The Important Reform of Significant Clauses Within the Essential Standard Forms of the Time Charterparty

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Abstract

The time charter plays a very significant role in the practical shipping field. However, the time charterparty itself has attracted little consideration by researchers working in the field. In addition, there are still many legal issues that require resolution as it is possible to easily confuse merchants, leading to further practical disputes.

This thesis explores the core characteristics of the time charter. It discusses crucial legal issues and aims to resolve potential legal disputes. It also considers key improvements to the relevant significant clauses in the current essential standard forms of the time charterparty by way of recommending revisions to clauses within various charterparties such as the BALTIME form, the NYPE 46 form, the NYPE 93 form and the GENTIME form. The original contribution of this thesis is not only the modification of vital clauses in these essential forms for merchants, but also the provision of constructive ways of reforming the remaining clauses in these forms thereby providing a potential guiding framework for the revision of other standard charterparty forms in the future.

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CHAPTER 1:

INTRODUCTION

1.1 Research Background

The development of the time charter took place in the latter half of the nineteenth century.[1] This was triggered when the duration of shipping became precisely predictable due to the dependable improvement of the triple enlargement of the engine resulting in an economical and reliable steamship.[2] These attributes made paying for the service of the vessel for a period of time rather than on the basis of a voyage more desirable to the time charterer.[3] In addition, when the time charter was established, demise (bareboat) charters[4] became less popular within the shipping and finance industries than in the past.[5]

The time-chartered vessel still plays an important role in modern commercial

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[1] *The Albazero* [1977] AC 774 [808] (Roskill, L.J.); *Triad Shipping Co. v Stellar Chartering & Brokerage Inc. (The Island Archon)* [1994] 2 Lloyd's Rep 227 [232] (Evans L.J.); Martin Stopford, *Maritime Economics* (3th edn, Routledge 2009) 50; See also Paul Todd, *Maritime Fraud* (Informa Professional 2003) 117-18.
[2] ibid.
[3] ibid.
[4] John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 7; Christopher Smith, 'Time Charterparties' in Bernard Eder and others (eds), *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet and Maxwell Limited 2011) para 4-004.
[5] Todd (n 1) 118-19.

shipping practice and it can function as a sub-charter,[6] a liner,[7] or tramp vessel.[8] The various types of time chartered vessels are designed for carrying different commodities.[9] For example, a container is usually carried under the liner, and bulk carriers are able to transport dry cargo, such as coal, grains or iron ores.[10] In addition, tankers are specially designed for carrying oil, gas and chemicals.[11]

The time charterparty is one kind of charterparty.[12] The general concepts relating to the time charterparty are described and explained in the following sections in order to initially build a general foundation and provide a clear and easy basis for the subsequent discussion of significant legal issues in the following chapters and guide the direction of this thesis.

1.1.1 The governing law of the time charterparty

The regulation 593/2008 (Rome I) replaces the Rome Convention[13] and it applies to contractual obligation in commercial and civil issues in the

[6] Charles Debattista, 'Cargo Claims and Bills of Lading' in Yvonne Baatz (ed), *Maritime Law* (2nd edn, Sweet & Maxwell 2011); See the explanation in Section 6.7.1 in Chapter 6.
[7] The liner service might run between major ports. Wilson (n 4) 5; See Section 6.7.1 in Chapter 6.
[8] Wilson (n 4) 5. The time charted vessel might commercially operate the services of tramp vessels to sail from port to port in order to seek cargo.
[9] *Dry Cargo Chartering* (2011/2012 edn, Witherby Publishing Group Ltd 2011) 2, 82; *Tanker Chartering* (2011/2012 edn, Witherby Publishing Group Ltd 2011) 1-8.
[10] *Dry Cargo Chartering* (n 9) 2, 82. Alan E. Branch, *Elements* of Shipping (8th edn, Routledge 2007) 5.
[11] *Tanker Chartering* (n 9) 1-8, 14-16, 111-112.
[12] Wilson (n 4) 3-4.
[13] This is "The Convention on the Law Applicable to Contractual Obligations". The Contract (Applicable Law) Act 1990 gives Rome Convention the force of law in England. Terence

occurrence of a conflict of laws.[14] Therefore, with the exception of some issues[15] currently the issue of applicable law regarding contractual claims is decided by Rome I.[16]

It is provided in Article 3.1 of Rome I[17] that the law is chosen by the contractual parties governing the contract.[18] In addition, this choice must be 'expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.'[19] Therefore, for example, under Article 3.1 of the Rome I,[20] if contractual parties under the time charter expressly choose English law as the governing law of their time charterparty, then their choice of law is valid.[21] It can be seen that an expression of governing law chosen by the contractual parties under the time charter is usually provided either in the essential standard form of the time charterparty—such as Clause 22 of the BALTIME form,[22] Clause 45 of the NYPE 93 form[23] or Clause 22 of the

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Coghlin and others, *Time Charters* (6th edn, Informa 2008) para 1.19; <http://www.legislation.gov.uk/ukpga/1990/36> accessed 27 September 2013.

[14] This refers to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). <http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/jl0006_en.htm> accessed 15 December 2013.

[15] 'It does not apply to revenue, customs or administrative matters.' See Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 723; See also Article 1 (2) of Rome I.

[16] Chuah (n 15) 723.

[17]<http://eurlex.europa.eu/legalcontent/EN/ALL/;jsessionid=QkGST5jNtDV5hKJQ6qF5gxRql2Z7bV2y7jVxyh2sn1NvdcjkvKC1!1948192893?uri=CELEX:32008R0593> accessed 15 December 2013.

[18] Ibid; It is provided in Article 28 of Rome I that 'The Regulation shall apply to contracts concluded after 17 December 2009'.

[19] Ibid; Under Article 3.1 of Rome I, the parties also can choose the law governing the whole or merely part of the contract. .

[20] ibid.

[21] ibid.

[22] The BALTIME form 1939 (as revised 2001). Unless otherwise specified, all reference to the BALTIEM form refer to the BALTIME form 1939 (as revised 2001). D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 288.

[23] Peter Brodie, *Commercial Shipping Handbook* (2nd edn, Informa 2006) 45.

GENTIME form[24]—or in the clause which is added under the agreement by the contractual parties.[25] However, if any expression of governing law provision cannot be found in the time charterparty, the demand for arbitration of disputes in a specific place, such as London, is normally stipulated within an arbitration provision in the time charterparty.[26] If London arbitration is chosen, English law is implied as the choice of governing law of the time charterparty.[27]

For the purposes of clarity, the chapters of this thesis are primarily based on English law when discussing the issues relating to the time charterparty.

1.1.2 Paramount clause

A consideration of both Article I (b) and Article V of the Hague[28] and Hague-Visby Rules,[29] shows that the Rules are not used in the charterparty.[30] This is because parties who have similar commercial bargaining power to

[24]<https://www.bimco.org/~/media/Documents/Document_Samples/Time_Charter_Parties/Sample_Copy_GENTIME.ashx> accessed 29 March 2011.
[25] Coghlin and others (n 13) para 1.21.
[26] ibid.
[27] Dicey, Morris & Collins, *The Conflict Laws* (14th edn) paras 32.094-32.097; Coghlin and others (n 13) para 1.21; C.M.V. Clarkson and Jonathan Hill, *The Conflict of Laws* (4th edn, OUP 2011) 212.
[28] The full name of the Hague Rules is 'International Convention of the Unification of the Certain Rules of Law relating to Bills of Lading'. <http://www.admiraltylawguide.com/conven/haguerules1924.html> accessed 8 April 2011.
[29] The whole name of the Hague-Visby Rules is 'Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading' <http://www.admiraltylaw.com/statutes/hague.html> accessed 5 February 2011; The Carriage of Goods by Sea Act 1971 had added the Hague-Visby Rules as a schedule and the Act was made effective in the U.K. on 23 June 1977. Wilson (n 4) 174. <http://www.legislation.gov.uk/ukpga/1971/19/contents> accessed 18 April 2011.
[30] Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 268, 279.

negotiate the terms of the charterparty do not need to be protected by the Hague[31] and the Hague-Visby Rules[32] as the holder of a transferable bill of lading and the consignee of a straight bill of lading are already protected by these Rules.[33] However, aiming to keep the obligations the same within both the charterparty and the bill of lading,[34] it is normal that the Hague[35] or Hague-Visby Rules,[36] or other similar national legislation enacting any of these Rules,[37] is incorporated into the charterparty and the bill of lading.[38] This is known as a clause paramount or a paramount clause.[39]

Through being governed by English law, the incorporation of the Rules[40] into a charterparty via the paramount clause will be deemed as the terms of a contract.[41] In addition, it is likely that the paramount clause is regarded by the English court as an intention by contractual parties to be superior to the conflicting terms of the charterparty when any conflict is shown between the provisions of the Rules and the charterparty.[42] The impact of the incorporation of the Rules into the time charterparty by way of a paramount

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[31] (n 28).
[32] (n 29).
[33] Yvonne Baatz, 'Clause Paramount in Time Charters' in Thomas (n 22).
[34] ibid.
[35] (n 28).
[36] (n 29).
[37] For example, the US Carriage of Goods by Sea Act 1936 adopts the Hague Rules 1924. <http://www.forwarderlaw.com/library/view.php?article_id=285> accessed 18 July 2013; it has been found that the US Carriage of Goods by Sea Act 1936 is incorporated into Clause 24 of the NYPE 46 form and Clause 31 of the NYPE 93 form.
[38] Girvin (n 30) 279, 283; Baatz (n 33); Jan Ramberg, 'Freedom of Contract in Maritime Law' (1993) LMCLQ 178.
[39] ibid.
[40] (n 28); (n 29).
[41] Coghlin and others (n 13) para 34.1.
[42] For example, *Marifortuna Naviera S.A v Government of Ceylon* [1970] 1 Lloyd's Rep 247 [255] (Mocatta J); *Nea Agrex S.A v Baltic Shipping Co. Ltd. (The Agios Lazaros)* [1976] QB 933 (CA) [943]-[944] (Lord Denning MR); Girvin (n 30) 279-80.

clause[43] might appear in the seaworthiness obligation,[44] carrying dangerous goods,[45] the time bar[46] and the exemptions.[47] The related details of the impact of incorporating the Rules into the time charterparty through a paramount clause will be discussed in the relevant chapters of this thesis.[48]

1.1.3 Clarifying the general concept of the time charter

It is important to clarify the general concept of the time charterparty and the time charter in order to reach a deep discussion of the significant legal issues and to find a way to solve any related problems in the time charterparty. However, the time charterparty and the time charter are often easily misunderstood and confused with the other two kinds of charterparties and charters.[49] For the purposes of distinguishing the essential concept of the time charterparty and the time charter from the concept of the demise (bareboat)[50] charterparty and the demise charter; and the voyage charterparty and the voyage charter, the general and basic principles of

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[43] Baatz (n 33).
[44] See Chapter 2.
[45] See Chapter 3.
[46] It is held by Colman J in *The Marinor* that, in order to apply the time bar in Art III, rule 6 of the Hague/ Visby Rules, it is necessary to sufficiently connect the claim with the goods shipped. *Noranda Inc. v Barton (Time Charter) Ltd. (The Marinor)* [1996] 1 Lloyd's Rep 301 [312] (Colman J) Therefore, when the Hague-Visby Rule is incorporated into the time charterparty, the one-year time bar in Art III, Rule 6 of the Hague-Visby Rules will be applied within the time charterparty if the loss or damage claim is linked to the carried cargo. See Grant Hunter, 'Standard Forms-the BIMCO experience in Thomas (n 22). In addition, according to English law, the time bar in Article III, Rule 6 of the Hague-Visby Rules usually starts from arbitration proceedings. See *The Merak* [1964] 2 Lloyd's Rep 527; Coghlin and others (n 13) para 34.34.
[47] See Chapter 7.
[48] See Chapter 2, 3 and 7.
[49] This refers to the demise (bareboat) charterparty and the demise charter; and the voyage charterparty and the voyage charter.
[50] See (n 4).

these latter kinds will also be also introduced in this section.

Being governed by the rule of supply and demand and being negotiated under a currently free charter market, a charterparty is formed on the basis of the freedom of contract,[51] the terms of which are negotiated by the shipowner and the charterer, who have relative commercial bargaining powers.[52]

The demise (bareboat)[53] charterparty, the voyage charterparty and the time charterparty are three elementary[54] types of charterparty.[55] For each kind of charterparty, the contract is established between the shipowner and the charterer (the demise charterer under the demise charter;[56] the voyage charterer under the voyage charter;[57] and the time charterer under the time charter[58]).

Under the nature of the lease, a demise charterer is granted whole possession and control of the vessel by the shipowner for the duration of the charter.[59] Therefore a demise charterer practically acts as a shipowner,

[51] Yvonne Baatz, 'Charterparties' in Baatz (n 6).
[52] Wilson (n 4) 3.
[53] See (n 4).
[54] The variety of hybrids might be seen under the charter on the basis of the freedom of contract. For example, a charter may be formed for a particular voyage which operates under a time charter; or a time charter may be formed as with consecutive voyage charters, which perform a sequence of voyages between planned ports. Wilson (n 4) 4; Simon Baughen, *Shipping Law* (5th edn, Routledge 2012) 185-86.
[55] Indira Carr, *International Trade Law* (4th edn, Routledge-Cavendish 2010) 162.
[56] Wilson (n 4) 7.
[57] Baughen (n 54) 184.
[58] ibid.
[59] *Shipping Law* (2011/2012 edn, Witherby Publishing Group Ltd 2011) 155.

equips and employs the crew of the vessel[60] and takes all responsibilities for the management and navigation of the vessel as well as the expenses of running the vessel.[61]

In terms of the voyage charter, as a typical example, a seller who sells goods under a CIF contract[62] supplies the voyage charter to carry goods to the buyer, the seller then acts as the voyage charterer taking responsibility for transporting particular cargo between particular ports and for arranging the reception of the cargo at the destination and the port of discharge.[63] In addition, the voyage charterer is liable for the cost associated with the time of loading and discharging the cargo beyond the contractual lay days.[64] The shipowner still controls and operates the vessel and supplies the carrying services.[65] The freight paid to the shipowner by the voyage charterer is either calculated in proportion to the quantity of carried cargo, such as a fixed rate per ton of cargo for the voyage, or as a lump sum for the voyage.[66]

In terms of the time charter, this has its own special characteristics and these

[60] Wilson (n 4) 7.
[61] *Shipping Law* (n 59); Wilson (n 4) 7.
[62] CIF stands for "cost, insurance and freight". Under the CIF contract, the freight and insurance are covered in the price. Therefore, the seller takes responsibility for arranging the entirety of transporting goods by sea, which covers those relevant to insurance. The buyer would state the port of arrival or nominate one of a number of ports at some period after the contract is established. In addition, it is necessary for the buyer to get hold of the shipping documents, such as the bill of lading, commercial invoice and insurance policy, in order to take the goods which are delivered. See Michael Furmston and Jason Chuah (eds), *Commercial and Consumer Law* (Pearson Education Limited 2010) 269; Ewan Mckendrick (ed), *Goode on Commercial Law* (4th edn, Penguin Books Ltd 2010) 951, 1042.
[63] Wilson (n 4) 4-5.
[64] This is known as demurrage. Baatz (n 51); Wilson (n 4) 5, 76; *Shipping Law* (n 59) 148.
[65] ibid; Wilson (n 4) 4-5.
[66] Wilson (n 4) 5.

are indeed radically distinct from the demise charter[67] and the voyage charter.[68] Under the time charter, the shipowner still possesses and controls the vessel through the Master and crew who are hired by the shipowner.[69] On the other hand, the time charterer needs to pay the shipowner for the time charter service[70] in exchange for ordering the Master and using the vessel to run his/her business and reach his/her commercial aim[71] during an agreed period of time[72] within the contractual permission.[73]

The following chapters in this thesis shape the key picture of the important legal liability of the shipowner and the time charterer under the time charter. Based on these core characteristics of the time charter,[74] crucial legal issues are discussed and this thesis aims to resolve the possible disputes by way of proposing reforms to the essential standard forms of the time charterparty.[75]

1.1.4 The important standard forms of the time charterparty

[67] John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (2nd edn, JUTA & Co, LTD 2009) 747.
[68] Wilson (n 4) 85.
[69] The ship owner takes responsibilities for the navigation. The discussion of the ship owner's responsibility will be shown in Chapter 2, Chapter 6 and Chapter 7.
[70] This will be dealt with in Chapter 5.
[71] This will be discussed in Chapter 6.
[72] This will be dealt with in Chapter 4 and Chapter 5.
[73] Chapter 3 will deal with this.
[74] *The Berge Tasta* [1975] 1 Lloyd's Rep 442 [424] (per Donaldson, J.); Coghlin and others (n 13) para 1.13; Christopher Hill, *Maritime Law* (6th edn, Informa Professional 2003) 171. *Sea & Land Securities v Dickinson* [1942] 72 Ll.L Rep 159 [163] (MacKinnon, L.J.); *The Hill Harmony* [2001] 1 Lloyd's Rep 147 [156] (Lord Hobhouse); Coghlin and others (n 13) para 1.10.
[75] Such as the BALTIME form, the NYPE 46 and NYPE 93 forms, and the GENTIME form.

The BALTIME 1939 (as revised in 2001),[76] the NYPE 46 form (the 1946 version of the New York Produce Exchange form)[77] and the NYPE 93 form (the 1993 version of the New York Produce Exchange form),[78] and the GENTIME form[79] will be considered as the currently significant standard forms of the time charterparty.

The BALTIME 1939 form,[80] which is a specifically owner-friendly form, remains broadly used in short-sea trade and is still one of BIMCO's[81] most well-known documents.[82] The part I Box Layout of this form was presented in 1974.[83] The only minor technical change was the substitution of outdated clauses in the latest published version of the form by BIMCO[84] in 2001; however, there is actually no material change in the version of the form.[85] It is known as BALTIME 1939 (as revised in 2001).[86]

The New York Produce Exchange form (1913) was updated in 1921, 1931, 1946, 1981 and 1993.[87] The ASBATIME (1981)[88] has received a

[76] Thomas (n 22) 286-89.
[77] Harvey Williams, *Chartering Documents* (4th edn, LLP Reference Publishing 1999) 228-31.
[78] Brodie (n 23) 32-46.
[79] (n 24).
[80] Thomas (n 22) 286-89.
[81] BIMCO is the major world shipping organization which takes responsibility for the progress of free-standing clauses and standard forms of contract for shipping fields as well as offering advice, education and valuable information in order to assist the commercial operation of its membership. <https://www.bimco.org/en/About/About_BIMCO.aspx> accessed 28 September 2013; Hunter (n 46).
[82] Hunter (n 46).
[83] ibid.
[84] <https://www.bimco.org/> accessed 28 September 2013.
[85] Hunter (n 46).
[86] ibid.
[87] ibid.
[88]<http://www.shipinspection.eu/index.php/home/k2-item-view/item/73-asbatime> accessed 28 September 2013.

considerably restricted acceptance in the charter market.[89] The NYPE 46 form[90] continues to exist as the most significant and commonly used standard form of the time charterparty for dry cargo[91] charters.[92] When shipbrokers refer to the NYPE form, they commonly refer to the NYPE 46 form.[93] The NYPE 93 form[94] is the current version of the New York Produce Exchange form[95] and it is one of the contemporary leading standard forms of time charterparty.[96] The NYPE 93 form[97] was completed as a consequence of cooperation between BIMCO,[98] ASBA[99] and FONASBA.[100] Subsequently, it has been added to the approved list of BIMCO.[101] The up-to-date and more modern version of the form is listed because it is concerned with the change in the practicality of the charter market and the development of types of vessel.[102]

[89] Hunter (n 46).
[90] Williams (n 77) 228-31.
[91] Such as coal, grains or iron ores. See (n 10).
[92] Hunter (n 46); Coghlin and others (n 13) para 1.2.
[93] Hunter (n 46).
[94] Brodie (n 23) 32-46.
[95] Hunter (n 46).
[96] Girvin (n 30) 600.
[97] Brodie (n 23) 32-46.
[98] See (n 81).
[99] Association of Ship Brokers and Agents Inc. <www.asba.org> accessed 28 September 2013. 'ASBA is an independent membership trade association, established in 1934 that brings together member Shipbrokers, Agents and Affiliates with offices in the United States and Canada. ASBA advances and fosters the ideas and standards of professional conduct and practices and is a medium through which members with common interests can communicate.'
<http://www.maritime-executive.com/maritime-directory/Assoc-of-Shipbrokers-and-Agents-(ASBA)/> accessed 28 September 2013.
[100] The Federation of National Association of Shipbrokers & Agents. This organization endorses fair and equitable practice and makes sure that the requests of its members are recognized at the maritime field and governmental level.
<https://www.fonasba.com/fonasba-member> accessed 28 September 2013.
[101] Hunter (n 46).
[102] ibid.

It is worth mentioning that, even though there is a new draft of NYPE 2014[103] which proposed to include the provisions of some new development of issues in the time charter, such as providing the specific duty on the matter of electronic bills of lading and other dematerialised documentation,[104] providing the shipowner should comply with the requirements of the ISM[105] and ISPS Codes[106] into the NYPE 2014 form,[107] until the completion of this phd thesis, the draft of NYPE 2014 form[108] is still in an uncertain, immature and changeable stage by showing that it is open to industries to give comments and feedback as well as to be reviewed the industries' comments by the draft team.[109] Therefore, no further formal explanatory notes of NYPE 2014 form[110] had been supplied by BIMCO[111] and no authority, such as court decision, had mentioned a relevant point of view of these new issues. In order not to confuse the academic and practical field, this phd thesis tries to narrow down the discussion to certain important issues of pre-existing clauses in NYPE 46 and NYPE 93 forms. When the NYPE 2014 form[112] further evolves in the final and certain stage and there are enough authorities, the following researchers, if they are interested in the new development of issues in the NYPE 2014 form,[113] can also continue to deeply explore this area.

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[103]<https://www.bimco.org/~/media/News/2014/NYPE_93_v_NYPE_2014_comparison.ashx?RenderSearch=true> accessed 10 September 2014.
[104] ibid. See Clause 32 of new draft of NYPE 2014 form.
[105] See Clause 46 of new draft of NYPE 2014 form.
[106] See Clause 47 of new draft of NYPE 2014 form.
[107] See (n 103).
[108] ibid.
[109]<https://www.bimco.org/news/2014/06/30_industry_invited_to_comment_on_updated_nype_charter.aspx> accessed 10 September 2014;
<https://www.bimco.org/news/2014/08/11_industry_engages_with_new_nype.aspx> accessed 10 September 2014.
[110] See (n 103).
[111] See (n 84).
[112] See (n 103).
[113] ibid.

The GENTIME form[114] is designed on the basis of BOXTIME,[115] which was the existing standard form of the time charter party for container[116] vessels published by BIMCO in 1999.[117] It is designed to reflect the modern time chartering industry and to improve the standard form of the time charterparty to provide a balanced and contemporarily well-drafted form under the time charter by BIMCO.[118] The form is intended for use in the dry cargo[119] area and in the container industry.[120] The GENTIME form[121] might also be regarded as one of the currently important standard forms of the time charterparty.[122]

The discussion of reforming the standard forms of the time charterparty in the following chapters within this thesis intends to focus on the improvement of the dry cargo standard forms of time charterparty and therefore it is based on the aforementioned important current standard forms of the time charterparty which include the BALTIME form,[123] the NYPE 46[124] and NYPE 93[125] forms, and the GENTIME form.[126]

[114] (n 24).
[115]<https://www.bimco.org/en/Chartering/Documents/Time_Charter_Parties/Withdrawn_forms/~/media/Chartering/Document_Samples/Withdrawn/Sample_Copy_BOXTIME.ashx> accessed 28 September 2013.
[116] A container is a large box which is designed for the transport of goods by sea. <http://oxforddictionaries.com/definition/english/container> accessed 27 September 2013.
[117] Hunter (n 46).
[118] ibid.
[119] See (n 91).
[120] Hunter (n 46).
[121] (n 24).
[122] Girvin (n 30) 600.
[123] Thomas (n 22) 286-89.
[124] Williams(n 77) 228-31.
[125] Brodie (n 23) 32-46.
[126] (n 24).

1.2 Research motivation and method

Finding ways to improve the crucial clauses within the essential standard forms of the time charterparty[127] is an area worthy of dedicated study and interest. However, it has not yet been systematically researched in the field. Therefore, this thesis aims to explore and discuss the significant legal issues of the important clauses within the time charterparty and searches for an approach to solving their related legal problems by making a constructive contribution toward improving these imperfect standard contractual forms.

Even though the interview is one type of methodology, this thesis does not use interviewing of relevant users of those forms as a methodology. Instead a text-based approach has been adopted in this thesis. This is because the text-based methodology allows various materials to be compared, contrasted and analysed such as books, journals, websites, different essential standard forms of the time charterparty,[128] case law and comments, industry practice and arbitration awards. By way of the text-based methodology, it assisted in finding strengths and weaknesses in the important clauses within the different essential standard forms of the time charterparty[129] whose contents had possibly been interpreted by judgments or discussed through various other materials. This further achieves the aim of this thesis which is to reform the important clauses of the essential standard forms of the time charterparty.

[127] (n 75).
[128] ibid.
[129] ibid.

1.3 The aim and normative foundation of the thesis

The thesis is concerned with the reform of these important clauses within the current essential standard forms of the time charterparty. By what criteria should the reform of these clauses be guided?

There is a vast literature which examines the principles which should be followed in drafting rules which are to function as "standard" or "default" terms for private parties' bargains.[130] For the purpose of this thesis, the assumption of this thesis is that the terms should aim to promote "economic efficiency"[131] This familiar prescription has come to dominate much of the discussion around the drafting of such rules.[132]

Efficiency is a notoriously controversial goal, however. There has been much debate about whether or not it is desirable for lawmakers, or judges, to pursue efficiency, especially where doing so may conflict with other values, such as "fairness". It is not the aim of this thesis to defend the choice of this value in comparison to alternatives, such as fairness, when designing default rules for time charterparties. Providing such a defence would surely deserve a thesis in its own right. Rather, the aim of this thesis is to work out what

[130] For a good introduction, see for example D. Charny, 'Hypothetical Bargains: The Normative Structure of Contract Interpretation' [1991] 89 Michigan Law Review 1815.
[131] In simple terms, we may follow Cooter and Ulen and say that 'economic efficiency is a comprehensive measure of public benefits that include the profits of firms, the well-being of consumers, and wages of workers'. Robert B. Cooter and Thomas Ulen, *Law and Economics* (6th edn, Pearson Education Limited 2014) 4.
[132] ibid; C. A. Riley, 'Designing Default Rules in Contract Law: Consent, Conventionalism and Efficiency' [2000] 20 OJLS 367.

efficiency actually requires, in the context of time charterparty terms. It is worth noting, nevertheless, as other writers have observed, that although efficiency has admittedly proved controversial as a guide to the reform of, say, tort law,[133] reliance on this value when drafting terms that serve only as default rules, within consensual contractual relationships, seems much more defensible.[134] And this applies even more so to the extent that the rules in question are being promulgated, as they are here, "in advance", so that contractors are, or should be, aware of the rules even before they enter into a contractual relationship in the first place (as opposed to the default rule being designed by an adjudicator, in the course of settling a pre-existing dispute).[135]

Even if, however, we accept that reforms to time charterparty terms should be driven by the value of efficiency, how are we to know what makes any particular, proposed, term more, or less, efficient, than alternative formulations of that term? Again, there is a considerable literature exploring what considerations should guide the draftsperson who wishes to produce contractual default terms that are efficient.[136] The starting point is usually taken to be that the choice of term should aim to reduce the parties' "transaction costs", for by reducing such costs the drafter of the standard

[133] See for example the criticisms in R. Dworkin, 'Why Efficiency?' [1980] 8 Hofstra L.Rev 563.
[134] See Riley (n 132) 384-87.
[135] ibid.
[136] See e.g. Charny (n 130); I. Ayres and R. Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' [1989] 99 Yale LJ.87; R. Craswell, 'Efficiency and Rational Bargaining in Contractual Settings' [1992] 15 Harvard.J.of Law and Public Policy 805.

terms can help to maximise the parties' wealth.[137] The literature on transaction costs then seeks to identify what the content of a standard contract term should be if it is to fulfil this transaction cost-saving goal.[138]

Three factors seem especially important here, and these factors will inform much of the analysis in the remainder of this thesis. First, clarity and comprehensibility of any chosen term are crucial if it is to function well in reducing parties' transaction costs. If terms are unclear, then parties will waste time and money in the process of seeking to understand the term's content, either ex ante, or ex post. Unclear terms will also fail to guide the parties' behaviour in the desired way during the currency of the contract. Unclear terms will also increase disputes about the meaning of the chartperparty, undermining enforcement. Finally, a lack of clarity is also likely to lead to increased litigation, which links to the second factor that is stressed as being important here.

This second factor is that, in attempting to reduce transaction costs, rules must be designed so as to limit adjudication costs.[139] The costs of adjudication are part of the costs of enforcement. This thesis, therefore, will explore in depth the relationship between charterparty terms and past judicial

[137] 'Transaction costs are the costs of exchange.' (1) search costs, (2) bargaining costs and (3) enforcement costs are the three types of transaction costs corresponding to these three steps of an exchange. Cooter and Thomas Ulen (n 131) 74.
[138] For a clear explanation of the issue here, see I.Ayres, 'Preliminary Thoughts on the Optimal Tailoring of Contractual Rules' [1993] 3 S.Cal.Interdisciplinary Law J 1.
[139] It is recommended that the costs are more economically efficient to have fixed rules of law rather than solve by disputes by judges. Richard Stone, *The Modern Law of Contract* (10th edn, Routledge 2011) 20.

interpretations and practices. The aim is to ensure that the terms which are suggested "fit" appropriately with previous case law, and minimise the likelihood of interpretive conflicts.

The third factor that is relevant in seeking to reduce transaction costs is to ensure that the terms proposed fit with existing commercial practice. Why is this important? For one thing, it should ensure that the terms are more likely to reflect the actual expectations of contracting parties, which is often taken as itself being "fairer".[140] But moreover, in terms of "transaction cost analysis", it is generally accepted that transaction costs are more likely to be saved if a standard contract term mimics the term which the majority of contractors would have chosen anyway – what is sometimes referred to as the parties' "hypothetical bargain".[141] In this way, the standard term avoids most transaction costs, by saving most parties the need to think out, and write out, their own bespoke rule.

It must of course be admitted that reducing transaction costs (and thereby adjudication costs too) cannot be the only consideration if one's goal is "efficiency". It is conceivable that sometimes a term that reduces transaction costs (say because it is perfectly clear, and reflects what most contractors would choose anyway) may still be economically inefficient. It is for this reason that "efficiency analysis" of standard contract terms aims not merely

[140] See eg Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' [1997] 113 Law Q.Rev 433.
[141] See Charny (n 130) 1840-1848.

to mimic prevalent commercial practice, but also sometimes to improve on that practice. It is sometimes said, therefore, that the efficient term must be an "idealised" one – the term which ideally economically rational parties would choose.[142] Two comments might be made in response to this point.

First, it is easy to exaggerate this conflict between actual commercial practice and ideally rational economic choices. The practices of thousands of real world parties entering into time charterparties is likely to contain a great deal of accumulated wisdom about just what terms best promote the economic health and well-being of those parties. Accordingly, anyone seeking to draft new charterparty terms must surely accord a great deal of presumptive "efficiency" to terms and commercial practices which real parties, gambling with their own money, have worked out over many years.[143]

Second, whilst the foregoing point is surely correct, it is nevertheless important to consider whether proposed terms do indeed produce sound economic results. Crucial here is to ensure that such terms provide a sound and defensible allocation of the economic risks that are an inevitable feature of the activities which the time charterparty governs. Accordingly, within the thesis, analysis of relevant commercial practice will be supplemented, where appropriate, with direct analysis of the efficient allocation of such risks.

[142] See generally Craswell (n 136).
[143] See R. D. Cooter, 'Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant' [1996] 144 Uni.of Penn. L Rev 1643.

1.4 Thesis structure

Chapter 2 begins with a discussion and analysis of the important legal issues relevant to the beginning of the time charter service, such as the cancelling clause, misdescription of the vessel, the seaworthiness of the vessel, and maintaining the vessel. In addition, the arguable issue which, 'substantially deprives the time charter of the whole benefit of the contract'[144] will be discussed. Possible recommendations to manage the legal risk and solve practical disputes will be made.

Chapter 3 analyses the interaction scenario between the shipowner and the time charterer when the latter breaches trading limits and safe port undertakings within the time charterparty while using the time charter service. To resolve this dilemma, the legal consequences of the time charterer's breach will be clearly presented in the proposed reform. In Chapter 4, the extent of the margin, the early and late ending of the time charter service, will be discussed. The chapter will also consider how to reasonably allocate risk in ensuring differing legal consequences for the late ending of the time charter service for legitimate and illegitimate final voyages.

In Chapter 5, by way of discussing safeguarding both the shipowner and the time charterer's legal rights with respect to their commercial targets, the

[144] This is indicated in *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha* [1962] I All ER 474 (CA).

drawbacks of the relevant clauses in the time charterparties[145] will be explored and suggestions will be made for better designing these clauses. Chapter 6 will clarify the scope of the time charterer's orders for the Master and discuss the connection between the shipowner's indemnity and the time charterer's ordering for the Master. The chapter will consider the practical difficulties of distinguishing who the contractual carrier is and make some recommendations for improving this. Chapter 7 examines the exemptions clause within these time charterparties.[146] The imperfection of Clause 12 of the BALTIME form[147] will be discussed and possible improvements will be proposed. Finally, Chapter 8 will provide a concluding analysis by presenting the original contribution of this thesis.

[145] (n 75).
[146] ibid.
[147] Thomas (n 22) 287.

CHAPTER 2:

BEGINNING OF THE TIME CHARTER SERVICE

2.1 Introduction

The legal issues regarding the "delivery of the vessel"[1] between the shipowner and the time charterer are materially important in the time charterparty, because they will greatly affect the time charterer's use of the vessel and his/her rights to perform his/her specific commercial purpose.[2] This chapter will analyse and evaluate the legal liabilities regarding the "delivery of the vessel"[3] for both the shipowner and the time charterer under the time charterparty by discussing significantly relevant legal issues and possible improvements to the disputable clauses in respect of "delivery of the vessel"[4] in the essential standard forms of the time charterparty.[5] This chapter will start by clarifying the concept of "delivery of the vessel".[6] Then, the cancelling clause and misdescription of the vessel will be analysed. Following the seaworthiness of the vessel, maintaining

[1] It is suggested in Section 2.2 of this Chapter to use the wording "beginning of the time charter service" instead of "delivery of the vessel".
[2] John D.Kimball, 'Termination of Right under Time Charters' in D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008).
[3] See (n 1).
[4] ibid.
[5] Such as the BALTIME form 1939 (as revised 2001), the NYPE 46 and NYPE 93 forms, and the GENTIME form.
[6] See (n 1).

the vessel will be discussed. The possible reform of these under the time charterparty will be shown in the relevant sections of this chapter.

