties in its "maritime work in progress" and in "maritime work contemplated".¹⁷

¹⁵ Ibid.

¹⁶ Ibid. at para. 416.

¹⁷ W. Totley, CMI Future Work - Commentary (draft, 1991) at 7. According to Report of the Liaison Sub-Committee - I.M.O. and Other International Organizations (Montreal: Canadian Maritime Law Association, 1991) there was a division of opinion between developing countries which supported UNCTAD's recommendations and developed countries which regard this project as a commercial matter to be dealt with by commercial organizations.

It is also worth noting that the Comité Maritime International is preparing a conference on charterparties which will take place in Genoa in June 1992.¹⁸

II. AN INTERNATIONAL CONVENTION BASED ON IMPLIED TERMS OF VOYAGE CHARTERS

A. Introduction

It appears that one of the main problems regarding a new international convention on charterparties is how to draw the line between those aspects of charters which should be governed by the convention and those which should be left to the parties.

One solution may be to extend the application of the Hague or Hague/Visby Rules to voyage, time, and demise charters, with certain modifications.

The other is the one which has been argued throughout this thesis and which is based on the implied terms of voyage charterparties. It is submitted that some of these implied terms have been and are the fundamental legal structure of the voyage charterparty and should therefore become express rules of international law. In order to remove the uncertainty and confusion regarding the interpretation of contracts, as well as to contribute to the uniformity, certainty, and justice of maritime law, these new international rules should not be subject to exclusion by

¹⁸ Ibid. at 15.

contract.

A number of Common law judicial decisions dealing with implied terms of contracts (other than voyage charterparties) have already been codified by national statutes. It is likely that this was inspired by Civil law which supplies many "implied" terms in the form of legislation (ius dispositivum). Generally, all implied terms can be excluded by express provisions. However, in both the Civil and the Common legal systems, some of the implied terms actually became rules of law which cannot be excluded by the parties.

A new international convention should include all types of charterparties. Thus, it should include general rules applicable to voyage, time, and demise charterparties, as well as special provisions relating to each of these three types of charters.

According to Professor Tetley¹⁹, the purpose of an international convention may be summarized in three principles: uniformity of law, certainty of law, and justice.

It is submitted that the new international convention on charterparties would meet the first requirement since it "would simplify the law for the citizens of the nations of the world, for their lawyers, their courts and all other interested parties".²⁰

A uniformly adopted convention would also contribute to the certainty of maritime law, since it "would avoid conflicts of law and would assist the citizens of the world - their lawyers,

¹⁹ Tetley, supra, note 1 at 340.

²⁰ Ibid.

judges, governments and representatives - to know their rights and obligations, wheresoever these happened to arise".²¹

Finally, a new convention would ensure justice by providing fair, equitable, and just rights and obligations for the lessors (shipowners, demise, bareboat, or time charterers) and charterers.²²

The following provisions may be considered as possible solutions to two problems. They would abolish the notion of implied terms of voyage charterparties, and satisfy the above-mentioned principles of international law. The rationale of each rule can be found in the conclusion of each chapter.²³ The recommendations are, of course, far from representing "excellence of drafting" which should be a characteristic of every international convention.²⁴ Excellence requires the drafters of any convention to renounce national interests and practices, which is beyond the purpose of this thesis.

²¹ Ibid. at 341.

²² Ibid.

²³ See pp. 141-145 (re seaworthiness), 169-171 (re reasonable despatch and care), 208-211 (re deviation), 267-270 (re safe port/berth), 308-310 (re dangerous goods) and 337-339 (re frustration of voyage charters).

²⁴ Tetley, supra, note 1 at 341-342.

B. New International Rules Recommended

1. Seaworthiness

The lessor (a shipowner, bareboat, demise, or time charterer) is bound to exercise due diligence, before and at the beginning of the voyage, to make the ship seaworthy, and properly manned and equipped for the services contemplated in the contract, and shall exercise due diligence to maintain such condition during the whole of the period of the contract.

NOTA BENE: This provision is based on the Quebec Draft Civil Code 1977, but it extends the exercise of due diligence throughout the voyage. Since a vast majority of standard form voyage charterparties provide the shipowner's obligation to exercise due diligence to make a vessel seaworthy (which replaces the absolute warranty of seaworthiness), it would probably be easier to convince the parties to a convention to adopt the due diligence approach.

In addition, it is to be noted that the obligation to provide a seaworthy ship should include standards of environmental protection from pollution provided by international conventions.

2. Reasonable Despatch and Care

The lessor shall undertake the preliminary voyage to the port of loading with reasonable despatch, and shall exercise reasonable care and skill [or all diligence] in performing his duties of loading and discharge, of navigating, of caring for the cargo, and shall complete the voyage with all reasonable despatch.

NOTA BENE: The shipowner's implied undertaking to proceed with reasonable despatch and to exercise reasonable care is generally accepted in both the Civil and the Common law systems. It should therefore become a rule of international law.

3. Deviation

Any deviation to save or in attempt to save life or property at sea, or to exercise due care to protect or minimize damage to the environment, or any other reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the voyage charterparty, and the lessor shall not be liable for any loss or damage resulting

therefrom.

NOTA BENE: This rule is based on the Hague and Hague/Visby Rules. It is submitted that, in accordance with the new international spirit regarding the protection of the environment from pollution, the shipowner should be allowed to deviate from the proper course in the case of an accident at sea involving a threat of pollution to the environment, in order to exercise due care to protect or minimize damage to the environment.

4. Safe Port and/or Berth

The charterer shall exercise due diligence to ascertain that any place to which he orders the vessel are physically, environmentally, politically, and sanitarily safe for the vessel.

The charterer shall, however, not be deemed to warrant the safety of any place and shall be under no liability in respect thereof except for loss or damage caused by his failure to exercise due diligence as aforesaid.

NOTA BENE: This provision is based on two standard form voyage charterparties, namely INTERTANKVOY 76 and SHELLVOY 2. It is

submitted that the present state of the law relating to the safe port obligation does not contribute to uniformity, certainty, and justice in maritime law. The warranty rule, the concept of prospective safety, and the concept of implied terms have been criticized. Perhaps the most suitable solution for a new convention can be found in the due diligence approach which is well known and recognized in other fields of maritime law.

It is also argued in this thesis that the port should be "environmentally safe" in accordance with international law. Every port should have adequate facilities for the reception of residues and oily mixtures, noxious liquid substances, sewage, and garbage from ships. The lack of such equipment may cause damage not only to the environment, but also places a vessel and its owner in the predicament of having to discharge pollutants into the sea, risking therefore liability under local legislation. Thus, appropriate facilities would diminish accidental and intentional pollution of the seas.

5. Dangerous Goods

The charterer shall exercise due diligence not to deliver dangerous goods, unless he gives notice to the lessor (the shipowner, demise, bareboat or time charterer).

The charterer shall be responsible for loss or

damage sustained by the lessor arising or resulting from the act, fault, or neglect of the charterer in delivering dangerous goods.

NOTA BENE: This article is based on the Hague and Hague/Visby Rules. It is difficult to see which solution, absolute warranty, or due diligence, would seem better for a new international convention. The former is recognized by English law and Civil law countries, while the latter prevails in American law and is also adopted by the Hague and Hague/Visby Rules. It is more likely that a greater number of states will accept due diligence.

The charterer's undertaking not to ship dangerous cargo should include an obligation to provide "environmentally safe" goods, unless the parties expressly agree to ship and carry cargo (e.g. oil) which might be dangerous to the marine environment. In addition, even in the case where the charterer and shipowner are aware of the dangerous character of a particular cargo, the risk of damage to the environment and liability vis-à-vis third parties should be placed on both. This argument is supported by several international conventions, drafts and other documents.

6. Frustration of Voyage Charters

The parties (the lessor and the charterer) are discharged from further performance of their obligations whenever it is proved that some

event has occurred during the currency of the voyage charter, due to no fault of either party, which makes further performance impossible or illegal, or which makes it something radically different from that which was originally contemplated.

The freight paid to the lessor in pursuance of the voyage charterparty before the parties were discharged is recoverable from him as money received by him for the use of the charterer; and the freight payable to him in pursuance of the voyage charterparty ceases to be payable.

If, before the parties were discharged, the lessor incurred expenses in connection with the performance of the voyage charter, the court shall allow him to retain or to recover the whole or any part of the freight paid or payable not exceeding the amount of the expenses.

NOTA BENE: This rule is based on the English decision in Davies Contractors Ltd. v. Fareham U.D.C.,²⁵ the Ontario Frustrated

²⁵ [1956] A.C. 696.

Contracts Act and the United Kingdom Law Reform (Frustrated Contracts) Act 1943. Accordingly, the rule provides the adjustment of the rights and liabilities of the parties to frustrated voyage charterparties.

PART VI
APPENDICES

APPENDIX A: EXPRESS TERMS OF VOYAGE CHARTERPARTIES REGARDING SEAWORTHINESS

I. INTRODUCTION

A review of the many standard form voyage charterparties¹ used in coal, fertilizer, grain, livestock, meat, ore, salt, scrap, steel, sugar, tanker, wood trades and general purposes, allows one to conclude that there are at least four general categories of seaworthiness clauses.

The first category, comprising the vast majority of standardized voyage charterparties, includes the shipowner's obligation to exercise due diligence to make his vessel seaworthy, thus replacing the absolute warranty of seaworthiness implied in charterparties by the general maritime law (U.S.A.) or by the Common law (U.K.). Such clauses either incorporate the Harter Act², the Hague Rules³, the Hague/Visby Rules⁴, or any other national

¹ Most of the standardized voyage charterparties are published in M.M. Cohen et al., Benedict on Admiralty - Carriage of Goods by Sea: Charter Parties; Commentary and Forms, Vol. 2B, Seventh Edition (Revised) (New York: Matthew Bender, 1985). I acknowledge the assistance of UNCTAD, BIMCO, and General Council of British Shipping which kindly sent me a number of other up to date standard form voyage charterparties.

² Act of February 13, 1893, chap. 105, 27 Stat. 445-46, 46 U.S. Code Appendix 190-196.

³ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and entered into force June 2, 1931.

version of these international conventions⁵. Alternatively, they include the bare contractual due diligence undertaking without referring to any of these conventions or statutes.