2.2 Clarifying the concept of "delivery of the vessel"

It is incorrect to interpret the legal characteristics of the time charterparty only on the basis of the principle *noscitur a sociis*.[7] Concepts including that the owners "let", the charterers "hire" , and that the vessel is "delivered" in the clause regarding "delivery of the vessel"[8] under a time charterparty, and even within clauses such as clause 1 of the latest BALTIME form 2001 revision[9] and clause 1 and 2 of the NYPE 93 form,[10] are still used and easily confused with the legal characteristics of a demise charterparty. This is because the vessel is delivered to the demise charterer who hires the whole vessel for a period and the demise charterer fully controls the vessel under the demise charterparty.[11] Even though the vessel is controlled by the shipowner reaching the time charterer and it is the shipowner who places the vessel in the available berth at the time

[7] This means that a word is to be interpreted on the basis of its context. <http://www.duhaime.org/LegalDictionary/N/Nosciturasociis.aspx> accessed 16 May 2011.
[8] See (n 1).
[9] Thomas (n 2) 286; There is no substantial difference between the 2001 revision of the BALTIME form and the earlier versions of the BALTIME form, except War Risks (revised Clause 20) and Dispute Resolution (revised Clause 22). In addition, the merchants could edit the standard form to create their time charterparties in practice. Grant Hunter, 'Standard Form-the BIMCO experience' in Thomas (n 2).
[10] Peter Brodie, *Commercial Shipping Handbook* (2nd edn, Informa 2006) 32-33.
[11] *Sea & Land Securities v Dickinson* [1942] 72 LIL Rep159 [163] (MacKinnon, L.J.); Terence Coghlin and others, *Time Charters* (6th edn, Informa 2008) para 1.10; Christopher Smith, 'Charterparties' in Bernard Eder and others (eds), *Scrutton on Charterparties and Bills of Lading* (22th edn, Sweet and Maxwell Limited 2011).

charterer's disposal, the vessel is legally put at the charterer's service.[12] The time charterer merely exercises his/her right to the service of the vessel, starting from the beginning of the period of the time charter until the end of the contractually allowed period of the time charter, and pays for the services[13] since the vessel is still controlled and possessed by the crews hired by the shipowner.[14] Thus, it is necessary to declare in advance, due to the special legal characteristics of the time charterparty, that "delivery of the vessel" or "the vessel is delivered"[15] as used under the time charterparty, should refer to the "beginning of the time charter service";[16] in other words, they also refer to the start of the time charterer's "using the vessel" through his/her ordering the Master and the crew, who are owned by the shipowner.[17] Therefore, it is suggested that this conventional but confusing wording in the modern time charterparty form should be changed. It will be proposed that the "beginning of the time charter service" should be used, instead of the term, "the vessel is delivered" under the time charterparty.[18] These changes are recommended in order to clarify the specific characteristics of the time charterparty and to avoid potential misunderstandings as well as to directly reflect previous views expressed in the courts about these traditional issues in the time charterparty.

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[12] ibid para 1.35.
[13] *The Berge Tasta* [1975] 1 Lloyd's Rep 442 [424] (per Donaldson, J.); Coghlin and others (n 11) para 1.13; Christopher Hill, *Maritime Law* (6th edn, Informa Professional 2003) 171.
[14] *Sea & Land Securities v Dickinson* (n 11) [163] (MacKinnon, L.J.); *The Hill Harmony* [2001] 1 Lloyd's Rep 147 [156] (Lord Hobhouse); Coghlin and others (n 11) para 1.10.
[15] For example, '…the vessel is "delivered" and placed at the disposal of the Charterers between 9a.m. and 6 p.m., or between 9 a.m. and 2 p.m….' in Line 20 and 21 of clause 1 of the BALTIME form 2001 revision; 'The Owners agree to let and the Charterers agree to hire the Vessel from the time of "delivery" for a period of…' in Line 24 and 25 of clause 1 of the NYPE 93 form
[16] *The Berge Tasta* (n 13) [424] (per Donaldson, J.); Coghlin and others (n 11) para 1.13.
[17] *Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 Lloyd's Rep 253 [256]-[257] (Lord Diplock); Coghlin and others (n 11) para 1.4.
[18] Smith (n 11).

Taking this action would clarify the issue for merchants, aid comprehension and avoid future disputes in practice.

2.3 The cancelling clause

Under a time charterparty, an implied obligation is normally imposed on the shipowner to show due diligence in supplying the vessel, whose condition is readiness for beginning the time charter service by the particular cancelling day.[19] In *The Democritos*, Kerr J. pointed out that the charterer could cancel the charter only on the cancelling day if the vessel is not sent to the charterer in readiness by the cancelling day.[20] Before that, all the charterer can do is to continue to wait and he/she is under no obligation to do anything.[21] It was also shown in *Moel Tryvan*[22] that the shipowner cannot demand a charterer's declaration in advance, whether or not this optional charterer's right to cancel will be exercised.[23]

[19] *The Democritos*[1976] 2 Lloyd's Rep 149 (CA) [152] (Lord Denning); Coghlin and others (n 11) para 7.51, 24.1, 24.4, 24.8; To make sure the condition of the vessel is ready, for example, it needs to comply with all the essentials set out in Line 21 to 24 of the NYPE 46 form. Coghlin and others (n 11) para 8.34. In addition,' The position under English Law is generally that if an owner renders a vessel to perform a charterparty in an unseaworthy condition, the charterers can refuse to take delivery of the vessel until the defects have been remedied. Furthermore, the charterers will generally have the protection of a contractual right to cancel if the defects are not remedied by a specific cancelling date.' See Mark Hamsher, 'Seaworthiness and the Hongkong Fir decision' in Thomas (n 2).
[20] *The Democritos* [1975] 1 Lloyd's Rep 386; Coghlin and others (n 11) para 24.12.
[21] ibid [397] (Kerr, J.).
[22] *Moel Tryvan v Weir* [1910] 2 KB.844; Coghlin and others (n 11) para 24.12.
[23] Coghlin and others (n 11) para 24.12.

If the vessel cannot be sent to the time charterer by the shipowner to allow the time charter service to begin by a particular time, there is likely no legal liability for the shipowner.[24] On the other hand, in this circumstance, the time charterer can exercise the right to cancel[25] and therefore terminate the time charterparty.[26] Whether or not the shipowner is at fault carries no weight with regard to the time charterer's right to cancel the time charter.[27] The protections to both the shipowner and the time charterer are indicated by a cancelling clause under the time charterparty when the vessel is delayed in reaching the time charterer.[28] Clause 21 of the BALTIME form[29] and Clause 14 of the NYPE 46 form[30] exemplify the time charterer's option of cancelling the time charterparty.

However, weather and sea conditions are controlled by nature and it is always difficult to accurately predict when risks taken at sea will impact upon the sailing of the vessel. Clause 16 of the NYPE 93 form[31] and Clause 1 (d) of the

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[24] *The Democritos* (n 20) (Bridge, L.J.); Coghlin and others (n 11) para 24.2.
[25] This is by way of written or oral notice to notify the shipowner. Coghlin and others (n 11) para 24.15.
[26] Coghlin and others (n 11) para 24.2.
[27] ibid para 24.5; Yvonne Baatz, 'Charterparties' in Yvonne Baatz (ed), *Maritime Law* (2nd edn, Sweet & Maxwell 2011).
[28] Coghlin and others (n 11) para 24.2.
[29] The BALTIME form 1939 (as revised 2001). Unless otherwise specified, all reference to the BALTIEM form refer to the BALTIME form 1939 (as revised 2001). Clause 21 of the BALTIME form provided that 'Should the Vessel not be delivered by the date indicated in Box 22, the Charterers shall have the option of cancelling. If the Vessel cannot be delivered by the cancelling date, the Charterers, if required, shall declare within 48 hours after receiving notice thereof whether they cancel or will take delivery of the vessel'. Thomas (n 2) 288.
[30] 'That if required by Charterers, time not to commence before… and should vessel not have given written notice of readiness on or before…but not later than 4 p.m. Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness.'
[31] 'If the Owners warrant that, despite the exercise of due diligence by them, the vessel will not be ready for delivery by the cancelling date, and provided the Owners are able to state with

GENTIME form[32] take this situation into account and clearly give the shipowner extra flexibility for the extension of the sending time if this is required by the particular situation under the time charterparty.[33] These clauses also provide instruction for both parties to deal with these special circumstances. The expression regarding the extension of cancelling is not only fair, giving the shipowner more time and space to deal with accidents, but also gives the time charterer the option to choose whether or not to cancel a time charter, thus balancing both parties' rights. In addition, particularly under Clause 1 (d) of the GENTIME form, it also has the merit of providing a time restriction which indicates that if the time charterer fails to reply within "two working days" of receiving notification of an extension, then the new cancelling date will replace

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reasonable certainty the date on which the vessel will be ready, they may, at the earliest seven days before the vessel is expected to sail for the port or place of delivery, require the Charterers to declare whether or not they will cancel the Charter Party. Should the Charterers elect not to cancel, or should they fail to reply within two days or by the cancelling date, whichever shall first occur, then the seven day after the expected date of readiness for delivery as notified by the Owners shall replace the original cancelling date. Should the vessel be further delayed, the owners shall be entitled to require further declarations of the Charterers in accordance with this Clause.' Brodie (n 10) 37.

[32] 'Should the Vessel not be delivered by the date/time stated in Box 10 the Charterers shall have the option to cancel the Charter Party without prejudice to any claims the Charterers may otherwise have on the Owners under the Charter Party. If the Owners anticipate that, despite their exercise of due diligence, the Vessel will not be ready for delivery by the date/time stated in Box 10, they may notify the Charterers in writing, stating the anticipated new date of readiness for delivery, proposing a new cancelling date/ time and requiring the Charterers to declare whether they will cancel or will take delivery of the Vessel. Should the Charterers elect not to cancel or should they fail to reply within two (2) working days (as applying at the Charterers' place of business) of receipt of such notification then unless otherwise agreed, the proposed new cancelling date/ time will replace the date/time stated in Box 10. This provision shall operate only once and should the vessel not be ready for delivery at the new cancelling date/time the Charterers shall have the option of cancelling the Charter Party.' <https://www.bimco.org/~/media/Documents/Document_Samples/Time_Charter_Parties/Sample_Copy_GENTIME.ashx> accessed 29 March 2011.

[33] (n 31); (n 32).

the original cancelling date, thereby resolving this legal issue within a reasonable number of days.[34]

2.3.1 The reform of the cancelling clause under the time charterparty

There are some aforementioned advantages of the extension of cancellation time which provides a reasonable time limitation in which to ascertain the legal position of both parties under Clause 16 of the NYPE 93 form[35] and Clause 1 (d) of the GENTIME form, it is therefore suggested to use those and to modify Clause 21 of the BALTIME form[36] and Clause 14 of the NYPE 46 form[37] in order to make them more complete and flexible.

However, the interpellation mechanism[38] which is limited to operating "once" within Clause 1 (d) of the GENTIME form permits the shipowner at an early period to inform the time charterer that he/she cannot meet the cancellation day while stating the anticipated new day of readiness for the beginning of the time charter service.[39] It is proposed that this restriction to operating "once" at the end of Clause 1 (d) of the GENTIME form[40] be removed. Since the charterer already has protection by exercising the option of cancelling the time charter

[34] (n 32).
[35] Brodie (n 10) 37.
[36] Thomas (n 2) 288.
[37] Harvey Williams, *Chartering Documents* (4th edn, LLP Reference Publishing 1999) 230.
[38] Hunter (n 9).
[39] (n 32).
[40] ibid.

upon receiving notification from the shipowner, to strictly limit this interpellation mechanism to “once” under the Clause 1 (d) of the GENTIME form[41] is unnecessary. This clause concerns the uncontrollable peril of the sea and gives flexibility to the shipowner, but there is likely no reason for prohibiting him/her to operate this clause again if the vessel is again not ready for sending to the time charterer based on uncontrollable perils of the sea at the time of the new cancelling date.

As mentioned above, in terms of the cancelling clause, even though there are strengths in both Clause 16 of the NYPE 93 form[42] and Clause 1 (d) of the GENTIME form,[43] drawbacks still exist in both. Therefore, the best way to reform the cancelling clause in the time charterparty, whether in the BALTIME form,[44] the NYPE 46 form,[45] the NYPE 93 form[46] or the GENTIME form,[47] is to keep the strengths under the cancelling clause of the GENTIME form,[48] to modify Clause 21 of the BALTIME form,[49] Clause 14 of the NYPE 46 form,[50] and Clause 16 of the NYPE 93 form,[51] as well as deleting the parts of Clause 1 (d) of the GENTIME form[52] which have been criticised earlier in this section.

[41] ibid.
[42] Brodie (n 10) 37.
[43] (n 32).
[44] Thomas (n 2) 285-89.
[45] Williams (n 37) 228-31.
[46] Brodie (n 10) 32-46.
[47] (n 32).
[48] ibid.
[49] Thomas (n 2) 288.
[50] Williams (n 37) 230.
[51] Brodie (n 10) 37.
[52] (n 32).

2.4 Misdescription of the vessel

Description of the vessel is provided in the preamble of the BALTIME form[53] and of the NYPE 46 form[54] and the NYPE 93 form.[55] The vessel should be in compliance with the description of the vessel, such as name, flag, gross and net tonnage, speed, fuel consumption and cargo capacity, which are agreed by both the shipowner and the time charterer.[56] Otherwise, the vessel provided could conflict with the time charterer's intention and his/her commercial plan for establishing the time charterparty and this would involve the issue of misdescription.[57] For example, the real speed of the vessel would likely affect the efficiency of the vessel.[58] The plan and commercial target of the time charterer may not be achieved if the speed of the vessel does not accurately match its description in the time charterparty and it would also fail to meet the actual expectations of the time charterer. Therefore, as indicated by Lord Roskill in The TFL Prosperity,[59] the shipowner cannot base on the exemption clause of the BALTIME form[60] to assert immunity from a claim of misdescription of the vessel, otherwise this exemption clause would conflict with the expressed true

[53] Thomas (n 2) 286.
[54] Williams (n 37) 228.
[55] Williams (n 37) 228; Brodie (n 10) 32.
[56] Coghlin and others (n 11) para 3.17.
[57] ibid para 3.38.
[58] ibid para 3.73.
[59] *The TFL Prosperity* [1984] 1 Lloyd's Rep 123 [130]; Coghlin and others (n 11) para 37.69.
[60] Clause 13 of the BALTIME form. Thomas (n 2) 287.

common intention regarding the vessel shared by both contractual parties and this clause would then be regarded as unfair.[61]

Moreover, the time charterer may not suffer particularly substantial losses from the misdescription of the vessel.[62] However, the time charterer is entitled to damages when misdescription of the vessel decreases the value of the vessel and thus causes the time charterer to suffer particular loss.[63] It is indicated in *Tibermede v Graham*[64] and *Sterns v Salterns*[65] that the damages claimed by the time charterer can be 'measured as the difference between the hire agreed and the hire that would have been payable for the ship if accurately described.'[66]

There is a debate in respect of when the vessel should be the same as the description under the time charterparty. The view of Mocatta J. in *The Apollonius*[67] indicates that the vessel should be in compliance with her description at the "delivery" time, except for the class of the vessel.[68] Evans J. and Parker L.J. in *The Al Bida*[69] also appear to believe that, at least in terms of description of a vessel's consumption and speed, the approach of Mocatta J. in *The Apollonius* is correct.[70] However, Bingham L.J. in *The Didymi* stated that the

[61] Coghlin and others (n 11) para 37.69.
[62] ibid para 3.38.
[63] If there is any material misdescription of the vessel, it breaches a contract and the time charterer may have legal right to claim damages. ibid para 3.18, 3.38.
[64] *Tibermede v Graham* [1921] 7 LlL Rep 250; ibid para 3.38.
[65] *Sterns v Salterns* [1922] 12 LlL Rep 385; ibid para 3.38.
[66] ibid para 3.38.
[67] *The Apollonius* [1978] 1 Lloyd's Rep 53 [64]; Coghlin and others (n 11) para 3.27.
[68] Coghlin and others (n 11) para 3.27.
[69] *The Al Bida* [1986] 1 Lloyd's Rep 124 (CA) [150], [129]; Coghlin and others (n 11) para 3.28.
[70] *The Apollonius* (n 67); Coghlin and others (n 11) para 3.27.

description of the vessel's capacity at the time of drawing up the time charterparty covering the description of her consumption and speed in the preamble of the time charterparty.[71] Nonetheless, it is shown in the double undertaking by the shipowner in the NYPE 46 form[72] that the vessel must be the same as the description of the "seaworthy vessel" when the time charterparty is made[73] and also when the vessel is beginning its time charter service.[74] However, the NYPE 93 form[75] modified these and does not include the requirement that the vessel is seaworthy, which is promised by the shipowner, when the contract is made.[76]

2.4.1 The reform of the description of the vessel under the time charterparty

Even though it is essential for the vessel to be the same as its contractual description when the time charterer starts to use it, the results of the negotiations of both parties regarding various aspects, and whether or not to keep the same vessel for the duration between the contractual party making the

[71] *The Didymi* [1988] 2 Lloyd's Rep 108 [110]; Coghlin and others (n 11) para 3.28.
[72] Williams (n 37) 228-31.
[73] 'with hull, machinery and equipment in a thoroughly efficient state' in Line 5 of NYPE 46. Williams (n 37) 228; Coghlin and others (n 11) para 3.41.
[74] By Lines 21 and 22 of NYPE 46. In addition, the seaworthiness of the vessel is provided in clause 2 of NYPE 93. It indicates that 'The vessel on her delivery shall be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for ordinary cargo service'; Coghlin and others (n 11) para 3.44.
[75] Brodie (n 10) 32-46.
[76] Coghlin and others (n 11) para 3.44.

contract and their performing the obligation of the contract, must be respected. Therefore, it is suggested that extra text should be added to show “when” the vessel must comply with the details of the description of the vessel and to allow both parties in the time charterparty to add at the end of the preamble of the BALTIME form,[77] the NYPE 46 form,[78] and the NYPE 93 form,[79] as well as the GENTIME form.[80] A specification of that contractual party’s real intention, “when” it is necessary for the vessel to fit “which” details of the description of the vessel. This is in order, again, to prevent future arguments and a waste of judicial resources as well as both parties’ time and financial resources. For example, the following could be added: ‘The vessel should be in compliance with the description of the vessel, such as… when this time charterparty is concluded. The vessel must be the same as the rest of the details of the description of the vessel, such as…when the time charter service begins.’

Moreover, it is recommended that a separately highlighted option be added to the details of description of the vessel, such as ‘when this time charterparty is concluded, the vessel should be in compliance with the description of the vessel,’ and ‘when the time charter service begins, the vessel should be in compliance with the description of the vessel’ in the Part 1 Box Layout of the BALTIME form[81] and GENTIME form.[82] Both parties could then negotiate and

[77] Thomas (n 2) 286.
[78] Williams (n 37) 228.
[79] Brodie (n 10) 32.
[80] (n 32).
[81] Thomas (n 2) 285.
[82] (n 32).

tick when it is necessary for the vessel to be the same as the description of the vessel. Furthermore, in order to draw special attention to the aforementioned options regarding decisions made by both parties and to address other key points of their legal obligations and rights within the clauses under the time charterparty, it is believed that it is also a good idea to consider adding a clear and organised Box Layout (or table) on the front of the NYPE 46 form[83] and the NYPE 93 form[84] so that busy merchants can efficiently note and bear in mind such details.

2.5 The seaworthiness of the vessel in the time charterparty

The seaworthiness of the vessel will considerably impact upon whether or not the vessel can be effectively employed by the time charterer and whether they can achieve their commercial target.[85] In addition, an unseaworthy vessel may further connect to other issues, such as, the liability of the marine insurer,[86] oil pollution on the sea, rising numbers of marine casualties and the riskiness of the

[83] Williams (n 37) 228-31.
[84] Brodie (n 10) 32-46.
[85] Coghlin and others (n 11) paras 8.16-19.
[86] 'The House of Lords in *The Good Luck* has pronounced that a promissory warranty in marine insurance is in fact a condition precedent, the breach of which automatically discharges the insurer from liability as from the date of breach. This rule applies to all promissory warranties including the implied warranty of seaworthiness.' See Susan Hodges, *Law of Marine Insurance* (Cavendish publishing Limited 2005) 129; See also Clause 33 and 39 of Marine Insurance Act 1906; Howard Bennett, *The Law of Marine Insurance* (2nd edn, OUP 2006) 848-49.

shipping industry.[87] The subject of the unseaworthy vessel under the time charter has also led to numerous legal disputes in the courts.[88] Therefore the seaworthiness of the vessel is a vital point which must be discussed when examining the legal issues regarding the beginning of the time charter service.

2.5.1 General key concept of the undertaking of seaworthiness by a shipowner under the time charterparty

"Seaworthiness of a vessel" is classically defined as a level of fitness and this is what a normally careful and prudent shipowner would demand his/her vessel to have at the commencement of her voyage having considered all the probable situations it may face.[89]

To require a shipowner to supply a seaworthy vessel does not mean the vessel has to be perfect[90] and this test of unseaworthiness is likely subjective rather

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[87] Ahmad Hussam Kassem, *Carriage of Goods by Sea-The Legal Aspects of Seaworthiness Current Law and Development* (Lambert Academic Publishing 2010) 2.
[88] Coghlin and others (n 11) paras 8.10-20.
[89] This is stated in *Carver on Carriage by sea,* which was approved by Scrutton, L.J. in *F.C. Bradley & sons v Federal Steam Navigation* (1926) 24 LIL Rep 446. In addition, in *Mobil Shipping and Transportation Company v Wonsild Liquid Carriers Ltd.* 190 F.3D 64, 1999 AMC 2705 (2d Cir. 1999), a factor in deciding whether the vessel was seaworthy under modern concepts ruled by court is that the potential risk to the environment should be calculated and considered. See Coghlin and others (n 11) para 8.16, 3.121.
[90] John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (2nd edn, JUTA & Co. Ltd. 2009) 643; '…In every contract for the carrier of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on

than objective.[91] The shipowner's obligation of seaworthiness is an implied warranty at the beginning of the voyage under common law[92] in order to make the vessel 'fit to meet and undergo the perils of the sea and other incidental risks to which of necessity she must be exposed in the course of a voyage' in every contract of affreightment[93] if it is not expressly within the contract.[94] There are various situations which in fact will be considered as unseaworthiness of the vessel and whereby the shipowner may therefore breach their undertaking of seaworthiness under a time charterparty.[95] Some significant cases illustrate the concept of the undertaking of seaworthiness of a shipowner under the time charterparty, as follows:[96]

2.5.1.1 Physical condition of the vessel

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the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so.' See *Lyon v Mells* (1804) 5 East 428 (Lord Ellenborough CJ); See Martin Dockray, *Cases & Materials on the Carriage of Goods by Sea* (3rd edn, Routledge-Cavendish 2004) 45.

[91] 'i.e. this ship must be fit to encounter the perils of the sea for the contractual voyage and not any other voyage.' See Baatz (n 27).

[92] N J J Gaskell, C Debattista and R J Swatton, *Chorley and Giles's Shipping Law* (Pearson Education Llimited 1987) 182.

[93] John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 9; In addition, Article 39 (4) of the Marine Insurance Act 1906 stipulates the general meaning of seaworthiness as ' A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured'. See Susan Hodges, *Cases and Materials on Marine Insurance Law* (Routledge-Cavendish 2008) 305.

[94] *Giertsen v Turnbull*,1908 S.C. 1101; *The Honglong Fir* [1961] 2 Lloyd's Rep 478 [489] (Upjohn, L.J.); Coghlin and others (n 11) para 8.11; 'In addition to the express clauses agreed by the parties, every contract of affreightment is negotiated against a background of custom and commercial usage from which a series of obligations are implied which are automatically incorporated into the contract in the absence of agreement to the contrary.' See Wilson (n 93) 9; See also Braden Vandeventer, 'Analusis of Basis Provisions of Voyage and Time Charter parties' <www.heinonline.org> accessed 28 April 2011.

[95] Coghlin and others (n 11) paras 8.44-46, 8.49.

[96] Coghlin and others (n 11) paras 20.4, 8.20, 8.44-45, 8.49-50.

It was held that the vessel was unseaworthy by the Court of Appeal in *The Yuri Maru*[97] since the propeller of the vessel was insufficiently strong and the blades began to be lost after less than three months of the time charter followed by over two months of unsuccessful attempts by the shipowner to remedy the vessel's defect.[98] In other words, the shipowner needs to ensure that the propeller of the vessel is sufficiently strong and there are no problems at the start of the time charter, otherwise the issue of the physical condition of the vessel will make it unseaworthy.

2.5.1.2 Adequate and competent staff

It was held in *The Hongkong Fir* that even if the condition of an old ship is satisfactory, it is necessary to have sufficient staff who are competent to operate the ship from the engine room.[99] If the size of the staff is not appropriate to operate the vessel, this could render the vessel unseaworthy.[100] In addition, competence of the staff includes their proclivities and their personal attributes, and is not just measured by the extent of the Master's training.[101] Salmon J. at first instance in this case, held that the chief engineer was a drunkard when he

[97] *Snia Societa di Navihazione v Suzuki & Co.* [1924] 18 LIL Rep 333; [1924] 17 LIL Rep 78 (KB); Coghlin and others (n 11) para 8.45.
[98] Coghlin and others (n 11) para 8.45.
[99] *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. (The Hongkong Fir)* [1962] 2 QB 26; Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 256.
[100] ibid.
[101] ibid.

performed his job, thus he was incompetent.[102] It was therefore held that the lack of sufficient numbers of competent staff to control the vessel was a breach of the undertaking of seaworthiness by the shipowner under the time charterparty at the start of the time charter.[103]

In addition, it was also held that the vessel was unseaworthy in *The Saxon Star*,[104] in which U.S COSGA 1936[105] was intended to be incorporated into the charterparty.[106] The vessel was unseaworthy in this case and the judge ruled that the delays in continuing the voyage charter in this case came from the breakdowns in the machinery which arose from the problem of having incompetent staff in the engine room.[107] The shipowner argued that he had exercised due diligence in choosing staff but this argument was rejected by the court[108] since the vessel had incompetent staff in the engine room at the start of each voyage under the continuing voyage charter.[109] Thus the shipowner breached his undertaking of seaworthiness at the beginning of each voyage

[102] Hamsher (n 19).
[103] Coghlin and others (n 11) para 8.44.
[104] *Adamastos Shipping Co. Ltd. v Anglo-Saxon Petroleum Co.* [1958] 1 Lloyd's Rep 73; Coghlin and others (n 11) para 34.5.
[105] 'This is the United States version of COGSA and it incorporates the Hague Rules 1924, with certain differences. In the United States, if there is any difference between the application of the Hague Rules and COGSA, the ACT prevails, COGSA applies to shipments under bills of lading or similar documents of title, which are evidence of the contract of carriage of goods by sea to or, from U.S.ports. It covers transportation in US. Foreign trade.' <http://www.shipinspection.eu/index.php?action=page_display&PageID=242> accessed 12 April 2011.
[106] Coghlin and others (n 11) para 34.5.
[107] ibid.
[108] ibid.
[109] ibid.

under the continuing voyage charter and needed to take responsibility for the unseaworthiness of the vessel resulting from a lack of competent staff.[110]

In short, it is clear that whether the charter is a continuing voyage charter or a time charter, a shipowner needs to provide competent staff in order to perform his undertaking of seaworthiness under the charterparty.

2.5.1.3 Documents or certificate

Whether or not a lack of appropriate documents amounts to unseaworthiness of the vessel in common law depends on what sort of documents they are.[111]
It has been held that it is necessary to possess a legal certificate from the port health authority, a deratisation certificate, in order to meet the requirement to be "in every way fitted for ordinary cargo service" and the shipowner's undertaking

[110] ibid.
[111] Coghlin and others (n 11) paras 8.49-50; In addition, 'in July 2002 the International Safety Management Code (ISM Code) of the IMO was made applicable to all vessels. The annex to the Code explains that it was brought into effect in order to "provide an international standard for the safe management and operation of ships and for pollution prevention". The Code obliges shipping companies to establish a Safety Management System (SMS) and provides that a Document of Compliance (DOC) and a Safety Management Certificate (SMC) will be issued to verify compliance with the Code. It is likely that a vessel will not be considered seaworthy when trading to states which are parties to the Code if she does not possess the DOC and SMC. Similarly, a vessel which does not have the documentation (ISSCs) and DOS (declaration of security) clearance required by the SOLAS ISPS (International Ship and Port Facilities Security) Code after the latter came into effect on 1st July 2004 May well be considered to be an unseaworthy ship'. See *Shipping Law* (2011/2012 edn, Witherby Publishing Group Ltd 2011) 135-36.

of seaworthiness is required in *The Madeleine*, which is the time chartered case under the BALTIME form.[112]

However, the Court of Appeal found in *The Derby* that holding the document needed for proper performance of the service of the charter is required as a warranty of seaworthiness.[113] It was held that there was no customary necessity for a shipowner to obtain a blue certificate or card issued by the International Transport Workers Federation and carrying this blue card was neither required by "the law of the vessel's flag" nor by 'the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's ports of call'.[114] Therefore, the blue card is not a document required to be possessed by the vessel and the shipowner also was not in breach of a warranty of seaworthiness.[115] In addition, it was commented on by Longmore L.J, in *The Elli* and *The Frixos*[116] that documents demanded by an officious outside authorised organization could not be treated as a document in respect of the seaworthiness of the ship.[117]

2.5.1.4 Cargoworthiness

[112] *Cheik Boutros v Ceylon Shipping Lines Ltd. (The Madeleine)* [1967] 2 Lloyd's Rep 224 (QB); Coghlin and others (n 11) para 8.50.
[113] *Alfred C. Toepfer Sehiffahrtsgesellschaft G.m.b.H.v. Tossa Marine Co. Ltd. (The Derby)* [1985] 2 Lioyd's Rep 325 (CA); Coghlin and others (n 11) para 8.49, 8.52.
[114] ibid.
[115] ibid.
[116] *Golden Fleece Maritime v ST shipping & Transport Inc.(The Elli and The Frixos)* [2008] 1 Lloyd's Rep 262 [19] (Longmore, L.J.); Coghlin and others (n 11) para 8.52.
[117] Coghlin and others (n 11) para 8.52.

It was indicated in *Maori King v Hughes* that cargoworthiness[118] of the vessel is required for seaworthiness.[119] *The Arianna* also asserted that a vessel is unseaworthy if it might result in serious damage to its cargo or make it impossible to load and unload cargo.[120] However, it was indicated in *M.D.C v Zeevaart Masstschappij* that it was possible for some routine or minor damage to the cargo to occur during the carriage and this does not constitute the vessel being unseaworthy.[121]

2.5.1.5 Overloading and bad stowage

The overloading and bad stowage of cargo which causes direct damage to cargo or surrounding cargo amounts to a shipowner's breach of undertaking of seaworthiness since the ship's holds are not "fit and safe" to carry the cargo.[122] In addition, in *The Standale,* it was held that a cargo of grain was badly stowed and this affected the seaworthiness of the vessel because the cargo of grain was stowed in the hold without suitable protection to prevent it from shifting.[123] Moreover, it was indicated in *Ocean Eagle-Lim.Procs* that there was no loading manual when a vessel left port with a 650-ton overload which lay her five inches

[118] It is stated that '…Its cargo spaces must be fit for the reception of cargo and any machinery used for preserving the cargo must be fit for that purpose'. Coghlin and others (n 11) para 8.19.
[119] *Maori King v Hughes* [1895] 2 QB 550; Coghlin and others (n 11) para 8.19.
[120] *The Arianna* [1987] 2 Lloyd's Rep 376; Coghlin and others (n 11) para 8.18.
[121] *M.D.C.v.Zeevaart Masstschappij* [1962] 1 Lloyd's Rep180 [186]; Coghlin and others (n 11) para 8.20.
[122] William Tetley, *Marine Cargo Claims,* vol (4th edn, Thomson Carswell 2008) 918.
[123] *The Standale* [1938] 61 LIL Rep 223; Baris Soyer, *Warranties in Marine Insurance* (2nd edn, Cavendish Publishing Limited 2006) 67.

beneath her marks.[124] Subsequently the vessel sagged and it caused the vessel to break in two.[125] The court then held that the vessel had been unseaworthy from the time of setting sail.[126]

However, overloading and bad stowage do not always cause unseaworthiness of the vessel.[127] It depends on the facts and relies on the decision of the court whether or not overload and bad stowage constitute a shipowner supplying an unseaworthy vessel.[128]

For example, in *The Aquacharm*, a time chartered case under the NYPE form, the vessel was down by the head when she arrived on the Panama Canal, due to the overloading of too much coal under the supervision of the Master.[129] Consequently *The Aquacharm* was refused permission to pass through the Panama Canal by the Panama Canal Co. authorities.[130] Part of the cargo also had to be transshipped in another vessel in order for *The Aquacharm* to pass through the canal and there was a delay of nine days.[131]

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[124] 1974 AMC 1629 at pp. 1654-1656 (D.P.R.1974); Tetley (n 122) 919.
[125] ibid.
[126] ibid; 'Seaworthiness requires that a vessel be safely loaded. If a vessel is loaded so heavy that she cannot safely sail on the voyage contracted for, she is unseaworthy. In *Foley v Tabor* [1861] 2 F & F 663, a vessel was held to be unseaworthy as a result of the ship being overloaded to such extent as to increase her danger and difficulty in navigation.' See Soyer (n 123) 68.
[127] Soyer (n 123) 67.
[128] Tetley (n 122) 918.
[129] *Actis Co. Ltd. v The Sanko Steamship Co. Ltd. (The Aquacharm)* [1982] 1 All ER 390 (CA); Coghlin and others (n 11) para 20.4.
[130] ibid.
[131] ibid.

The Court of Appeal decided that the vessel was still seaworthy under Article 3 (1) (a), (b), (c) of the Hague Rules[132] and the time charterer needed to pay for the "hire" of the vessel during the extra delay because lightening the cargo did not prevent the vessel from working fully. [133] Griffiths L.J. ruled that there was 'no suggestion that the vessel's draught was such as to put her at risk in a heavy sea or to render her in any way unsafe to sail in'[134] and that she was sound, efficient and a suitable vessel to carry a cargo of coal and meet the demand of "seaworthiness"[135] The delay, in fact, did not result from her unseaworthiness since the vessel could have sailed safely in the open seas but actually resulted from overload and bad stowage.[136]

To analyse these aforementioned cases as a whole, in brief, if the propellers of the vessel are defective, if there is a lack of adequate and competent crew, if a deratisation certificate is not possessed or if the vessel is not cargoworthy at the beginning of the time charter service, the shipowner will breach his undertaking of seaworthiness of the vessel under the time charterparty.[137] Overloading and

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[132] <http://www.admiraltylawguide.com/conven/haguerules1924.html> accessed 8 April 2011. 'The Hague Rules were also given statutory force in the United Kingdom by the Carriage of Goods by Sea Act 1924.' See Ewan Mckendrick (ed), *Goode on Commercial law* (4th edn, Penguin Books Ltd 2010) 1146.
[133] *The Aquacharm* (n 129); Coghlin and others (n 11) para 25.12.
[134] ibid. (Griffith, L.J.).
[135] <http://pntodd.users.netlink.co.uk/cases/cases_a/aquachm.htm> accessed 25 April 2011.
[136] Kassem (n 87) 51.
[137] Coghlin and others (n 11) paras 20.4, 8.20, 8. 44-45, 8.49-50; Kassem (n 87) 2; Moreover, it is also shown in *The Aquacharm* (n 129) [11] (Griffiths, L.J.), two aspects of seaworthiness are identified in this case of a voyage charter as follows: First, it is demanded that the vessel, her equipment and her crew must be sound enough and have the capability to overcome as well as bear the normal perils of the sea during the intended voyage. Second, it is also demanded that the contractual cargo needs to be carried by the vessel. See Coghlin and others (n 11) para 8.17.

bad stowage do not always cause a breach of a shipowner's seaworthy obligation.

2.5.2 The reform of the undertaking of seaworthiness of the vessel under a time charterparty

It can be said that, even though the Hague Rules[138] and Hague-Visby Rules[139] are not applied in the time charterparty,[140] the concepts of the shipowner's undertaking of seaworthiness under a time charter in common law have actually also been covered by the context of Article 3 (1) (a), (b), (c) of the Hague/Visby Rules.[141]

[138] Article 5 para. 2 of the Hague Rules provided that 'The provisions of this Convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.' In addition, Article 1 (b) of the Hague Rules provides that ' "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or similar documents as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.' <http://www.admiraltylawguide.com/conven/haguerules1924.html> accessed 8 April 2011.

[139] Article V of the Hague-Visby Rules is same with Article 5 of the Hague Rules <http://www.admiraltylaw.com/statutes/hague.html> accessed 5 February 2011.

[140] Tetley (n 122) 24.

[141] 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. In addition, the content of Article 3 of the Hague Rules is the same as Article III of the Hague-Visby Rules.

The expressed obligations of the shipowner in Clause 1 of the BALTIME form[142] are to provide a vessel which is "delivered" and placed at the disposal of the charterers in the nominated available berth[143] where she can safely lie always afloat, as the charterers may direct, the vessel being in every way fitted for ordinary cargo service.[144] "Seaworthiness of vessel" is also required in the preamble of the NYPE 46 form through 'with hull, machinery and equipment in a thoroughly efficient state'[145] and in Clause 1 of NYPE 46 form, which stipulated that the vessel must be 'in a thoroughly efficient state in hull, machinery and equipment for and during the service'.[146] In addition, Clause 2 of the NYPE 93 form states that 'The vessel on her delivery shall be…tight, staunch, strong and in every way fitted for ordinary cargo service, having water ballast and with sufficient power to operate all cargo-handling gear simultaneously.'[147] It is also prescribed in Clause 11 of the GENTIME form that the shipowner should deliver the vessel "in a thoroughly efficient state of hull and machinery".[148] However, the Hague Rules[149] are incorporated in Clause 24 of the NYPE 46 form,[150] and the Hague/Visby Rules[151] are incorporated in Clause 31 (a) of the NYPE 93 form;[152] by the Clause Paramount in B of the Appendix A-protective Clauses of

[142] Thomas (n 2) 286.
[143] The berth should be immediately available before or on the arrival of the vessel and the waiting period is entitled to be "hired" by the shipowner. See *The Golfstraum* [1976] 2 Lloyd's Rep 97; Coghlin and others (n 11) para 37.5.
[144] Coghlin and others (n 11) para 37.5.
[145] Williams (n 37) 228.
[146] ibid 229.
[147] Brodie (n 10) 33.
[148] (n 32).
[149] <http://www.admiraltylawguide.com/conven/haguerules1924.html> accessed 8 April 2011.
[150] Williams (n 37) 231.
[151] (n 149) <http://www.admiraltylaw.com/statutes/hague.html> accessed 5 February 2011.
[152] Brodie (n 10) 40-41.

the GENTIME form.[153] Meanwhile Article 3 (1) (a), (b), (c) of the Hague/Visby Rules[154] will be instead of the provision regarding seaworthiness of vessel under the NYPE 46 form,[155] NYPE 93 form[156] and the GENTIME form.[157] Therefore, the content of the seaworthiness of vessel under the NYPE 46 form,[158] the NYPE 93 form[159] and the GENTIME form[160] will be exactly the same as Article 3 (1) (a), (b), (c) of the Hague/Visby Rules.[161]

The concept of seaworthiness of vessel under the Hague Rules and the Hague-Visby Rules was widely discussed by relevant experienced experts when they were drafted and have already been successfully applied in the world for a long time and are widely accepted in academia and practice.[162] Thus it is suggested that the original description regarding shipowners' undertaking of seaworthiness should be deleted and a sub-clause to clearly define the seaworthy vessel should be added. A change to the clear wording as in the contents of Article 3

[153] (n 32).
[154] (n 149); (n 151).
[155] Williams (n 37) 228-29.
[156] Brodie (n 10) 33.
[157] It is likely that the clause paramount is treated by the English court as intended to override the conflicting terms of the charterparty by the contractual parties when any contradiction is indicated between the provisions of the Rules and the charterparty. See Section 1.1.2 of Chapter 1, and Section 2.5.4 of this chapter.
[158] Williams (n 37) 228-31.
[159] Brodie (n 10) 32-46.
[160] (n 32).
[161] (n 149); (n 151).
[162] Carriers, shippers, underwriters and bankers were involved in the discussion when the Hague Rules was drafted. See S.W. Margetson, 'The History of the Hague (Visby) Rules' in M.L.Hendrikse, N.H.Margetson and N.J. Margetson (eds), *Aspects of Maritime Law Claims under Bills of Lading* (Kluwer 2008). In addition, the Hague Rules were drafted under the auspices of the Maritime Law Committee of the International Law Association. The text of the Hague Rules as drafted were discussed by the ICC (International Chamber of Commerce), the proposals were also discussed by the CMI (The Comité Maritime International was founded by the eminent Belgian lawyer in 1897) and the World Shipping Conference; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 220-22.

(1) (a), (b), (c) of the Hague Rules[163] or the Hague-Visby Rules[164] is proposed, to replace the vague, incomplete and abstract wordings of 'where she can safely lie always afloat, as the charterers may direct, the vessel being in every way fitted for ordinary cargo service' in Clause 1 of the BALTIME form[165] if the Hague Rules[166] or Hague-Visby Rules[167] are not agreed by the contractual parties to be incorporated in the BALTIME form.[168] This would make the shipowners' obligation of seaworthiness accurate and clear in the time charterparty. Moreover, if both parties under the NYPE 46 form,[169] the NYPE 93 form,[170] or the GENTIME form[171] decide "not" to incorporate the Hague Rules[172] or Hague-Visby Rules,[173] it is also recommended that a better solution can be found by adopting the definition of seaworthiness in Article 3 (1) (a), (b), (c) of the Hague Rules[174] or Hague-Visby Rules.[175] This would make the contents clearer and more complete in Clause 1 of the NYPE 46 form,[176] Clause 2 of the NYPE 93 form[177] and Clause 11 of the GENTIME form.[178] Furthermore, this would harmonise the concept of shipowners' seaworthiness undertaking in the

[163] (n 149).
[164] (n 151).
[165] Thomas (n 2) 286.
[166] (n 149).
[167] (n 151).
[168] Thomas (n 2) 285-89.
[169] Williams (n 37) 228-31.
[170] Brodie (n 10) 32-46.
[171] (n 32).
[172] (n 149).
[173] (n 151).
[174] (n 149).
[175] (n 151).
[176] Williams (n 37) 228.
[177] Brodie (n 10) 33.
[178] (n 32).

essential standard forms of the time charterparty as well as helping to prevent future disputes.

2.5.3 The extent of the seaworthy obligation of the shipowner under the time charterparty

Seaworthiness of the vessel is the fundamental obligation of the shipowner in the carriage of goods by sea.[179] Moreover, in common law, the initial seaworthy obligation of the shipowner is an essential requirement and an absolute obligation under the time charterparty while the Hague Rules[180] or the Hague-Visby Rules[181] are not incorporated[182] This means that the shipowner cannot exclude his/her undertaking of the seaworthiness of the vessel, even though the shipowner can prove that he/she and the persons who are employed by him/her are not negligent.[183]

It could be construed that the absolute undertaking of seaworthiness from the shipowner's obligation is demanded at the beginning of the time charter service

[179] Girvin (n 162) 383.
[180] (n 149).
[181] (n 151).
[182] Tetley (n 122) 24, 875; Robert B. Fisher, 'The warranty of Seaworthiness in Charter Parties: Legal Methods of Amelioration' (1975) 1 Mar.Law.1. <<http://heinonline.org/HOL/Index?collection=journals&set_as_cursor=clear > accessed 26 April 2011.
[183] Wilson (n 93) 9.

under Clause 1 of the BALTIME form.[184] This is distinct from Article 3 (1) of the Hague Rules,[185] and Hague-Visby Rules[186] which provided that the carrier should exercise due diligence before and at the beginning of each voyage to make the vessel seaworthy.[187]

However, in terms of failure to make the vessel seaworthy which then causes delay, or loss or damage to goods on board, Clause 12 of the BALTIME form[188] also provides that the shipowner alone shall have responsibility problems regarding the vessel caused by an incompetent crew selected by the shipowner,[189] or on the part of his manager who runs the shipping activities for the shipowner[190] to make the vessel seaworthy.[191] The shipowner's implied absolute seaworthy undertaking in every contract of carriage 'could only be

[184] Thomas (n 2) 286.
[185] Coghlin and others (n 11) para 37.57.
[186] (n 151).
[187] Article III (1) of the Hague-Visby Rules. <http://www.admiraltylaw.com/statutes/hague.html> accessed 5 February 2011. Also see Francesco Berlingieri, 'Basis of Liability and Exclusions of Liability' (2002) LMCLQ 336.
[188] Thomas (n 2) 287.
[189] *Hongkong Fir* (n 99); Coghlin and others (n 11) para 37.65.
[190] 'The ship's manager is one of the co-owners appointed to act by and on behalf of fellow co – owners in the employment/trading of the vessel and the collecting of freight. The ship's manager is often referred to as the 'Managing Owner'. This is a commercial and not a legal expression'. See *Shipping Law* (n 111) 4-5. See also *The Lady Gwendolen* [1965] 1 Lloyd's Rep 335 [345]; Coghlin and others (n 11) para 37.59. For example, 'The shipowner was a brewer company whose shipping activities were subsidiary to their main business. The ships were run by a manager who was not a member of the board of directors but who was responsible to an assistant managing director.' See Coghlin and others (n 11) para 37.60.
[191] Clause 12 of the BALTIME 1939 form provides that 'The Owner only shall be responsible for delay in delivery of the vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager…'.Thomas (n 2) 287.

excluded by express and clear terms' in common law.[192] Clause 12 of the BALTIME form[193] is a clear exemption of the shipowner's absolute seaworthy undertaking in common law.[194] Therefore, Clause 12 of the BALTIME form[195] will decrease any absolute undertaking of seaworthiness from the shipowner's obligation in Clause 1 of the BALTIME form.[196] From this perspective, the extent of the shipowner's obligation of seaworthiness seems likely to be the same as in the Hague Rules,[197] or the Hague-Visby Rules. [198]

Nonetheless, this is different from the view of Viscount Simonds in *The Muncaster Castle*,[199] who states that "the shipowner" may be liable under Article 4 (1) of the Hague Rules,[200] and Hague-Visby Rules,[201] which also covers the failure of an independent contractor,[202] agents and servants[203] Therefore, it can be concluded that the range of liability of the shipowner under Clause 12 of the BALTIME form[204] which provides that the shipowner alone shall have responsibility for want of due diligence on their part or on the part of their

[192] *Atlantic Shipping and Trading Co. Ltd. v Louis Dreyfus & Co.* [1922] AC 250 at p.260; [1922] 10 LlL Rep 707 at p 708 (HL); Tetley (n 125) 875.
[193] Thomas (n 2) 287.
[194] See (n 192).
[195] Thomas (n 2) 287.
[196] Coghlin and others (n 11) para 37.57.
[197] (n 149).
[198] (n 151).
[199] *Riverstone Meat Co. v Lancashire Shipping Co.* [1961] 1 Lloyd's Rep 57; Wilson (n 93) 189.
[200] (n 149).
[201] Article IV (1) of the Hague-Visby Rules; (n 151).
[202] *Heyn v Ocean S.S Co.* [1927] 137 LT 158; *Hourani v Harrison* [1927] 32 Com Cas 305 [310]; It is shown in *Heyn v Ocean S.S Co.* that the employed independent contractors are treated as the servants or agents of the carrier if they are engaged by the carrier. It is also indicated that the stevedore who was engaged by the carrier to discharge the cargo was held to be a servant of the carrier, even though he was an independent contractor. Wilson (n 93) 278.
[203] Wilson (n 93) 189.
[204] Under common law, this expressed reduction of the shipowner's obligation of seaworthiness within the time charterparty is unlikely as Article 3 (8) of the Hague/Visby Rules, prevents the reduction of carrier's liability. See (n 192); *Shipping Law* (n 111) 136.

Manager to make the vessel seaworthy at the beginning of the time charter service, is narrower than under Article 4 (1) of the Hague Rules,[205] and Hague-Visby Rules.[206]

2.5.4 Incorporating the Hague Rules, or the Hague-Visby Rules into the time charterparty

It is important to note that there is not a paramount clause[207] under the BALTIME form[208] and so it is necessary to read Clause 1[209] and 12 of the BALTIME form[210] together**.** The extent of the shipowner's seaworthy obligation is that the shipowner and his manager should be bound at the beginning of the time charter to exercise due diligence to ensure that the vessel is seaworthy.[211] This is different from the provisions under the NYPE 46 form,[212] the NYPE 93 form[213] and the GENTIME form.[214] There are no additional phrases, such as exercising due diligence, to describe the extent of the shipowner's undertaking of seaworthiness under Clause 1 of NYPE 46[215] and Clause 2 of the NYPE

[205] (n 149).
[206] (n 151).
[207] Paramount clause had been introduced in Section 1.1.2 of Chapter 1.
[208] Thomas (n 2) 285-89.
[209] Thomas (n 2) 286.
[210] Thomas (n 2) 287.
[211] Clause 1 and 12 of the BALTIME form. Thomas (n 2) 286-87.
[212] Williams (n 37) 228-31.
[213] Brodie (n 10) 32-46.
[214] (n 32).
[215] Williams (n 39) 228.

93.[216] In addition, no extra responsibility provisions are outlined regarding the shipowner's undertaking of seaworthiness under the NYPE 46 form[217] and the NYPE 93 form.[218] In particular, Clause 18 (iii) (1) of the GENTIME form is distinct in that, it separately imposes the shipowner's responsibility having already clearly expressed that the shipowner and their servants should exercise due diligence before and at the beginning of each voyage to make the vessel seaworthy.[219]

However, Clause 24 of the NYPE 46 form,[220] Clause 31 (a) of the NYPE 93 form[221] and B of the Appendix A-protective Clauses of the GENTIME form[222] are paramount clauses[223] and all of them essentially cover the incorporation of Article 3 (1) of the Hague Rules[224] which requires the shipowner to exert due diligence before and at the beginning of each voyage in order to make the vessel seaworthy.[225]

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[216] Brodie (n 10) 33.
[217] Williams (n 37) 228-31.
[218] Brodie (n 10) 32-46.
[219] Clause 18 (iii) (1) of the GENTIME provides that 'The Owners shall be liable for any Cargo Claim arising or resulting from failure of the Owners or their servants to exercise due diligence before or at the beginning of each voyage to make the vessel seaworthy'. See (n 32).
[220] Williams (n 37) 231.
[221] Brodie (n 10) 40-41.
[222] The extent of the shipowner's undertaking of seaworthiness is overlapped under the GENTIME form when the Hague Rules or Hague-Visby Rules are incorporated because there is not any change to or difference in extent of the shipowner's seaworthy obligation. See (n 32).
[223] (n 207).
[224] (n 149).
[225] Yvonne Baatz, 'Clauses Paramount in Time Charters' in Thomas (n 2).

Even though there is no paramount clause[226] under the BALTIME form,[227] the parties to the contract can argue that as a result of the principle of freedom of contract namely that they should be free to decide the terms in their contract.[228] If both parties of the time charterparty agree to incorporate the Hague Rules[229] or the Hague-Visby Rules[230] into the time charterparty, the shipowner not only needs to exercise due diligence before and at the beginning of each voyage to make the vessel seaworthy but must continue to exercise due diligence to maintain the vessel in a thoroughly efficient condition in the hull and machinery during the time charter service.[231]

It can be therefore concluded that if both parties also specifically agree to incorporate the Hague/Visby Rules[232] into the BALTIME form,[233] the extent of the shipowner's undertaking of seaworthiness under this form will be the same

[226] (n 207).
[227] Thomas (n 2) 285-89.
[228] 'Where contracts between business are concerned, the assumption is that the parties should be free to make the deals and on the terms they regard as desirable for their businesses, with access to legal advice on both sides and thus with minimal interference from the law later. So duty qualified, the classic model remains a good basis on which to approach the rules and ethos of the law of contract, at least where commercial contracts are concerned.' See Janet O'sullivan and Jonathan Hilliard, *The Law of Contract* (4th edn, OUP 2010) para 1.9, 1.4; *Associated Metals & Minerals Corp. v S/S Jasmine*, 983 F.2d 410 at pp.412-413,1993 AMC 957 at p.960 (2 Cir.1993): 'Because charter parties are statutorily exempted from automatic coverage under COGSA, if the act is to apply, the parties must clearly indicate their intention to incorporate it into the charterparty itself' ; Tetley (n 122) 76, footnote 4.
[229] (n 149).
[230] (n 151).
[231] Baatz (n 27) 53; The extent of the shipowner's maintenance obligation will be discussed in Section 2.6.2.
[232] (n 141); (n 149); (n 151).
[233] Thomas (n 2) 285-89.

as under the NYPE 46 form,[234] the NYPE 93 form[235] and the GENTIME form[236] which already covers the paramount clause.[237]

2.5.5 The legal effect of a breach of the undertaking of seaworthiness under the time charterparty

The nature of the shipowner's undertaking of seaworthiness under the time charterparty is regarded as an innominate term (or an intermediate term),[238] which is neither a condition nor a warranty.[239] The innominate term was invented in one of the most significant cases of contract law in the 20th century,[240] *The Hongkong Fir.*[241] This case has also had a major impact upon contract law more generally.[242]

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[234] Williams (n 37) 228-31.
[235] Brodie (n 10) 32-46.
[236] (n 32).
[237] (n 207).
[238] Donald Nolan, '*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, The Hongkong Fir*'.in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008); Chen Liang, 'Seaworthiness in Charter Parties' (2000) JBL <http://login.westlaw.co.uk/> accessed 11 April 2011.
[239] Simone Schnitzer, *Understanding International Trade Law* (Law Matters Publishing 2006) 47. See also William Tetley, 'Good Faith in Contract Particularly in Contracts of Arbitration and Chartering'<http://www.mcgill.ca/files/maritimelaw/goodfaith.pdf> accessed 22 April 2011
[240] Nolan (n 238) See also Koji Takahashi, 'Right to terminate (avoid) international sales of commodities' (2003) JBL <http://login.westlaw.co.uk/> accessed 27 March 2011.
[241] *The Hongkong Fir* (n 99).
[242] 'As a result of the decision in *Hongkong Fir*, the courts have shown themselves ready to find that a term is innominate, even if the parties themselves describe it as a condition.' For example, in *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. 'the House of Lords held that use of the word "condition" was an indication that the parties intended that the innocent party should be allowed to terminate if that term was breached, but it was only an indication. It was still important to discover their intention by looking at the contract as a whole, and one relevant consideration would be whether imposing the strict legal meaning of condition created a very unreasonable result: "The more unreasonable the result, the less likely it is that the party untended it." In this case, their Lordships felt the result would be unreasonable, since the term

In *The Hongkong Fir* the time charterer chartered a vessel (*The Hongkong Fir*) from the shipowner for 24 months and the shipowner made an undertaking of seaworthiness of this vessel under the BALTIME 1939 form.[243] However, the vessel suffered a breakdown, caused by insufficient numbers of, and incompetent, staff in the engine room. The staff did not pay careful attention when operating the old engine of the vessel.[244] Due to the consequent repairs, the vessel was delayed and around twenty weeks were lost during the time charter period.[245] The time charterer therefore repudiated the time charterparty, but the shipowner sued for wrongful repudiation.[246]

The decision of Diplock, L.J in the Court of Appeal showed that the time charterer cannot repudiate the time charterparty.[247] The shipowner had indeed breached the undertaking of seaworthiness of the vessel, since the shipowner did not exercise due diligence[248] to supply sufficient and competent staff with the vessel at the start of the time charter.[249] However, this judgment held that the important factor was the actual consequences of the shipowner's breach in

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could be breached in very minor ways; the term was held not to be a condition and Schuler were not entitle to terminate the contract.' See Catherine Elliott and Frances Quinn, *Contract Law* (6th edn, Pearson Education Limited 2007) 126; In addition, the High Court of Australia and the Court of Appeal of Singapore 'also approved the tripartite classification of promissory terms to which the decision in *Hongkong Fir* case gave rise.' See J.W. Carter, ' Intermediate Terms Arrive in Australia and Singapore' (2008) journal of Contract Law 226.

[243] *Hongkong Fir* (n 99).

[244] ibid.

[245] ibid.

[246] ibid.

[247] Coghlin and others (n 11) para 8.44.

[248] Clause 12 of the BALTIME 1939 form provides that 'the Owner only shall be responsible for delay in delivery of the vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their manager…'

[249] Hamsher (n 19).

order to decide whether the time charterer should be entitled to terminate the time charterparty. The judge examined whether the breach of the undertaking of seaworthiness by the shipowner 'deprives the time charterer substantially of the whole benefit of the contract'.[250] That is also to say, if the shipowner's breach of the undertaking of the seaworthiness 'deprives the time charterer substantially of the whole benefit of the contract', the time charterer is entitled to terminate the time charterparty; in contrasting circumstances, if the shipowner's breach of the undertaking of the seaworthiness is relatively minor, this is insufficient grounds for the time charterer to be allowed to terminate the time charterparty.[251]

2.5.6 Is the decision of *The Hongkong Fir* appropriate?

The Hongkong Fir revealed that the innocent party needs to "wait and see"[252] whether he can justify the termination of the contract once the effect of the shipowner's breach of undertaking of seaworthiness is decided.[253] This is criticised as an uncertain risk and is claimed to cause difficulty for both parties in the contract trying to predict the result.[254]

[250] Elliott and Quinn (n 242) 125.
[251] Coghlin and others (n 11) para 8.44.
[252] *Bunge Corp. v Tradax Export S.A* [1981] 1 WLR 711 (HL) 714 (Lord Lowry).
[253] Coghlin and others (n 11) para 8.44.
[254] Ewan Mckendrick, *Contract Law Text, Cases, and Materials* (4th edn, OUP 2010) 778.

However, if there is no agreement regarding the maximum length of the shipowner's period of maintenance of the vessel during the time charter, it is an objective matter for a court to examine the facts regarding the effects of the occurrence and decide whether the shipowner's breach of undertaking of seaworthiness goes to the root of the contract or has deprived the time charterer substantially of the whole benefit of the time charterparty.[255] In addition, this more flexible approach remedies the rigid classification for conditions and warranties and gives the dispute another new solution when both parties are silent about the nature of the terms in the contract or when the contract is oral.[256] There are various and complex ways of interpreting the shipowner's breach of the undertaking of seaworthiness and it is too simplistic to define it by classifying the seriousness of the nature of the terms "conditions" and "warranties".[257] For example, many degrees of seriousness of breach, from a comparatively trivial breach, such as a rusty nail on the deck, to a significantly serious breach, such as the broken down engines, are all covered in the outcomes of a shipowner's breach of undertaking of seaworthiness.[258] Thus, to examine the effects and consequences of the breach may be a fair way to deal with the dispute.[259] *The Hongkong Fir* may also be valued as a milestone which

[255] JW Carter, G J Tolhurst and Elisabeth Peden,'Developing the Intermediate Term Concept' (2006) 22 Journal of Contract Law 268.
[256] Chris Turner, *Unlocking Contract Law* (3rd edn, Hodder Arnold 2010) 114.
[257] P S Atiyah and others, *Atiyah's Sales of Goods* (12th edn, Pearson Education Limited 2010) 88.
[258] Michael Bridge, *The Sales of Goods* (2nd edn, OUP 2009) 612.
[259] Turner (n 256) 115.

successfully contributed to bringing the time charterparty and contract law together.[260]

Nevertheless, there are two sides to the problems of *The Hongkong Fir,* one is the rule itself,[261] the other is the way that the decision is applied.

The consequences of the breach approach, will bring difficulties for commercial activities because of its uncertainty.[262] This uncertainty occurs because the court needs to balance the various aspects of the facts, such as the cost of making performance adhere to the terms of the contract, the losses resulting from the breach, the value of the performance that has been obtained by the innocent party, the desire of the party in breach to make good the effect of the breach, enough damages as a remedy to the innocent party and the possibility of a further breach by the party in breach.[263] As Megaw L.J. asserted in *The Mihalis Angelos*,[264] commercial predictability is an essential requirement for contractual parties in their commercial dealings.[265] Lord Bridge in *The Chikuma*[266] also emphasised the desirability of commercial certainty.[267] Moreover, Lord

[260] Nolan (n 238).
[261] Nolan (n 238).
[262] Mckendrick (n 254) 783.
[263] ibid.
[264] *Maredelanto Compania Naviera S.A v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164. The court of appeal held that the 'expected readiness' clause under the charterparty was a condition; See also Janet O'sullivan and Jonathan Hilliard (n 228) para 18.22.
[265] ibid.
[266] *Awilco of Oslo A/S v Fulvia SpA di Navigazione of Cagliari (The Chikuma)* [1981] 1 WLR 314.
[267] Richard Stone, *The Modern Law of Contract* (9th edn, Routledge 2011) 440.

Wilberforce indicated in *Bunge Corp*[268] that the "consequences of the breach" approach in *Hongkong Fir* "would be commercially most undesirable".[269] The rule of *The Hongkong Fir,* conflicts with the "enormous practical advantages in certainty" addressed by Lord Lowry[270] and the "need for certainty" in commercial dealings mentioned by Lord Roskill[271] in *Bunge Corp*.[272]

In addition**,** the downside is also shown when the judges in the Court of Appeal "apply" the law which they want to set up in the *The Hongkong Fir* to the facts, i.e. mistakes are caused when judges look at the effect of a shipowner's breach of seaworthy undertaking on the facts in order to decide if it deprived the time charterer of substantially the whole benefit he should have obtained under the time charterparty. In this case, Diplock, L.J. ignored the real intention of both parties and did not focus on the true construction of the contract.[273] The decision of *The Hongkong Fir* can also be contrasted with the view of Lord Steyn who asserted that English contract law should be in compliance with "the reasonable expectations of the contracting parties" in the business world.[274] Even though it could be argued that the vessel had been repaired, its problem had been fixed and the time charterer in fact still had around four fifths of the period of the time charter remaining in which to use the vessel to run his

[268] *Bunge Corp. v Tradax Export SA* [1981] 1 WLR 711 (HL) 714. The court held that 'the obligation to give notice to load in proper time should also be a condition.' See Turner (n 256) 116.
[269] ibid.
[270] ibid; Nolan (n 238).
[271] ibid; Nolan (n 238).
[272] (n 268); Nolan (n 238).
[273] Nolan (n 238).
[274] Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433.

business,[275] this vessel's condition was actually already unfit to fulfil the merchant's will and expectation. This is because the charterer had needed to fully utilise the vessel for the entire period of the time charter in order to have completed his commercial plan by the time he concluded the time charterparty.

Moreover, from an economical and commercial angle, as in the old saying, time is money, thus time is very important in mercantile contracts.[276] The shipowner, in fact, took around twenty weeks to repair the vessel and this could have destroyed the time charterer's business plan and commercial operations.

Furthermore, undoubtedly, a general time charterer may lack confidence and feel he lacks control of a vessel with an old engine which was repaired in around one fifth (1/5) of the period of the time charter, wondering if the vessel might break or need to be repaired again in the future. In short, the time charterer was under no obligation to tolerate this uncomfortable psychological burden or uncertainty regarding the future.

It is thought to be doubtful that the time charterer was a speculator and might have wanted to terminate the time charterparty in order to rent another, cheaper vessel, in response to a fall in market prices at the time of the dispute between

[275] According to the facts, the shipowner took around 20 weeks to repair the vessel and the total period of the time charter was 24 months. See Coghlin and others (n 11) para 8.44.
[276] Effectiveness, efficiency and competitiveness in completing maritime tasks are very important for the maritime industry. See Kevin Cullinane, 'Editor's introduction: the maritime industry means business' in Kevin Cullinane (ed), *International Handbook of Maritime Business* (Edward Elgar Publishing Limited 2010).

both contractual parties.[277] However, for the time charterer to terminate this time charterparty would be a reasonable and effective strategy for a businessman to balance his loss of nearly twenty weeks and to rescue his commercial position in order to make profits.

Fault and blame actually lies not with the time charterer, but with the shipowner who breached his undertaking of seaworthiness. It can thus be questioned why the time charterer should bear the final legal disadvantage. The right for one contractual party to terminate a contract should be allowed when to grant such a remedy is fair for both contractual parties and this is the modern notion of intermediate term which has evolved at the discretion of judges.[278] However, the decision in *The Hongkong Fir* is deemed unfair to the time charterer who could not terminate this time charterparty. It is not balanced, considering both parties' legal interests. It is also doubtful given the facts whether the shipowner's breach of undertaking of seaworthiness had already deprived the time charterer substantially of the whole benefit of the time charterparty. Furthermore, from a modern viewpoint, it is also asserted that this decision needs to be reviewed, since it cannot reflect the legal and commercial reality of the 21st century.[279]

To sum up, *The Hongkong Fir* has indeed made a positive contribution to changing the older rigid classifications of classical contract law and has added another new approach for courts to inspect the seriousness of the effects in

[277] Nolan (n 238).
[278] Turner (n 256) 114.
[279] Hamsher (n 19).

reality and to try to achieve fairness for both parties in the case.[280] This was why the courts in many subsequent cases have also stressed the advantages of the ruling in *The Hongkong Fir* and continued to uphold it.[281]

However, the disadvantages of the ruling in *The Hongkong Fir* are that it gives a judge too much discretion and renders the law too uncertain.[282] In addition, the decision in this case seems likely to infringe the real intentions of the time charterer when he agreed to establish the time charterparty[283] because repair of the vessel took too long. This meant that the time charterer could not effectively use the vessel and this breached the merchant's commercial aim to effectively and efficiently make maximum profits. Therefore, it is believed that the decision in *The Hongkong Fir* was inappropriate. In order to fairly and justly solve the real commercial disputes and in order to be fit for the modern activities of shipping, when a judge adopts *The Hongkong Fir* approach to interpret the time charterparty, and applies this approach to the facts to decide a case in the future, it is recommended that a judge must carefully consider the basic reason for forming a contract: both parties' real intentions.[284]

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[280] H.G.Beale and others (eds), *Chitty on Contracts*,vol 1 (13th edn, Sweet & Maxwell 2008) para 12-034.
[281] Such as *Cehave NV v Bremer Handelsgesselschaft mbH (The Hansa Nord)* [1976] QB 44; *Reardon Smith Line Ltd. v Hansen-Tangen* [1976] 1 WLR 989; Turner (n 256) 115-16; (n 242).
[282] Turner (n 256) 115.
[283] Nolan (n 238).
[284] Robert Upex and Geoffrey Bennett, *Davies on Contract* (10th edn, Sweet & Maxwell limited 2008) 51; John N. Adams and Roger Brownsword, *Understanding Contract Law* (5th edn, Sweet & Maxwell Ltd 2007) 106-07.

It is worth considering the ways in which parties might avoid the type of commercial dispute that arose in the *The Hongkong Fir*.[285] However, as already mentioned, the facts of a shipowner's breach of seaworthy undertaking are various, from trivial to significantly serious breaches.[286] It is difficult for contractual parties to foresee when a rusty nail will be found on the deck or when the engine of a vessel will break down.[287] This can be seen as the reason why the shipowner and time charterer generally wish to negotiate and manage their legal risk[288] to be reflected in their time charterparty in advance. However, the rule of *The Hongkong Fir* requires the court to examine the seriousness of the consequences of a shipowner's breach of seaworthy undertaking and then decide the suitable remedy for the contractual parties.[289]

In order to effectively solve these difficulties and to assist contractual parties to manage this risk of uncertainty regarding the legal effect as seen in the *The Hongkong Fir*,[290] a maintenance clause is proposed under the time charterparty and this solution will be illustrated in the following section in "The reform of the maintenance clause".

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[285] *Hongkong Fir* (n 99).
[286] Bridge (n 258) 612.
[287] Stone (n 267) 439.
[288] Legal risk management generally means the management of risks caused by the drafting and/or performance of contracts. Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa Law 2009) 1018, 1026, 1028; Michel Crouhy, Dan Galai and Robert Mark, *The Essentials of Risk Management* (McGraw-Hill 2006) 1-2, 9, 31.
[289] O'sullivan and Hilliard (n 228) para 18.17.
[290] *Hongkong Fir* (n 99).