It is to be noted that a voyage charter is generally not subject to conventions and statutes regulating contracts for the transportation of goods under bills of lading.⁶ However, there are two important occasions⁷ when they would apply to a voyage charterparty:

1. When the voyage charterparty itself specifically incorporates The Hague or Hague/Visby Rules or national enactments thereof;
2. When a bill of lading expressly incorporates the terms of a voyage charterparty, thereby making the charterparty itself subject to the laws and conventions which govern the bill of lading.

⁴ Protocol to Amend the 1924 Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, February 23, 1968 and entered into force June 23, 1977.

⁵ See, e.g. United States Carriage of Goods by Sea Act, 1936; Act of April 16, 1936, chap. 229, 49 Stat. 1207-13, 46 U.S. Code Appendix 1300-15 [hereinafter COGSA]; Canada Carriage of Goods by Water Act, R.S.C. 1985, c. C-27 (formerly R.S.C. 1970, c. C-15) [hereinafter COGWA]; United Kingdom Carriage of Goods by Sea Act 1924 (now Carriage of Goods by Sea Act 1971, (1971) U.K.c.19 as amended by the Merchant Shipping Act 1979, (1979) U.K.c.39 and by the Merchant Shipping Act 1981, (1981) U.K.c.10, adopting the Hague/Visby Rules).

⁶ See article 5 of the Hague or Hague/Visby Rules; section 5 of COGSA; article 5 of COGWA, etc.

⁷ Compare W. Tetley, Marine Cargo Claims, Third Edition (Montreal: International Shipping Publications BLAIS, 1988) at 35-43.

The second category of seaworthiness clauses requires shipowners to have their vessels "tight, staunch and strong, and in every way fitted for the voyage". Such clauses permit the Common law to imply an absolute obligation to provide a seaworthy ship.

The third category only contains exceptions to the shipowner's liability with respect to the bursting of boilers, the breakage of shafts, or any latent defect in the hull, machinery etc., provided that due diligence has been exercised.

In the final and fourth category, is the voyage charterparty where the class and certificate of the vessel appear to be prima facie proof of seaworthiness.

On the following pages of this chapter, the voyage charterparties will be set out with their full data (e.g. name, year of adoption, international organization, etc.) in order to provide all of the relevant information relating to the harmonization and standardization of voyage charters.

II. THE DISTINCTION BETWEEN AN EXPRESS AND AN IMPLIED OBLIGATION OF SEAWORTHINESS

There is an important distinction between an express obligation of seaworthiness and an implied one. The former generally refers to the time of sailing to the port of loading, and a breach of it may entitle the charterer to refuse to load.⁸ The implied obligation, however, refers to the time of sailing from the

⁸ Stanton v. Richardson, (1874) L.R. 9 C.P. 390.

port of loading, and its breach does not entitle the charterer to refuse to load, unless it is such as to frustrate the object of the charter.⁹

Ivamy¹⁰ succinctly explains this difference as follows:

This difference arises from the different times to which the express and the implied undertakings relate. The charterer's obligation to load is conditional upon the ship being seaworthy at the port of loading, not upon her being seaworthy at the time the contract was made.

III. DUE DILIGENCE

A. The Harter Act

The Harter Act is usually incorporated in a voyage charterparty by the following clause (see AMERICANIZED WELSH COAL CHARTER):

...this shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States, approved on the 13th day of February, 1893...

A similar provision can be found in the following standardized voyage charterparties:

⁹ B. Vandeventer, "Analysis of Basic Provisions of Voyage and Time Charter Parties" (1975) 49 Tul. L. Rev. 806 at 837; Halsbury's Laws of England, Shipping and Navigation, Vol. 43 (London: Butterworths, 1983) at para. 425.

¹⁰ E.R.H. Ivamy, Payne and Ivamy's Carriage of Goods by Sea, Eleventh Edition (London: Butterworths, 1979) at 18.

AMERICANIZED WELSH COAL CHARTER (Clause 7): Approved 1953.

BALTIMORE FORM C (Clause 3): Berth Grain Charter Party - Steamer; Adopted 1913.

LIVESTOCK CHARTER PARTY (Clause 20): Horses, Mules and Cattle Form.

Section 2 of the Harter Act states that the stipulations which relieve the shipowner, master, or manager from the exercise of due diligence in equipping vessels (i.e. to make the vessel seaworthy and capable of performing its intended voyage), are not lawful. The shipowner may benefit from limitations of liability for errors of navigation, dangers of the sea, and acts of God stated in section 3, provided that he exercised due diligence to make the vessel in all respects seaworthy and to have it properly manned, equipped, and supplied.

However, the courts have not always supported the conclusion that the due diligence provision of the Harter Act replaces the absolute warranty of seaworthiness. It was held in McFadden v. Blue Star Line¹¹ that the warranty of seaworthiness, which is prima facie implied in a contract for the carriage of goods by sea, is an absolute warranty. The court held that the incorporation of the provisions of the Harter Act in the bill of lading does not affect the shipowner's absolute obligation to make the ship seaworthy.

Similarly, in The Erik Boye¹², the court held that the Harter Act did not exclude the implied warranty of seaworthiness

¹¹ [1905] 1 K.B. 697 at 706-707.

¹² 18 Asp. Mar. Law Cas. 66 at 67-68 (1929).

for the cargo, nor did it diminish this implied warranty to an undertaking to use due diligence to make the ship seaworthy.

In the often cited American case of The Carib Prince¹³, section 2 of the Harter Act was held to mean only that the shipowner may, when he has used due diligence to furnish a seaworthy ship, contract out of the obligation of seaworthiness. If the contract does not so exempt him, he is not relieved from furnishing a seaworthy ship. Furthermore, the court held that section 3 did not imply that because the shipowner is exempted when he has been duly diligent, he is thereby also relieved from the duty of furnishing a seaworthy vessel.

A few years later, the Supreme Court of the United States stated that before the shipowner could have the benefit of the relief provided by section 3, he must have exercised due diligence to provide a seaworthy vessel.¹⁴

In another case,¹⁵ the court again held that section 3 did not relieve the shipowner from the duty of furnishing a seaworthy ship at the beginning of the voyage, nor affect his liability for the loss of the cargo arising from unseaworthiness.

¹³ 170 U.S. 655 at 660-662 (1898).

¹⁴ The Southwark, 191 U.S. 1 at 8 (1903).

¹⁵ Benner Line v. Pendleton, 217 F. 497 at 505 (2nd Cir. 1914).

B. The Hague Rules and Their National Enactments

These provisions of the Harter Act certainly inspired the relevant portions of the Hague Rules which require that due diligence be exercised to provide a seaworthy ship before and at the beginning of the voyage. Articles 3(1) and 4(1) of the Hague Rules read as follows:

Article 3

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to -

- (a) Make the ship seaworthy.
- (b) Properly man, equip and supply the ship.
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article 4

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. 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.

A clause which incorporates the whole or some relevant

provisions of the Hague Rules, the Hague/Visby Rules, COGSA, COGWA or other national versions of the said Rules, may read as follows (see NIPPONCOAL):

...The Hague Rules ... as enacted in the country of shipment shall apply to this charterparty and to any bill of lading issued hereunder ...

This clause is generally interpreted to be in favour of due diligence.¹⁶ A similar clause is included in the following voyage charterparties:

AMERICANIZED WELSH COAL CHARTER (Clause Paramount): Amended 1979.

NIPPONCOAL (Clause 15): The Documentary Committee of the Japan Shipping Exchange, Inc. Coal Charter Party; Issued August 26, 1983; Adopted by the Documentary Council of the Baltic and International Maritime Council [hereinafter BIMCO].

FERTIDUCH (General Paramount Clause): Dutch Fertilizer Charter 1950.

FERTILIZER CHARTER PARTY (F.I.O.) (Clauses 3, 24).

FERTIVOY (Clauses 1, 33, 36): North American Fertilizer Charter Party 1978; Recommended by the Documentary Council of BIMCO, Copenhagen, and the Documentary Committee of the General Council of British Shipping, London.

¹⁶ Due diligence is a question of fact. The carrier has to provide actual proof which demonstrates due diligence on the part of himself, as well as of servants, agents, and independent contractors to make the vessel seaworthy. Due diligence has been equated to the following obligations: the Common law duty of care; reasonable diligence with regard to the circumstances (known, or fairly to be expected); to the nature of the voyage and the cargo to be carried; and as a genuine, competent, and reasonable effort to fulfill the carrier's obligations. See H.M. Kindred et al., The Future of Canadian Carriage of Goods by Water Law (Halifax: Dalhousie Ocean Studies Programme, 1982) at 130-131; Tetley, supra, note 7 at 389-394; G. Gilmore, C.L. Black, The Law of Admiralty, Second Edition (Mineola: The Foundation Press, Inc., 1975) at 150-155.

FERTIVOY 88 (Clauses 1, 36): North American Fertilizer Charter Party 1978/88; Recommended by the Documentary Council of BIMCO.

FOSFO (Clauses 1, 18, 24): Phosphate Charter Party.

HYDROCHARTER (Clause 10): Voyage [Fertilizer] Charter Party; Amended November, 1975; Adopted by the Documentary Council of BIMCO.

COASTVOY (Clauses 21, 22): Coastwise [General] Charter Party (F.I.O.); Revised January 2, 1946.

GENVOY (Clauses 32, 36): General Purpose Charter Party.

MULTIFORM 1982 (Clause 34): The Federation of National Associations of Ship Brokers and Agents [hereinafter FONASBA]; Multi-Purpose Charter Party 1982.

SCANCON (Clause 4): The BIMCO Scandinavian [General] Voyage Charter; Amended January, 1962.

WARSHIPVOY (Clauses 1, 25): Voyage [General] Charter Party; Revised August 15, 1944.

AUSBAR (Clause 29): Australian Barley Charter 1975; Revised April, 1984.

AUSTRAL (Clause 26): Chamber of Shipping Australian Grain Charter, 1928; Amended July 1, 1974.

AUSTWHEAT (Clause 23): Australian Grain Charter, 1972; Amended July 1, 1974; Agreement between the Australian Wheat Board and the Documentary Committee of the Chamber of Shipping of the United Kingdom.

BALTIMORE FORM C (Clause 42): Berth Grain Charter Party; Adapted 1963.

BALTIMORE FORM C (Clauses 5,6): Adapted 1976.

NORGRAIN 89 (Clauses 36-38): North American Grain Charterparty 1973; Amended May 1989; Recommended by BIMCO and FONASBA.

BULK FORM (F.I.O.) (Clause 14): Ore Charter Party.