2.6 The shipowner's maintenance obligation

Special and different from using an owned vessel in the carriage of goods by sea, the initial seaworthy obligation of the shipowner under a time charter usually attaches the maintenance obligation to the shipowner within a time charterparty.[291] The shipowner's maintenance obligation is comprised of two parts.[292] One is that the shipowner is obliged to keep up and to cautiously survey, inspect, renew and replace the hull and machinery of the vessel as necessary.[293] Another, as in the case of *The Yuri Maru*,[294] indicates that if the equipment and machinery of the vessel becomes inefficient during the time charter period, the shipowner is required to take reasonable steps to repair the vessel to an efficient condition in a reasonable time, under the time charterparty.[295] Moreover, *The Elli and The Frixos* also showed that, to decide whether maintenance is "reasonable", it is not necessary to consider whether the cost of repairing the defect of the vessel is suitable or proportional.[296] It is also further indicated in the same case by the Court of Appeal that if law or policy is changed and the shipowner has particularly promised[297] that the vessel

[291] Wilson (n 93) 12; Lars Gorton and others, *Shipbroking and Chartering Practice* (7th edn, Informa Law 2009) 261.
[292] Coghlin and others (n 11) para 11.7.
[293] ibid.
[294] *Snia Societa di Navihazione v Suzuki & Co.* [1924] 18 LlL Rep 333; [1924] 17 LlL Rep 78 (KB) [88] (Gree, J.); Coghlin and others (n 11) para 11.7.
[295] ibid.
[296] *The Elli and The Frixos* (n 116) [59] (Cooke, J.). *The Elli and The Frixos* are two tankers which are time chartered under the SHELLTIME 4 form. See Coghlin and others (n 11) para 11.8, 11.16.
[297] Clause 1 (g) of the SHELLTIME 4 provides that 'She shall have on board all certificates, documents and equipment required from time to time by any applicable law to enable her to perform the charter service without delay'. Thomas (n 2) 335;

will be maintained in a suitable condition to ship a specific sort of cargo, then the shipowner would have an obligation to make physical modifications to ensure the vessel continued to be kept legally fit to carry these cargoes.[298] It is therefore suggested that a time charterer under the BALTIME form,[299] the NYPE 46 form,[300] the NYPE 93 form[301] and the GENTIME form[302] negotiates with a shipowner to follow the expression in Clause 1 (g) of the SHELLTIME 4 form[303] and to add a sub-clause under the maintenance clause. This would allow a specific promise to keep the vessel legally fit during the time charter as well as to be clearly protected by the contractual clause if the time charter believes that it is necessary.

2.6.1 Maintenance clause under the time charterparty

The shipowner is required to 'maintain her [the vessel] in a thoroughly efficient state in hull and machinery during service' under Clause 3 of the BALTIME form.[304] In addition, Clause 11 of the GENTIME form stipulates that the shipowner should 'maintain the vessel in such Class and in every way fit for the

<http://www.lawandsea.net/1documents/Shelltime4maintenance_obligation.pdf> accessed 29 April 2011.
[298] *The Elli and The Frixos* (n 116); [2008] 2 Lloyd's Rep 119 (CA); Coghlin and others (n 11) para 11.16.
[299] Thomas (n 2) 285-89.
[300] Williams (n 37) 228-31.
[301] Brodie (n 10) 32-46.
[302] (n 32).
[303] (n 297).
[304] Thomas (n 2) 286.

service throughout the period of the Charter Party'.[305] Moreover, Clause 1 of the NYPE 46 form[306] indicates that the shipowner has the obligation to 'maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.' Furthermore, Clause 6 of the NYPE 93 form[307] also adds the following information: 'and have a full complement of officers and crew'[308] to make the meaning of "maintenance" more complete.[309]

However, it is essential to consistently follow the suggestion in Section 2.5.2 and use the wordings of Article 3 (1) (a), (b), (c) of the Hague Rules[310] or the Hague-Visby Rules[311] in the BALTIME form,[312] the NYPE 46[313] and NYPE 93[314] forms and the GENTIME form.[315] The content of this contractual clause clearly defines the seaworthy vessel in order to oblige the shipowner to offer a seaworthy vessel at the beginning of the time charter service.[316] Avoidance of repetition is recommended and it is suggested that a maintenance clause simply provide that the shipowner should be obliged to maintain the vessel's class if contractually required and to keep the vessel seaworthy during the period of the

[305] (n 32).
[306] Williams (n 37) 229.
[307] Brodie (n 10) 34.
[308] The NYPE 93 form provides that the Owners shall 'maintain the Vessel's class and keep her in a thoroughly efficient state in hull, machinery and equipment for and during the service, and have a full complement of officers and crew'.
[309] Brodie (n 10) 34.
[310] (n 149).
[311] (n 151).
[312] Thomas (n 2) 285-89.
[313] Williams (n 37) 228-31.
[314] Brodie (n 10) 32-46.
[315] (n 32).
[316] (n 149); (n 151).

time charter under the BALTIME form,[317] the NYPE 46 form,[318] the NYPE 93 form,[319] and the GENTIME form.[320] This would contribute to ensuring the content of the shipowner's maintenance and seaworthy obligation under the time charterparty is more consistent, clear, logical and simple across all the essential time charterparty forms.

2.6.2 The extent of the shipowner's maintenance obligation

The extent of the shipowner's maintenance obligation is established on the basis of the wording used in the time charterparty.[321] For example, it can impose absolute obligation upon the shipowner or make him exercise due diligence to maintain the vessel.[322] In Clause 11 of the GELTIME form it is clearly expressed that the shipowner 'shall exercise due diligence to maintain the vessel in such Class and in every way fit for the service throughout the period of the Charter Party'.[323] In addition, it is believed that the shipowner's maintenance obligation and seaworthy obligation are indeed different concepts and, obviously, the express maintenance obligation of the shipowner is wholly and separately distinct from the shipowner's seaworthy obligation provided in the time

[317] Thomas (n 2) 285-89.
[318] Williams (n 37) 228-31.
[319] Brodie (n 10) 32-46.
[320] (n 32).
[321] *Adamastos Shipping v Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd's Rep 73 (HL) [280] (Parker, L.J.); Coghlin and others (n 11) para 11.10.
[322] *The Saxon Star* (n 321); Coghlin and others (n 11) paras 11.10-11.
[323] (n 32).

charterparty.[324] Therefore, it will not conflict with the Hague Rules[325] and Hague-Visby Rules[326] when they are incorporated in the time charterparty. This is because no maintenance clause is stipulated in the Hague Rules[327] or the Hague-Visby Rules[328] and it is thus not necessary to consider the priority of legal effects between them.[329] That is to say, when the Hague Rules[330] or Hague-Visby Rules[331] are incorporated into the time charterparty, no changes should be made to the extent of the shipowner's maintenance obligation under the original time charterparty, regardless of whether they have contractually agreed to the shipowner's absolute obligation or only to the exercising of due diligence by the shipowner.[332]

However, it is argued that the shipowner's maintenance obligation merely extends the shipowner's initial obligation of seaworthiness under the time charterparty.[333] This may mean that the shipowner also has an absolute obligation to maintain the vessel in common law if the Hague Rules[334] or the Hague-Visby Rules[335] are not incorporated into the time charterparty. Nevertheless, the shipowner likewise will certainly need to exercise due

[324] Coghlin and others (n 11) para 8.1, 11.5, 11.15; Wilson (n 93) 12.
[325] (n 149).
[326] (n 151).
[327] (n 149).
[328] (n 151).
[329] Coghlin and others (n 11) para 11.15.
[330] (n 149).
[331] (n 151).
[332] Wilson (n 93) 12.
[333] Williams (n 37) 229. Coghlin and others (n 11) para 11.5.
[334] (n 149).
[335] (n 151).

diligence to maintain the vessel when Hague Rules[336] or the Hague-Visby Rules[337] are incorporated in the time charterparty.[338] *The Elli and The Frixos* indicate that the shipowner must exercise reasonable care and skill to maintain the vessel within a reasonable time when Clause 38 of SHELLTIME 4 form[339] is incorporated into the Hague Rules and Hague-Visby Rules.[340]

However, *The Elli and The Frixos*[341] concerned a time charter under the SHELLTIME 4 form[342] and Clause 3 (a) of the SHELLTIME 4 form[343] where the exact wording "due diligence" had clearly already been provided in order to specify the extent of the shipowner's maintenance obligation under the time charterparty.[344] This does not necessarily mean that the extent of the shipowner's maintenance obligation should be imposed by the time charterparty in order for the shipowner to exercise due diligence to maintain the vessel in order to keep it in efficient condition. It is believed that if the exact wording does not specify the extent of the shipowner's maintenance obligation, the shipowner still at least needs to exercise due diligence to maintain the vessel, otherwise it is indeed doubtful how the shipowner can keep the vessel working efficiently. The expression in Clause 3 (a) of the SHELLTIME 4[345] is simply to make sure

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[336] (n 149).
[337] (n 151).
[338] *Adamastos Shipping v Anglo-Saxon Petroleum (The Saxon Star)* [1957] 1 Lloyd's Rep 271 (CA); Coghlin and others (n 11) para 11.10.
[339] Thomas (n 2) 346.
[340] *The Elli and The Frixos* (n 116) (Cooke, J); Coghlin and others (n 11) para 11.8.
[341] *The Elli and The Frixos* (n 116).
[342] Thomas (n 2) 335-51.
[343] ibid 336.
[344] ibid.
[345] ibid.

that the extent of the shipowner's maintenance obligation is clear in the contract. Moreover, as *The Eurasian Dream* case indicated, to exercise due diligence is equivalent to exerting reasonable skill and care.[346] Thus, it is no wonder that *The Elli and The Frixos*[347] found that the shipowner needed to take reasonable steps to exercise reasonable care and skill to maintain the vessel within a reasonable time, since "exercise reasonable care and skill" and "exercise due diligence" indicate the same coverage of the shipowner's maintenance obligation under the time charterparty in common law and Clause 3 (a) of the SHELLTIME 4 form under which the shipowner needs to exercise due diligence to maintain the vessel.[348] It is an option for both parties to contractually agree the extent of the shipowner's maintenance obligation under the time charterparty, this option allows for a higher standard of maintenance to be agreed upon.[349] It can be argued though that it is essential for the shipowner "at least" to exercise reasonable care and skill or "due diligence" to maintain the vessel in an acceptable condition throughout the period of the time charter even if the exact wording does not specify the extent of the shipowner's maintenance obligation in order to ensure justice and fairness for both parties, regardless of whether or not the Hague Rules[350] or Hague-Visby Rules[351] are incorporated in the time charterparty.[352]

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[346] *Papera Traders Co. Ltd. and Others v Hyundai Merchant Marine Co. Ltd. (The Eurasian Duram)* [2002] 1 Lloyd's Rep 719.
[347] *The Elli and The Frixos* (n 116).
[348] Thomas (n 2) 336.
[349] (n 321).
[350] (n 149).
[351] (n 151).
[352] It is believed that there is no impact on the extent of the shipowner's maintenance obligation when the Hague Rules and Hague-Visby Rules are incorporated into the time charterparty,

2.6.3 The legal effect of breach of the maintenance clause

The nature of the shipowner's maintenance obligation is also an intermediate term and this is the same as the shipowner's initial undertaking of the seaworthiness of the vessel in common law.[353] Thus the legal effect of shipowner's breach of the maintenance obligation is the same as the legal effect of the shipowner's breach of the seaworthy obligation under the *Hongkong Fir* approach.[354] The court examined the effects of this event to judge whether or not the shipowner's breach of maintenance obligation is so serious as to substantially deprive the time charterer of the whole benefit of the contract.[355] It would then decide whether or not the time charterer can terminate the time charterparty.[356] The decision of the Court of Appeal in *The Hermosa* case shows that the sub-time charterer cannot justify termination of the sub-charter if the existing deficiency of the vessel can be repaired to the right condition by the head charterer in a comparatively short time, since in *The Hermosa case* there would still have been sixteen to twenty months for the sub-charter to run his business.[357] This demonstrates that the court will not allow the time charterer to terminate the time charterparty if the court believes that the consequences of

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because the shipowner's maintenance obligation and the shipowner's seaworthiness obligation are different concepts; Wilson (n 93) 12.

[353] Coghlin and others (n 11) para 11,12.

[354] ibid para 11.2-11.3. In addition, in *The Hongkong Fir*, 'There had also been a failure by the owners to maintain the vessel in a " thoroughly efficient state in hull and machinery during service".' See Hamsher (n 19).

[355] *Hongkong Fir* (n 99).

[356] ibid.

[357] *Chilean Nitrate Sales Corporation v Marine Transportation Co. Ltd.* [1982] 1 Lloyd's Rep 570 (CA*) (The Hermosa)*; Coghlin and others (n 11) para 11.14.

the shipowner's breach of the maintenance obligation are not sufficiently serious.

2.6.4 Reforming the maintenance clause

As mentioned in Section 2.6.3, it was concluded by the court that the maintenance clause is an intermediate term and it is necessary for the court to examine the facts in each case to determine whether this breach substantially deprives the time charterer of the whole benefit of the time charterparty.[358] It should then decide whether the time charterer can terminate the contract.[359] However, what is "going to the root of the contract" and what amounts to 'substantially deprives the time charter of the whole benefit of the contract' depends upon the judge's interpretation of the facts. For example, as previously mentioned, there are contrasting views with regard to the decision of the *The Hongkong Fir*.[360] The decision of *The Hongkong Fir* may be not appropriate, but these different views are all based upon the same fact: the shipowner took around 20 weeks to repair the vessel.[361]

[358] Coghlin and others (n 11) paras 11.12-13.
[359] ibid.
[360] Hamsher (n 19); Nolan (n 238).
[361] ibid.

Thus it is suggested that the time charterer should take steps to manage his risk[362] and possible uncertain outcomes in advance. If the time charterer already has a clear commercial target and has a sense of his/her pattern or course of dealing, it is better for him/her to predict in advance the maximum tolerated length of time for the repair of the vessel by the shipowner. Then the time charterer can negotiate with the shipowner and clearly express the maximum period for repairing the vessel when the time charterparty is made. Moreover, it is also recommended that the time charterer should also clearly express the consequences of this breach when the contract is formed. These particulars would facilitate a judgment as to whether any breach is "going to the root of the contract"[363] and "deprive[s] substantially the whole benefit of the contract"[364] and would clarify the legal result for both parties. It could be added as a sub-clause of the maintenance clause of the BALTIME form,[365] the NYPE 46 form,[366] the NYPE 93 form,[367] and the GENTIME form.[368] The wording could be added to these forms as follows:

'It is going to the root of the contract or is depriving the time charterer substantially of the whole benefit of the time charterparty when the maximum time of (length of time) for repairing the vessel by the shipowner has been exceeded. If the vessel has any problems during the time charter and she

[362] See (n 288).
[363] *Hongkong Fir* (n 99).
[364] ibid.
[365] Thomas (n 2) 285-89.
[366] Williams (n 37) 228-31.
[367] Brodie (n 10) 32-46.
[368] (n 32).

cannot be completely fixed within the maximum time, the time charterer is entitled to his/her right to terminate this time charterparty and has a right for damages to be paid.'

Furthermore, it is also a good idea to follow the GENTIME form[369] in adding an index to the front of BALTIME form,[370] the NYPE 46 form[371] and the NTPE 93 form[372] and to add the Box Layout of the NYPE 46 form[373] and the NYPE 93 form.[374] An underlined heading emphasizing key words should also be given at the front of each section of clauses in the standard forms of the time charterparty when these forms are chosen and modified by merchants in order for them to more easily and efficiently understand their legal rights and obligations.

It is particularly suggested to highlight the maximum period for repair in the time charterparty in the Part 1 Box Layout of these essential standard forms of the time charterparty. This will ensure that both parties are clearly reminded of the maximum period allowed for repair under the time charter.

2.7 Highlighting the key reforms in this chapter

[369] ibid.
[370] Thomas (n 2) 285-89.
[371] Williams (n 37) 228-31.
[372] Brodie (n 10) 32-46.
[373] Williams (n 37) 228-31.
[374] Brodie (n 10) 32-46.

To sum up, following discussion of this clause of the beginning of the time charter service, it is recommended that it is necessary to make the cancelling clause in BALTIME form[375] more practically flexible to reflect actual situations which might occur when the vessel is on the sea. In addition, the real intention of both parties should be emphasised by adding “when” it is necessary for the vessel to be comply with “which” details of the description of the vessel in the BALTIME form,[376] the NYPE 46 form[377] and the NYPE 93 form,[378] as well as the GENTIME form.[379] Moreover, in order to clearly define and harmonise the concept of the shipowner’s seaworthy undertaking in the essential time charterparty standard forms and prevent future disputes, it is suggested that the original description regarding the shipowner’s seaworthy obligation should be deleted and the definition of seaworthiness of vessel in Article 3 (1) (a), (b), (c) of the Hague Rules[380] or the Hague-Visby Rules[381] should be adopted under the relevant clause of the BALTIME form,[382] the NYPE 46 form[383] the NYPE 93 form[384] and the GENTIME form.[385] Furthermore, it is also recommended that when the time charterparty is made, a clear expression of the maximum period for repairing the vessel and the consequences of this breach should be present.

[375] Thomas (n 2) 285-89.
[376] ibid.
[377] Williams (n 37) 228-31.
[378] Brodie (n 10) 32-46.
[379] (n 32).
[380] (n 149).
[381] (n 151).
[382] Thomas (n 2) 285-89.
[383] Williams (n 37) 228-31.
[384] Brodie (n 10) 32-46.
[385] (n 32).

2.8 Conclusion

In practice, it is paramount to avoid future disputes and to control uncertainty as well as to properly manage risk in advance for both parties under the time charterparty. Therefore, it is better to modify the clauses of standard forms in view of the courts' interpretations of common law. In addition, details of the legal rights and obligations of both parties should be clarified in the time charterparty. It is also necessary to provide the legal effect of their breach in the clauses of the time charterparty.[386] These changes would provide more protection to contractual parties as well as save time and expense in their commercial dealings.[387]

[386] Richard Stone, James Devenney and Ralph Cunnington, *Text, Cases and Materials on Contract Law* (2nd edn, Routledge 2011) 228; Legal effect refers to impact on the contractual parties and legal effect is determined by precedent. See J.W Carter and Elisabeth Pedent, 'The "Natural Meaning" of Contracts' (2005) vol 21 Journal of Contract Law 277.

[387] Economical is defined as 'using the minimum required; not wasteful of time, effort, resources'.
<http://www.thefreedictionary.com/economical> accessed 6 August 2013; '…a complex international dispute can take a great deal of time and money to resolve, even by arbitration'.
<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> accessed 6 August 2013.

CHAPTER 3:
UTILIZING THE TIME CHARTER SERVICE AND ITS IMPORTANT RESTRICTIONS

3.1 Introduction

As mentioned in Section 2.2 of Chapter 2, the main purpose of the time charterer chartering the vessel is to employ the vessel from the beginning to the end of the time charter in order to achieve his/her business target.[1] Even though the time charterer has the legal right to the use of the time charter service on the basis of the time charterparty, some restrictions are usually agreed by the contractual parties in practice.[2] This chapter intends to make the provisions regarding trading limits and safe port undertaking in the time charterparty within the essential standard forms of the time charterparty more practically operable, complete and thoughtful through the reform of the legal effect of the time charterer's breach of trading limits and safe port undertaking within the time charterparty. In order to reach this aim, key general concepts regarding utilizing the time charter service and important restrictions will be introduced. In addition, trading limits will also be indicated. Moreover, important legal issues regarding the time charterer's safe port undertaking and the possible reform of the legal liability and effect of the time charterer's breach of trading limits and safe port undertaking within the time charterparty will be discussed.

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[1] *The Berge Tasta* [1975] 1 Lloyd's Rep 442 [424] (per Donaldson, J.); Terence Coghlin and others, *Time Charters* (6th edn, Informa 2008) para 1.13; Christopher Hill, *Maritime Law* (6th edn, Informa Professional 2003) 171.
[2] Howard Bennett, 'Safe Port Clauses' in D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008).

3.2 General key concepts regarding utilizing the time charter service and important restrictions

If the time charterer charters the vessel for carrying of cargoes, it will be for either his/her own or others' cargo.[3] The cargo space is provided in Clause 8 of the BALTIME form[4] and it indicates that 'the whole reach and burden of the vessel, including lawful deck-capacity shall be at the Charterers' disposal, reserving proper and sufficient space for the vessel's Master, officers, crew, tackle, apparel, furniture, provisions and stores.'[5] In addition, the time charterer can, pursuant to Clause 19 of the BALTIME form, also be a head charterer and sublet the vessel to a sub-charterer to then make profits by the difference between the original charter "hire" and the sub-charter "hire".[6] Although the time charterer has the liberty to dispose of and utilise the vessel to pursue his/her own commercial aims and financial interests, his/her rights are still limited by the implication or explication of the time charterparty.[7]

The time charterer is required to employ the vessel in lawful trades for the carriage of lawful merchandise.[8] The trades for which a time chartered vessel will be employed are those of carriage by sea and import and export of goods, and these trades need to be fit for the law of the vessel's flag and law

[3] Coghlin and others (n 1) para 1.41.
[4] The BALTIME form 1939 (as revised 2001). Unless otherwise specified, all reference to the BALTIEM form refer to the BALTIME form 1939 (as revised 2001); Thomas (n 2) 286.
[5] ibid.
[6] The Payment of "hire" can be found in Clause 6 of BALTIME form; Thomas (n 2) 286-87.
[7] For example, trading limits are imposed within Clause 2 of the BALTIME form, Line 15, 27 to 34 of the NYPE 46 form, Clause 5 of the NYPE 93 form, and Clause 2 (a) of the GENTIME form; Bennett (n 2).
[8] As provided in Clause 2 of the BALTIME form, Lines 24 to 25 of the NYPE 46 form, Clause 4 (a), Clause 5 of the NYPE 93 form, and Clause 3 (a) of the GENTIME form.

governing the charter.[9] In addition, the time charterer's undertaking of lawful merchandise is an absolute warranty.[10] If the goods cannot meet the law of the vessel's flag and the governing law of the charter, or the loading of goods breach of the local law, or the goods cannot lawfully be discharged at the nominated discharge ports, the goods will not amount to lawful merchandise.[11]

Moreover, it is also prescribed that dangerous goods[12] carried by the vessel should be excluded under the BALTIME form, the NYPE 93 form and the GENTIME form.[13] In contrast, the NYPE 46 form[14] lacks provisions preventing the shipping of dangerous goods but does permit both parties, with agreement, to add the exclusion in the space of Line 25 of the form.[15]

However, Clause 24 of the NYPE 46 form (Clause Paramount)[16]

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[9] Coghlin and others (n 1) para 5.5.
[10] *The Greek Fighter* [2006] EWHC 1729 (Comm) [2006] 1 Lloyd's Rep 99; Coghlin and others (n 1) para 9.1.
[11] Coghlin and others (n 1) para 9.1.
[12] "Dangerous goods" are defined under Section 87 (5) of the Merchant Shipping Act 1995 as 'goods designated as dangerous goods by safety regulations.' Regulation 2 (1) (iii) of the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997 give a definition of "dangerous goods" as follows: 'goods classified in the IMDG (International Maritime Dangerous Goods) Code or in any other IMO publication referred to in these Regulations as dangerous for carriage by sea, and any other substance or article that the shipper has reasonable cause to believe might meet the criteria for such classification…' See <http://www.legislation.gov.uk/uksi/1997/2367/contents/made> accessed 26 May 2012. In addition, a broad meaning is given to "dangerous" under Section 4 (6) of the United States Carriage of Goods by Sea Act 1936 (or Article 4 (6) of the Hague Rules or Hague-Visby Rules) and under common law. Even though cargoes of its type are not normally treated as dangerous, a particular cargo may be dangerous if its own specific characteristics, including issues regarding its packaging, endanger the vessel or other cargoes on board. For instance, see *The Giannis NK* [1998] 1 Lloyd's Rep 337 (HL); Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 310; Coghlin and others (n 1) paras 9.9-10.
[13] See Clause 2 of the BALTIME form, Clause 4 (a) of the NYPE 93 form and Clause 3 (b) of the GENTIME form.
[14] Harvey Williams, *Chartering Documents* (4th edn, LLP Reference Publishing 1999) 228-31.
[15] Coghlin and others (n 1) para 9.6.
[16] Williams (n 14) 231.

incorporating Section 4 (6)[17] of the United States Carriage of Goods by Sea Act 1936[18] and the Hague Rules[19] is therefore incorporated in the time charterparty.[20] Therefore it should be construed that it is the time charterer, instead of the shipper,[21] and the shipowner, instead of the carrier, within Section 4 (6) of the United States Carriage of Goods by Sea Act 1936[22] under the context of the NYPE 46 form.[23] When the shipowner, Master or shipowner's agent has not consented with knowledge about the nature and character of the shipment of dangerous goods, the time charterer is liable for all costs and damages which are directly or indirectly caused by any dangerous goods being shipped.[24] In addition, the shipowner, Master and shipowner's agent are entitled at any time before discharge to land at any place or destroy, or render innocuous, dangerous goods without compensation.[25]

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[17] Or Article IV, Rule 6 of the Hague Rules, '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 charterer, 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 damage 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.' See <http://www.admiraltylawguide.com/conven/haguerules1924.html> accessed 8 April 2011.
[18] <http://www.shipinspection.eu/index.php?action=page_display&PageID=242> accessed 12 April 2011; <http://www.law.cornell.edu/uscode/html/uscode46a/usc_sec_46a_00001304----000-.html> accessed 26 May 2012; Coghlin and others (n 1) para 34.1, 34.6.
[19] See footnote 105 in Chapter 2; Coghlin and others (n 1) para 9.7, 9.9, 9.16.
[20] *Adamastos Shipping Co. v Anglo-Saxon Petroleum Co. (The Saxon Star)* [1959] AC 133; *Seven Seas Transportation Ltd. v Pacifico Union Marina Corporation (The Satya Kailash and Oceanic Amity)* [1982] 2 Lloyd's Rep 465; [1984] 1 Lloyd's Rep 588 (AC); Yvonne Baatz, 'Clauses Paramount in Time Charters' in Thomas (n 2).
[21] ibid; The charterparty is governed by the English law and therefore is construed based on English law; Coghlin and others (n 1) para 9.19, 34.1.
[22] (n 17); (n 18).
[23] Baatz (n 20).
[24] Coghlin and others (n 1) para 9.19.
[25] Baatz (n 20).

On the other hand, if the shipowner has consented to the shipment with knowledge of the nature and character of the dangerous goods, the shipowner, Master and shipowner's agent are also entitled at any time before discharge to land at any place or destroy or render innocuous dangerous goods without liability except to the general average, if any.[26] In these circumstances, the time charterer is not liable for all costs and damages which are directly or indirectly caused by the dangerous goods he/she shipped.[27] Similarly, Section 4 (6) of the United States Carriage of Goods by Sea Act 1936,[28] or Article IV, Rule 6 of the Hague Rules[29] or the Hague-Visby Rules,[30] are incorporated by Clause 31 (a) of the NYPE 93 form[31] and Article IV, Rule 6 of the Hague-Visby Rules[32] are incorporated by the Clause Paramount in B of the Appendix A-protective Clauses of the GENTIME form.[33] Thus it is believed that the construction of Section 4 (6) of the United States Carriage of Goods by Sea Act 1936,[34] Article 4 (6) of the Hague Rules[35] and the Hague-Visby Rules[36] under the NYPE 93 form[37] and the GENTIME form[38] will be the same as the aforementioned under the NYPE 46

[26] ibid.
[27] *Chandris v Isbrandtsen-Moller* [1951] 1 KB 240; John F Wilson, *Carriage of goods by Sea* (7th edn, Pearson Education Limited 2010) 36; Baatz (n 20); Coghlin and others (n 1) para 9.19.
[28] (n 17); (n 18).
[29] <http://www.admiraltylawguide.com/conven/haguerules1924.html> accessed 28 April 2012.
[30] <http://www.admiraltylaw.com/statutes/hague.html> accessed 28 April 2012.
[31] Peter Brodie, *Commercial Shipping Handbook* (2nd edn, Informa 2006) 40-41.
[32] (n 28).
[33]<https://www.bimco.org/~/media/Documents/Document_Samples/Time_Charter_Parties/Sample_Copy_GENTIME.ashx> accessed 28 April 2012.
[34] (n 17); (n 18).
[35] (n 29).
[36] (n 30).
[37] Brodie (n 31) 32-46.
[38] (n 33).

form.[39]

3.3 Trading limits

Trading limits are indicated under Lines 15 to 34 of the NYPE 46 form.[40] It may be necessary to consider two essential aspects under the standard form of the time charterparty.[41] That is the shipped cargo must be lawful merchandise and the voyage should be under the provided scope and restrictions.[42] However, it is believed that the GENTIME form is clearer, since it separately indicates that the shipped cargo must be lawful merchandise in another clause, Clause 3.[43] In order to benefit the shipping industries' business, and to avoid mixing both aspects of the time charterer's legal liabilities under the time charterparty together and increasing their complexity, the approach of the GENTIME form[44] is adopted in this section. Thus trading limits in this section should only specifically refer to the voyage being under the provided scope and restrictions.

The time charterer has the liberty to send the vessel to any port during the time charter period if there is a lack of appropriate provision under the time charterparty.[45] This is different from the voyage charter, which contains one

[39] United States Carriage of Goods by Sea Act 1936 incorporates the Hague Rules 1924. In addition, Article 4 (6) under the Hague Rules is same as the Hague-Visby Rules; (n 19)-(n 25).
[40] Williams (n 14) 228.
[41] Coghlin and others (n 1) para 5.4.
[42] ibid.
[43] (n 33).
[44] ibid.
[45] Martin Davies and Anthony Dickey, *Shipping Law* (3rd edn, Lawbook Co 2004) 369.

or more designated voyages.[46] However, in practice, in order to prevent the vessel from a high risk of damage in regions where risks such as reefs, bad weather or ice exist,[47] the shipowner normally sets out restrictions for the geographical scope of the voyages under the time charterparty to require the time charterer not to order the vessel outside an agreed geographical range of the voyage.[48]

Therefore, generally, the time charterer only has a legal right to order utilization of the vessel under the trading limits within the time charterparty.[49] While the time charterer's order is outside the contractual trading limits, the Master and the shipowner can refuse the order.[50] As Mackinnon LJ stated in *Halcyon Steamship v Continental Grain*, if the named discharge port under the bill of lading is outside the trading limits, the Master is also not obliged to sign a bill of the lading.[51]

In addition, under the Master or shipowner's protest, either the time charterer withdraws the uncontractual order outside trading limits or the shipowner follows the order.[52] In the latter situation, as indicated in *Rederi Sverre Hansen v Van Ommeren*, when the charterer's order from outside trading

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[46] Julian Cooke and others, *Voyage Charters* (3rd edn, Informa 2007) para 1.1.
[47] It is usually the shipowner who has insurance for the vessel's hull and machinery. The shipowner agrees with the hull underwriters not to order the vessel outside the specified limits in order to keep the vessel away from the high risk of damage resulting from dangerous areas, otherwise the shipowner needs to pay an extra premium. Thus the shipowner in turn asks the time charterer not to instruct the vessel outside this specified limits under the time charterparty. See Davies and Dickey (n 45) 369.
[48] See (n 7); Coghlin and others (n 1) paras 5.1-5.2; Thomas (n 2) 286; Williams (n 14) 228; Brodie (n 31) 34; (n 33).
[49] Coghlin and others (n 1) para 5.12.
[50] ibid.
[51] ibid; *Halcyon Steamship v Continental Grain* [1943] 75 LlL Rep 80 [84]; Coghlin and others (n 1) para 5.12.
[52] Coghlin and others (n 1) para 5.18.

limits was followed under the shipowner's well-established objection, the shipowner may be entitled to claim the payment of "hire" at the current market rate if it is higher than the charter rate.[53] The reason was, as mentioned in *The Batis*, that the extra contractual services, which were outside trading limits, were worth that value in the market at the time the charter service was completed.[54] In contrast, if a time charterer's order is outside trading limits and is accepted by the shipowner and followed without the shipowner's objection, it would be possible for the shipowner to claim for restitution of the undoubtable benefit granted to the time charterer in the current market.[55] Therefore, it is likely to be necessary for the time charterer to pay the going rate for a service based on the benefit which he/she receives from the time charter service outside trading limits under the time charterparty.[56]

Moreover, in practice the time charterer may be willing to pay the extra premium demanded by the shipowner's underwriters in order to get agreement under the time charterparty to order the vessel to sail outside particular trading limits.[57] For example, in *The Helen Miller*, which was time chartered under the New York Produce form, the charterers paid extra insurance under an additional clause which gave the time charterers the liberty to break limits, and consequently they instructed the vessel to ports

[53] *Rederi Sverre Hansen v Van Ommeren* [1921] 6 LIL Rep 193; Coghlin and others (n 1) para 5.21.
[54] *The Batis* [1990] 1 Lloyd's Rep 345 [352]-[353] (Hobhouse J.); Coghlin and ohters (n 1) para 5.21.
[55] Coghlin and others (n 1) paras 5.22-23.
[56] ibid.
[57] Coghlin and othersl (n 1) para 10.81.

outside the trading limits.[58] This resulted in ice damage to the vessel and the shipowners claimed for damage against the time charterers.[59] Mustill J held that the time charterers still needed to take responsibility for this damage since they were in breach of safe port undertaking.[60] The court indicated that even though the time charterers may pay the extra premium to get the shipowners' general allowance to sail beyond trading limits, this does not mean the time charterer can be released from liability resulting from sending the vessel to a dangerous port.[61]

However, difficulty will arise when the time charterer insists that the Master or shipowner should be compliant with an uncontractual order under protest but the Master or the shipowner continues not to follow the order.[62] In this circumstance, the shipowner might claim wrongful repudiation by the time charterer to terminate the time charterparty early and claim for damages.[63]

Furthermore, it is generally asserted that the time charterer will be in breach of the time charterparty if he/she instructs the vessel to fulfil the charter service outside the agreed trading limits under the time charterparty.[64] On the other hand, it is argued by Lord Mustill in *The Gregos* that the shipowner will be entitled to indemnity[65] against loss resulting from the time charterer's illegitimate order under protest, thus it may be unnecessary to treat the

[58] ibid; *St Vincent Shipping Co. Ltd. v Bock, Godeffroy & Co. (The Helen Miller)* [1980] 2 Lloyd's Rep 95 (QB).
[59] ibid.
[60] ibid.
[61] ibid.
[62] Coghlin and others (n 1) para 5.18.
[63] ibid.
[64] Coghlin and others (n 1) para 5.14.
[65] See Section 6.5 in Chapter 6.

illegitimate order by the time charterer as a breach of contract.[66] Nonetheless, it is asserted that it would be held by the court that a damages claim could be awarded for the shipowner's suffered loss on the basis of the time charterer's illegal order in breach of the time charterparty if the shipowner's indemnity claim is unable to be won.[67] However, it is believed that the shipowner can claim suffered loss by claiming for damages based on the time charterer's breach of trading limits or by an indemnity claim, but an indemnity claim should be regarded as the shipowner's last resort for use when all prior interests do not succeed.[68] Nevertheless, there is an absence of detail of the legal effect of the time charterer's breach of trade limits in the BALTIME form,[69] the NYPE 46 form[70] and the NYPE 93 form[71] and the GENTIME form.[72] Therefore, it is one of the targets of reform for this section.