BULK ORE CHARTER PARTY (F.I.O.) (Clause 35).

ORECON (Clause 20): The BIMCO Ore Charter Party 1950; From Scandinavia to Poland; Agreed with Centrala Zaopatrzenia Hutniczego, Katowica and Matallmex, Prague, November, 1949.

OREVOY (Clauses 1, 21): Ore Charter Party; Adopted by the Documentary Committee of the General Council of British Shipping, London, and FONASBA; Agreed with MALMEXPORT AB, Stockholm, and ROHSTOFFHANDEL G.m.b.H., Dusseldorf.

STEEL CHARTER PARTY (Clause 40): GENCON [Uniform General Charter] Adapted.

ASBATANKVOY (Clauses 19-20): October 1977, identical to EXXONVOY 1969 (Clauses 19-20): Tanker Voyage Charter Party.

With respect to the last two charterparties, it was held that it was the shipowner's burden to establish the exercise of due diligence to make the vessel seaworthy.¹⁷ Unseaworthiness per se does not permit the charterer to cancel the charterparty.

In The Regina¹⁸, the charterers were not entitled to cancel or otherwise refuse to perform the charterparty since none of the breaches was so substantial as to defeat or frustrate the commercial purpose of the voyage charter. If the vessel is not ready to load because of an unseaworthy condition at the time notice of readiness is tendered, the voyage charterer may refuse the notice and may cancel the voyage charter if the ship is not ready by the cancelling date.¹⁹

A similar clause is also to be found in:

BIMCHEMVOY (Clauses 1, 26): The BIMCO Standard Voyage Charter for the Transportation of Chemicals in Tank Vessels;

¹⁷ See Petro-Kinva A.S., Charterer v. Sporades Maritime, Ltd., Owner (The Corona Beach), 1980 S.M.A. 1433; Accord, Amoco Overseas Oil Co., Charterer v. Ocean Couriers, Inc., Owner (The Avenger), 1977 S.M.A. 1179, cited in D.T. McCune, The Asbatankvoy Charter (London: Lloyd's of London Press Ltd., 1984) at 5.

¹⁸ Aegean Shipping Corp., Owner v. Petrozair, Charterer, 1977 S.M.A. 1099, cited in McCune, supra, note 17 at 6.

¹⁹ Getty Oil Co., Charterer v. Huron Liberian Co., Owner (The Nedi), 1981 S.M.A. 1604, cited in McCune, supra, note 17 at 6.

Adopted by the Documentary Committee of the General Council of British Shipping, London.

MOBILVOY 80 (Clause 17): Tanker Voyage Charter party. It is to be noted that this charterparty contains the provision in Clause 1(a) stating that the shipowner shall exercise due diligence to provide seaworthy ship not only at the commencement of loading but that the vessel shall be so maintained throughout its service under the charterparty.

NUVOY-84 (Clause 43): Revised [General] Charter Party 1964; Recommended by the Documentary Council of BIMCO and the Documentary Committee of the General Council of British Shipping, London.

CEMENTVOY (Clause 32): Standard Voyage Charter Party for the Transportation of Bulk Cement and Cement Clinker in Bulk; Issued by the Documentary Committee of BIMCO.

BEEPVOY 2 (Clauses 2,38): BP Tanker Company, Ltd. Voyage Charter Party.

BISCOILVOY (Clauses 1, 27): The BIMCO Standard Voyage Charter Party for Vegetable/Animal Oils and Fats; Agreed 1975; Adopted by the Documentary Committee of the General Council of British Shipping, London; Agreed: 1975 between BIMCO and International Association of Seed Crushers [hereinafter IASC].

BISCOILVOY 86 (Clauses 1, 26): The BIMCO Standard Voyage Charter Party for Vegetable/Animal Oils and Fats; Revised and Agreed between BIMCO, IASC and Federation of Oils, Seeds and Fats Associations Ltd. (FOSFA).

FINAVOY (Clause 40): Issued by Petrofine, Brussels, September 1975 [Tanker Voyage Charter Party]. However, the shipowner is bound by virtue of the Clause 2 to exercise due diligence to make the vessel, its tanks, valves and pipelines tight, staunch, strong, and to be in good order and condition not only before and at the commencement of the voyage, but also throughout the voyage.

GASVOY (Clauses 1, 23): Gas Voyage Charter Party; For Liquid gas Except LNG; Issued July, 1972 by the Documentary Council of BIMCO; Adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom.

INTERTANKVOY (Clauses 1, 25); Issued 1976 by International Association of Independent Tanker Owners [hereinafter INTERTANKO], Oslo; Adopted by BIMCO, FONASBA, The Documentary Committee of the Japan Shipping Exchange, Inc. with "Japanese Terms".

It is obvious that the parties to voyage charterparties

often wish to and may incorporate the Hague Rules or similar national statutes in their agreements.²⁰ Thus, with regard to seaworthiness, they agree to impose upon the shipowner an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon him.²¹ The statutory standard of seaworthiness should relate to all voyages under the charterparty.

C. The Absolute Warranty of Seaworthiness Expressly Excluded

Some of the standardized voyage charterparties expressly exclude the absolute warranty of seaworthiness and incorporate the Hague Rules (see POLCOALVOY):

...Notwithstanding anything herein contained no absolute warranty of seaworthiness is given or shall be implied in this Charter Party and it is expressly agreed that the Owners shall have the benefit of the "Rights and Immunities" in favour of the carrier or Ship and shall assume the "Responsibilities and Liabilities" contained in the Enactment in the country of shipment giving effect to the [Hague Rules]... [Emphasis added]

The following charterparties contain such a clause:

POLCOALVOY (Clause 28): The BIMCO Coal Charter 1971; Revised April, 1976; Agreed with C.H.Z. "Weglokoks"; Adopted by the Documentary Committee of the General Council of British Shipping.

²⁰ See J.B. Effenson Company v. Three Bays Corporation, 238 F. 2d 611 at 616 (5th Cir. 1956).

²¹ See Anglo-Saxon Petroleum Co., Ltd. v. Adamastos Shipping Co., Ltd., [1958] 1 Lloyds Rep. 73 at 81 [H.L.]. Applying the principle of falsa demonstratio non nocet, the opening words of the paramount Clause were to be read as if they were: "This charter-party", instead of: "This bill of lading".

NUOVOY (Clause 34): Voyage [General] Charter Party 1964; Recommended by the Documentary Council of the BIMCO.

GRAINVOY (Clause 22): Grain Voyage Charter Party 1966; Revised 1974; Recommended by the Documentary Council of BIMCO and the Documentary Committee of the Chamber of Shipping of the United Kingdom.

GENORECON (Clause 27): The BIMCO General Ore Charter Party 1962; Issued January 8, 1963.

MURMAPATIT (Clause 31): Apatite Charter Party; For Shipments of Apatite Ore and Apatite Concentrate from Murmansk; issued October, 1970; Adopted by the Documentary Council of the Conference of the Chartering and Shipowners Organizations of the Countries - Members of the Council for Mutual Economic Assistance; Agreed with the Documentary Council of BIMCO.

NIPPONORE (Clause 14): Iron Ore Charter Party; Amended July 18, 1974; Adopted by the Documentary Council of BIMCO.

RIODOCEORE (Clause 29): Iron Ore Charter Party; Vale do Rio Doce Terms 1967.

SCANORECON (Clause 25): The BIMCO General Ore Charter 1962; Scandinavian Terms 1966.

SOVORECON (Clause 32): Soviet Ore Charter Party; For Ores and Ore Concentrates From U.S.S.R. Ports; Issued October, 1970; Adopted by the Documentary Council of the Conference of the Chartering and Shipowners Organizations of the Countries - Members of the Council for Mutual Economic assistance; Agreed with the Documentary Council of BIMCO.

COASTSALT (Clause 31): The Indian Coastal Conference; Salt Charter Party; Revised April 1, 1966.

BLACKSEAWOOD (Clause 40): Black Sea Timber Charter Party; For Timber from U.S.S.R. and Romanian Black Sea and Danube Ports; Adopted April, 1973 by the Documentary Council of the Conference of the Chartering and Shipowners Organizations of the Countries - Members of the Council for Mutual Economic Assistance; Agreed with the Documentary Council of BIMCO.

Some charterparties referring to section 2 of the United Kingdom Carriage of Goods by Sea Act 1924 and article IV of the Schedule thereto exclude the implication of an absolute warranty of seaworthiness:

BALTCON (Clause 13): The Baltic and White Sea Conference Coal Charter, 1921; For Steamers and Full Power Motor-Vessels; From East Coast of England and Scotch Ports to all Ports in the Baltic, Scandinavia and White Sea; Amended January 1, 1950.

COASTCON (Clause 23): Chamber of Shipping Coasting Coal Charter-Party, 1920; From East Coast of England, From Scotland, and From Belgian, Dutch and German Ports, to Ports Between Elbe and Brest and Ports in the United Kingdom (London and Rochester Excepted); Amended January 1, 1950; Adopted by the Documentary Council of BIMCO.

MEDCON (Clause 8): Chamber of Shipping East Coast Coal Charter Party, 1922; For Steamers and Full-Power Motor Vessels; From East Coast (Humber to Berwick), for all Trades Except Coasting, Elbe to Brest and all Ports North of Elbe-Baltic Trades-Monte Video, Buenos Ayres, Etc.,-Danube, Rosario, Rivers Parana and Uruguay; Amended July 1, 1974; Agreed with the British Coal Exporters' Federation, Le Syndicat Central des Negociants Importateurs de Charbons en France, The Italian State Railways, Associazione General del Commercio dei Carboni Fossili, Genoa, Representatives of Milan Chamber of Commerce and Turin Coal Importers; Adopted by the Documentary Council of BIMCO.

MERSEYCON (Clause 3): Chamber of Shipping Coasting [Coal] Charter Party, 1921; For Mersey District Ports Including Cumberland, Barrow, Preston, Fleetwood, and Manchester Ship Canal; Amended July 1, 1974; Agreed with Merchant's Representatives; Adopted by the Documentary Council of BIMCO.

WELCON (Clause 20): Chamber of Shipping Coasting Coal Charter-Party, 1913; From the Bristol Channel to Ports Between the Elbe and Brest and in the United Kingdom; Amended July 1, 1974; Adopted by the Documentary Council of BIMCO.

FERTICON (Clause 11): Chamber of Shipping Fertilizers Charter, 1942; Amended July 28, 1950; Adopted by the Documentary Council of BIMCO.