The legal effect of the time charterer's breach of trading limits under the time charterparty in essential standard forms is unclear, incomplete, easily confused and insufficiently organised. The time charterer's trading limits and safe port undertaking are both restrictions of the time charterer's use of the time charter service under the time charterparty and therefore there is some connection between them. It is therefore suggested that it may be appropriate to reform legal liability and effect of the time charterer's breach of both trading limits and safe port undertaking together in Section 3.4.5.

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[66] *The Gregos* [1995] 1 Lloyd's Rep 1 [9]; Coghlin and others (n 1) para 5.14.
[67] Coghlin and others (n 1) para 5.14.
[68] David Foxton, 'Indemnities in time charters' in Thomas (n 2).
[69] Thomas (n 2) 285-89.
[70] Williams (n 14) 228-31.
[71] Brodie (n 31) 32-46.
[72] (n 33).

3.4 The time charterer's safe port undertaking

Traditionally, if the contractual parties under the voyage charter do not expressly incorporate a safe port clause into the voyage charterparty, the charterer's safe port undertaking may not be implied within the standard form of the voyage charterparty.[73] This is because it is often a draft with a voyage between named ports which has been agreed to by the contractual parties under the voyage charter.[74] However, in this respect, the time charterparty is different from the voyage charterparty.[75] In practice, there is normally a specified limitation to the time charterer merely sending the vessel to a safe port under the time charterparty.[76] To impose the time charterer's undertaking of nominating a safe port[77] can safeguard the individual welfare of the Master and crew, and the shipowner 's interest in the vessel while the time charterer exercises his/her contractual right to make profit under the time charter

[73] Bennett (n 2).
[74] Girvin (n 12) 322.
[75] Wilson (n 27) 25.
[76] Davies and Dickey (n 45) 371.
[77] 'The Ebola outbreak in West Africa is the deadliest occurrence of the disease since its discovery in 1976.' (http://www.bbc.co.uk/news/health-28105531, accessed 23 September 2014). In the legal respect, the issue regarding whether or not a specific port in an affected area is safe will rely on an evaluation of the facts of the possibility of the crew being exposed to Ebola. In addition, whether a shipowner or the Master can decline to continue the voyage to the port will be based on the charterparty.
<http://jacquessimon506.wordpress.com/2014/08/27/ebola-and-its-effect-on-shipping-contracts-calling-or-not-calling-in-africa/> accessed 23 September 2014.
It is asserted that the impact on the shipping industry could be large. It could be found that, when the charter is concluded, the shipowner might pursue extra protection by restraining trading limits to exclude named countries which are affected by Ebola. Moreover, if the Hague/Visby Rules apply, the shipowner's legal responsibility to the third parties for late "delivery" or for deterioration, as a consequence of the delay, may be exempt by the "restraint of princes" (this is indicated in Section 7.2.2 under Chapter 7) in Rule 2 (g) of Article IV. Therefore interfering by a government or state by closing a port or quarantining a ship can fall within the exemption of "restraint of princes". Alternatively, it may be dependent on Rule 2 (h) of Article IV "quarantine restrictions", regarding which, it is asserted that there is less need for the "present threat of executive force" than with the exemption, "restraint of princes". <http://www.sagarsandesh.com/news/if-ebola-escalates-its-impact-on-the-shipping-industry-could-be-considerable-reedsmith/> accessed 23 September 2014.

service.[78] In this section, important aspects regarding the time charterers' safe port undertaking will be examined and a reform of the time charterer's legal liability and the effect of safe port undertaking will be suggested.

3.4.1 Defining a safe port

It is claimed that whether a port is safe depends on an issue of fact, but the requirements which must be applied in deciding whether a port is a safe port[79] and whether the time charterer has been in breach in his/her safe port undertaking are arguments of law.[80]

Sellers L.J. in *The Eastern City*[81] described a safe port in the following way: 'A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.'[82]

While identifying whether a port is safe or unsafe, further to the aforementioned definition of a safe port, some essential additional criteria of

[78] Bennett (n 2).
[79] Coghlin and others (n 1) para 10.49.
[80] Hill (n 1) 180.
[81] *Leeds Shipping v Societe Francaise Bunge (The Eastern City)* [1958] 2 Lloyd's Rep 127 [131]; Coghlin and others (n 1) para 10.3.
[82] ibid. A port is unsafe if the vessel needs to lighten her cargo to move into the port. See *AIC Ltd. v Marine Pilot Ltd. (The Archimidis)* [2008] EWCA Civ 175. A port is also unsafe if the structure of the vessel has to be taken apart so as to be able to reach the port. See *Limerick Steamship Co. Ltd. v WH Stott & Co. Ltd* [1920] 5 LlLR 190; Girvin (n 12) 325.

a safe port held by the court[83] are worth mentioning and are given in the following three paragraphs.

It is held by the court that the port does not become an unsafe port only because of temporary danger, such as neap tides.[84] This is because the Master is required to wait for a reasonable time until the temporary risk has been removed or has gone.[85] The Court of Appeal in *The Hermine* also signified that delays to the voyage resulting from obvious peril or obstruction make the port become unsafe only when the delays are of a sufficient duration to frustrate the journey.[86]

Moreover, in *The Saga Cob*[87] *and The Chemical Venture*,[88] it was deemed that political risk is usually merely demanding enough to render a port as prospectively unsafe whenever the risk is such that a reasonable Master or shipowner would refuse to proceed into it with the vessel.[89]

Furthermore, it is asserted that the prior warning of hazards and avoidance of them by a safe system is also necessary for a safe port.[90] For example, as

[83] John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (2nd edn, JUTA & Co. Ltd. 2009) 763.
[84] *Aktieselskabet Eriksen v Foy, Morgan & Co.* [1926] 25 LlLR 442; *Carlton S.S. Co. v Castle Mail Co*. [1898] AC 486.
[85] Wilson (n 27) 27.
[86] *Unitramp v Garnac Grain (The Hermine)* [1979] 1 Lloyd's Rep 212 (CA); Coghlin and others (n 1) para 10.13,10.16.
[87] *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corporation* (*The Saga Cob*) [1992] 2 Lloyd's Rep 545; Yvonne Baatz, 'Charterparties' in Yvonne Baatz (ed), *Maritime Law* (2nd edn, Sweet & Maxwell 2011).
[88] *Pearl Carriers Inc. v Japan lines Ltd. (The Chemical Venture)* [1993] 1 Lloyd's Rep 508; Howard Bennett, 'Performance of Contract: Loading' in Bernard Eder et al (eds), *Scrutton on Charterparties and Bill of Lading* (22nd edn, Sweet and Maxwell Limited 2011).
[89] Bennett (n 88).
[90] Baatz (n 87).

The Khian Sea[91] illustrated, even if the weather is bad, if there are appropriate forecasting systems to monitor the weather, enough sea room to manoeuvre and sufficient tugs and pilots to assist the vessel to leave, then the port is still a safe port.[92] However, as indicated in *The Marinicki*, while there is no suitable system in port to explore, discover and remove underwater obstructions, the port is unsafe.[93] In *The Count*, the view by the court is that the port of Beria was a prospectively unsafe port at the time of the charterer's nomination because there was no proper system in the port to monitor the main navigational channel and this was established as a continuing danger to the vessels.[94] Thus the court awarded damages for detention in this unsafe port to the shipowner.[95]

3.4.2 The key concept of the time charterer undertaking to nominate a safe port and berth under the time charterparty

In common law, when a time charterer has a contractual right to nominate a safe port, he/she needs to warrant that the port is safe.[96] If the safe port undertaking is not expressively included within the time charterparty, it is implied by the courts under the time charterparty which is operated in a wide

[91] *The Khian Sea* [1979] 545; Baatz (n 87).
[92] Baatz (n 87).
[93] *Maintop Shipping Co. Ltd. v Bulkindo Lines Pte Ltd. (The Marinicki)* [2003] 2 Lloyd's Rep Rep 655; Girvin (n 12) 325.
[94] *Independent Petroleum Group Ltd. v Seacarriers Count Pte Ltd. (The Count)* [2008] 1 Lloyd's Rep 72; Baatz (n 87).
[95] ibid.
[96] Girvin (n 12) 307, 318; Charles G.C.H.Baker, 'The Safe Port/Berth Obligation and Employment and Indemnity Clauses' [1988] LMCLQ 43.

geographical range.[97] In addition, as shown in *The Livanita*, the time charterer's safe port undertaking will normally also be applied to the named port, since the named port had been agreed by the shipowner within the time charterparty and this does not conflict with the time charterer's undertaking in order to ensure the safety of the vessel.[98] Moreover, it is believed that the nature of the time charterer's safe port undertaking under the time charterparty is categorised as a condition under which the innocent contractual party is given the right to repudiate all his/her further obligations within the charterparty[99] and claim for damages[100] when the time charterer breaches his/her safe port undertaking.[101]

It is also indicated that when the time charterer assigns the vessel to the port, the time charterer's primary obligation regarding the safe port is imposed.[102] In addition, the duty of the time charterer to undertake a safe berth is generally the same as the time charterer's safe port undertaking.[103] When the expressed safe port undertaking is imposed on the charterer, this undertaking will include a charterer's safe berth undertaking if the obligation as to the safe berth is not expressed in the charterparty.[104]

Moreover, in practice, the time charterer's safe port undertaking is

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[97] Girvin (n 12) 309, 319.
[98] *STX Pan Ocean Co. Ltd. v Ugland Bulk Transport AS (The Livanita)* [2008] 1 Lloyd's Rep 86; Coghlin and others (n 1) para 10.78.
[99] Wilson (n 27) 28.
[100] Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, OUP 2010) 140.
[101] Wilson (n 27) 28.
[102] *Kodors Shipping Corporation v Empress Cubana de Fletes (The Evia (No.2))* [1983] 1 AC 736, 765 (Lord Roskill); Coghlin and others (n 1) para 10. 50.
[103] *Anders Utkilens Rederi A/S v O/Y Lovisa Stevedoring Co. A/B (The Golfstraum)* [1976] 1 Lloyd's Rep 547**;** Davies and Dickey (n 45) 374; Coghlin and others (n 1) para 10.85.
[104] Cooke and others (n 46) para 5.42.

absolute.[105] However, this might be modified and reduced to the time charterer exercising due diligence within express terms under the time charterparty,[106] such as in Clause 4 (c) of the SHELLTIME 4.[107] Nonetheless, as shown in *The Acina*, a time charterer's due diligence obligation is non-delegable, except that it clearly limits the time charterer's obligation to one of personal want of due diligence under the express term of the time charterparty.[108] Therefore, in this situation, the time charterer normally endures liability for any want of due diligence to nominate a safe port, even if he/she delegated this duty of nomination to others.[109]

In addition, a time charterer's safe port undertaking denotes the safety of the port at the time when the port is used rather than when the port is nominated.[110] For example, even if a port is icy when the time charterer nominates it, it may be safe at the time of using because the ice could have melted by the time the vessel arrives there.[111] The view of the House of Lords in *The Evia* (No 2)[112] indicates that the time charterer's express

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[105] Girvin (n 12) 323.
[106] ibid.
[107] 'Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks, anchorages, submarine line, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charter, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid. Subject as above, the vessel shall be loaded and discharged at any places as Charterers may direct, provided that Charterers shall exercise due diligence to ensure that any ship-to-ship transfer operations shall conform to standards not less than those set out in the latest published edition of the ICS/OCIMF Ship-to-Ship Transfer Guide.'
[108] *Dow Europe S.A v Novoklav Inc. (The Acina)* [1998] 1 Lloyd's Rep 306; Coghlin and others (n 1) para 38.46.
[109] ibid.
[110] Wilson (n 27) 30.
[111] Baatz (n 87).
[112] *Empress Cubana de Fletes v Kodors Shipping Corporation (The Evia (No.2))* [1982] 2 Lloyd's Rep 307; Wilson (n 27) 31.

undertaking to nominate a safe port does not mean a continuing guarantee of the port's safety but merely means the prospective safety of the port at the time of nomination.[113] In other words, it means the port will be potentially safe when the vessel reaches, uses and leaves it.[114] The courts will be concerned about a wide range of circumstances, such as high winds, ice, wrecks, wars, on the basis of a factual perspective, rather than a subjective one, to decide whether or not a port is safe.[115]

Even though the Lords also affirmed the time charterer would take responsibility for the existing features and qualities of the port, regardless of whether or not they are explicitly known to the time charterer,[116] the time charterer's safe port undertaking does not require that the time charterer be liable for unexpected and abnormal events[117] and this may also be connected with the individual insurance arrangements of contractual parties.[118] It can be seen that, based on the facts, *The Evia* (No 2), which was time chartered under the BALTIME form, was snared in the Shatt al Arab waterway by the onset of the war between Iran and Iraq.[119] The arbitrator held that the time charterparty was frustrated and the time charterer therefore did not need to pay for future "hire".[120] Consequently, the shipowner appealed and asserted that any frustration was caused by the

[113] Wilson (n 27) 31.
[114] Coghlin and others (n 1) para 10.50; N JJ Gaskell, C Debattista and R J Swatton, *Chorley and Giles' Shipping Law* (Pearson Education Limited 1987) 221.
[115] Lachmi Singh, *The Law of Carriage of Goods by Sea* (Bloomsbury Professional Ltd 2011) 133.
[116] Wilson (n 27) 31.
[117] The Court of Appeal held that the attack to the vessel by Eritrean Guerrillas in Massawa was an abnormal and unexpected event. See *The Saga Cob* (n 87); See also Baatz (n 87).
[118] Bennett (n 2).
[119] *The Evia (No.2)* (n 112).
[120] ibid.

time charterer, because the time charterer was in breach of the explicit undertaking of nominating a safe port.[121] However, ultimately, the House of Lords still rejected the appeal and held that the time charterer was not liable for unexpected and abnormal events and Lord Roskill believed that the shipowner's insurer should pay for the loss sustained by the shipowner.[122]

3.4.3 The time charterer's secondary obligation

If a nominated port ceases to become actually and prospectively safe at the time after the nomination of a port and before the vessel's arrival at a port or even after the vessel has berthed in the port, a secondary obligation of the time charterer arises.[123] The time charterer is required to revoke the initial order and to give a fresh order,[124] i.e. to re-nominate another safe port.[125] However, as Lord Roskill further indicated in *The Evia* (No 2),[126] in which it was too late to prevent risk to the vessel by leaving since she was trapped in the Shatt al Arab waterway due to the war, the time charterer's secondary obligation to re-nominate another port arises if the vessel is likely to be physically left there when the safe port later becomes unsafe after the vessel enters it.[127]

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[121] ibid.
[122] *The Evia (No.2)* (n 112) [315]; Wilson (n 27) 30-31.
[123] Bennett (n 2); Wilson (n 27) 31.
[124] ibid.
[125] *The Evia (No.2*) (n 102) (Lord Roskill); Baatz (n 87); Gaskell, Debattista and Swatton (n 114) 222.
[126] *The Evia (No.2*) (n 102).
[127] *The Evia* (*No.2)* (n 102) (Lord Roskill); Gaskell, Debattista and Swatton (n 114) 222.

This is exemplified by *The Lucille*.[128] Congestion prevented the vessel from going into the port until two days before the start of the Iran-Iraq war.[129] The court held that the charterer was in breach of his safe port undertaking because once the port was no longer prospectively safe the charterer had a chance to leave the port.[130] He failed to give a fresh order to allow the vessel to escape the port, consequently causing the vessel to become trapped in the port.[131]

Moreover, a more advanced issue relevant to the time charter, which was not resolved in *The Evia* (No 2), is also worth discussing here.[132] That is, after nomination of a prospectively safe port, what level of diligence is required to find any unexpected risk to the nominated safe port by the time charterer's secondary obligation?[133] It is asserted that the time charterer's secondary obligation arises merely when he is aware of the situation of the port becoming unsafe.[134] Another view suggests that for the time charterer to perform his secondary obligation it is necessary for him/her to have constructive knowledge of the fact that the nominated port has become dangerous.[135]

Nevertheless, it is believed that if the time for the vessel possibly physically to leave there when the safe port later becomes unsafe after the vessel

[128] [1983] 1 Lloyd's Rep 387; Wilson (n 27) 31-32.
[129] ibid.
[130] ibid.
[131] ibid.
[132] *The Evia (No.2)* (n 102).
[133] Girvin (n 12) 332; Wilson (n 27) 35; Baatz (n 87).
[134] Coghlin and others (n 1) para 10.51.
[135] Bennett (n 2).

enters it,[136] in this circumstance, the secondary obligation of the time charterer might still make it necessary to impose the need to exercise due diligence on the time charterer to nominate another new "prospectively safe" port after the port becomes unsafe in order to ensure that the vessel can reach a safe port, use it and leave from it. Therefore, in order to prevent an unnecessary dispute, it might be better for the contractual parties to negotiate and clearly state in the time charterparty that in the event that the vessel may need to leave when the safe port becomes unsafe after it enters it, it is necessary under the time charterer's secondary obligation that the time charterer exercise due diligence and re-nominate another new "prospectively safe" port after the port becomes unsafe.

3.4.4 The legal effect of the time charterer's breach of safe port undertaking under the time charterparty

The time charterer is in breach of his/her undertaking to nominate a safe port if the port is prospectively unsafe at the time of nomination of the port,[137] and causes a promissory obligation.[138]

It is believed that the time charterer's safe port undertaking is directly enforceable by claiming time charterer's breach of contract rather than by an indirect enforcement relying on an express or implied indemnity of a

[136] See (n 127).
[137] Gaskell, Debattista and Swatton (n 114) 221-22.
[138] Bennett (n 2); Wilson (n 27) 31.

traditionally named employment clause,[139] such as Clause 9 of the BALTIME form,[140] Clause 8 of the NYPE 46 form,[141] Clause 8 of the NYPE 93 form,[142] and Clause 12 of the GENTIME form.[143] The shipowner might try to make an alternative claim for indemnity under the aforementioned employment clause when the time charterer's safe port undertaking is expressly limited by the time charterer or implied to be limited by the courts,[144] or when the shipowner's claim that the time charterer is in breach of safe port undertaking fails since the situation occurs from a change of situation after the time charterer's instruction to proceed to the nominated port.[145]

Moreover, even if the nominated port by the time charterer is unsafe, it is debatable whether or not the time charterer should be totally liable for the shipowner's damage.[146] It is possible for the time charterer to assert that the Master should have understood the peril and that he/she should have declined to proceed to the unsafe port.[147] In addition, it may be argued by the time charterer that the unsafe port is not the cause of the damage and the damage actually resulted from the negligent operation of the vessel by the Master or Crew at the connected time, or "partly by one and partly by the other".[148] On the other hand, it may also be debatable as to whether the Master is conscious of the extent of risk, when it is not obvious how serious

[139] Bennett (n 2).
[140] ibid 286-87.
[141] Williams (n 14) 229.
[142] Brodie (n 31) 34.
[143] (n 33).
[144] Coghlin and others (n 1) para 10.94.
[145] ibid.
[146] Coghlin and others (n 1) para 10.68.
[147] ibid.
[148] ibid.

the risk is.[149] Under these circumstances, a dilemma may occur.[150] If the Master refuses an order from the time charterer, he/she may put the shipowner, his/her employer,[151] at risk of taking responsibility for a breach of contract, but if he/she complies with the time charterer's order to proceed to the port, the vessel is exposed to possible loss or damage by his/her action.[152]

Whether or not the negligent act of the Master or Crew, rather than the time charterer's breach of the safe port undertaking results in damage by the shipowner, the effective cause of the damage will be considered by the court under English law.[153] If the time charterer's breach of his/her safe port undertaking is not the effective cause of the damage, the time charterer has no responsibility for the result.[154]

However, the issue is that it may be arguable because if the Master follows the time charterer's initial order to the unsafe port, the time charterer's breach of the time charterparty actually would be the effective cause of the damage.[155] In the case of *The Houston City*, the port of Geraldton was held to be unsafe owing to a lack of a hauling off buoy and part of a fender on the wharf where the vessel was berthed.[156] It is debatable, given the facts, whether the Master was presented with a dilemma as to whether to follow

[149] Bennett (n 2).
[150] ibid.
[151] Baatz (n 87).
[152] Bennett (n 2).
[153] *The Dagmar* [1968] 2 Lloyd's Rep 563 [571] (Mocatta, J.); *The Polyglory* [1977] 2 Lloyd's Rep 353; *The Mary Lou* [1981] 2 Lloyd's Rep 272; Coghlin and others (n 1) para 10.69.
[154] ibid.
[155] Coghlin and others (n 1) para 10.69.
[156] *Reardon Smith Ltd. v Australian Wheat Board (The Houston City)* [1956] AC 266.

the time charterer's instruction to proceed to the unsafe port.[157] The agent, who controlled the loading at the port and had the same possibility of knowledge as the Master, represented the time charterer.[158] In addition, the harbour-master pilot, who guided the Master, did not give any guidance to the Master to help them choose a safe berth.[159] Thus it is possibly problematic to treat the damage of the vessel as not being the natural and direct result of the time charterer's nomination to the berth at Geraldton.[160]

Nevertheless, the Master holds professional judgment as to the proceeding of the vessel.[161] In terms of the issue of a safe port, it is asserted by Sellers L.J. in *The Stork* that the Master must act reasonably.[162] An unreasonable act by the Master can be evidence of his/her negligence when the time charterer nominates an unsafe port.[163]

The Master and shipowner have a legal right to reject an invalid order made by the time charterer which directs the vessel to proceed to an unsafe port.[164] They can then request another valid instruction.[165] In addition, if the Master or the shipowner is not conscious that the port is unsafe, he/she may decline to go into the port when he/she later understands the position of the

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[157] ibid.
[158] ibid.
[159] ibid.
[160] ibid.
[161]<http://www.eagle.org/eagleExternalPortalWEB/ShowProperty/BEA%20Repository/Rules&Guides/Current/111_ShipSecurity(SEC)Notation/Pub111_ShipSecurity> accessed 5 May 2012.
[162] *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd. (The Stork)* [1955] 1 Lloyd's Rep 349.
[163] Bennett (n 2).
[164] *The Hill Harmony* [2001] 1 Lloyd's Rep 147 [160] (Lord Hobhouse).
[165] Baatz (n 87).

port.[166] However, as Leggatt L.J. indicated in *The Product Star* (No 2), the Master or shipowners can refuse to proceed to the nominated unsafe port, but it is necessary that their discretion is not exercised "arbitrarily, capriciously or unreasonably."[167]

Therefore, even if the time charterer would have been in breach of the time charterparty in nominating a safe port, this would not justify damage suffered to the vessel by a deliberate act of the Master.[168] Moreover, if the Master recklessly ignores the obvious dangers of the nominated port, does not refuse the time charterer's order and complies with the charterers' order to proceed to or enter into the unsafe port, a break in the chain of causation will be established.[169] The Master's negligence must be sufficiently serious for his/her intervening act or fault to be treated as novus actus interveniens.[170] The shipowner cannot then claim for suffered damage from the time charterer.[171] This is because the Master is the servant of the shipowner and

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[166] ibid.
[167] *Abu Dhabi National Tannker Co. v Product Star Shipping Ltd. (The Product Star (No 2))* [1993] 1 Lloyd's Rep 397 (CA).
[168] *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd. (The Stork)* [1955] 2 QB 68 [104] (Morris, L.J.); Bennett (n 2).
[169] Baatz (n 87).
[170] Girvin (n 12) 334.
[171] Baatz (n 87); As in *American President Lines Ltd. v United States*, if it can be proven that maritime casualties resulted from "intervening negligence on the part of the Master," the charterer may be exempted from any responsibilities for his breach of unsafe port undertaking. However, it was also held in *Ore Carriers of Liberia v Navigem company*, *United States v Reliable Transfer Co. Inc.* and *Board of Commissioners v The Space King* that the charterer and the shipowner were both liable for the damages, which were divided proportionally based on the fault of the charterer and the shipowner. Thus in terms of time charterer's liabilities for breach of unsafe port undertaking, it can be seen that American law is different from English law; *American President Lines Ltd. v United States*, 208 F.Supp. 573 [1968] AMC 830 (N.D.Cal.1961). See Coghlin and others (n 3) para 10.166; *Ore Carriers of Liberia v Navigem company* [1971] AMC 513; Bennett (n 88) para 9-022, footnote 59; *United States v Reliable Transfer Co. Inc.* 421 US 397 (1975). See Coghlin and others (n 1) para 10.173; *Board of Commissioners v The Space King* [1978] AMC 856; Coghlin and others (n 1) para 10.176.

the shipowner's resulting loss was caused by the choice of the Master.[172]

It is suggested that the International Safety Management (ISM) Code[173] and International Ship and Port Facilities Security (ISPS) Code[174] can be used as risk assessment tools in order for the Master to investigate whether or not the circumstances of the port are safe for the vessel to enter[175] and minimise the risk of the vessel proceeding to an unsafe port[176] as well as to prevent potential disputes between the charterers and the shipowners.[177] It is asserted that whether the Master is negligent can be determined by examining whether or not the ISM Code[178] and ISPS Code are complied with by the shipowner's servant, the Master.[179]

The ISM Code provides several duties of the Master, with a checklist for identifying any dangers or any unforeseeable risks which may cause the port to become unsafe whilst preparing to enter.[180] Although the risk of the port may be unclear, compliance with the ISM Code could aid the Master in making an accurate judgement as to whether to reject the time charterer's

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[172] Baatz (n 87).
[173]<http://www.imo.org/ourwork/humanelement/safetymanagement/documents/ismcode_4march2010_.pdf> accessed 27 April 2012.
[174] <http://www.stlucia.gov.lc/nemp/agreements/ISPS_Code_en.pdf> accessed 27 April 2012.
[175] Talaal Hamad Aladwani, *Carriage of Goods by Sea*: *The Obligation of the Charterers' to Direct the Vessel to Safe Ports* (VDM Publishing House Ltd 2011) 56.
[176] Baris Soyer and Richard Williams, 'Potential Legal Ramifications of the International Ship and Port Facility Security (ISPS) Code on Maritime Law' (2005) LMCLQ 515.
[177] The Oil Companies International Maritime Forum, Tanker Management and Self assessment: A Best-Practice Guide for Ship Operators (1st edn, Witherby & Co. Ltd. 2004) 28-29; Aladwani (n 175) 57.
[178] Phil Anderson, *ISM Code: A Practical Guide to the Legal and Insurance Implications* (2nd edn, LLP 2005) 89.
[179] Aladwani (n 175) 53.
[180] Phil Anderson, 'The Errors of Our ways' (2007) 21 (2) MRI 3,16-17; <http://www.ismcode.net/papers_and_articles/the_errors_of_our_ways.pdf> accessed 2 May 2012; Aladwani (n 175) 53.

order and ask for another one so as to nominate a safe port.[181] Thus if the Master does not adhere to the ISM Code regarding the aforementioned situation, the Master is in breach of his duty and can be deemed negligent.[182] In addition, writing in a logbook or maintaining an electronic record is necessary for the Master as evidence in a tribunal.[183] The court could use this to judge whether the Master properly followed the ISM Code before the vessel entered the port or if the Master negligently failed to follow the ISM Code and broke the chain of causation between the time charterer's nomination of the unsafe port and the shipowner's resulting damage.[184]

Moreover, by means of following the procedure of the ISPS Code, which provides the procedure for both operating ports and ships, the ISPS Code has established a safeguard to shipping and ports to prevent terrorist attacks.[185] Therefore, reviewing whether or not the Master or the shipowner implemented the procedure provided in the ISPS Code to prevent a terrorist attack is also an approach to determine whether the Master or the shipowner was negligent when they proceeded with the voyage both before entering and within the unsafe port.[186]

However, it is arguable that examining the Master's adherence to the ISM Code and the ISPS Code is only one possible method for a tribunal or court to use to decide whether or not the Master is negligent and breaks the chain

[181] Anderson (n 178) 89-90.
[182] Aladwani (n 175) 54.
[183] ibid 53.
[184] ibid 53-54.
[185] Soyer and Williams (n 176) 515.
[186] Aladwani (n 175) 53, 56.

of causation.[187] Because real life circumstances are varied, it is impossible, given the facts, for these Codes to cover every standard for the court to determine whether or not the Master is negligent. Therefore, in order to properly decide whether or not the Master is negligent in proceeding to sail, both before entering and within an unsafe port, it is believed that the tribunal or the court may not only need to examine whether or not these Codes, along with certain international conventions, such as the International Convention for the Safety of Life at Sea (SOLAS),[188] Code of Safe Working Practice (COSWP),[189] and other case laws, are followed by the Master,[190] but may also need to take into account the tailor-made process of the risk assessment within the individual shipping company.[191] Nevertheless, it is also important that the court, in the future, continues to remain up-to-date and adapts to current situations when considering and evaluating whether a Master has acted reasonably when performing his/her task[192] in different situations in the current market.

On the other hand, the time charterer would be in repudiatory breach of the time charterparty if he/she still insisted on the invalid order.[193] The shipowner would also be entitled to choose to terminate the time charterparty[194] and

[187] ibid.
[188]<http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-(solas),-1974.aspx> accessed 2 May 2012.
[189] <http://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/coswp.pdf> accessed 3 May 2012.
[190] Aladwani (n 175) 53- 54, 56-57, 61.
[191] ibid 60.
[192] Bennett (n 2).
[193] Baatz (n 87).
[194] ibid; Bennett (n 2) 76.

claim for damages.[195] In these circumstances, if the time charterer insisted on the invalid order, the shipowner could choose to waive his/her right to reject it and proceed to the unsafe port, but the shipowner could still have a right for damages on the basis of the charterer's breach of safe port undertaking.[196]

It can be seen in *The Kanchenjunga*, from the facts, that the shipowners called on the charterers to suggest another safe port and they were aware that the port was unsafe.[197] However, they finally accepted the charterers' order, declared that the vessel was ready to load, asked the charterers to organise priority berthing and stated that the laytime was operating.[198] Thus, it is important to note that if the shipowner is with knowledge of the unsafe port and he/she regards the time charterer's order as valid, then by following that order, the choice of the shipowner will bind him/her and this will lead to his/her waiving the right to refuse an invalid order by the time charterer.[199]

Furthermore, in terms of a remedy, the legal consequence of the time charterer's breach of his/her safe port undertaking is that he/she is liable for the damages.[200] The shipowner's legal right to claim for damage, which is based on the time charterer's breach of his/her promissory obligation,[201]

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[195] Janet O'Sullivan and Jonathan Hilliard, *The Law of Contract* (4th edn, OUP 2010) para 18.38.
[196] *Motor Oil Hellas* (*Corinth*) *Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (HL); Baatz (n 87); Girvin (n 12) 333; Coghlin and others (n 1) para 10.64-65; Bennett (n 2).
[197] *The Kanchenjunga* (n 196) [400] (Lord Goff).
[198] ibid.
[199] Coghlin and others (n 1) para 10.64.
[200] Baatz (n 87).
[201] Bennett (n 2).

would usually include recovery of physical damage to the vessel.[202] The cost of investigation caused by the shipowner to ensure the reason for the damage of the vessel is also provided to the shipowner.[203] In addition, the shipowner is also entitled to recover extra expenses incurred at the unsafe port.[204] For instance, this covers the cost of lightening the vessel because of a vessel's excessive draught resulting in her being unable to enter a port,[205] the cost of preventing peril[206] or the time charter "hire" and additional insurance premiums caused by delay.[207] However, such a resulting loss is recoverable but still restricted by the doctrine of remoteness of damages and causation.[208]

To sum up, under English law, the time charterer has an undertaking of nominating a safe port within the time charterparty.[209] However, it is necessary for this port to be prospectively safe at the time of nomination.[210] In addition, if the time charterer's breach of his/her safe port undertaking is the effective cause of the damage, the time charterer must take responsibility for the result.[211]

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[202] Girvin (n 12) 334; Baatz (n 87).
[203] London Abitration 4/00 (LMLN 538). See Girvin (n 12) 334.
[204] Baatz (n 87).
[205] ibid.
[206] For instance, by lightening the vessel or through tugs. Girvin (n 12) 334; London Arbitration 6/80 (8 LMLN 3); It is also indicated that if a port which is made safe by the operation of seamanship, the shipowner can also recover the cost of unusual steps that are demanded. See Robert Gay, "Safe Port undertakings: named ports, agreed areas and avoiding obvious dangers"; The Archimidis [2010] LMCLQ 119.
[207] Baatz (n 87).
[208] *Independent Petroleum Group Ltd. v Seacarriers Count Pte Ltd. (The Count)* [2006] EWHC 3222 (Comm); [2008] 1 Lloyd's Rep 72 [22] (Toulson, J.); Girvin (n 12) 334; See also *Grace* (*GW*) *& Co. Ltd. v General Steam Navigation Co. Ltd. (The Sussex Oak*) [1950] 2 KB 383 [397]; Bennett (n 2).
[209] (n 95).
[210] Wilson (n 27) 31.
[211] ibid.