BRITCONT (Clause 12): Chamber of Shipping General Home Trade Charter, 1928; Amended July 1, 1974.

CEMENCO (Clause 3): Chamber of Shipping Cement Charter-Party, 1922; For All Ports in Great Britain and Ireland and on the Continent Between Elbe and Brest; Amended July 1, 1974; Agreed with the Cement Marketing Co., Ltd.; Adopted by the Documentary Council of BIMCO.

PANSTONE (Clause 3): Chamber of Shipping Stone Charter-Party, 1920; For all British Ports, Channel islands, and Continent Between Elbe and Brest; Amended July, 1974; Arranged and agreed with the National Federation of Granite and Roadstone Quarry

Owners; Adopted by the Documentary Council of BIMCO.

D. The Contractual Obligation to Exercise Due Diligence
Before and at the Beginning of the Voyage

There are some voyage charterparties which do not refer to or incorporate international conventions or national statutes. Rather they provide the obligation to exercise due diligence to make the vessel seaworthy (probably before and at the beginning of the voyage) (see FERTIDUCH):

...Owners are responsible for loss or damage to the cargo or for delay in delivering the cargo 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...

A similar clause can be found in:

GERMANCON-NORTH (Clause 18): The BIMCO German Coal Charter 1957; For Coal, Coke and patent Fuel From the Ruhr-District (Germany) to all Ports in Denmark, Finland, Norway and Sweeden; Amended September, 1975; Agreed with Ruhrkohle-Verkauf G.m.b.H., Essen and the Scandinavian Coal Importers' Federation.

SOVCOAL (Clause 18): Soviet Coal Charter 1962; For Coal, Coke and between the Documentary Council of BIMCO, V/O 'Sojuzpromexport', Moscow, and V/O "Sovfracht", Moscow.

FERTIDUCH (Clause 3): Dutch Fertilizer Charter 1950.

GENCON (Clause 2): Uniform General Charter; Revisited 1922.

For instance, in The Gundulic²², the shipowner had failed to prove that the damage had occurred without any personal want of due diligence on the part of the superintendent provided for in the GENCON charterparty. The conditions of the wedges on inspection were such that any prudent surveyor ought to have foreseen a real risk that water would enter the holds through the seams in the hatch covers and would have called for repairs.

A similar clause is also to be found in:

GENCON (Clause 2): Uniform General Charter; Revisited 1976; Adopted by the Documentary Committee of the General Council of British Shipping, London and the Documentary Committee of the Japan Shipping Exchange, Inc., Tokyo; Recommended by BIMCO.

NIPPONVOY 1963 (Clause 12): Voyage [General] Charter Party; Amended July 18, 1974.

STEMMOR CHARTER PARTY (1983) (Clause 1): Adapted from C.(ORE) 7 MEDITERRANEAN IRON ORE; Metal Transport Corp., New York.

GENJAPSCRAP (Clause 2): Adapted GENCON.

BULK SUGAR CHARTER - U.S.A. (Clause 1): April, 1962.

TEXACOVoy (Clauses 1, 22): Tanker Voyage Charter Party; Adopted September 1, 1971.

VEGOILVOY (Clauses 1, 17): Tanker Voyage Charter Party; Adopted January 27, 1950.

WARSHIPOILVOY (Clauses 1, 18): Tanker Voyage Charter Party; Revised June, 1950.

BALTPULP (Clause 5): Baltic Pulp and paper Charter from Finland to U.K. and Continent; Amended 1949, January 1, 1950; Issued by Finnish Cellulose Union, Helsingfors; Adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom and the Documentary Council of BIMCO.

²² Itoh & Co. Ltd. v. Atlantska Plovidba, [1981] 2 Lloyd's Rep. 418 at 425 [Q.B. (Com. Ct.)]. See Hang Fung Shipping Co., Ltd. v. Mullion & Co., Ltd., [1966] 1 Lloyd's Rep. 511 [Q.B. (Com. Ct.)].

BEIZAI 1964 (Clause 11): American Logs/Lumber Charter Party; Amended July 18, 1974.

NANYOZAI 1967 (Clause 10): Amended July 18, 1974 [Wood Charter Party].

NUBALTWOOD (Clause 12): Chamber of Shipping Baltic Wood Charter Party 1973; Baltic and Norway to the U.K. and to the Republic of Ireland; Agreed by the Chamber of Shipping of the U.K.; Agreed and adopted by BIMCO; Agreed with the Timber Trade Federation of the U.K., The Finnish Sawmill Owner's Association, and the Swedish Wood Exporters' Association.

SOVCONROUND (Clause 37): The BIMCO Soviet Roundwood Charter Party; For Pulpwood, Pitwood, Roundwood and Logs From Baltic and White Sea Ports of the U.S.S.R.; Issued by the Documentary Council of BIMCO, the U.S.S.R. Chamber of Commerce, V/O "Exportles", V/O "Sovfracht" and "Sojuzmorniiprojekt", Moscow; Adopted by the Documentary Committee of the Chamber of Shipping of the U.K.; Recommended by BIMCO.

SOVIETWOOD (Clause 12): Soviet Wood Charter Party 1961; U.S.S.R. Baltic, White Sea, Barents Sea and Kara Sea Ports to the U.K., the Republic of Ireland and other Countries; For Steam Vessels and full power Motor Vessels; Agreed April, 1961, between the Documentary Committee of the Chamber of Shipping of the U.K., London, the Documentary Council of BIMCO, the Timber Trade Federation of the United Kingdom, London, the U.S.S.R. Chamber of Commerce, Moscow, V/O "Exportles", Moscow, and V/O "Sovfracht", Moscow.

The shipowner must show that his servants, including the ship's master, who are employed to make the vessel seaworthy as required by the charterparty, actually use due diligence. Furthermore, there must be due diligence on part of the shipowner's servants in the use of equipment, before commencement of the voyage, and until the voyage actually begins.²³

²³ Ionian Steamship Co. of Athens v. United Distillers, 236 F. 2d 78, 1956 A.M.C. 1750 (5th Cir. 1956). In Smith Hogg & Co. v. Black Sea Insce. Co., [1940] 3 All E.R. 405, the cause of the loss was the unstable and unseaworthy condition of the vessel, which was due to a failure on the part of the owners and master to exercise due diligence. Therefore, the owners could not recover the general average loss.

E. The Contractual Obligation to Exercise due Dilligence
Throughout the Voyage

Some of the voyage charterparties do not refer to or incorporate the Hague or Hague/Visby Rules or national statutes thereof. Rather they warrant that the seaworthiness of the vessel shall be maintained, as far as possible by the exercise of due diligence, throughout the voyage (i.e. during the whole of the period of the charterparty) (see EXON MASTER INLAND WATERWAYS VOYAGE CHARTER AGREEMENT):²⁴

Owner shall, before and at the beginning of each voyage, exercise due diligence to make each Vessel seaworthy, properly manned, equipped and supplied for the voyage and to make the cargo tanks, pipelines, and valves of each Vessel suitable for the intended cargo and its pumps and heating coils, if any, in good working condition and shall exercise due diligence to maintain such condition...
[Emphasis added]

The following charterparties contain a similar clause:

EXXON MASTER INLAND WATERWAYS VOYAGE CHARTER AGREEMENT
(Clauses 1, 9): [General Voyage Charter party].

FINAVOY (Clause 2).

MOBILVOY 80 (Clause 1).

SHELLVOY 4 (Clause 1): Voyage [Tanker] Charter Party;
Revised May 1980.

STB VOY (Clause 1): Tanker Voyage Charter Party.

²⁴ See F.M. Ventris, Tanker Voyage Charter Parties (Bradford - on-Avon: Kluwer Law Publishers, 1986) at 49-57, where he deals with warranty of seaworthiness in the STB VOY charterparty.

IV. VESSEL TO BE TIGHT, STAUNCH AND STRONG

A. Preliminary Voyage

Voyage charterparties frequently contain express provisions regarding seaworthiness, such as that the vessel is "tight, staunch and strong, and in every way fitted for the voyage":

AFRICANPHOS 1950 (Clause 1): Phosphate Charter Party.

CENTROCON (Clause 2): Chamber of Shipping River Plate [Grain] Charter Party, 1914; Homewards; Amended September 6, 1934, January 1, 1937, January 1, 1950.

EUROMED 1983 (Preamble): [Grain Charter Party].

SAIGON CHARTER-PARTY (Clause 1): Steam or Motor; [Grain Charter Party]; April 1938; Agreed between the Chamber of Shipping Documentary Committee and the Syndicat des Exportateurs Francais d'Indochine.

SYNACOMEX (Clause 2): Continent Grain Charter Party; Amended 1974; Adopted by the Documentary Committee of the Chamber of British Shipping of the United Kingdom and the Documentary Council of BIMCO.

LAMCON (Clause 2): Iron Charter Party; From Lower Buchanan, Liberia, to all Destinations; Agreed October, 1961; Agreed with Trafikaktiebolaget Grangesberg - Oselosund, Stockholm.

MEDITERRANEAN C. (ORE) 7 (Clause 2): Iron Ore Charter Party.

MERIDORE 1965 (Clause 2): [Ore Voyage Charter Party].

SUGAR CHARTER-PARTY (Clause 5): Revised September, 1969.

SUGAR CHARTER-PARTY (Clause 5): Revised 1977.

The "vessel to be tight, staunch and strong" clause in a voyage charterparty relates to the preliminary voyage to the port of loading, referring to the time at which the contract is made or to the time of sailing for the port of loading. It does not replace

the implied undertaking of seaworthiness which relates to the time of sailing from the port of loading, but enlarges it by requiring the same at an earlier time than the commencement of loading or sailing.²⁵

The shipowner is not excused by the fact that a defect is latent and unknown to him.²⁶ This is an important distinction between the Common law absolute undertaking to provide a seaworthy ship and the Hague Rules duty of exercising due diligence. Under the former, the excuse of latent defect, even if such is undiscoverable, is not accepted. Under the latter, however, the shipowner is not liable unless the latent defect could have been discovered by exercising due diligence.

B. Contractual Voyage

Some charterparties expressly extend the obligation to provide a seaworthy ship throughout the voyage (see TANK VESSEL VOYAGE CHARTER PARTY):

That the said Vessel being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage...