However, in these circumstances, the Master is required to act reasonably.[212] The Master has a legal right to refuse an invalid order from the time charterer which nominates the vessel to proceed into an unsafe port, and to request a valid instruction.[213] Moreover, the shipowner would also be entitled to choose to terminate the time charterparty[214] and claim for damages[215] if the time charterer still insisted that an invalid order be followed despite protest.[216] In addition, if the time charterer continues to insist on the invalid order**,** the shipowner could elect to waive his/her right to reject the initial order and accept the order to proceed to the unsafe port, but the shipowner could still have the right to claim for his/her suffered damages based on the time charterer's breach of safe port undertaking.[217]

Furthermore, if the Master deliberately or recklessly ignores any clear risks at the nominated port, does not refuse the time charterer's order and complies with the charterers' instruction to proceed or enter into the unsafe port, the chain of causation between the time charterer's nominated unsafe port and the shipowner's resulting damage will be broken[218] and the shipowner cannot therefore claim for damage from the time charterer.[219]

Although the law of the legal effect of the time charterer's safe port undertaking is revealed by the court as mentioned above, none of those are

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[212] *The Stork* (n 162).
[213] Baatz (n 87).
[214] ibid.
[215] O'sullivan and Hilliard (n 195) para 18.38.
[216] Baatz (n 87).
[217] *The Kanchenjunga* (n 196).
[218] Baatz (n 87).
[219] ibid.

shown in the BALTIME form,[220] the NYPE 46 form[221] or NYPE 93 form,[222] or the GELTIME form.[223] Therefore, it is doubtful whether such a crucial legal effect of the time charterer's safe port undertaking is sufficiently presented in the time charter standard forms so that in the shipping business a lay person can clearly understand their legal obligations and rights in the contract so as to be aware of and avoid any potential disputes in advance. This is triggered by the need for the reform of legal liability and the effect of the time charterer's safe port undertaking.

3.4.5 Reforming the legal effect of the time charterer's breach of trading limits and safe port undertaking within the time charterparty

The time charterer's trading limits and safe port undertaking are important restrictions when utilizing a time cnarter service.[224] These restrictions will significantly impact on the interests of bothcontractual parties, the time charterer and the shipowner.[225] However, it is unlikely that sufficient provisions relevant to these parts are included in the essential standard forms.

[220] Thomas (n 2) 286-89.
[221] Williams (n 14) 228-31.
[222] Brodie (n 31) 32-46.
[223] (n 33).
[224] Davies and Dickey (n 45) 369; Bennett (n 2).
[225] Bennett (n 2).

It would be beneficial for the NYPE 46[226] and 93 forms[227] to adopt the Box Layout as in the BALTIME form[228] and the GENTIME form[229] in order to more clearly highlight the important agreement and help the busy businessman to pay attention to these key settlements of trading limits. Thus the addition of a Box Layout to emphasise “trading limits”, “excluded ports” and “excluded countries” in the NYPE 46[230] and NYPE 93 forms[231] are also recommended. In addition, it is clearer to divide “at the beginning of the time charter service”, “at the ending of the time charter service” and “during the time charter” within “excluded ports” and “excluded countries” for the contractual parties to have the discretion and flexibility to deal with different circumstances.

Even though a Box Layout is used on the front of the BALTIME form[232] and the GENTIME form,[233] the BALTIME form’s Box Layout[234] fails to highlight “excluded ports” and “excluded countries” and the GENTIME form’s Box Layout[235] does not emphasise “excluded ports”. Thus, it would be beneficial to add these and also separate “at the beginning of the time charter service”, “at the ending of the time charter service” and “during the time charter” within “excluded ports” and “excluded countries” for the contractual parties to negotiate and fill in.

In addition, from the discussion in Sections 3.3 and 3.4.4, it can be seen that

[226] Williams (n 14) 228-31.
[227] Brodie (n 31) 32-46.
[228] Thomas (n 2) 286-89.
[229] (n 33).
[230] Williams (n 14) 228-31.
[231] Brodie (n 31) 32-46.
[232] Thomas (n 2) 286-89.
[233] (n 33).
[234] Thomas (n 2) 285.
[235] (n 33).

the legal effects of the time charterer's breach of trading limits and safe port undertaking are very similar, except as noted in Section 3.3 where, while the charterer's order outside trading limits is followed, the shipowner may claim payment of "hire"[236] at the current market rate if it is higher than the charter rate.[237] It may help to clarify the shipowner's potential claim and draw the time charterer to the attention of his/her legal obligation if the aforementioned legal effect of the time charterer's breach of trading limits were shown in the BALTIME form,[238] the NYPE 46[239] and NYPE 93 forms,[240] and the GENTIME form.[241]

It could be argued that Clause 2 of the BALTIME form,[242] Lines 15 to 21,[243] and 27 to 34[244] and Clause 6 of the NYPE 46,[245] and Clause 5 of the NYPE 93 form[246] are too simple and are incomplete. And despite the fact that the GELTIME form[247] is more organised, this criticism could also be made of Clause 2 (a) of the GENTIME form.[248] They all lack clear stipulations about the legal effects of the time charterer's breach of trading limits and safe port undertaking. This might cause contractual parties to be unclear about their legal rights and obligations. In addition, this might result in unpredictable legal consequences for the contractual parties.

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[236] A suggested change to the wording is as payment for the time charter service. See Section 5.2.1.
[237] See (n 53).
[238] Thomas (n 2) 286-89.
[239] Williams (n 14) 228-31.
[240] Brodie (n 31) 32-46.
[241] (n 33).
[242] Thomas (n 2) 286.
[243] Williams (n 14) 228.
[244] ibid.
[245] Williams(n 14) 229.
[246] Brodie (n 31) 34.
[247] Bennett (n 2).
[248] Brodie (n 31) 34.

Therefore, in order to make the provision of legal liability and the effect of the time charterer's breach of trading limits and safe port undertaking clear, practically operable, complete, thoughtful, reasonable, less confusing, easier to follow and better organised through the reform of this provision within the essential standard forms of the time charterparty, the following suggested provisional guidelines for the time charterparty standard forms not only keep the benefits of the wordings in the standard form, Clause 2 (a) of the GENTIME,[249] but also provide some recommendations.

To avoid future possible disputes and make sure that the reform of the provision can be operated in practice, adopting the view of the House of Lords in *The Evia* (No 2)[250] to clearly indicate that the time charterer's express undertaking to nominate a safe port means the prospective safety of the port at the time of nomination is suggested.[251]

In addition, excluded ports and countries which are listed as aforementioned suggestions in the Box Layout of the essential standard forms of time charterparty are also recommended as mirrored as the statement in Box Layout to be clearly provided in these forms. The reform would make the provision consistent with the recommendation in the Box Layout and improve the presentation's organization and make the provision clearer, less confusing and much easier to follow.

Adopting the view in *The Hill Harmony* is also proposed in order to make the

[249] ibid.
[250] *The Evia (No.2)* (n 112).
[251] Wilson (n 27) 31.

provision more practically applicable. Therefore, the Master has a legal right to reject an invalid order from the time charterer which would direct the vessel to proceed to an unsafe port.[252] In reforming the provision, an appropriate submission should be made so that the Master can then request another valid instruction.[253] If the time charterer asserts that the initial order should be obeyed under protest,[254] the shipowner has the legal right to choose to terminate the time charterparty[255] and claim for damages.[256] This legal consequence will be also the same with the time charterer's breaching trading limits under the same circumstances when the time charterer directs the vessel outside the trading limits.[257]

In order to make the provision more complete and consider all possible situations, it is suggested that the decision of *he Kanchenjunga*[258] also be adopted in the provision in a clear manner to indicate that when the time charterer insists on an invalid order, the shipowner also can choose to waive his/her right to refuse this order by the time charterer and comply with the initial order to proceed to the unsafe port. However, in this situation, the shipowner could still have a legal right to claim for suffered damages based on the charterer's breach of the safe port undertaking.[259] It is also believed this legal consequence will be applied when the time charterers' breach trading limits under the same situations.

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[252] *The Hill Harmony* (n 164) [160] (Lord Hobhouse).
[253] Baatz (n 87).
[254] ibid.
[255] ibid.
[256] O'Sullivan and Hilliard (n 195) para 18.38.
[257] Coghlin and others (n 1) para 5.18.
[258] *The Kanchenjunga* (n 196); Bennett (n 2).
[259] ibid.

Moreover, to make payment for the time charter service under the invalid order of the time charterer more considerable and reasonable, it is recommended that if the time charterer orders the vessel outside the trading limits or nominates the vessel to proceed to an unsafe port and the Master or the shipowners follow the invalid order under protest, the shipowners are entitled to payment for the time charter service at the current market rate if it is higher than the charter rate.[260] This design of the provision might help to decrease the risk of the time charterer's intention to invalidate ordering the vessel outside the trading limits or nominating the vessel to proceed to an unsafe port because they might not want to make a higher payment for the time charter service if a current market exists.[261] This may be especially true since the rate of payment would be above the contractual rate during the period of the time the vessel was under the time charterer's invalid order.

Furthermore, the Master's novus actus interveniens[262] cannot be seen in the provision regarding the legal effect of the time charterer's breach of safe port undertaking under the essential standard forms of the time charterparty. To make the provision more complete, practically applicable and thoughtful under the time charter, it is worth adding the point of view of Morris L.J. in *The Stork*[263] and the view of a convinced authority[264] to reform the provision. Thus, it is proposed to provide that the time charterers are not liable for the

[260] See (n 53); (n 54).
[261] The market refers to the market for the equivalent vessel for period time charters on terms similar to the contractual charter. *The Johnny* [1977] 2 Lloyd's Rep 1 (CA); Coghlin and others (n 1) paras 4.56.
[262] Girvin (n 12) 334.
[263] *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd. (The Stork)* [1955] 2 QB 68 [104] (Morris, L.J.).
[264] Baatz (n 87).

shipowners' suffered damage[265] if the Master deliberately[266] or recklessly ignores[267] the vessel outside the trading limits and/or the obvious dangers of a nominated port, does not reject the time charterer's order, and obeys the time charterers' order outside trading limits and/or to proceed to or enter into an unsafe port.[268]

The reform of this provision in the standard form of time charterparty may be used as guidance for modern shipping industries as a basic framework of legal liability and effect of the time charterer's breach of the trading limits and safe port undertaking. In addition, the contractual parties may also use this suggestion to add or modify their own agreement within the time charterparty to fit their individual needs.

3.5 Highlighting the key reforms in this chapter

The suggestions made in this section can be summarized and shown in the standard forms of the time charterparty as follows:

(A) <u>Trading limits and safe port undertaking</u>

The Vessel shall be employed in lawful trades within the trading limits as stated in Box__ between safe ports or safe places where she can safely

[265] *The Stork* (n 263) [104] (Morris, L.J.); Baatz (n 87).
[266] *The Stork* (n 263) [104] (Morris, L.J.); Bennett (n 2).
[267] Baatz (n 87).
[268] ibid; *The Stork* (n 263) [104} (Morris, L.J.).

enter, lie always afloat and depart.[269] The Charterers' safe port undertaking makes it necessary for this port to be prospectively safe at the time of nomination.[270]

(B) Excluded ports and countries

The Owners warrant that the vessel will not have traded to any of the ports and the countries listed in Box__at the time of beginning the time charter service. The vessel will also not be allowed to have traded to any of the ports or countries listed in Box__ during the time charter and/or at the time of ending of the time charter service.

(C) The Master's rejection and the Owners' termination of the time charterparty

The Master is entitled to reject an invalid order by the time charterer which instructs the vessel to perform a service outside trading limits or nominates the vessel to proceed to an unsafe port[271] and to request an alternative valid order.[272] If the Charterers insist that the initial order should be followed under protest, the Owners are entitled to choose to terminate the time charterparty[273] and claim for damages.[274]

(D) The Owners claim for damage

The Owners are entitled not to choose to exercise their right under (C)

[269] See Clause 2 (a) of the GENTIME form; (n 33).
[270] *The Evia (No.2)* (n 112).
[271] *The Hill Harmony* (n 164) [160] (Lord Hobhouse).
[272] Baatz (n 87).
[273] ibid.
[274] O'Sullivan and Hilliard (n 195) para 18.38; Coghlin and others (n 1) para 5.18.

but to comply with the Charterers' order outside the trading limits or to proceed to an unsafe port.[275] In these circumstances, the Owners are still entitled to claim for suffered damages.[276]

(E) The Owners are entitled to payment for the time charter service at the current market rate

If the Charterers order the vessel outside the trading limits or nominate the vessel to proceed to an unsafe port and the Master or the Owners comply with the invalid order, the Owners are entitled to payment for the time charter service at the current market rate if it is higher than the charter rate during the period of time charter under the time charterer's invalid order.[277]

(F) The Charterers are not liable for damages

If the Master deliberately[278] or recklessly ignores[279] the obvious dangers of a nominated port, does not refuse the Charterer's order and complies with the Charterers' order outside trading limits and/or to proceed to or enter into the unsafe port, the Charterers are not liable for the Owners' suffered damage.[280]

3.6 Conclusion

[275] *The Kanchenjunga* (n 196).
[276] ibid.
[277] See (n 53); (n 54).
[278] *The Stork* (n 263) [104] (Morris, L.J.).
[279] Baatz (n 87).
[280] ibid; *The Stork* (n 263) [104] (Morris, L.J.).

In order to ensure the effective use of the vessel by the time charterer and to protect the interests of both contractual parties, paying attention to the crucial restrictions of employment of the time charter service under the time charterparty and law is significant for the time charterer and the shipowner. The current provisions regarding legal liabilities and the effect of the time charterer's breach of trading limits and safe port undertaking In the essential standard forms of time charterparty have some drawbacks, and therefore, hopefully the suggested reforms provided in this chapter can improve the guidance provided when these popular standard forms are chosen and modified in later editions.

CHAPTER 4:

ENDING OF THE TIME CHARTER SERVICE

4.1 Introduction

Examining the duration of a time charter and the rate of payment in a particular clause of a time charterparty is important when ending the time charter since they are connected to the legal obligation and rights between a shipowner and a time charterer under a time charterparty.[1] In addition, the duration of a time charter will impact on the commercial operation and business plan of the shipowner and the time charterer.[2] Therefore, in order to investigate whether or not the duration of the time charter under the time charterparty is clearly shown in the time charter standard forms, and the legal effect of early "redelivery of the vessel"[3] and late "redelivery of the vessel" are thorough and clear in these standard forms, general key concepts, significant legal issues surrounding "redelivery of the vessel" under the time charter, such as the extent of the margin, early "redelivery of the vessel" and late "redelivery of the vessel" will be discussed in this chapter. In addition, the reform of duration and "redelivery of the vessel" under the time charter standard forms will also be recommended.

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[1] John F Wilson, Carriage of Goods by Sea (6th edn, Pearson Education Limited 2010), 90.
[2] Paul Herring, 'Ascertaining the charter period' in D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008).
[3] Changing "redelivery of the vessel" to "ending of the time charter service" is proposed in Section 4.6.

4.2 General key concepts surrounding "redelivery of the vessel"

In order to prevent contractual parties from confusing the time charter with the bareboat charter and following the aforementioned concepts of the specific characteristics of the time charter which are discussed in Section 1.1.3 of Chapters 1 and Section 2.2 of Chapter 2, it is first necessary to clarify the notion of "redelivery of the vessel". As opposed to "the delivery of the vessel" which refers to "the beginning of the time charter", "redelivery of the vessel" actually means "the ending of the time charter service." i.e. the end of the time charterer's "using the vessel" through instructing the Master and Crew who are employed by the shipowner.[4] Thus, in this chapter, "redelivery of the vessel" means "ending of the time charter service".

"Redelivery of the vessel"[5] is provided in Clause 7 of the BALTIME form 2001 revision.[6] It is required in this clause that the vessel is redelivered in the same good order and condition as when it was first delivered.[7] In addition, Line 54 within Clause 4 of the NYPE 46 form[8] and Clause 4 of the GENTIME form also stipulate the agreement between the contractual parties regarding the "redelivery of the vessel".[9]

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[4] *The Berge Tasta* [1975] 1 Lloyd's Rep 442 [424] (per Donaldson, J.); Terence Coghlin and others, *Time Charters* (6th edn, Informa 2008) para 1.5, 1.13; Christopher Hill, *Maritime Law* (6th edn, Informa Professional 2003) 171; Christopher Smith, 'Charterparties' in Bernard Eder and others (eds), Scrutton on Charterparties and Bills of Lading (22nd edn, Sweet and Maxwell Limited 2011).
[5] It refers to "ending of the time charter service".
[6] Unless otherwise specified, all reference to the BALTIEM form refer to the BALTIME form 1939 (as revised 2001); Thomas (n 2) 286.
[7] ibid.
[8] Harvey Williams, *Chartering Documents* (4th edn, LLP Reference Publishing 1999) 229.
[9]<https://www.bimco.org/~/media/Documents/Document_Samples/Time_Charter_Parties/Sample_Copy_GENTIME.ashx> accessed 25 November 2011.

For the benefit of the shipowner,[10] it is usually provided in the standard form of the time charterparty, such as in Line 101 to 102 of Clause 7 of the BALTIME form,[11] Lines 56 to 57 within Clause 4 of the NYPE 46 form[12] and Line 94 to 95 of Clause 4 (c) of GENTIME form,[13] that the time charterer is obliged to give a notice of "redelivery of the vessel."[14] In practice, the agreement between the shipowner and time charterer should specify the approximate notice of "redelivery of vessel" given within an a certain number of days, then definitive notice of "redelivery of the vessel" given within a particular number of days.[15] Therefore, as indicated in *The Liepaya*, failure to give notice of "redelivery of the vessel" within the agreed number of days by the time charterer is in breach of the time charterparty and the shipowner has a legal right to claim damages for the resulting loss.[16]

In addition, even though it may be possible that the shipowner requires the vessel be "redelivered" to a specific port, it is more common for a central range of specified ports to be named than a specific port under the time charterparty.[17] For example, in *The Sanko Honour*, the time charterparty provided that the vessel be 'redelivered to Owners at a port or point at sea worldwide within Institute warranty limits but not further in distance than the

[10] Yvonne Baatz, 'Charterparties' in Yvonne Baatz (ed), *Maritime Law* (2nd edn, Sweet & Maxwell 2011).
[11] Thomas (n 2) 286.
[12] Williams (n 8) 229.
[13] (n 9).
[14] Christopher Smith, 'Time Charters' in Eder and others (n 4).
[15] ibid.
[16] ibid; *UBC Chartering Ltd. v Liepaya Shipping Co. Ltd. (The Liepaya)* [1999] 1 Lloyd's Rep 649.
[17] Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 683.

Persian Gulf is from Japan at Charterer's option'.[18]

Moreover, Clause 7 of the BALTIME form[19] also provides the exception of good order and "fair wear and tear" when the vessel is redelivered.[20] The vagueness of the term "fair wear and tear" leads to questions about whether or not this includes loading and discharge.[21] If it is believed that the shipowner should bear the consequences of "fair wear and tear", this conflicts with the view that the time charterer might need to take responsibility for "fair wear and tear" caused by loading and discharge on the basis of his/her usually being liable for giving instructions for the process of loading and discharge, and controlling the process of loading and discharge under the time charterparty.[22] Nevertheless, it could be argued that the shipowner who runs the specific charter services should have the knowledge and experience to foresee that "fair wear and tear" is a natural process for their particular vessel. Thus it is believed that whether or not the time charterer should be liable for the condition of the vessel really depends on the facts. It is reasonable to allow the shipowner to prove that the vessel is not in the same good condition as when delivered. This results from potential negligent use of the vessel by the time charterer and allows for imposition of the time charterers' liability for his/her damage to the vessel.

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[18] *Reardon Smith Line Ltd. v Sanko Steamship Co. Ltd. (The Sanko Honour)* [1985] 1 Lloyd's Rep 418.
[19] Thomas (n 2) 286.
[20] 'The Vessel shall be re-delivered on the expiration of the Charter in the same good order as when delivered to the Charterers (fair wear and tear excepted) at an ice-free port in the Charterers; option at the place or within the range stated in Box 21…' See Thomas (n 2) 286.
[21] Wilson (n 1) 88.
[22] ibid.

4.3 Important legal issues surrounding the duration of the time charter under the time charterparty

Extent of margin and relevant reform regarding the duration of the time charter under the time charterparty are discussed in this section.

4.3.1 Extent of margin

It is often found that legal questions which arise in practice pertain to whether or not an extent of margin is allowed when the final voyage ends after (overlap)[23] or before (underlap) the day of expiration under the time charterparty.[24]

The duration of the time charter may vary depending on the agreement between the shipowner and time charterer.[25] The time charterparty may show that the duration of the time charter is either for a range of time, for example, “3 months, 15 days more or less”, “3-6 months” or for a fixed period of time, for example, “three months”.[26] Due to the difficulties experienced by the time charterer when making an accurate plan for how long each voyage will take during the time charter, a reasonable time margin is normally permitted to allow the time charterer to have some flexibility regarding the

[23] Simon Baughen, *Shipping Law* (4th edn Routledge-Cavendish 2009) 263.
[24] Herring (n 2).
[25] Coghlin and others (n 4) para 4.8.
[26] ibid.

duration of the time charter.[27]

Even though there are various ways to provide the duration for the time charter on the basis of the principle of freedom of the contract within the time charterparty,[28] the key notion regarding the margin of a period time under time charter could be briefly illustrated as follows.

Although the word “about”, i.e “approximately”,[29] may not actually be shown in the time charterparty, the court will treat it as including an implied reasonable margin when it provides a fixed duration for a time charter, such as six months or two years, because it is very difficult in practice for the time charterer to correctly calculate the specific day for the end of the last voyage.[30] Around plus or minus 5 per cent of the period indicated in the time charterparty is normally allowed by the court as an implied margin, except where there is an express agreement for an overlap in the time charterparty.[31] In addition, if the words “without guarantee” are specified regarding the duration of the time charter in the time charterparty, the time charterer would not be held responsible for exceeding the expected duration of the time charter.[32] For example, *The Lendoudis Evangelos II*[33] was a case about a time charter trip.[34] The court indicated in this case that the charterer was not in breach of contract for either early or late “redelivery of the vessel”

[27] Baatz (n 10).
[28] Neil Andrews, *Contract Law* (CUP 2011) 6.
[29] Coghlin and others (n 25) para 4.19.
[30] ibid para 4.8; *Shipping Law* (2011/2012 edn, Witherby Publishing Group Ltd 2011) 141.
[31] Wilson (n 1) 86.
[32] Smith (n 14).
[33] *Continental Pacific Shipping Ltd. v Deemand Shipping Co. Ltd. (The Lendoudis Evangelos II)* [1997] CLC 432.
[34] ibid.

if he/she estimated the duration of the period of the time charter in good faith under the explicit provision of “without guarantee” of duration of the charter.[35]

However, when an expressed spread for a variable period of the time charter in the time charterparty is set by the contractual parties, this may mean that the court does not allow an extra margin for this duration of the time charter.[36] For example, in *The Dione*,[37] “six months, 20 days more or less” for a charter was provided in a charterparty.[38] It was thought that the time charterer could “redeliver” the vessel at any time within the range of six months plus or minus 20 days, and still had the right to use the vessel until the end of the spread.[39] However, the London arbitrators believed that when the vessel was “redelivered”, a reasonable overlap of 8.4 days should have been allowed for a period of six months and twenty days.[40] Nevertheless, the court of appeal held that the additionally implied tolerance could not be permitted beyond the agreed margin.[41]

In addition, if margin of a period under time charter is not set up in the time charterparty, extra tolerance is not allowed beyond a handwritten range of redelivery dates.[42] For example, the view of Atkin J in *The Hugin*[43] showed that the extent of the margin would not be allowed beyond 31 October 1912, since it was indicated that the “redelivery” day would be “between 15th and

[35] ibid; Herring (n 2); Smith (n 14).
[36] Coghlin and others (n 4) para 4.14.
[37] *Alma Shipping Corporation v Mantovani (The Dione)* [1975] 1 Lloyd’s Rep 115 (CA).
[38] ibid.
[39] ibid.
[40] ibid.
[41] ibid.
[42] Coghlin and others (n 4) para 4.15.
[43] *Watson Steamship v Merryweather (The Hugin)* [1913] 18 Com Cas 294; Coghlin and others (n 4) para 4.15.

31st October, 1912", as handwritten in the time charterparty.[44]

However, it is indicated that if the spread of redelivery days is narrow, the implied tolerance may be justified.[45] Nonetheless, it was shown in *Bocimar v Farenco Navigation*[46] that if there is a wide spread of days, such as "a period of 11 to 14 months" for the charter, it may be impossible to imply a reasonable allowance, 5 days, before the expiration of 11 months for "redelivery of the vessel."[47]

Furthermore, there is also no implied extra margin before the indicated minimum and beyond the indicated maximum when the time charter period is given an explicit minimum and maximum time under the time charterparty.[48] For example, Kerr, in *Mareva A.S*,[49] which is a case regarding a time charter under the NYPE 46 form, held that no margin over a maximum of 3 months was tolerated if lengths of two months minimum and three months maximum were stated for the time charter.[50] It can be found that, if no intention to apply any margin is shown by the shipowner or time charterer, the court will also respect the agreement by the contractual parties and will not require any margin to be applied in the time charterparty.[51]

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[44] Coghlin and others (n 4) para 4.15.
[45] *The Hugin* (n 43); Coghlin and others (n 4) para 4.17.
[46] *Bocimar v Farenco Navigation* [2002] EHWC 1617 (QB); Coghlin and others (n 4) para 4.17.
[47] ibid.
[48] Coghlin and others (n 4) para 4.18.
[49] *The Mareva A.S.* [1977] 1 Lloyd's Rep 368; Coghlin and others (n 4) para 4.18.
[50] ibid.
[51] *Shipping Law* (n 30) 141.

Even if the view in the case of *Mareva A.S*[52] is found in the American case, *Tweedie Trading Co v Sangstand*,[53] a contrasting result under American law is indicated in *Ropner v Inter-American S.S.Co.*[54] The court decided in this case that no different treatment should be made between the maximum period and a flat period under the time charter and a reasonable overlap was permitted.[55] Nonetheless, it is believed that the decision in *Ropner v Inter-American S.S.Co.*[56] was unreasonable and that it was in contrast with the intention of the shipowner and the time charterer when the time charterparty was concluded, since the provided maximum period for the duration of the time charter under the time charterparty normally signifies no contractual intention for an extra margin beyond the maximum period for "redelivery of the vessel" by the time charterer.

In brief, it could be concluded that either the provision of an explicit margin or a minimum and maximum period for the duration of the time charter in the time charterparty would make the duration of the time charter clearer and easier for the time charterer to follow. In addition, it would also benefit the shipowner and time charterer in clearly outlining their legal rights and obligations.

4.3.2 Reforming the duration of the time charter under the time

[52] *The Mareva A.S*; (n 49).
[53] *Tweedie Trading Co. v Sangstand*, 180 F.691 (2d Cir.1910); Coghlin and others (n 4) para 4.119.
[54] *Ropner v Inter-American S.S. Co.* 243 F.549 (2d Cir.1917); Coghlin and others (n 4) para 4.122.
[55] ibid.
[56] ibid.

charterparty

In terms of the duration of the time charter under the time charterparty, it is found that Clause 1 of the BALTIME form,[57] Lines 13 to 14 of the NYPE 46 form[58] and Clause 1 of the NYPE 93 form[59] are too simple and unclear. In addition, an allowed margin is not expressed at all. Moreover, as mentioned in Section 2.6.4 of Chapter 2, lack of organisation of the BALTIME form[60] and NYPE 46 and NYPE 93 forms[61] means there are no index and/or Box Layout on the front of them. Therefore, they do not function to help the time charterer to be especially efficient or effectively adhere to the duration of the time charter.

As noted, even if the word “about” is not present, in the time charterparty the court still might use the facts of a case to make a decision about the held margin for “redelivery of a vessel”.[62] Thus the function of the word “about” is questionable. In addition, the use of “About…(how long)” to describe the duration of the time charter in Lines 13 to 14 of the NYPE 46 form[63] could easily cause disputes in practice[64] since the words “about how long” are subjective and could be interpreted differently by the shipowner and the time

[57] ‘The Owners let, and the Charterers hire the Vessel for a period of the number of calendar months in Box 24 from the time (not a Sunday or a legal Holiday unless taken over) the Vessel is delivered…’ See Thomas (n 2) 286.
[58] ‘…That the said Owners agree to let, and the said Charterers agree to hire the said vessel, form the time of delivery, for about…within below mentioned trading limits…’ See Williams (n 8) 228.
[59] ‘The Owners agree to let and the Charterers agree to hire the Vessel form the time of delivery for a period of…within below mentioned trading limits.’ See Peter Brodie, *Commercial Shipping Handbook* (2nd edn, Informa 2006) 32.
[60] Thomas (n 2) 285-89.
[61] Williams (n 8) 228-31; Brodie (n 59) 32-46.
[62] Smith (n 14).
[63] Williams (n 8) 228.
[64] Coghlin and others (n 4) para 4.20.

charterer. Actually “About…(how long)” for the duration of the time charter is construed as giving explicit flexibility on the date of “redelivery” and it also can be said that the extent of the margin is provided for the duration of the time charter. Therefore, for the purpose of significantly commercial certainty within shipping industries,[65] it is suggested that the word “about” should be deleted from Line 14 of the NYPE 46 form[66] and changed to an expression in the time charterparty specifying either the minimum and maximum duration of the time charter or a clearly explicit margin.

Compared to the provisions above, Clause 1 (a) of the GENTIME form[67] is better organised and worthy of consideration, and could exercise the guiding function of a standard form of a time charterparty more effectively than the clauses of duration of a time charter in the BALTIME form[68] and NYPE 46[69] and NYPE 93 forms[70] noted above.

However, Box 6 (a) on the front of the Clauses of the GENTIME form only provides the “Margin on the Final Period”.[71] This could be divided into “margin on early ending of the time charter service” and “margin on late

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[65] Lord Hoffmann, ‘The Achilleas: Custom and Practice or Foreseeability?’ (2010) 14 (1) Edin. LR 47.
[66] Williams (n 8) 228.
[67] ‘Period - In consideration of the hire stated in Box 24 the Owners let not and the Charterers hire the Vessel for the period/trip(s) stated in Box 6.
The Charterers shall have the option to extend the Charter Party by the period(s)/trip(s) stated in Box 7 which option shall be exercised by giving written notice to the Owners on or before the date(s) stated in Box 7.
Unless otherwise agreed, the Charterers shall have the option to increase or to reduce the final period of the Charter Party by up to the number of days stated in Box 6 (a), which shall be applied only to the period finally declared’. (n 9).
[68] Thomas (n 2) 285-89.
[69] Williams (n 8) 229.
[70] Brodie (n 59) 32.
[71] (n 9).

ending of the time charter service" to make the GENTIME form[72] clearer. An alternative suggestion is to show boxes for minimum and maximum durations of the time charter on the GENTIME form.[73] The contractual parties are free to choose what exactly they want. Either of these suggestions would promote greater commercial certainty for the duration of the time charter. Moreover, they would also have the benefit of allowing the contractual parties to effectively pay attention to the negotiated margin and remind the time charterer to obey it. In addition, modifying the duration of the time charter in the BALTIME form[74] and the NYPE 46[75] and NYPE 93 forms[76] could also bring the benefits of Clause 1 (a) of the GENTIME form[77] and add the aforementioned suggestion for the GENTIME form[78] to reduce any drawbacks.

4.4 Early "redelivery"

The time charterer would be in breach of the time charterparty if he/she "redelivered" the vessel earlier than the allowed terminal date given in the time charterparty.[79] The legal consequence in this circumstance is down to the innocent shipowner who can either accept the "return" of the vessel and claim damages or keep the time charterer within the time charterparty.[80]

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[72] ibid.
[73] ibid.
[74] Thomas (n 2) 286.
[75] Williams (n 8) 229.
[76] Brodie (n 59) 32.
[77] (n 9).
[78] ibid.
[79] Baatz (n 10).
[80] Shipping law (n 30) 142; Girvin (n 17) 631.

However, it is indicated that the former result would probably be decided by the court in practice.[81] This seems appropriate and realistic since the early ending of the time charter service may be due to the time charterer having no further business plans. If the shipowner chooses to refuse the early ending of the time charter service and keep the time charterer under this time charterparty, the time charterer, in practice, will probably find it difficult to immediately find their next business opportunity which could fit with the rest of the charter period after last voyage.

In terms of measuring damages, it is worth noting that "fair" is the basic concern of the court when damages are awarded.[82] In addition, the principle for the court in awarding damages to the shipowner for the time charterer's breach of time charterparty is that the shipowner cannot be compensated for more than his/her actual suffering and the award cannot allow the shipowner to gain any resulting financial benefits.[83] Moreover, the shipowner has an obligation to mitigate his/her loss under the assessment of damages.[84]

If there is an available charter market of a similarly substituted time charter, which is of an equivalent length of period to the terminated charter, then by re-chartering the vessel for the unexpired period exists at the day of

[81] *The Puerto Buitrago* [1976] 1 Lloyd's Rep.250; *Shipping Law* (n 30) 142.
[82] Andrew Taylor, "Damages for Breach of Time Charter: Some Recent Developments" in Thomas (n 2).
[83] Coghlin and others (n 4) para 4.37.
[84] 'The Mitigation rule reduces the claimant's recovery to the extent that he has failed to act reasonably to limit or reduce his loss caused by the defendant's breach.'; Mindy Chen-Wishart, *Contract Law* (3rd edn OUP 2010) 572; *British Westinghouse Electric Co. Ltd. & Manufacturing Co. v Underground Electric Railways* [1912] AC 673 (HL); Janet O'Sullivan, 'Case Comment-Damages for Lost Profits for Late Redelivery: How Remote is too Remote?' (2009) CLJ <http://login.westlaw.co.uk> accessed 7 December 2011.

termination of the time charterparty,[85] the damages would be likely as follows: The time charterer will necessarily continue to pay the contractual rate of "hire" from the date of prematurely ending the time charter service until the date of the vessel being re-chartered, plus the difference[86] between the time charter rate of "hire"[87] and the charter market rate of "hire" for the vessel to be re-chartered from the date of re-chartering until the expiry date on the original the time charterparty if the charter market rate of "hire" is lower than the original contractual charter rate of "hire". [88]

However, if no such aforementioned available charter market exists, the actual loss to the shipowner resulting from the breach of the time charterer is a possible way to measure damages awarded by the court.[89] In this situation, the usual rules of assessing damage, which cover the rule of the claimant's mitigation of loss, will still be applied.[90]

Nonetheless, the legal consequences of early "redelivery of the vessel" discussed here are not shown clearly or in detail in the essential standard

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[85] Coghlin and others (n 4) paras 4.40-4.41; *The Johnny* [1977] 2 Lloyd's Rep 1 (CA).
[86] The market rate for the time charter does not remain stable and can fluctuate before, during or after the period of the time charter. Wilson (n 1) 90.
[87] "Payment for the time charter service" will be discussed in Section 5.2.1 of Chapter 5.
[88] For example, the time charterer ends eight days earlier than the expiry date of the time charter service, and the shipowner re-charters the vessel on the fourth day before the expiry date of time charterparty, the damage might be assessed as follows: (1) the time charterer continues to pay the contractual daily rate of "hire" multiplied by four days, plus (2) the difference between the contractual daily rate of "hire" and market daily rate of "hire" for the re-chartered vessel multiplied by four days if the re-charter market daily rate is lower than contractual daily rate.
[89] *Glory Wealth Shipping v Korea Line Corporation (The MV Wren)* [2011] EWHC 1819 (Comm). It does not matter whether the charter market is revived at a later period; *Zodiac Maritime Agencies Limited v Fortescue Metals Group Limited* [2010] EWHC 903 (Comm); See Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 329.
[90] Chuah (n 89) 329.

time charterparty forms.[91] This prompts the need to improve these forms and is discussed in Section 4.6.

4.5 Late "redelivery"

It is established as a general rule that a legitimate final voyage is an implicit duty of the time charterer[92] and there is a reasonable expectation on the time charterer that "redelivery of the vessel" will be on time, within any explicit or implied margin.[93] Being a legitimate final voyage is necessary to satisfy both when the order of final voyage is giving and when the performance falls due.[94]

If a final voyage is ordered in advance by the time charterer, judgement of whether or not the final voyage is legitimate is made at the time of the performance of the final voyage rather than when the order of the final voyage was given.[95] This is because the initially valid orders may become invalid.[96] For example, if another vessel blocks the relevant entrance of the intended discharge port for several days during the final voyage, the originally valid order for the final voyage would become invalid.[97] In this circumstance, the vessel is committed to the final voyage. If the time

[91] Such as the BALTIME form, the NYPE 46 and NYPE 93 forms, and the GENTIME form.
[92] Coghlin and others (n 4) para 4.64.
[93] Baatz (n 10).
[94] Coghlin and others (n 4) paras 4.69-70.
[95] *Torvald Klaverness v Arni Maritime* (*The Gregos)* [1995] 1 Lloyd's Rep 1 (HL) (Lord Mustill); Coghlin and others (n 4) para 4.70; Baatz (n 10).
[96] ibid.
[97] *The Gregos* (n 95) (Lord Mustill).

charterer does not expect that a final voyage will be completed within the period of the time charter necessary to comply with the time charterparty, i.e. the time charterer estimates that the final voyage might exceed the ending date of the time charter service plus any tolerance under the time charterparty,[98] this final voyage could be regarded as being illegitimate.[99]

It was also revealed in *The Gregos*[100] that the time charterer's contractual obligation regarding "redelivery of the vessel" no later than the end of the time charter period is likely an intermediate term.[101] Therefore, it would not allow late "redelivery" for a short time to justify the termination of the time charterparty by the shipowner.[102] Moreover, if an illegitimate final voyage is ordered by the time charterer, the shipowner has the right to refuse this order and to request that the time charterer send a new valid order.[103] If the time charterer declines to follow that request, he/she indicates that he/she has no intention of completing his/her obligation with regard to the time charterparty.[104] This constitutes a repudiatory breach of the time charter[105] and the shipowner has the right to choose to terminate the time charterparty.[106]

There is a question about who will bear the risk when neither contractual

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[98] Shipping law (n 30) 142.
[99] *The Gregos* (n 95) (Lord Mustill); Coghlin and others (n 4) para 4.70.
[100] ibid.
[101] *The Gregos* (n 95) (Lord Mustill); Coghlin and others (n 4) para 4.50; "Intermediate term" is discussed in Section 2.5.5 in Chapter 2.
[102] ibid; 'Time Charterparty'. <http://www.lawandsea.net/CP_Time/Charterparty_Time_Redelivery.html> accessed 29 November 2011.
[103] Coghlin and others (n 4) para 4.70.
[104] (n 92).
[105] *The Gregos* (n 95) (Lord Mustill); Coghlin and others (n 4) para 4.70; Baatz (n 9).
[106] *The Gregos* (n 95); Coghlin and others (n 4) para 4.70.

party is at fault and causes a late "redelivery". The House of Lords, in *The London Explorer*, which used the NYPE 46 form for a time charter, decided that the time charterer needed to pay the contractual charter rate of "hire" until the extended "redelivery" date of the vessel.[107] After examining the facts, late "redelivery of the vessel" was attributed to unforeseen strikes during the final voyage, even though the freight market rate during that time had fallen.[108] In other words, the charter rate was higher than the market rate and the time charterer was legally bound to pay the difference between the contractual rate of "hire" and the market rate of "hire" for the overlapping period. It is unclear why the time charterer needed to pay damages for a late "redelivery" under circumstances out of their control. However, under English law it is generally believed that the time charterer who uses the time charter service during the time charter bears the risk for the overrunning period.[109]

Under a legitimate final voyage, the shipowner may claim the payment for the time charter service for late "redelivery" within an overrunning period.[110] Also, in this situation, the amount which may be claimed by the shipowner for damages for late "redelivery" within an overrunning period under a legitimate final voyage is the difference between the contractual charter rate of "hire"

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[107] *Timber Shipping Co. S.A v London and Overseas Freighters (The London Explorer)* [1971] 1 Lloyd's Rep 523 (HL); Coghlin and others (n 4) para 4.2.
[108] ibid; The market refers to 'the market for period time charters of a length similar to that from which the ship was redelivered late.' *The Johnny* (n 85); Coghlin and others (n 4) paras 4.55-56.
[109] Herring (n 2).
[110] For example, shipowner may claim the amount according to Line 177 to Line 178 of clause 8 (a) of the GENTIME form. 'The Charterers shall pay hire per day or pro rata for any part of a day from the time the vessel is delivered to the Charterers until her redelivery to the Owners,…' the hire'. See (n 9).

and the market rate of "hire", if it is higher.[111] If the market rate is lower than the contractual charter rate, the higher value will be chosen so as to pay damages for the overrunning period. Thus if the market rate is lower, the shipowner still has the right to claim the difference between the higher charter rate of "hire" and the market rate of "hire" for these overrunning days.[112] However, it also needs to be emphasised that if late "redelivery" is caused by a defect in the vessel, something which is a maintenance obligation of the shipowner, the time charterer will not take responsibility for damages.[113]

Another argument arises as to whether or not damages incurred for the time charterer's late "redelivery of the vessel" should include additional losses such as loss of profit on the shipowner's next fixture as in *The Achilleas*.[114] The case of *The Achilleas* involved a time charter for a minimum of five to a maximum seven months under the NYPE 93 form.[115] The shipowners established a new time charterparty with the next time charterer for four to six months on 21st April 2004 with a contractual charter rate of $39,500 a day for "hire"[116] and an agreed cancelation date of 8th May 2004.[117] This next fixture was arranged because the original time charterer notified the shipowner on 20th April 2004 that the vessel would be "redelivered" to them no later than midnight on 2nd May 2004.[118] However, the vessel was not

[111] *Hyundai Merchant Marine v Gesuri Chartering (The Peonia)* [1991] 1 Lloyd's Rep 100 (Commercial Court and CA); Coghlin and others (n 4) para 4.46; Baatz (n 10).
[112] See (n 108).
[113] Girvin (n 17) 686.
[114] *Transfield Shipping v Mercator Shipping (The Achilleas)* [2008] 1 Lloyd's Rep 275.
[115] ibid.
[116] ibid.
[117] ibid.
[118] ibid.

"redelivered" until 11th May 2004, passing the shipowners' next fixture's cancelation date.[119] Even though the shipowners successfully negotiated a deal with the next time charterer, the next time charterer paid a reduced rate of $31,500 a day for "hire" because the market rate fell dramatically during those two weeks.[120] The shipowner therefore claimed for loss of profit, at the cost of the difference between the payment for "hire" the shipowner would have received if the vessel had been "returned" on time and the actual reduced charter rate of "hire" he received, i.e. $8000 a day, during the minimum period from the next fixture.[121]

Even though the House of Lords ultimately adopted a strict view regarding damages in this case and held that damages for the late "redelivery" would only amount to the difference between the contractual charter rate of "hire" and the market rate of "hire" for the overrunning period, it is worth noting that the majority of arbitrators, the commercial court and the Court of Appeal passed judgments in favour of the shipowner and awarded damages which included the value of the "hire" which the shipowners lost in the next fixture.[122]

The importance of *The Achilleas* is that it brings the court's and lawyers' attention to what types of damages for late "redelivery" under the final voyage, with no fault of the time charterer, could possibly be included.[123] It also gives them the opportunity to think about and debate whether or not

[119] ibid.
[120] ibid.
[121] ibid; Hoffmann (n 65).
[122] ibid.
[123] ibid.

damages for late “redelivery” should be limited to the normal measure of damages, i.e. the difference between the charter rate of “hire” and the market rate of “hire”.[124]

It is still arguable as to whether or not the time charterer should be liable for the shipowners’ loss of profit in this case, because the time charterer admitted before the arbitrators that, given the facts, the late “redelivery” was likely to have led to the shipowners’ missing the cancelling day of their next fixture.[125] In addition, as Lord Rodger indicated in this case, given the facts, it was also possible that the time charterer had reasonably contemplated that the late “redelivery” of this kind of vessel would cause a significant loss of profit to the shipowner and that the charterer might be liable for this.[126] This seems to indirectly show that the time charterer might have had the knowledge and experience of the shipowners’ usual course of dealings in the time charter service and that the time charterer might have foreseen the possible negative impact on the shipowners’ business. Moreover, the shipowners had also performed their duty for the mitigation of loss,[127] i.e the shipowners had tried to negotiate with the next time charterer by reducing the payment for “hire”.[128] Thus, that the shipowner claimed for loss of profit is unlikely to be unreasonable.

However, it is believed that the time charterer may be held responsible for

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[124] Roger Halson, ‘Time Charters, Damages and Remoteness - The Achilleas’ (2008) LMCLQ 119.
[125] *Transfield Shipping v Mercator Shipping (The Achilleas)* [2007] 1 Lloyd’s Rep 19 [29]. (Christopher Clarke); Coghlin and others (n 4) para 4.63.
[126] Coghlin and others (n 4) para 4.61.
[127] See (n 84).
[128] *The Achilleas* (n 114).

the shipowners' loss of profit if the shipowners informed the time charterer about the particular cancelation date of the existing subsequent fixture when the original time charterparty was established.[129] This situation cannot be found on the facts of this case. In addition, Lord Hoffmann was concerned about the "background of market expectations", which is 'outside the scope of liability which the parties would reasonably have considered the value was undertaking.'[130] It would be appear that the decision of the House of Lords was possibly supported by the "assumption of responsibility test" which, when applied in this case, is that the contractual parties are assumed liable for normal losses under their expectation, whereas unusual losses would not be assumed under the circumstances.[131] In this specific case, it was asserted that, on the facts, the market rate fell sharply during those two weeks due to the extraordinary volatility in the charter market during the overrunning period.[132] This could be treated as an altogether different sort of loss which resulted in the shipowners' loss of profit being unusually greater than could be reasonably expected.[133]

Nevertheless, it is believed that the decision by the House of Lords in this case was made on the basis of direct evidence which was provided by the shipowners. Therefore, the legal measure of damages held would really depend on the diversity of the facts and the evidence which was supplied by

[129] ibid (Lord Rodger); Coghlin and others (n 4) para 4.59.
[130] Janet O'Sullivan, 'Case Comment-Damages for Lost Profits for Late Redelivery: How Remote is too Remote?' (2009) CLJ <http://login.westlaw.co.uk> accessed 7 December 2011.
[131] Jill Poole, *Casebook on Contract Law* (10th edn, OUP 2010) 418.
[132] Hoffmann (n 65).
[133] ibid.

the claimant.[134] If the loss of profit which the shipowners could claim had already been provided in the time charterparty, the shipowners would have been protected by this explicit agreement.[135] Alternatively, if the shipowners had acted differently and could have proved that the damages which they had claimed were not remote,[136] the decision in this case might have been different. This is because if the time charterer had been informed of the cancelling day of the shipowners' next fixture when the time charterer sent the last voyage and given evidence to illustrate the foreseeabilities of the amount of loss of profit from his next fixture**,** the court might possibly have held that damages for late "redelivery" under the time charterer's final voyage covered the loss of profit of the shipowners' next business,[137] not just the difference between the contractual charter rate of "hire" and market rate of "hire" for the overrunning period.

A similar result can also be found in *The Romandie,* an American case in which the charterer breached stipulations of "redelivery of vessel" regarding the minimum/maximum "redelivery" period.[138] Even though the shipowner claimed for special damages given the situation, if the vessel had not been "redelivered" late (a profitable transatlantic voyage could have been completed), the panel of arbitrators decided that there was not enough supporting evidence for the shipowner's claim for special damages given the

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[134] ibid.
[135] ibid.
[136] 'The remoteness test is that: Loss is recoverable in contract if the defendant contemplated that type of loss as a serious possibility at the time of contracting, or ought reasonably to have done so.' See Mindy Chen-Wishart, *Contract Law* (3rd edn, OUP 2010) 582; Edwin Peel, *The Law of Contract* (13th edn, Sweet and Maxwell 2011) para 20-099.
[137] O'Sullivan (n 130); Poole (n 131) 418.
[138] *The Romandie, SMA* 1092 (Arb.at NY.1977); Coghlin and others (n 4) para 4.146.

facts.[139] However, it was also stated by the panel that if the shipowner could have proved that he had either warned the charterers in advance or that the charterer had had other relevant knowledge regarding the financial results of late "redelivery" by overrunning the maximum 38 months, the special damages in this case would have been awarded to the shipowner.[140]

The case of *The Achilleas* concerns measure of damages under a legitimate final voyage, but not measure of damages for an illegitimate final voyage, so that is now explored.[141] A precedent for this issue does not exist.[142] It is believed that basic time charterers' liability for late "redelivery" under his sending of an illegitimate final voyage may follow the view indicated by Rex L.J. in *The Achilleas*:[143] if the time charterer continued to send the illegitimate final voyage with knowledge of the shipowners' specific next fixture, the time charterer should be liable for the loss of profit resulting from the late "redelivery".[144] However, it is unfair and unreasonable that the legal consequence of late "redelivery" under a legitimate and an illegitimate final voyage be the same. Such a situation might indirectly promote more illegitimate final voyages to be ordered by the time charterer, because there would be no difference in consequences between a legitimate and an illegitimate final voyage. Differentiating the legal consequences of late "redelivery" under legitimate and illegitimate final voyages is an important

[139] ibid.
[140] ibid.
[141] Halson (n 124).
[142] David Foxton, 'Damages for Late or Early Redelivery under Time Charterparties' (2008) LMCLQ 461.
[143] *Transfield Shipping v Mercator Shipping (The Achilleas)* [2007] 2 Lloyd's Rep 555 (CA) [577] (Rix, L.J.); Coghlin and others (n 4) para 4.60.
[144] ibid.

possible reform which will be discussed in the next section.

To sum up, whether or not late “redelivery” is caused by the time charterer sending the vessel on a legitimate or illegitimate final voyage, the court’s usual means of awarding damages amounts to the difference between the contractual charter rate of “hire” and the market rate of “hire” if the market rate of “hire” is higher than the contractual rate of “hire” for the overrunning dates.[145] However, lack of practical guidance for contractual parties to predict the legal consequences of claiming for additional losses caused by the late “redelivery” under an illegitimate final voyage is a potentially controversial issue.[146] In addition, in terms of loss of profit resulting from late “redelivery” under a legitimate final voyage, it is convincing that except for when the shipowners’ loss of profit is protected by explicit terms in the time charterparty, supplying sufficient evidence to clearly show that the time charterer had already been properly informed about the cancelling date of the shipowners’ next fixture and proving that the time charterer had knowledge or enough experience to know the financial effects of late “redelivery” under a legitimate final voyage, is possibly the key to shipowners winning their claim for loss of profit caused by time charterers’ late “redelivery”.[147] Nonetheless, in practice, it is probably not so easy for the shipowners to prove this. For the purpose of reducing illegitimate final voyages being ordered by the time charterer and avoiding future disputes, modifying the standard forms of the time charterparty to make it clearer and more thoughtful, in order to functionally guide the shipowner and the time

[145] Herring (n 2); Baatz (n 10).
[146] Foxton (n 142).
[147] O’Sullivan (n 130).

charterer, may be a possible solution.

4.6 Reforming the "redelivery of the vessel" within the time charterparty

Commercial certainty is crucial for businessmen in the shipping industries.[148] Reforming the "redelivery of the vessel" within the time charterparty reflects this need. Resolving the legal issues and filling in the gaps discussed above are two other targets of the modification of the "redelivery" clause under the following standard forms of the time charterparty.

Clause 7 of the BALTIME form grants that the time charterer can continue to use the vessel to finish his/her voyage when the vessel is under a legitimate final voyage sent by the time charterer and she is "redelivered" after the termination date of the time charter, but that the charterer should pay more for the time charter service if the market[149] rate rises at that time.[150] This clause is criticised for not being clear enough and not covering the legal effect of an early "redelivery of the vessel", the legal effect of the late "redelivery of the vessel" under a legitimate final voyage sent by the time charterer if the market rate is lower than the contractual rate, or the legal effect of late "redelivery of the vessel" under an illegitimate final voyage sent by the time charterer.

[148] Hoffmann (n 65).
[149] See (n 108).
[150] Thomas (n 2) 286.

In addition, the insufficiency of Clause 4 of the NYPE 46 form[151] and Clause 1 of NYPE 93 form[152] is also questionable, since these forms both lack provision for the legal effects of the early "redelivery of the vessel" and late "redelivery of the vessel" for a legitimate and illegitimate final voyage sent by the time charterer.

Moreover, although Clause 4 (d) of the GENTIME form[153] gives more thought to an illegitimate final voyage ordered by the time charterer compared to Clause 7 of the BALTIME form,[154] Clause 4 of the NYPE 46 form[155] and Clause 1 of the NYPE 93 form,[156] it still omits the legal effect of the early "redelivery of the vessel" and late "redelivery of the vessel" under a legitimate final voyage sent by the time charterer. In addition, it does not provide a legal effect of an illegitimate final voyage sent by the time charterer if the market rate is lower than the stated contractual rate within the GENTIME form.[157]

What is more, a "liquidated damages clause", which means the enforceable clause of the contract provides the genuine pre-estimate of the loss arisen from the contractual parties' breach, is suggested.[158] It is possible to make the contractual parties' legal position under the time charterparty more certain and predictable if the contractual parties negotiate a way in advance of measuring the damage[159] from the early "redelivery of the vessel" and late

[151] Williams (n 8) 229.
[152] Brodie (n 59) 32.
[153] (n 9).
[154] Brodie (n 59) 32.
[155] William (n 8) 229.
[156] Brodie (n 59) 32.
[157] (n 9).
[158] Ewan McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 362.
[159] ibid.

"redelivery of the vessel" within the time charterparty. This recommendation may also make the draft of the provision for the "redelivery of the vessel" within the time charterparty more complete and better thought out.

Measuring damage from an early "redelivery of the vessel" could be done by creating two possible situations and providing them in the time charterparty. One is when an available charter market of a similar substitute time charter, which is in equivalent length periods to the terminated charter, by re-chartering the vessel for the unexpired period, exists at the day of the termination of the time charterparty,[160] the way of measuring damages will follow the rule showed in Section 4.4.[161] The other is when no such available charter market exists on the day of the termination of the time charterparty.[162] In this case the time charterer would need to pay the agreed charter rate of "hire" until the expired date within the time charter period. The reason for this suggestion is that, according the normal approaches to contract damage,[163] the shipowner has the legal right to such fixed payments as would put him/her in the same financial position as he/she would have been in if the time charterparty had been performed,[164] i.e. the shipowner is entitled to the payment for the time charter service as if there were no situation of early ending of time charter service. Based on this, the contractual obligation and rights had been clearly set in the time charterparty, the shipowner did not need to further collect evidence on how to prove how much actual loss

[160] Coghlin and others (n 4) paras 4.40-4.41; See also *The Johnny* (n 85).
[161] For instance, see (n 88). In addition, this can be compared with *The Achilleas*, which is occurred in the situation of late ending of the time charter service. See Section 4.5.
[162] (n 89).
[163] Richard Taylor and Damian Taylor, *Contract Law* (4th edn, OUP 2013) 285.
[164] Coghlin and others (n 4) para 4.44.

resulted from the time charterer's breach of the time charterparty and the early ending of the time charter service.

Therefore, this recommendation might also help to reduce the burden of proof on the shipowner (the claimant)[165] to prove how much actual loss[166] he /she suffered when there was no such aforementioned available charter market. This could also be regarded as a practicable way to prevent disputes in advance.

Furthermore to reduce the possibility of an illegitimate final voyage being ordered by the charterer and to avoid further disputes as well as making Clause 7 of the BALTIME form,[167] Clause 4 of the NYPE 46 form,[168] Clause 1 of the NYPE 93 form[169] and Clause 4 (d) of the GENTIME form[170] more complete and thoughtful it is suggested that in addition to changing the wording of "redelivery of the vessel" to "ending of the time charter service" and keeping the legal effect of illegitimate ordering of the final voyage by the time charterer as provided in Clause 4 (d) of the GENTIME form,[171] it is necessary to make clear the difference between the legal consequences of late "redelivery" under a legitimate final voyage and late "redelivery" under an illegitimate final voyage. Therefore, in terms of the measured way of determining the damage caused by the late "ending of the time charter

[165] 'In common law countries, the plaintiff must prove the case by a preponderance of the evidence in civil disputes.' Robert B.Cooter Jr. and Thomas Ulen, *Law and Economics* (6 th edn, Pearson Education Limited 2014) 431.
[166] *The MV Wren* (n 89).
[167] Thomas (n 2) 286.
[168] Williams (n 8) 229.
[169] Brodie (n 59) 32.
[170] (n 9).
[171] ibid.

service", it is believed that, when there is an available market for period time charterers of a length similar to the equivalent vessel which overruns on its last voyage,[172] the damages awarded under both a legitimate final voyage and an illegitimate final voyage could possibly not only include the difference between the contractual charter rate of "hire" and market rate of "hire" for the overrunning days if the market rate is higher than the contractual rate, but the loss of profit could also be negotiated by contractual parties. This could make it necessary for the time charterparty to be clearly set up to entitle the shipowner to damages.[173] Alternatively, the other additional loss, the details of which can be negotiated by the contractual parties and which are clearly provided for in the time charterparty make the other additional loss recoverable by the shipowner for the late ending of the time charter service under an illegitimate final voyage. However, if there is no such market as mentioned, reasonable compensation for the shipowner would be agreed through the establishment of a clear agreement to ensure that the time charterer pay the contractual rate of "hire" for the overrunning dates under a legitimate final voyage. Also, in order to clearly measure the damage, the contractual parties could negotiate the details of additional loss and obviously stipulate them in the time charterparty. This might benefit the shipowner in that it would probably be easier to recover the additional loss if the vessel were "redelivered" late under an illegitimate final voyage.

4.7 Highlighting the key reforms in this chapter

[172] *The Johnny* (n 85); Coghlin and others (n 4) paras 4.55-56.
[173] Hoffmann (n 65).

Through the aforementioned analysis, the key recommendations which therefore need to be followed within these essential standard forms could be addressed as follows:

Ending of the Time Charter Service

(A) <u>Early Ending of the Time Charter Service</u>

(i) If there exists an available charter market of similar substitute time charter, which is of equivalent length of periods to the terminated charter, by re-chartering the vessel for the unexpired period which exists at the day of termination of the time charterparty, and is caused by the Charterer's early ending of the time charter service, the damage that the Charterer will necessarily need to pay will be the payment for the time charter service at the contractual rate from the date of the early ending of the time charter service until the date of the vessel being re-chartered, plus the difference between the payment of time charter service under the contractual charter rate and the charter market rate for the vessel to be re-chartered from the date of re-chartering until the expiry date on the original the time charterparty if the re-charter market rate is lower than the contractual rate.[174]

(ii) If such a charter market as described in (A) (i) does not exist, the Charterer should continue to pay for the time charter service at the agreed contractual charter rate until the expiry date given in the

[174] See (n 88).

time charterparty.

(B) <u>Late Ending of the Time Charter Service by a Legitimate Last Voyage</u>

(i) If the Charterer orders a final voyage when the order is given and when performance falls due,[175] with a reasonable expectation that a final voyage will complete within the agreed period……plus the tolerated extra….. (or between the minimum…and maximum… of the duration given in the time charterparty), even if the vessel is actually late and beyond the tolerated extra periods (or maximum of the duration of the time charter), the final voyage ordered by the Charterer is still regarded as a legitimate last voyage. In this circumstance, the Charterer shall pay the contractual charter rate of payment for the time charter service, stated in the box…for the overrunning dates, if the market rate is higher.[176] Also, the Owner can claim damages for a breach of time charterparty for the time beyond the tolerated extra period (or maximum duration given in the time charterparty). The damages shall be the difference between the contractual charter rate of payment for the time charter service and the market rate for the overrunning dates, if the market rate is higher.[177] If the market rate is lower than the agreed rate stated in the box…., the Charterers shall still pay the contractual rate for the overrunning dates. In addition, the Owner can also

[175] The Gregos (n 95); Coghlin and others (n 4) paras 4.69-70.
[176] See (n 110).
[177] This can be seen in Lines 106 to 111 of Clause 7 of the BALTIME form.

claim for the loss of profit[178] caused by the overrunning of this last voyage.

(ii) If there is no available charter market for an equivalent vessel for a similar length of time at the time the Charterer overruns on a legitimate last voyage,[179] the Charterer shall still pay for the time charter service at the contractual rate stated in the box…. for the overrunning dates.

(C) <u>Late Ending of the Time Charter Service by an Illegitimate Last Voyage</u>

(i) If the Charterer orders a final voyage when the order is given or when the performance falls due,[180] the final voyage cannot reasonably be expected to be completed within the agreed period……plus the tolerated extra….. (or between the minimum…and maximum… of the duration given in the time charterparty), the final voyage which is ordered by the Charterer is regarded as an illegitimate last voyage. In this circumstance, the Owner will have the option of (1) refusing the order from the Charterer and requesting a substitute order allowing the timely ending of the time charter[181] or (2) choosing to terminate the time charterparty if the Charterer persists in carrying out the invalid

[178] Hoffmann (n 65).
[179] *The Johnny* (n 85); Coghlin and others (n 4) paras 4.55-56.
[180] ibid; *The Gregos* (n 95) (Lord Mustill).
[181] *The Gregos* (n 95); Coghlin and others (n 4) para 4.70.

order[182] or (3) performing the order without prejudice to their rights to claim damages for a breach of the charter caused by the overrunning of the illegitimate last voyage. The Charterer shall pay the contractual charter rate of payment for the time charter service, stated in the box…for the overrunning dates, if the market rate is higher. Also, the damages shall be the difference between the contractual charter rate of payment for the time charter service**,** stated in the box…., and the market rate for the overrunning dates, if the market rate is higher. If the market rate is lower than the agreed rate stated in box…., the Charterer shall still pay for the time charter service under the contractual rate for the overrunning days. In addition, both contractual parties can negotiate that damages include the loss of profit; and the other additional losses, such as…..

(ii) If there is no available charter market for an equivalent vessel for a similar length of time at the time the Charterer overruns on an illegitimate last voyage,[183] the time charterers shall still pay for the time charter service at the contractual rate stated in the box…. for the overrunning dates. In addition, both contractual parties can negotiate that damages include additional losses, such as…..

[182] ibid.
[183] *The Johnny* (n 85); Coghlin and others (n 4) paras 4.55-56.

4.8 Conclusion

It is crucial to clarify the legal obligations and rights of the time charterer and the shipowner at the end of a time charter. In this chapter, by way of the aforementioned recommendations to improve the duration of the time charter within the time charterparty to deal with the legal issues and eliminate the shortages of provisions regarding the early ending of the time charter service and late ending of the time charter service under the standard forms, it may also be beneficial for the merchants in shipping industries to clearly predict the legal effect of the ending of the time charter within the time charterparty. This chapter will contribute to the reduction of illegitimate final voyages being ordered by the time charterer by making the legal effect of the late ending of time charter services under legitimate and illegitimate final voyages a difference between damages incurred through late ending time charter services under legitimate final voyages and late endings time charter services under illegitimate final voyages. The recommendations might also help to remind shipowners and time charterers that they may take steps to avoid future controversy by negotiating whether damages should include the loss of profit and other additional losses under an illegitimate last voyage and stipulating them within the time charterparty.

CHAPTER 5:

PAYMENT OF THE TIME CHARTER SERVICE, DEDUCTION FROM PAYMENT FOR THE TIME CHARTER SERVICE, WITHDRAWAL AND SUSPENSION OF THE TIME CHARTER SERVICE, AND OFF-PAYMENT FOR THE TIME CHARTER SERVICE

5.1 Introduction

From the business perspective, receiving payment for the time charter service[1] (payment of hire)[2] is the most important concern for the shipowner when he/she offers the charter service to the time charterer.[3] In order to control the earnings from the time charter service, the shipowner has the right to withdraw the time charter service (withdraw the vessel)[4] and the right of suspension of the time charter service based on the time charterparty.[5] On the other hand, the time charterer may possibly also need to be protected by the right of deduction of the payment for the time charter service (deduction

[1] Terence Coghlin and others, *Time Charters* (6th edn, Informa 2008) para 1.15.
[2] A change to these wordings is suggested. See reform of payment for time charter service. In this thesis, the phrase, "payment for time charter service" is used instead of "payment of hire".
[3] Yvonne Baatz, 'Charterparties' in Yvonne Baatz (ed), *Maritime Law* (2nd edn, Sweet & Maxwell 2011).
[4] This wording change is also recommended. See reform of the withdrawal of the vessel. In this thesis, after this mentioned, "withdraw the time charter service", which includes "withdraw the vessel, the Master, Officers and Crew from the time charter service" is used instead of "withdraw the vessel".
[5] Baatz (n 3).

of hire)[6] and an off-payment for the time charter service (off-hire)[7] to permit deduction from payment for the time charter service or non-payment for the time charter service required if he/she cannot receive the time charter service from the shipowner or suffers loss of time.[8] Because current provisions within the essential standard forms of time charterparties regarding payment for the time charter service, deduction from payment for the time charter service, withdrawal of the time charter service, suspension of the time charter service, and off-payment for the time charter service, are not clear, precise or complete enough, the target in this chapter is to reform the arguable contents within these forms in order to improve them. These topics are all relevant to the payment for the time charter service and will be combined and analysed in this chapter. Firstly, the payment for the time charter service and the reform of payment for the time charter service will be discussed. This will then be followed by an analysis of the deduction of payment of the time charter service. Next the reform of the deduction of payment of the time charter service will be addressed. Then the general key concepts of the withdrawal of the time charter service under the time charterparty will be introduced. Then the important issue of the withdrawal and suspension of the time charter service will be analysed and a suggestion with respect to the withdrawal and suspension provision will be made. Subsequently, the general key concepts of the off-payment for the time charter service will also be indicated. Then the vital legal issue of the off-

[6] A wording change is suggested. See reform of deduction of payment for the time charter service. In this thesis, the term “deduction of payment for time charter service” is used instead of “deduction of payment of hire”.
[7] It is proposed to modify these wordings. See reform of the off-payment for the time charter service. In this thesis, the phrase “off-payment for the time charter service” is used instead of “off-hire”.
[8] Coghlin and others (n 1) para 25.2.

payment for the time charter service will be discussed. Finally possible reform as to the clause of the off-payment for the time charter service will be recommended.

5.2 Payment for the time charter service under the time charterparty

The time charterer usually needs to make a payment for the time charter service[9] punctually in advance[10] and pay on the basis of a daily rate under the time charterparty in order to use the vessel and the time charter service.[11] This can be exemplified by Clause 6 of the BALTIME form, which provides that payment of "hire"[12] must be paid every 30 days in advance.[13] Another example is Clause 5 of the NYPE 46 form, which also stipulates that payment of "hire"[14] by the time charterer has to be paid semi-monthly in advance.[15] In addition, paying in an agreed currency, such as United States currency, is also set out in the time charterparty, and is specified in Clause 5 of the NYPE 46 form.[16] If the due date of the payment is on a Sunday or another non-banking day, payment no later than the immediately preceding banking day is required in order for the time charterer to avoid being in

[9] Coghlin and others (n 1) para 1.15.
[10] This is a characteristic of the time charter "hire". It is the consideration given by the time charterer for being permitted to use of the vessel and the time charter service of her Crew, Officers and Master. See *Shipping Law* (2011/2012 edn, Witherby Publishing Group Ltd 2011) 143.
[11] Baatz (n 3).
[12] (n 2).
[13] Clause 6 of the BALTIMEform 1939 (as revised 2001). Unless otherwise specified, all reference to the BALTIEM form refer to the BALTIME form 1939 (as revised 2001); D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 286.
[14] (n 2).
[15] Harvey Williams, *Chartering Documents* (4th edn, LLP Reference Publishing) 229.
[16] ibid.

default.[17]

Moreover, under the time charterparty, it is normally required that the time charter service should be paid for in cash.[18] However, modern commercial customs seem to have recognised bankers' payment slips and drafts as amounting to cash[19] because the payment is immediately accessible to the shipowner through direct bank transfer to his/her account.[20] As Brandon J indicated in *The Brimnes*,[21] payment for the time charter service in cash should have a wider meaning and any commercially accepted way of transferring funds should be included.[22] It is asserted that the court also construed that payment in cash is to 'give the transferee the unconditional right to the immediate use of the funds transferred'.[23] This definition by *The Brimnes* as to payment in cash was also approved and clarified by the House of Lords in *The Chikuma.*[24] It is believed that payment in cash amounts to "unfettered or unrestricted"[25] payment. In addition, the House of Lords also indicated that if the creditor is given "the equivalent of cash or as good as cash", this is covered in the meaning of payment in cash under Clause 5 of the NYPE 46 form.[26] Thus it can be said that payment under reserve or payment by cheque does not amount to payment in cash since the

[17] *Mardorf Peach & Co. Ltd. v Attica Sea Carriers Corp. of Liberia (The Laconia)* [1977] 1 Lloyd's Rep 315; John F Wilson, *Carriage of goods by Sea* (7th edn, Pearson Education Limited 2010) 95.
[18] For example, Line 84 of Clause 6 of the BALTIME form, Line 58 of Clause 5 of the NYPE 46 form.
[19] *The Georgios C* [1971] 1 Lloyd's Rep 7; Wilson (n 17) 94.
[20] Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 641.
[21] *Tenax Steamship Co. Ltd. v The Brimnes (Owners) (The Brimnes)* [1972] 2 Lloyd's Rep 465 [476]; Coghlin and others (n 1) para 16.30.
[22] ibid.
[23] ibid.
[24] *A/S Awilco of Oslo v Fulvia SpA di Navigazione of Cagliari (The Chikuma)* [1981] 1 Lloyd's Rep 371 (HL); Coghlin and others (n 1) para 16.30.
[25] *The Chikuma* (n 24) [375]; Coghlin and others (n 1) para 16.30.
[26] ibid; Williams (n 15) 229.

shipowner cannot access the funds unconditionally and immediately.[27]

Furthermore, there is also another issue relating to calculating the time for payment for the time charter service.[28] That is, the ending of the time charter service might be in a place which is in a different time zone from the beginning of the time charter service.[29] The argument is therefore whether or not it is necessary for the time charterer to pay for any hours included in this time zone discrepancy as part of the time charter service ("elapsed time").[30] The guideline for this issue can be found in *The Arctic Skou*[31] where "per Calendar Month" and "part of a month" within Lines 53 and 54 under the NYPE 46 form were removed.[32] Instead, "per day" and "part of a day" is used under the form.[33] Leggatt J considered the primary issue to be how long the vessel has been in the charter service and that should constitute the charter period any shipowner would expect to be repaid for and any charterer would expect it to be necessary to pay for, from a rational commercial point of view.[34] Clear wording referring to or confirming the intention of the contractual parties within the time charterparty is also concerned.[35] He believed that the time charter service should be suitably computed based on the actual period which had elapsed, since the language within Line 54 of the NYPE 46 form[36] did not indicate the time on the clock at the place of ending of the time charter service but specifically referred to the actual time, "day",

[27] *Shipping Law* (n 10) 143.
[28] Coghlin and others (n 1) para 14.1.
[29] ibid.
[30] ibid.
[31] *The Arctic Skou* [1985] 2 Lloyd's Rep 478; Coghlin and others (n 1) para 14.2.
[32] ibid.
[33] ibid.
[34] ibid.
[35] ibid.
[36] It provides that '…hire to continue until the hour of the day of her re-delivery…'

which substitutes “Calendar Month”.[37] Then he held in *The Arctic Skou* that the time charter service should be paid for according to mention of the elapsed time rather than local time.[38]

In short, the practical disputes relevant to payment for the time charter service give rise to the need to improve the essential standard forms of the time charterparty. The following suggestion for reforming payment for the time charter service, hopefully can provide advance preparation for contractual parties which will prevent unnecessary arguments in the future.