²⁵ Stanton v. Richardson (1874) L.R. 9 C.P. 390; affirmed (1875) 45 L.J.Q.B. 78 (H.L.); Scott v. Foley (1899) 5 Com.Cas. 53; New York and Cuba Mail SS Co. v. Eriksen (1922) 27 Com.Cas. 330; A.A. Mocatta, M.J. Mustill, S.C. Boyd, Scrutton on Charterparties and Bills of Lading, Nineteenth Edition (London: Sweet & Maxwell, 1984) at 87; Ivamy, supra, note 10 at 17-18.

²⁶ The Edwin I. Morrison, 153 U.S. 199 (1894). See Hubert v. Recknagel, 13 Fed. 912 (S.D.N.Y. 1882).

TANK VESSEL VOYAGE CHARTER PARTY (Clause 1).

GUANO CHARTER PARTY (Clause 1): [Fertilizer Charter Party].

V. LATENT DEFECTS EXPRESSLY EXCEPTED

There are several voyage charterparties which contain the shipowner's obligation to exercise due diligence to protect the vessel from the bursting of boilers, the breakage of shafts, or any latent defect in the hull, machinery, etc. It is submitted, that such clauses do not exclude the implied warranty of seaworthiness but only limit it. The shipowner's liability for latent defects exists only if the latent defect cannot be discovered by exercising due diligence:

CENTROCON (Clause 29)

EUROMED 1983 (Clause 1).

SYNACOMEX (Clause 19).

MEDITERRANEAN C. (ORE) 7 (Clause 20).

MERIDORE 1965 (Clause 17)

SUGAR CHARTER -PARTY (Clause 8): 1969.

SUGAR CHARTER-PARTY (Clause 8): 1977.

In some cases regarding bills of lading which contained a similar clause, it was held that the clause was effectual to limit the implied warranty of seaworthiness.²⁷ However, a simple exception of "defects in hull, tackle or machinery" or "latent

²⁷ Cargo ex Laertes, (1877) 12 P.D. 187; Bond, Connolly v. Federal S.N. Co., (1905) 21 T.L.R. 438.

defects in hull" would not have the same effect.²⁸

VI. CLASS AND CERTIFICATE - SEAWORTHINESS

One "meat voyage charterparty" contains an interesting clause concerning seaworthiness which in fact equates seaworthiness with having the required class and certificate:

Required Class and Certificate shall be deemed to satisfy and discharge every obligation or warranty, express or implied, under Charter Party or Bill of lading, to provide a seaworthy and fit vessel for the voyage or any stage thereof...

PLATE-MEAT A. (Clause 8): Refrigerator-Meat Charter Party.

In some cases, shipowners tried to argue that the classification of the vessel represented conclusive evidence of seaworthiness. Their argument was rejected by the courts which held that ships are often retained in the classification long after they have become a hazard to navigation and a handicap to maritime commerce.²⁹

²⁸ Tudor Accumulator Co. v. Oceanic S.N. Co., (1924) 41 T.L.R. 81; The Christel Vinnen, [1924] P. 208.

²⁹ See Vandeventer, supra, note 9 at 838, citing The Negus, 298 F. 749 (S.D.N.Y. 1923); Navegacion Castro Riva v. The Nordholm, 178 F. Supp. 736 (E.D. La. 1959).

APPENDIX B - UNIVERSAL VOYAGE CHARTER PARTY 1984

Original drawn up and held by

UNIVERSAL VOYAGE CHARTER PARTY 1984
 (Revised Voyage Charter Party 1964)

Code Name: NUVOY-84

PART I-1

C/P: place and date

 Opened see
 PART II Cl No:
1. Preamble

(a) *Subject of Contract.* - It is hereby agreed between the Owners and the Charterers that the Vessel shall be presented at the loading port or so near thereunto as she may safely get and lie always afloat, and there - being in every respect fitted for carriage of the agreed cargo - shall load the cargo, which the Charterers bind themselves to supply, and carry it with all possible despatch (unless economic speed to conserve fuel expressly agreed) to the port of discharge or so near thereunto as she may safely get and lie always afloat, and deliver it there. Carriage under this Charter shall be performed against payment of freight and in accordance with the terms contained herein.

(b) *Identity of Parties.* - Parties described in Cl. 2 as Owners or (Time-)Chartered Owners or Disponent Owners or Disponents (hereinafter called "Owners") and in Cl. 3 as Charterers - shall each be deemed to be a Party to this Charter, and no evidence shall be admissible to show that they have contracted merely as agents.

(c) *Construction of the Charter.* - This charter consists of PART I and PART II. Typewritten provisions of PART I (and of the Rider, if any) shall prevail over printed provisions of this Preamble and of PART II to the extent of any conflict between them.

2. Owners

tix. No.

3. Charterers

tix. No.

4. Vessel name

GRT-NRT

DWAT*/DWCC*

built

flag

now

UMS: GT-NT

 further particulars
 cargo battens: not required*/required*
5. Cargo full*/part*: cargo of
 % more
 less at Owner's option, exact quantity being declarable (when)

completion cargo: allowed*/not allowed*

of which

may be carried on deck

6. Laydays not to commence before

CANCELLING DATE

7. Loading (a) port(s)/berth(s)

(b) Vsl's max draught loaded

swt*/bwt*/tw*

(c) daily rate*/total laytime*

SHINC*/SHEX*

(d) shore winch/cranemen for

account

(e) dunnage for

account

(f) Shippers

(g) cost load

8. Discharge (a) Port(s)/berth(s)

(f) cost discharge

(b) Vsl's max arrival draught

swt*/bwt*/tw*

(c) daily rate*/total laytime*

SHINC*/SHEX*

(e) Consignees

(d) shore winch/cranemen

account

 Recommended by
 the Documentary Council of The Baltic and
 International Maritime Conference, Copenhagen and
 the Documentary Committee of the General
 Council of British Shipping, London

* delete the inapplicable

 Joint by Polish Chamber of Foreign Trade, Gdynia
 and sold by
 Audzron Bogtrykari A/S, Toldbodgade 55
 13 Copenhagen K, Denmark

Otherwise see
PART II Cl No:

NUVOY-84 C:P dd

Vessel

361
Cargo

Load port

Disch port

PART I-2

20	9. Advance Notices which Owners are to give to following addressee(s)	35
	(a) port of loading	36
	- running days of approx date*, to	37
	- running days of definite date*, to	38
	- running hrs ETA, to	39
	(b) port of discharge	40
	sailing telg. from (last)load port, to	41
	ETA disch port hrs, to	42
26	10. Time Counting: Loading	43
	(a) NOR: 24 hrs SHINC*/24 hrs SHEX*/within office hrs SHEX*	44
27(a)	(b) commencement: upon NOR*/from 13.00 or 08.00 hrs* (or other times agreed)	45
27(b)	(c) intervals: weekend from hrs on to hrs on	46
	holiday from hrs on day preceding holiday to hrs on day after holiday	47
27(a)-(g)	other agreements	
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	(a) NOR: 24 hrs SHINC*/24 hrs SHEX*/within office hrs SHEX*	49
27(a)	(b) commencement: upon NOR*/from 13.00 or 08.00 hrs* (or other times agreed)	50
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	holiday from hrs on day preceding holiday to hrs on day after holiday	52
27(a)-(g)	other agreements	
36	12. Freight rate per on quantity	53
	when payable, currency beneficiary, bank, deductions, etc.	
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	(b) disch: rate payable by Charterers	56
	Despatch Money on working time (laytime) saved	57
	(a) load: rate payable to Charterers	58
	(b) disch: rate payable to Charterers	59
37, 38	14. Taxes (on Freight etc.), SPECIAL DUES, EXTRA INSURANCE (specify name & by whom payable)	60
50	15. Arbitration (place, tribunal/rules, law)	61
51	16. Brokerage % payable to	62
	17. Additional Clauses deemed to be incorporated in this Charter: No. to No.	63

For the Owners

For the Charterers

Remark		DISCHARGE	146
Actual agreements that are at variance with the printed text of PART II – to be entered by typing in PART I or in the Rider (not in the printed text of PART II). Sub-clauses marked with an asterisk (*) are optional alternatives. The heading of the Sub-clause actually agreed – to be entered by typing in the relevant Clause of PART I, whereby all other alternatives in PART II shall become inapplicable.		25. Cost (always subject to Cl. 33: Overtime)	147
		★ (a) <i>Free out (or: Free discharge).</i> – Charterers shall discharge the cargo from Vessel's holds, including shovel-cleaning, free of expense to Owners.	148
		★ (b) <i>Gross terms.</i> – Owners shall discharge the cargo from Vessel's holds, and place it unhooked and unslung, or dumped by grab, alongside the Vessel at their expense, and Charterers shall take the cargo from there at their expense.	150 151 152 153
VESSEL and CARGO		LOADING and DISCHARGE	154
18. Vessel	64	26. Notice of readiness (NOR)	155
(a) <i>Prerequisites.</i> – Owners shall ensure that:	65	(a) <i>In port.</i> – When the Vessel – on arrival at the port – is in all respects ready (whether in loading/discharging berth or not) to load/discharge the cargo under this Charter, at each port of loading/discharge the Master shall tender to Shippers/Consignees a written notice of Vessel's readiness to load/discharge, stating at loading port(s) the quantity of cargo required.	156 157 158 159 160
(aa) (class) the Vessel be classed Lloyd's Register 100 A1 or equivalent, and Owners shall exercise due diligence to maintain that class throughout the performance of this Charter.	66	Such notice to be tendered:	161
(ab) (technical requirements) the Vessel be equipped to meet the technical requirements as specified in Cl. 4.	67	(aa) 24 hrs SHINC: at any time, day or night, Sundays (or their local equivalents) and holidays included.	162
(ac) (compliance with regulations etc.) the Vessel and her Master and crew will comply with all safety, health and other statutory rules, regulations and internationally recognized requirements as are necessary to secure safe and unhindered loading, performance of the voyage and discharge of the cargo.	68 69 70 71 72 73 74 75 76 77 78 79	(ab) 24 hrs SHEX: at any time, day or night, Sundays (or their local equivalents) and holidays excepted.	163 164 165
(b) <i>Substitution.</i> – If in Cl. 4 Owners have expressly been given liberty to provide a substitute vessel, such substitute shall be in all respects equivalent to the Vessel named in this Charter.		(ac) <i>within office hrs SHEX:</i> within ordinary office hours, Sundays (or their local equivalents) and holidays excepted.	166 167
19. Cargo	80	(b) <i>Off port</i> (not applicable in 'berth' charters). – If – on Vessel's arrival off the port of loading/discharge – Charterers or their agents have not indicated a readily accessible loading/discharging berth, the Master shall be entitled to tender a written notice of readiness (as per 'a' hereabove) from such place of arrival, whether cleared at customs or not, whether in free pratique or not.	168 169 170 171 172 173
(a) <i>Warranty.</i> Charterers warrant that – unless otherwise specified in Part I – the cargo referred to in Cl. 5 is non-dangerous for carriage according to applicable safety regulations including IMO Code(s).	81	However, if at that time the Vessel should be prevented from entering the port by reason of Vessel's inefficiency or of other hindrances which constitute Owners' usual hazards – notice of readiness may not be tendered until such hindrances have ceased to exist.	174 175 176 177
(b) <i>Completion.</i> – If in Cl. 5 Owners have been given an option of completing with other cargo, the latter must in no way be detrimental to cargo under this Charter and is to be effectively separated therefrom at Owners' expense.	82 83 84 85 86	27. Time counting	178
		(a) <i>Commencement.</i> – Laytime for loading/discharge shall commence to count:	179
LOADING	87	(aa) <i>upon NOR:</i> on tendering Master's notice of readiness to Shippers/Consignees or their agents	180 181 182
20. Advance notices	88	★ (ab) <i>from 13.00 or 08.00 hrs:</i> at 13.00 hrs if Master's notice of readiness tendered to Shippers/Consignees or their agents before noon, or at 08.00 hrs next working day if notice tendered within office hours after noon.	183 184 185
(a) <i>Approximate date.</i> – Shippers are to receive from Owners a written notice stating the approximate date of Vessel's readiness to load, containing also Vessel's name and the approximate quantity of cargo required.	89	Such notice time not to apply to second/subsequent port(s) of loading/discharge, where laytime always to count upon tendering Master's notice of readiness.	186 187 188
(b) <i>Definite date.</i> – Shippers are to receive from Owners a written notice of the definite date of Vessel's readiness to load, containing also Vessel's name and the approximate quantity of cargo required.	90 91 92 93 94	Unless with Charterers' consent, laytime at loading port not to commence counting earlier than on the day of the definite loading date given as per Cl. 20 'b'.	189 190 191
The definite date of Vessel's readiness to load shall not be earlier than the approximate date.	95	(b) <i>Excepted periods</i> (not applicable if SHINC terms agreed). – Sundays (or their local equivalents) and legal holidays to be excepted unless used, in which event actual time used shall count.	192 193 194
In the event of Owners giving a too short notice of the definite loading date, commencement of the laytime shall be postponed by the number of days by which the notice has fallen short of the period agreed in Cl. 9.	96 97 98 99	Periods indicated in Cl. 10 'c' (Loading: intervals) and in Cl. 11 'c' (Discharge: intervals) to be treated as Sunday or holiday time.	195 196
See also Cl. 27 'd' (Earlier commencement).	100	(c) <i>Weather hindrances.</i> – Laytime shall not count when the loading/discharge of cargo into/from the Vessel under this Charter is actually prevented by adverse weather conditions.	197 198 199
(c) <i>ETA.</i> – The Master shall despatch to Shippers an E(xpected) T(ime of) A(rrival) message as per Cl. 9, or – if Vessel lying at the port of loading – shall give to Shippers a 48-hours notice of Vessel's expected readiness to load the cargo under this Charter.	101 102 103 104	(d) <i>Earlier commencement.</i> – Notwithstanding provisions of Cl. 20 'b' (Definite date) and of Cl. 27 'a', if the loading/discharge has started before the commencement of laytime, actual time used shall count in this period.	200 201 202
(d) <i>Alteration in readiness.</i> – Shippers are to be kept advised of any alteration in Vessel's expected readiness to load.	105 106	(e) <i>Waiting off port.</i> – If the notice of readiness as per Cl. 26 'b' (Off port) has been tendered while the Vessel was off the port, the laytime shall commence counting and shall count as if she were in berth.	203 204 205
21. Cost (always subject to Cl. 33: Overtime)	107	The time of shifting to the loading/discharging berth or to a waiting berth in port shall not count.	206 207
★ (a) <i>Free in and stowed/trimmed.</i> – Charterers shall load and stow/trim the cargo on board the Vessel free of expense to Owners.	108	After berthing, the actual time lost until the Vessel is in fact ready in all respects to load/discharge (incl. customs clearance, and free pratique if applicable) shall not count as laytime or time on demurrage.	208 209 210
Storage includes the lashing and/or securing of the cargo.	109	(f) <i>Termination.</i> – Laytime/demurrage shall cease counting on completion of loading (incl. trimming/stowage/ashing/securing) respectively discharge (incl. shovel-cleaning and/or discharge of Charterers' dunnage), or draught survey, or repairs of stavedore damage as per Cl. 34 'c' – whichever may be later.	211 212 213 214 215
★ (b) <i>Free in and spout/grab trimmed.</i> – Charterers shall load/dump the cargo into Vessel's holds and trim it mechanically with shore spout, or (at Charterers' option) with shore grabs, at their expense. Any extra trimming and/or levelling as required by Master shall be for Owners' account and time so used not to count as laytime or demurrage.	110 111 112 113 114 115	(g) <i>Inefficiency etc.</i> – Time lost due to inefficiency or any other cause attributable to the Vessel, her Master, her crew or the Owners, which affects the working of the Vessel – shall not count as laytime or as time on demurrage.	216 217 218
★ (c) <i>Gross terms.</i> – Charterers shall bring the cargo alongside the Vessel under hook unslung, or under grab, at their expense, and Owners shall sling, hook up, load and stow/trim the cargo at their expense.	116 117 118	28. Hatches – opening/closing	219
22. Cargo battens	119	At each port of loading/discharge, the first opening and the last closing of hatches, including removal and replacement of beams, shall be effected at Owners' expense and time shall not count, while – (if free in and/or free out terms agreed) any other opening/closing as required by Master shall be effected by shore labour at Charterers' expense and time to count, or – (if gross terms loading and/or discharge agreed) any other opening/closing shall be effected at Owners' expense and time not to count.	220 221 222 223 224 225 226 227
★ (a) <i>Required.</i> – Before tendering Master's notice of readiness, the Vessel to have cargo battens fitted.	120	29. Vessel's cargo gear (not applicable if in Cl. 4 Vessel described as gearless)	228
★ (b) <i>Not required.</i> – Before tendering Master's notice of readiness, the Vessel to have cargo battens removed, failing which Charterers or their agents shall not be held responsible for any damage to battens during loading/discharge.	121 122 123 124 125	(a) <i>Cargo handling gear.</i> – Owners shall always give free use, throughout the duration of loading/discharge, of all Vessel's cargo handling gear and of sufficient motive power to operate all cargo handling gear simultaneously.	229 230 231
23. Dunnage	126	(b) <i>Breakdowns.</i> – All such equipment to be in good working order up to tested capacity. Unless caused by negligence of Charterers' stevedores, time lost by breakdown of Vessel's cargo handling gear – pro rata the total number of cranes/winchmen required at that time for loading/discharging cargo under this Charter – shall not count as laytime or as time on demurrage.	232 233 234 235 236
★ (a) <i>For Charterers' account.</i> Charterers shall provide and lay all dunnage material as required by Master for proper stowage and protection of the cargo. Owners allowing the use of all dunnage available on board. Dunnage shall be laid in accordance with Master's instructions.	127 128 129 130	(c) <i>Cranemen/winchmen.</i> – Owners shall provide free of charge crane/winchmen from crew unless local regulations prohibit this, in which latter event shore labourers shall be for account of the party indicated in Cl. 7 (Loading) and Cl. 8 (Discharge).	237 238 239 240
In the absence of disposal instructions from Charterers, Master shall have liberty to dispose of the dunnage upon discharge. Any proved cost incurred thereby to be refunded by Charterers.	131 132	Shore crane/winchmen shall always work under supervision of the Master.	241 242
★ (b) <i>For Owners' account.</i> – Owners shall provide and lay all dunnage material required for proper stowage and protection of the cargo.	133 134 135		
24. Separation (see also Cl. 40 'b': Bs/L – Separate delivery)	136		
Charterers have the right to ship parcels of different description and/or for different Consignees in separate compartments within Vessel's natural segregation provided that such stowage, carriage and discharge are compatible with Vessel's seaworthiness, and provided that such separation does not affect Owners' right to receive the quantity of cargo as per Cl. 5.	137 138 139 140 141		
Charterers shall provide and lay all material as required by Master for proper separation of various parcels within Vessel's compartments, Owners allowing the use of all separation material available on board. Separation shall be laid in accordance with Master's instructions.	142 143 144 145		

30. Grab Loading/discharge (applicable to cargoes in bulk only)	243
(a) <i>Vessel's technical suitability.</i> - The Vessel to be suitable for grab loading and discharge.	244
(b) <i>Sealining.</i> - Inside Vessel's holds, all vulnerable structural parts and equipment of the Vessel to be protected by Owners against possible damage by grab loading/discharge, failing which Charterers or their agents shall not be held responsible for the damage.	246
(c) <i>Extra cost and time.</i> - If on Master's request cargo has been placed in compartments inaccessible to grabs (including deep tanks, wings and ends of 'tween-deck spaces) Owners shall bear the extra cost and extra time of loading, trimming and discharge above the cost and time of normal loading, trimming and grab discharge.	248
31. Light	255
Whenever required, Owners shall provide free of charge, throughout the duration of loading/discharge, light (as on board) for work on and under deck, and, (if necessary) alongside Vessel.	256
32. Shifting, Warping - Seaworthy trim	259
(a) <i>Shifting.</i> - If Charterers have an option of loading/discharging the Vessel at more than one berth, the cost of shifting from one berth to another shall be borne by Owners, but time shall count.	261
(b) <i>Waiting berth.</i> - If, for Owners' convenience, the Vessel has moored at a waiting berth (lay berth) in port, all shifting expenses thereto, and also from waiting berth to loading/discharging berth - shall be borne by Owners and time shall not count.	262
(c) <i>Warping.</i> - The Vessel shall be warped along the quay, without outside assistance except line runners, to and from the loading/discharging appliances as reasonably required by Charterers, at Owners' risk and expense, but time shall count.	263
(d) <i>Seaworthy trim.</i> - For moving between berths and ports the Vessel shall be left in a seaworthy trim in accordance with Master's instructions.	265
33. Overtime	273
(a) <i>Right to order.</i> - Irrespective of the division of loading/discharging cost as per Cl. 7 (Loading) and Cl. 8 (Discharge), Charterers or their agents and Owners have an option to order that the loading/discharge/shifting/warping be carried out beyond ordinary working hours and during excepted periods.	276
(b) <i>Shore labour.</i> - Extra cost of stevedores and all extra expenses incurred on shore to be for account of the party ordering the overtime.	278
(c) <i>Ordered by authorities etc.</i> - Where overtime is ordered by authorities or any other governmental agencies or persons/bodies empowered by authorities, or by the party (not being Charterers, Shippers or Consignees) controlling the loading/discharging terminal or facility - the extra cost and expenses incurred thereby shall be borne by the parties in conformity with the division of loading/discharging cost as per Cl. 7 'a' (Loading) and Cl. 8 'a' (Discharge).	280
(d) <i>Crew.</i> - Overtime expenses for Vessel's officers and crew shall always be for Owners' account.	282
34. Stevedore damage (not applicable when stevedores appointed by Owners)	289
(a) <i>Procedure of claiming.</i> - Whenever the Vessel has sustained damage (beyond ordinary wear and tear, and except Owners' failure under Cl. 30 'b': Sheathing) caused by stevedores, Owners shall endeavour to obtain the stevedores' written acknowledgement of liability and to settle stevedore damage claims direct with the stevedores. Failing such settlement, Owners shall immediately lodge their claim in writing with Shippers at loading port and/or with Consignees at port of discharge, and shall endeavour to settle their claim with the latter parties.	291
(b) <i>Charterers' responsibility.</i> - If not settled as under 'a', Charterers shall be ultimately responsible for stevedore damage. Owners to notify such damage to them by telex/telegram immediately after occurrence, or as soon as noticed, possibly before Vessel's departure from the port where damage has occurred, but latest by completion of discharge.	292
(c) <i>Repairs.</i> - Stevedores or cargo interests concerned may perform the repairs at any time before Vessel's departure from the port where damage has occurred. The time of repairs to count as laytime or time on demurrage.	293
(d) <i>Minor damage.</i> - Minor damage, not affecting Vessel's seaworthiness and/or cargoworthiness, to be mutually agreed as to value, which amount to be promptly paid without Vessel being detained. In such case no further compensation for time of repairs shall be due to Owners.	294
35. Shore tally	310
If shore tally has been ordered by Owners, it shall be arranged and paid for by Owners. If shore tally has been ordered by any other party, or if it is compulsory, it shall be paid for by Charterers or their agents.	311

PAYMENTS

36. Freight	315
(a) <i>When payable.</i> - Freight shall be paid by Charterers as per agreement in Cl. 12.	316
(b) <i>When deemed earned.</i> - Unless payable on/after right and true delivery of cargo, freight shall be deemed earned on shipment of cargo and shall be non-returnable. Vessel and/or cargo lost or not lost. The same rule shall apply pro rata to the pre-payable portion of the freight.	317
(c) <i>On delivered weight/quantity.</i> - If freight or part thereof is payable on delivery of cargo, Charterers shall have the option of paying freight on delivered weight/quantity provided such option be declared in writing before breaking bulk and the weight/quantity be ascertained by official weighing machine, otherwise by joint draught survey or by tally. Charterers shall pay all costs incurred in connection with weighing, draught survey or tally. Owners shall be at liberty to appoint check clerks at their own expense.	318
(d) <i>Rate of exchange.</i> - If freight is payable in other currency than that in which the freight rate is expressed, the payment shall be effected at the mean rate of exchange ruling at the place of payment on the day when freight falls due.	319

37. Dues, charges, taxes	333
(a) <i>On Vessel.</i> - Owners shall pay all dues, charges and taxes customarily levied on the vessel, howsoever the amount thereof may be assessed.	334
(b) <i>On cargo.</i> - Charterers shall pay all dues, charges, duties and taxes customarily levied on the cargo, howsoever the amount thereof may be assessed.	335
(c) <i>On freight.</i> - Taxes levied on the freight shall be paid by the party named in Cl. 14.	336

38. Extra insurance	341
Extra insurance on cargo - if incurred by reason of Vessel's age, class, flag or ownership - to be for Owners' account and may be deducted from freight. Unless a maximum amount has been agreed, such extra insurance shall not exceed the lowest extra premium which would be charged for the vessel and voyage in the London insurance market. Owners may require substantiation of the amount.	342

GENERAL

39. Cancelling	349
(a) <i>Missing the cancelling date.</i> - Should the Vessel not have given notice of readiness to load as per Cl. 26 by the cancelling date, Charterers shall have the option of cancelling this Charter.	350
(b) <i>Interpellation.</i> - Should Owners anticipate with reasonable certainty that the Vessel will not be ready to load by the cancelling date, they shall notify Charterers thereof without delay, stating the probable date of Vessel's readiness to load and asking whether Charterers will exercise their option of cancelling the Charter, or agree to a new cancelling date.	351
Charterers' option to be declared within 4 running days of receipt of such notice. If Charterers do not then exercise their option of cancelling, the fourth day after the new date of readiness indicated in Owners' notice shall be regarded as a new cancelling date. Provisions under this Sub-clause shall operate only once, and - in case of Vessel's further delay - Charterers shall have the option of cancelling the Charter as per Sub-clause 'a'.	352

40. Bills of Lading - Separate delivery	364
(a) <i>Presentation and signature.</i> - Upon completion of loading Shippers to present and Master to sign Bills of Lading. The "Nuvoybill-84" form to be used whenever possible.	365
(b) <i>Separate delivery.</i> - If so declared by Shippers before commencement of loading and if cargo delivered to the Vessel separately, a separate set of Bills of Lading shall be signed for each parcel.	366
Cargo under each Bill of Lading shall be delivered to Consignees separately.	367

41. Deviation	373
The Vessel shall have liberty to deviate for the purpose of saving life or property at sea, or in order to call at any port or place en route for fuel supplies as necessary for completion of the voyage under this Charter, or for any other reasonable purpose. Any such deviation to be reported to Charterers by radiogram as soon as possible.	374

42. Lien on cargo	379
(a) <i>Lien.</i> - Owners shall have a lien on cargo for freight, deadfreight and demurrage (including damages for detention, if any) due to them under this Charter, including necessary cost of recovering same. Charterers to remain responsible for payment of these items, but Owners shall take all reasonable steps to obtain satisfaction of their claim by exercising the lien.	380
(b) <i>Security.</i> - In case of disputes over items payable by Charterers/Shippers/Consignees, the interested party shall have an option of providing a letter of guarantee issued by a first class bank, in which event Owners not to exercise lien on cargo for such items.	381

43. Responsibilities and immunities	389
(a) <i>International Rules.</i> - Provisions of the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25th August 1924 (the 'Hague Rules'), shall apply to this Charter and to any Bill of Lading issued hereunder, the term 'Carrier', as used in these Rules, being taken to mean 'Owners' as party to this Charter. In respect of shipments to which national enactments of the said Rules are compulsorily applicable, provisions of such enactments shall prevail.	390
In trades where the above Convention as amended by the Protocol dated Brussels, 23rd February 1968 (the 'Hague-Visby Rules'), is compulsorily applicable, provisions of the Hague-Visby Rules shall apply.	391
(b) <i>Period of responsibility.</i> - Owners shall not be liable for loss of or damage to the cargo, howsoever arising, prior to loading into and after discharge from the Vessel.	392
(c) <i>Deck cargo and live animals.</i> - If shipment of deck cargo and/or live animals agreed, same to be carried at Charterers' risk. Deck cargo shall be secured under supervision of the Master.	393
(d) <i>General exemptions.</i> - Unless otherwise expressly provided in this Charter, neither party shall be responsible for any loss or damage or delay or failure in performance hereunder resulting from elements of nature; or from war, civil commotion, riot; or from act of state or of any ruling power; or from any unforeseeable event which cannot be avoided or guarded against, whether on land or at sea.	394

44. Charterers' stevedores	412
Where handling of the cargo is performed by stevedores appointed by Charterers or their agents, Master is to supervise the work performed by stevedores and to instruct them properly.	413
Should the stevedores refuse to follow his instructions, Master to protest to them in writing and to advise Charterers immediately thereof, disclaiming Owners' responsibility for safety of the cargo so mishandled.	414

45. Sub-chartering	419
Charterers may, under advice to Owners, sub-charter the Vessel, but shall always remain responsible to Owners for due fulfilment of this Charter and shall warrant that such sub-chartering will not restrict the Vessel in her future trading.	420

46. Strike etc.	424	wards or forwards, although in a contrary direction to or out of or beyond the	524
(a) General principle. - Neither Charterers nor Owners shall be responsible	425	ordinary route. In the event of the Master electing to proceed with part cargo	525
for the consequences of strike or lock-out preventing or delaying the fulfill-	426	under this Clause freight shall in any case be payable on the quantity deliv-	526
ment of any obligation under this contract.	427	ered.	527
(b) Loading port. - In the event of strike or lock-out affecting the loading of	428	(4) If at the time the Master elects to proceed with part or full cargo under	528
cargo, or any part of it, when the Vessel is ready to proceed from her last	429	Clause 3, or after the Vessel has left the loading port, or the last of the load-	529
port or at any time during the voyage to the port or ports of loading or after	430	ing ports if more than one, it appears that further performance of the con-	530
her arrival there, Owners may ask Charterers to declare that they agree to	431	tract will subject the Vessel, her Master and crew or her cargo, to war risks,	531
count the laytime as if there were no such hindrance. Unless Charterers have	432	the cargo shall be discharged, or if the discharge has been commenced	532
given such declaration in writing (by telegram, if necessary) within 24	433	shall be completed, at any safe port in vicinity of the port of discharge as	533
hours, Owners shall have the option of cancelling this Charter. If part cargo	434	may be ordered by the Charterers. If no such orders shall be received from	534
has already been loaded, the Vessel must carry it to the port of discharge	435	the Charterers within 48 hours after the Owners have despatched a request	535
(freight payable on loaded quantity only) having liberty to complete with	436	by telegram to the Charterers for the nomination of a substitute discharging	536
other cargo on the way for Owners' own account.	437	port, the Owners shall be at liberty to discharge the cargo at any safe port	537
(c) Anticipated strike etc. - In the event of strike or lock-out which can rea-	438	which they may, in their discretion, decide on and such discharge shall be	538
sonably be expected - before the loading has commenced - to affect the	439	deemed to be due fulfillment of the contract of affreightment. In the event of	539
discharge of cargo, Owners are at liberty to cancel this Charter unless	440	cargo being discharged at any such other port, the Owners shall be entitled	540
Charterers declare (within 24 hours of receipt of Owners' notification of in-	441	to freight as if the discharge had been effected at the port or ports named in	541
tended cancellation) that they agree to count the laytime at port of dis-	442	the Bill(s) of Lading, or to which the Vessel may have been ordered pursuant	542
charge as if there were no such hindrance, without prejudice to the Consig-	443	thereto.	543
nees' right of ordering the Vessel to a substitute port of discharge in accor-	444	(5) (a) The Vessel shall have liberty to comply with any directions or re-	544
dance with Sub-clause (d). In the said 24 hours time for loading does not	445	commendations as to loading, departure, arrival, routes, ports of call, stop-	545
count.	446	pages, destination, zones, waters, discharges, delivery or in any other wise	546
(d) Discharging port. - In the event of strike or lock-out affecting the dis-	447	whatsoever (including any direction or recommendation not to go to the port	547
charge of cargo on or after Vessel's arrival at or off the port of discharge,	448	of destination or to delay proceeding thereto or to proceed to some other	548
Consignees shall have the option of keeping the Vessel waiting until such	449	port) given by any Government or by any belligerent or by any organized bod-	549
strike or lock-out is at an end against paying half demurrage after expiration	450	body engaged in civil war, hostilities or warlike operations or by any person or	550
of the time provided for discharging, or of ordering the Vessel to a safe port	451	body acting or purporting to act as or with the authority of any Government	551
where she can safely discharge without risk of being detained by strike or	452	or belligerent or of any such organized body or by any committee or person	552
lock-out. Such orders to be given within 48 hours after Owners have given	453	having under the terms of the war risks insurance on the Vessel, the right to	553
notice to Consignees of Vessel's readiness to discharge or of Owners' re-	454	give any such directions or recommendations. If, by reason of or in compli-	554
quest for orders. All conditions of this Charter and of the Bill of Lading is-	455	ance with any such direction or recommendation, anything is done or is not	555
sued hereunder shall apply to the delivery of cargo at such substitute port,	456	done, such shall not be deemed a deviation.	556
and Owners shall receive the same freight as if the cargo had been dis-	457	(b) If, by reason of or in compliance with any such directions or recommen-	557
charged at the original port of destination, except that if the distance of the	458	dations, the Vessel does not proceed to the port or ports named in the Bill(s)	558
substitute port exceeds 100 nautical miles, freight on the cargo delivered at	459	of Lading or to which she may have been ordered pursuant thereto, the Ves-	559
the substitute port to be increased in proportion.	460	sel may proceed to any port as directed or recommended or to any safe port	560
(e) Notification. - The party who first learns about the occurrence of strike or	461	which the Owners in their discretion may decide on and there discharge the	561
lock-out shall immediately notify thereof the other party.	462	cargo. Such discharge shall be deemed to be due fulfillment of the contract	562
47. Ice	463	of affreightment and the Owners shall be entitled to freight as if discharge	563
Loading Port	464	had been effected at the port or ports named in the Bill(s) of Lading or to	564
(a) Before Vessel's arrival. - If the Vessel cannot reach the loading port by	465	which the Vessel may have been ordered pursuant thereto.	565
reason of ice when she is ready to proceed from her last port, or at any time	466	(6) All extra expenses (including insurance costs) involved in discharging	566
during the voyage, or on her arrival, or if frost sets in after her arrival, the	467	cargo at the loading port or in reaching or discharging the cargo at any port	567
Master - for fear of Vessel being frozen in - is at liberty to leave without	468	as provided in Clauses 4 and 5 (b) hereof shall be paid by the Charterers	568
cargo; in such cases this Charter shall be null and void.	469	and/or cargo owners, and the Owners shall have a lien on the cargo for all	569
(b) During loading. - If during loading the Master - for fear of Vessel being	470	moneys due under these Clauses.	570
frozen in - deems it advisable to leave, he has liberty to do so with what	471	49. General average, New Jason and Both-to-Blame Collision Clauses	571
cargo he has on board and to proceed to any other port with option of com-	472	General average shall be adjusted in accordance with the York- Antwerp	572
pleting cargo for Owners' own account to any port or ports including the port	473	Rules 1974, or any subsequent modification thereof, and as to matters not	573
of discharge. Any part cargo thus loaded under this Charter to be forwarded	474	provided for by these Rules - in accordance with the law and practice pre-	574
to destination at Vessel's expense against payment of the agreed freight,	475	vailing at the place where the adjustment is drawn up.	575
provided that no extra expenses be thereby caused to Consignees, freight	476	Owners shall have the right to decide the place where the adjustment will	576
being paid on quantity delivered (in proportion if lump sum), all other condi-	477	be drawn up and to appoint the average adjuster.	577
tions as per Charter.	478	If the adjustment of the General Average or the liability for any collision in	578
(c) Loading at more than one port. - In case of more than one loading port,	479	which the vessel is involved while performing the voyage under this Charter	579
and if one or more of the ports are closed by ice, the Master or Owners to be	480	Party fails to be determined in accordance with the law and practice of the	580
at liberty either to load a part cargo at the open port and fill up elsewhere for	481	United States of America, the following clauses shall apply:	581
Owners' own account as under Sub-clause (b) or to declare the Charter null	482	New Jason Clause	582
and void unless Charterers agree to load full cargo at the open port.	483	In the event of accident, danger, damage or disaster before or after the com-	583
Voyage and Discharging Port	484	encement of the voyage, resulting from any cause whatsoever, whether	584
(d) Before Vessel's arrival. - Should ice prevent the Vessel from reaching	485	due to negligence or not, for which, or for the consequence of which, the	585
the port of discharge, Consignees shall have the option of keeping the Ves-	486	Carrier is not responsible, by statute, contract or otherwise, the goods,	586
sel waiting until the reopening of navigation and paying demurrage, or of or-	487	Shippers, Consignees or owners of the goods shall contribute with the Car-	587
dering the Vessel to a safe and immediately accessible port where she can	488	rier in general average to the payment of any sacrifices, losses or expenses	588
safely discharge without risk of detention by ice. Such orders to be given	489	of a general average nature that may be made or incurred and shall pay	589
within 48 hours after Owners or Master have given notice to Charterers of	490	salvage and special charges incurred in respect of the goods.	590
impossibility of reaching port of destination.	491	If a salving ship is owned or operated by the Carrier, salvage shall be paid	591
(e) During discharge. - If during discharging the Master - for fear of Vessel	492	for as fully as if the said salving ship or ships belonged to strangers. Such	592
being frozen in - deems it advisable to leave, he has liberty to do so with	493	deposit as the Carrier or his agents may deem sufficient to cover the esti-	593
what cargo he has on board and to proceed to the nearest safe and access-	494	mated contribution of the goods and any salvage and special charges	594
ible port. Such port to be nominated by Charterers/Consignees as soon as	495	thereon shall, if required, be made by the goods, Shippers, Consignees or	595
possible, but not later than 24 running hours, Sundays and holidays exclud-	496	owners of the goods to the Carrier before delivery.	596
ed, of receipt of Owners' request for nomination of a substitute discharging	497	Both-to-Blame Collision Clause	597
port, failing which the Master will himself choose such port.	498	If the Vessel comes into collision with another ship as a result of the neglig-	598
(f) Discharge at substitute port. - On delivery of the cargo at such port, all	499	ence of the other ship and any act, neglect or default of the Master, Mariner,	599
conditions of the Bill of Lading shall apply and Owners shall receive the	500	Pilot or the servants of the Carrier in the navigation or in the management of	600
same freight as if the Vessel had discharged at the original port of destina-	501	the Vessel, the owners of the cargo carried hereunder will indemnify the	601
tion except that if the distance to the substitute port exceeds 100 nautical	502	Carrier against all loss or liability to the other or non-carrying ship or her	602
miles, freight on the cargo delivered at that port to be increased in propor-	503	Owners in so far as such loss or liability represents loss of, or damage to, or	603
tion.	504	any claim whatsoever of the owners of said cargo, paid or payable by the	604
48. War risks ("Voywar 1950")	505	other or non-carrying ship or her Owners to the owners of said cargo and	605
(1) In these Clauses "war risks" shall include any blockade or any action	506	set-off, recouped or recovered by the other or non-carrying ship or her	606
which is announced as a blockade by any Government or by any belligerent	507	Owners as part of their claim against the carrying Vessel or Carrier. The fo-	607
or by any organized body, sabotage, piracy, and any actual or threatened	508	regoing provisions shall also apply where the Owners, operators or those in	608
war, hostilities, warlike operations, civil war, civil commotion, or revolution.	509	charge of any ship or ships or objects other than, or in addition to, the collid-	609
(2) If at any time before the Vessel commences loading, it appears that per-	510	ing ships or objects are at fault in respect of a collision or contact.	610
formance of the contract will subject the Vessel or her Master and crew or	511	50. Arbitration	611
her cargo to war risks at any stage of the adventure, the Owners shall be en-	512	Any dispute arising under this Charter shall be referred to arbitration at the	612
titled by letter or telegram despatched to the Charterers, to cancel this	513	place and before the arbitration tribunal indicated in Cl. 15 in accordance	613
Charter.	514	with the procedure and (unless otherwise agreed) with the substantive law	614
(3) The Master shall not be required to load cargo or to continue loading or	515	prevailing there.	615
to proceed on or to sign Bill(s) of Lading for any adventure on which or any	516	51. Brokerage	616
port at which it appears that the Vessel, her Master and crew or her cargo	517	Brokerage upon the freight and deadfreight shall be paid by Owners and	617
will be subjected to war risks. In the event of the exercise by the Master of	518	shall be deemed to be earned by Brokers upon shipment of cargo.	618
his right under this Clause after part or full cargo has been loaded, the Mas-	519		
ter shall be at liberty either to discharge such cargo at the loading port or to	520		
proceed therewith. In the latter case the Vessel shall have liberty to carry	521		
other cargo for Owners' benefit and accordingly to proceed to and load or	522		
discharge such other cargo at any other port or ports whatsoever, back-	523		

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