5.2.1 Reforming payment for the time charter service

As already mentioned in Section 1.1.3 of Chapter 1, the time charter has its own special characteristics, which are different from the demise charter and the voyage charter.[39] The shipowner supplies the time charter service, including offering the vessel, the Master, Officers and Crew, to the time charterer during a specified period.[40] The shipowner still possesses the

[37] ibid; Coghlin and others (n 1) para 14.3.
[38] ibid; Coghlin and others (n 1) para 14.4; Under the majority of American cases, calculating of time within the time charter is to be decided by mention of local dates and times at the place of “delivery” and “redelivery” of the vessel rather than by elapsed time. See Coghlin and others (n 1) para 14.15.
[39] *The Berge Tasta* [1975] 1 Lloyd’s Rep 422 [424] (Donaldson, J.); *Sea & Land Securities v Dickinson* [1942] 72 LlL Rep 159 [163] (MacKinnon, L.J.); Coghlin and others (n 1) para 1.4, 1.5, 1.10, 1.13; Christopher Smith, ‘Charterparties’ in Bernard Eder and others (eds), *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet and Maxwell Limited 2011).
[40] *The Scaptrade* [1983] 2 Lloyd’s Rep 253 [256]-[257]; Coghlin and others (n 1) para 1.4.

vessel through the Master, Officers and Crew.[41] Thus there is no actual "hire" of the vessel by the time charterer from the shipowner.[42]

For the purposes of avoiding misleading the merchant and preventing them from mixing the legal concepts of time charter and demise charter (bareboat charter)[43] together and confusing them, it is believed that appropriate wordings should be used to accurately present the unique features of the time charter[44] and make the concept of the time charter clear within the time charterparty. It is therefore proposed that "payment of hire" should be modified to "payment for the time charter service"[45] within the relevant clauses of the BALTIME form,[46] the NYPE 46 form,[47] the NYPE 93 form,[48] and the GENTIME form.[49]

In addition, if satisfied by giving the shipowner unconditional rights to the immediate use of funds transferred, the wider meaning of "in cash" for the time charterer's payment for the time charter service can be admitted in modern commercial practice.[50]

Thus, in order to follow commercial practice and make the contents of the

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[41] *Timber Shipping Co. S.A v London and Overseas Freighters (The London Explorer)* [1971] 1 Lloyd's Rep 523 [526]; Coghlin and others (n 1) para 1.5.
[42] Coghlin and others (n 1) para 1.15.
[43] Wilson (n 17) 7.
[44] *The Scaptrade* [1983] 2 Lloyd's Rep 253 [256]-[257]; *Sea & Land Securities v Dickinson* [1942] 72 LIL Rep 159 [163] (MacKinnon, L.J.); Coghlin and others (n 1) para 1.4, 1.5, 1.10, 1.13.
[45] Coghlin and others (n 1) para 1.15.
[46] See Clause 6 of the BALTIME form.
[47] See Clause 4 and 5.
[48] See Clause 10 and 11.
[49] See Clause 8.
[50] *The Brimnes* (n 21) [476]; Coghlin and others (n 1) para 16.30.

clause clearer, it is recommended that the contents regarding payment for the time charter service under Clause 6 of the BALTIME form[51], Clause 5 of the NYPE 46 form[52] and Clause 11 (a) of the NYPE 93 form[53] be modified and provide that payment for the time charter service must be by cash or 'other payment method equivalent to payment in cash under commercial practice, which can give the shipowner the unconditional right to the immediate use of the funds.'[54] This might render the wording within these standard forms of the time charterparties more precise.

Moreover, there is an issue with the applicable rate of payment for additional time for the time charter service.[55] Additional time can be found in Clause 9 (d) of the GENTIME form, which allows the time charterer to declare his/her option in writing within a period of limited time, adding the period of off-payment for the time charter service (off-hire)[56] into the charter period within the time charterparty.[57] Under this circumstance, Clause 8 (a) of the GENTIME form provides that the payment for the time charter service of this additional period is on the basis of the rate operable at the time that the time charter service ends.[58]

In practice, different rates of time charter service can be found to operate

[51] Thomas (n 13) 286.
[52] Williams (n 15) 229.
[53] Peter Brodie, *Commercial Shipping Handbook* (2nd edn, Informa 2006) 35-36.
[54] See (n 21).
[55]<https://www.bimco.org/Members/Chartering/BIMCO_Documents/Time_Charter_Parties/GENTIME/Explanatory_Notes_GENTIME.aspx> accessed 28 October 2012.
[56] A wording change is propsed. See Section 5.5.3.
[57]<https://www.bimco.org/~/media/Documents/Document_Samples/Time_Charter_Parties/Sample_Copy_GENTIME.ashx> accessed 18 January 2013.
[58] In Chapter 4 modifying "redelivery" to "ending of the time charter service" is suggested.

over the course of a long-term time charter.[59] It is possible that disputes may occur as to which rate of time charter service should be used for any additions to the time charter period.[60] Is it the rate at the actual time of ending of the time charter service or the rate at the "original" time of the time charter service ending? In order to avoid disputes, the explanatory notes to Clause 8 (a) of the GENTIME form indicate that, according to common practice, within this clause, the payment of this additional period is on the basis of the rate operable at the original time of ending of the time charter service.[61] However, the "original" time of ending of the time charter service is not obviously shown in this clause of the time charterparty.

Even though Clause 8 (a) of the GENTIME form[62] provides a more well thought out and complete rate of payment for the time charter service for additional time than Clause 6 of the BALTIME form,[63] Clause 4 of the NYPE 46 form[64] and Clause 10 of the NYPE 93 form,[65] all of which are short of these provisions, Clause 8 (a) of the GENTIME form[66] can still be criticised. The contractual parties necessarily take further time to research the accurate explanation of this point within the explanatory notes of this clause. If busy merchants do not further examine the explanatory notes of this clause, it is still possible for them to comprehend the payment for the time charter service on the basis of an applicable rate which is not consistent with the

[59] (n 55).
[60] ibid.
[61] ibid.
[62] (n 57).
[63] Thomas (n 13) 286.
[64] Williams (n 15) 229.
[65] Brodie (n 53) 35.
[66] (n 55).

indication in the explanatory notes of this clause; this makes disputes between the contractual parties inevitable.

Therefore, adding “original” to Line 181 of Clause 8 (a) of the GENTIME form[67] is proposed to render the content in Lines 180 to 181 of this clause: ‘In the event that additional time charter service is payable in accordance with Clause 9 (d) of the GENTIME form[68] such time charter service shall be based on the rate applicable at the original time of ending of the time charter service.’ In addition, if the option is also given to the time charterer to add the period of off-payment for the time charter service to the charter period through negotiation when the contractual parties choose the BALTIME form,[69] the NYPE 46 form[70] or the NYPE 93 form,[71] the same recommendation of such a time charter service having to be on the basis of the rate applicable at the original time of ending of the time charter service to satisfy common practice is also suggested as being adopted within Clause 6 of the BALTIME form,[72] Clause 4 of the NYPE 46 form[73] and Clause 10 of the NYPE 93 form.[74]

Furthermore, in terms of computing a payment for the time charter service, it is asserted that unless clear intention to apply the local times is indicated by the contractual parties through the language held within the time

[67] (n 57).
[68] ibid.
[69] Thomas (n 13).
[70] Williams (n 15).
[71] Brodie (n 53).
[72] Thomas (n 13) 286.
[73] Williams (n 15) 229.
[74] Brodie (n 53) 35.

charterparty, the assumption in support of elapsed time as made in the decision of *The Arctic Skou*[75] will rule the issue and this will possibly be applied in future cases.[76] Therefore, to correctly compute the whole payment time for the time charter service under the time charterparty [77] and to avoid practical disputes,[78] it has been suggested that the contractual parties must show their intention by expressing what the governing time is.[79]

To indicate the governing time in the time charterparty in order to calculate the payment for the time charter service, the elapsed time is used as the governing time in accordance with the decision of *The Arctic Skou*.[80] For the contractual parties, it is necessary to convert the local time of the beginning of the time charter service and ending of the time charter service to UTC (Universal Time Coordinated) because the beginning of the time charter service and ending of the time charter service might be in different time zones.[81] It has already been found that the elapsed time has been applied in statements such as, “shall be adjusted to GMT” in Lines 137 to 138 of Clause 10 of the NYPE 93 form,[82] and similarly in Lines 181 to 182 of Clause 8 (a) of the GENTIME form, which provides that, ‘All calculation of hire shall be made by reference to UTC (Universal Time Coordinated)’.[83]

[75] *The Arctic Skou* [1985] 2 Lloyd’s Rep 478; Coghlin and others (n 1) para 14.2.
[76] Coghlin and others (n 1) para 14.4.
[77] (n 55).
[78] Coghlin and others (n 1) para 14.15.
[79].ibid.
[80] *The Arctic Skou* (n 75); Coghlin and others (n 1) para 14.2.
[81] ibid.
[82] Coghlin and others (n 1) para 14.5.
[83] (n 57).

However, Clause 6 of the BALTIME form[84] and Clause 5 of the NYPE 46[85] still lack an express provision regarding what the governing time is to calculate the whole time for the payment for the time charter service. Therefore, it is recommended to follow either Lines 137 to 138 of Clause 10 of the NYPE 93 form[86] or Lines 181 to 182 of Clause 8(a) of the GENTIME form[87] and to clearly provide the elapsed time as the ruling time, to comply with the court decision in *The Arctic Skou*.[88] This might facilitate preventing the argument's reappearance as to whether or not the local time or the elapsed time will be applied when computing the whole time for the payment for the time charter service[89] in the event that the shipowner and the time charterer still choose the BALTIME form[90] or the NYPE 46 form[91] as their agreement.

5.3 Deduction

A deduction from the time charter service provides a way for the time charterer to adjust his/her payment for the time charter service,[92] such as deducting a claim for performance and speed from the payment of the time

[84] Thomas (n 13) 286.
[85] Williams (n 15) 229.
[86] Coghlin and others (n 1) para 14.5; Brodie (n 53) 35.
[87] (n 57).
[88] *The Arctic Skou* (n 75).
[89] Explanation Notes to NYPE 93 form. <https://www.bimco.org/en/Chartering/Documents/Time_Charter_Parties/NYPE93/Explanatory_Notes_NYPE93.aspx> accessed 28 October 2012.
[90] Thomas (n 13) 286-89.
[91] Williams (n 15) 228-31.
[92] Wilson (n 17) 100.

charter service,[93] or in the situation of failure to satisfy the other specific requirements of the vessel under the time charterparty,[94] or for advances for disbursements on behalf of the shipowner under the time charter.[95]

There are two circumstances that enable the time charterer to deduct from the time charter service payment if a reasonable assessment in good faith is made.[96] One is when his/her right for deduction is clearly expressed within the time charterparty,[97] for example, Lines 65 to 67 of Clause 5 of the NYPE 46 form explicitly stipulate that the time charterer's advances for the ordinary disbursement of the vessel at any port shall be deducted from the hire.[98] Another is the equitable right for the time charterer to set off under English law when there is no explicit stipulation in the time charterparty that allows the time charterer to deduct a particular sum from the payment for the time charter service.[99]

The courts were formerly reluctant to permit a self-help remedy if there is no express right to deduct for the time charter service.[100] It was held by Donaldson J. in *The Satya Kamal* that there is no normal equitable right of set-off for the time lost within an off-payment for the time charter service

[93] London Arbitration 5/08 LMLN 739; *Federal Commerce & Navigation Co. Ltd. v Molena Alpha Inc. (The Nanfri, Benfri*, *and Lorfri)* [1978] 2 Lloyd's Rep 132; Baatz (n 3) 175.
[94] For example, Line 99 to 101 of Clause 15 of the NYPE 46 form; Line 233 to 236 of Clause 17 of the NYPE 93 form.
[95] For instance, Clause 13 of the BALTIME form, Line 65 to 67 of Clause 5 of the NYPE 46 form; Clause 11 (d) of the NYPE 93 form.
[96] *Federal Commerce & Navigation Co. Ltd. v Molena Alpha Inc. (The Nanfri*, *The Benfri*, *The Lorfri)* [1978] QB 927 (CA); Baatz (n 3) 175-76.
[97] Baatz (n 3).
[98] Williams (n 15) 229.
[99] Baatz (n 3).
[100] Girvin (n 20) 654.

clause under the time charterparty.[101] In contrast, Parker J in *The Teno* believed that it would be manifestly unjust if the shipowner could retrieve the payment of the time charter service within the charter period but had breached the contract and did not supply the payable time charter service.[102] Consequently, the subsistence of the equitable right to set-off was supported by Parker J. and he believed that the time charterer had the right based on this equitable set-off to deduct from the future payment of the time charter service to include disbursements made on behalf of the shipowner during the off-payment for the time charter service period which had arisen from the breakdown of machinery on the vessel.[103]

In addition, the majority of the Court of Appeal in *The Nanfri*[104] also approved the decision in *The Teno*[105] which applies the principle of equitable set-off to a time charterparty.[106] It is indicated that there are three elements covered in the right of set-off in equity.[107] Firstly, the claim and the cross claim must result from the same contract.[108] Secondly, the cross claim must so directly connect with the claim.[109] Thirdly, it would be manifestly unjust to allow the claim to be declared without concern for the cross claim.[110] It is asserted that

[101] *Seven Seas Transportation v Atlantic Shipping (The Satya Kamal)* [1975] 2 Lloyd's Rep 188; Wilson (n 17) 100.
[102] *Compania Sud Americana de Vapores v Shipmair BV (The Teno)* [1977] 2 Lloyd's Rep 289; Girvin (n 20) 654.
[103] *The Teno* (n 102); Wilson (n 43) 100.
[104] *Federal Commerce & Navigation Co. Ltd. v Molena Alpha Inc. (The Nanfri)* [1978] QB 927 (CA).
[105] *The Teno* (n 102).
[106] Robert Gay, 'How to Apply the Principle of Equitable Set-Off to Time-Charter Hire' (2006) 12 JIML 251.
[107] ibid; *The Teno* (n 102).
[108] *The Teno* (n 102); *The Nanfri* (n 104).
[109] ibid.
[110] ibid.

under English law there are two conceptions which a time charterer can set off his/her cross claim against the payment of the time charter service if the cross claim meet the requirements either of the first conception, which is a shipowner's deliberate refusal of providing the service of the vessel, or the second conception which is a shipowner's breach of the time charterparty where the time charterer's damages can be measured by the payment of the time charter service for a period.[111]

The legal basis for *The Nanfri*[112] is that the shipowner's deliberate refusal to allow the time charterer use of the vessel is counted as the shipowner's failing to provide the services of the vessel.[113] A time charterer can therefore set off his/her cross claim against the payment of the time charter service.

However, Lord Denning in *The Nanfri* also asserted that when the shipowner was in breach of the time charterparty and the consequence of such a breach was to wrongly prevent the time charterer from using the vessel, the charterer had the legal right to deduct an amount equal to the time so lost within the payment of the time charter service.[114] Even though this aspect of the decision has not yet been re-examined by the House of Lords, it has been supported by *Century Textiles & Industry Ltd. v Tomoe Shipping (Singapore) Pte Ltd. (The Aditya Vaibhav).*[115]

[111] Gay (n 106).
[112] *The Nanfri* (n 104).
[113] ibid; Gay (n 106).
[114] *The Nanfri* (n 104) [976]-[977]; Girvin (n 20) 654.
[115] [1991] 1 Lloyd's Rep 573; Girvin (n 20) 655.

Moreover, the court held in *The Leon* for the shipowner.[116] The time charterer believed the bunker consumption of the ship might not have been warranted as they were entitled to and alleged that the shipowner had been improperly dealing with the fuel.[117] Consequently the time charterers had a cross claim regarding their allegations, an entitlement to make an equitable set off from the payment of the time charter service.[118] However, the court believed that the time charterer's cross claim was not relevant to the use of the vessel nor did it prejudice his/her using the vessel and therefore decided that the time charterer's allegation was unsuccessful and the time charterers did not have the legal right to an equitable set off.[119] It is believed that the court's decision is correct. Based on the principle of equitable set-off, the cross claim must be directly connected with the claim.[120] However, in *The Leon*, bunkers are not part of the main time charter service regarding payment of the time charter service being payable.[121] Therefore, the time charterers still use the time charter service and it is necessary for them to pay for the time charter service. Thus there are no grounds for the time charterer to assert an equitable set off from the payment of the time charter service.

Similarly, *The Li Hai*[122] dealt with the bunker cancellation fee. However, unlike *The Leon,* the court held for the time charterer.[123]

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[116] *Leon Corp. v Atlantic Lines & Navigation Co. Inc. (The Leon)* [1985] 2 Lloyd's Rep 470.
[117] ibid.
[118] ibid.
[119] ibid.
[120] *The Teno* (n 102); *The Nanfri* (n 104).
[121] *The Leon* (n 116).
[122] *Western Bulk Carriers K/S v Li Hai Maritime Inc. (The Li Hai)* [2005] 2 Lloyd's Rep 389.
[123] ibid.

The fact of this case is that the time charterers concluded a time charterparty with the shipowners regarding a bulk carrier.[124] The payment of the time charter service was due in advance and the shipowners could choose to withdraw the time charter service if the time charter was in default and subject to a clause in which 72 hours' notice would be offered to the time charterers before exercising the choice.[125] The time charterers deducted a payment from the time charter service regarding an anticipated seven days of dry docking and the time charterers also paid a USD 500 bunker cancellation fee.[126] A pro-rated payment of USD 600 for cables and victualing was also made by the time charterers.[127] However, the shipowners gave notice of withdrawal of the time charter service on the time charterers. The time charterers paid the amount previously refused for dry docking in order to not be withdrawn from the time charter service by the shipowners.[128] Notwithstanding, the time charterers did not pay the USD 500 bunker cancellation fee to the shipowners because the time charterers asserted that a sum was not considered as a precondition of not being withdrawn by the time charter service by the shipowner.[129] Finally due to a deduction from the payment of the time charter service, the shipowners withdrew the time charter service.[130]

The judgment including (1) the time charterers had no legal right to deduct for anticipated off-payment of the time charter service, short of a provision in

[124] *The Li Hai* (n 122).
[125] ibid.
[126] ibid.
[127] ibid.
[128] ibid.
[129] ibid.
[130] ibid.

contrast, even if it was certain that the ship would be off-payment of the time charter service.[131] In addition, there was no evidence to show that the time charterer actually suffered any loss or prejudice in their using the ship, the loss of the USD 500 bunker cancellation was too remote to the shipowner's right to payment of the time charter service and both of them did not connect with each other.[132] In terms of the pro-rate payment of USD 600, although the time charterparty did not provide the payment of the time charter service for the cables and victualing was paid 15 days in advance, this had been a long and unchanging practice between the contractual parties.[133] If the time charterer wanted to disobey this practice they should have given notice to the shipowner.[134] The time charterer would also not redesignate this payment expost facto.[135] (2) Due to an off-payment of the time charter service, if the payment of the time charter service had been paid in advance and proved to have been overpaid, the time charterer had a legal right to recover an over-payment of the time charter service for the consideration which was totally failed.[136] However, this was unequal to no whole payment of the time charter service on the day of payment.[137] Also the time charterer's right to repayment did not begin until after the payment of the time charter service was due and payable.[138] (3) The shipowners had never said that they would not try to withdraw the time charter service for inappropriately small deductions.[139] The shipowners furthermore had threatened from time to time that they would

[131] ibid.
[132] ibid.
[133] ibid.
[134] ibid.
[135] ibid.
[136] ibid.
[137] ibid.
[138] ibid.
[139] ibid.

protect their position even though only a small deduction had been made.[140] (4) The notice had to be formal, in writing and had to clearly give notice to the time charterer that unless they corrected their failure to make payment for the time charter service within 72 hours, the time charter service would be withdrawn.[141] It was significant that there was no ambiguity within the notice even though shipowners do not often need to put precisely how much the payment is in the notice.[142] In this case, the notice created confusion and defectiveness. The shipowners breached the time charterparty in withdrawing the time charter service.[143]

It was convinced by the judgment in *The Li Hai*.[144] This is because the shipowners did not obey the requirements of a formal notice set up in the anti-technicality clause.[145] The notice by the shipowner in this case did not give a clear ultimatum to the time charterer that the vessel would be withdrawn unless the payment of the time charter service was paid in full within 72 hours. Therefore it is believed that it was inappropriate to give the shipowner even more power.

Nevertheless, the deduction from the time charter service should be a reasonable evaluation made in good faith, whether the deduction is based on an express clause under the time charterparty or equitable set-off.[146] As Lord

[140] ibid.
[141] ibid.
[142] ibid.
[143] ibid.
[144] ibid.
[145] See the explanation in Section 5.4.1.
[146] *The Nanfri* (n 104); Baatz (n 3).

Denning in *The Nanfri* indicated, although too large an amount came out as a result, which was deducted by the time charterer from the claim, a deduction for the time charter service which is reasonable and bona fide is still allowed.[147] In this situation, the shipowner has no right to withdraw the time charter service[148] but he/she could recover the sum which is over deducted by the time charterer.[149] It is believed that this might be an applicable way to solve the issue because the time charterer's payment for the time charter service should also enable him/her to efficiently use the time charter service to achieve his/her commercial aim. If the time charterer honestly deducts the payment for the time charter service, even though it is likely to be over, this situation is different from the requirement triggering the right of the shipowner to withdraw from the time charter service. It is therefore a reasonable and effective way to prevent the shipowner from withdrawing from the time charter service[150] while enabling him/her to recover the sum which is over deducted by the time charterer. Subsequently, this approach by Lord Denning was adopted by the lower courts.[151]

Moreover, the deduction for the time charter service is also restricted in other circumstances.[152] The cross-claims for deducting payment for the time charter service have to closely connect with the shipowner's claim for

[147] *The Nanfri* (n 104).
[148] ibid.
[149] Baatz (n 3).
[150] See the suggested wordings in Section 5.4.3.
[151] *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep 157; *SL Sethia Liners v Naviagro Maritime Corp. (The Kostas Melas)* [1981] 1 Lloyd's Rep 18; *Owneast Shipping Ltd. v Qatar Navigation QSC* [2010] EWHC 1663 (Comm); [2011] 1 Lloyd's Rep 350; [2010] 2 CLC 42 [46]-[47]; Baatz (n 3).
[152] *The Nanfri* (n 104).

payment for the time charter service during the time charter period or they must be driven by the same transaction.[153] Therefore, other claims relevant to the time charterer's unavailability to use the vessel[154] or a claim for cargo damage resulting from the negligence of the Crew[155] are not covered in the time charterer's right for deduction.[156] In addition, it is believed that, however certain the vessel is to be put in off-payment for the time charter service, the prospective period of off-payment for the time charter service cannot be allowed to be deducted from the payment for the time charter service in advance by the time charterer because the anticipated off-payment for the time charter service period has not actually occurred and is uncertain, which could result in arguments.[157]

Furthermore, as held in *The Marika M*, which was chartered under the NYPE 46 form, when the off-payment for the time charter service arose from running aground, even if the charterer's time loss was caused by waiting for a berth, there was no allowance to deduct from the payment for the time charter service under "net time lost" within the off-time charter service clause[158] after she had been once again refloated, even if the original grounding led to this direct result.[159] However, it is worth mentioning that**,** in terms of this issue, such a time loss could likely be deducted under American

[153] ibid.
[154] For example, a claim for misappropriation of the charterer's bunkers by the Master. *The Leon* (n 116).
[155] *Federal Commerce & Navigation Co. Ltd. v Molena Alpha Inc. (The Nanfri)* [1978] 2 Lloyd's Rep 132 [140] [Lord Denning); Wilson (n 17) 101.
[156] Wilson (n 17) 101.
[157] *The Li Hai* (n 122); Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 331; Wilson (n 17) 101.
[158] See the discussion on the off-payment for the time charter service clause.
[159] *The Marika M* [1981] 2 Lloyd's Rep 622; *The Pythia* [1982] 2 Lloyd's Rep 160; Wilson (n 17) 99.

law.[160] Net overall time lost as a consequence of any grounds listed within the "net time lost" clause under the time charterparty is likely permitted through the American courts and arbitrators.[161]

Nonetheless, it may be reasonable for the view of English courts to be to refuse deduction in this situation since net overall time lost as a consequence of any of the particular causes listed under the time charterparty, such as the vessel waiting for a berth, is not the expressly specified situation for the deduction of payment for the time charter service under Clause 15 of the NYPE 46 form.[162] In addition, this should be strictly construed in favour of the shipowner[163] when the time charterer deducts a payment for the time charter service, which is the time charterer's fundamental obligation[164] under the time charter; because the time charterer seeks to cut down the shipowner's right to payment for the time charter service.[165] If the vessel had already been recovered in a working position from the off-payment for the time charter service and the time charterer therefore had been in a position to benefit from receiving the time charter service, to allow deductions for time loss extending subsequently to the vessel's wait for a berth is likely too overly broad and not in balance with the concerns over the benefit and burden between both contractual parties.

[160] Wilson (n 17) 99; Coghlin and others (n 1) para 25.56, 25.91.
[161] For example, *The Chris* SMA No 199 (Arb at NY 1958); *The Chrysanthi GL.* SMA No 1417 (Arb at NY 1980); Wilson (n 92) 99, footnote 90; Coghlin and others (n 1) para 25.91.
[162] It is believed that "*Expressio unius est exclusio alterius*" could be applied here. This means when one thing is expressed within the contract, it may imply to exclude the other things of the same general category which are not stated. Baris Soyer, 'Construing terms in time charterparties-beginnng of a new era or business as usual?' in Thomas (n 13).
[163] *Royal Greek Government v Minister of Transport* (*No 1*) *(The Ilissos)* [1948] 82 LILR 196 [199] (Bucknill L.J.); Wilson (n 17) 97; Coghlin and others (n 1) para 25.4.
[164] Girvin (n 20) 644.
[165] *The Ilissos* (n 162).

In short, the time charterer's right to deduct from the payment of the time charter service would be conferred in certain circumstances but this is still restricted in some aspects under English law.

5.3.1 Reforming the deduction of the payment for the time charter service

For the same reasons explained in Section 5.2.1 in this chapter, it is recommended to amend the wording "deduction of hire" to the precise wording, "deduction of the payment for the time charter service".

At present, it can be found that the time charterer's rights for the deduction from the payment for the time charter service are provided separately within the standard forms of the time charterparty and this might render the organisation of the content of the time charterparty sub-optimal. For example, the time charterer's rights to deduct from the payment for the time charter service, under the NYPE 46 form, regarding advances as to ordinary disbursements for the vessel at any port are provided in Clause 5.[166] The extra expenses caused by the occurrences of the off-payment for the time charter service are provided in Clause 15 of the NYPE 46 form.[167] Within the NYPE 93 form, advances as to the vessel's ordinary disbursements at any

[166] Williams (n 15) 229.
[167] Williams (n 15) 230.

port are stipulated in Clause 11 (d).[168] Also, the extra proven expense is set out in Clause 17 of the NYPE 93 form.[169] In addition, under the GENTIME form, the expenditure incurred on behalf of the shipowner is provided in Clause 8 (d),[170] while the advance funds are stipulated in Clause 13 (e) of the GENTIME form.[171]

Even though the lawyer will possibly be involved in the reviewing of the draft of the time charterparty and it is possible for the contractual parties, the shipper men, not actually to read the content of the contract, for example, the view of House of Lords showing in *the Starsin*,[172] the shipowner and the time charterer still "should" carefully read the standard form of contract prior to making a fixture. This is because the content of the clause within the time charterparty is deeply connected to the legal right and obligation of the contractual parties and they "should" carefully read the contents of the clauses within the time charterparty and be thoughtfully concerned about what is relevant to them within the contract.

However, these separated provisions within the time charterparties do not make it easy for the contractual parties--the lay parties—to immediately grasp the information and to gain a clear picture of the time charterer's different rights for deducting from the payment of the time charter service

[168] Brodie (n 53) 36.
[169] Brodie (n 53) 38.
[170] (n 57).
[171] ibid.
[172] *Homburg Houtimport BV v Agrosin Private Ltd. (The Starsin)* [2003] 2 WLR 711.

under the time charterparty.[173] Therefore, aiming to benefit the contractual parties by simplifying and reducing their reading burden by organising and associating separate information together, and to make it easier and clearer for contractual parties to understand their legal rights and obligations, it is recommended that the relevant provisions be organised together regarding the deduction of the payment of the time charter service and placed in an extra sub-clause of the payment for the time charter service under the time charterparty.

Moreover, as mentioned in Section 5.3, the clearly expressed time charterer's right for a deduction from the payment of the time charter service provided within the time charterparty is one way to be legally allowed to deduct from the payment for the time charter service if a reasonable assessment in good faith is made.[174]

Thus, in order to avoid possible arguments before the court as to whether the time charterer has the equitable right to set off under English law when no explicit provision under the time charterparty exists,[175] it is better for the contractual parties, the shipowner and the time charterer, to negotiate in advance on this matter. The result of their negotiation should be clearly provided regarding the other specific circumstances which also allow the

[173] From the point of view of psychology, the "concepts" can be organised by the human brain and can impact how they think. The "concepts" will enable humans to track their knowledge about the world. In addition, transforming information to reach conclusions of thought of human being is through the consistent organising of information and belief into a series of stages within the mental activity. Daniel Schacter, Daniel Gilbert and Daniel Wegner, *Psychology* (Palgrave Macmilan 2012) 270-72, 288, 292.
[174] *The Nanfri* (n 104); Baatz (n 3).
[175] Baatz (n 3).

time charterer to deduct expenses or costs from their payment for the time charter service within an extra sub-clause of the payment for time charter service under the time charterparty. It is necessary to note, in the view of the court, that the deduction should also be based on a reasonable evaluation made in good faith.[176]

If Clause 11 of the NYPE 93 form,[177] for example, adopts the above suggestions to add an extra sub-clause, Clause 11 (e) of the NYPE 93 form, in order to organise relevant provisions of deduction from the payment of the time charter service together and to clearly express the "other specific circumstances", which also allow the time charterer to deduct expenses or costs from their payment for the time charter service, it would become:

> The time charterer is entitled to deduct the payment for the time charter service under this Charter Party under the following circumstances: cash advance within (d) of this Clause and the cost and all extra proven expenses caused within Clause 17 and the other circumstances, such as _____, ___, and ____.

A similar approach could be likewise followed for the BALTIME form,[178] the NYPE 46 form[179] and the GENTIME form[180] when they are chosen and modified by the contractual parties or updated the version in the future.

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[176] *The Nanfri* (n 104).
[177] Brodie (n 53) 35-36.
[178] Thomas (n 13) 286-89.

Furthermore, for the purposes of making the time charterer's different rights for the deduction from the payment of the time charter service which occur in individual provisions under the time charterparty quickly and obviously noticeable, it is also proposed that the relevant information be combined together into one Box Layout to highlight those differently allowed situations for the time charterer to deduct from the payment of the time charter service under the time charterparty. For instance, if the NYPE 93 form[181] adopts the aforementioned proposal to set up the Box Layout in Part 1, one box titled "deduction" is suggested and it is recommended that it be divided into several columns. For example, the columns of the Box layout can be divided into Clause 11 (d),[182] Clause 17[183] and "the other circumstances". The separate columns of Clause 11 (d)[184] and Clause 17[185] are for the contractual parties to negotiate then denote whether or not they still agree to keep the time charterer's right for deduction from the payment of the time charter service within the NYPE 93 form[186] (i.e., if the contractual parties negotiate to delete either of these clauses, they do not need to select either of these clauses under the NYPE 93 form[187]). In addition, "the other circumstances" are for the contractual parties to fill in newly added clause numbers or newly added sub-clause numbers. Similarly these highlights—for the varying circumstances which allow for deductions from the payment of the time charter service under the time charterparty—within the Box Layout,

[179] Williams (n 15) 228-31.
[180] (n 57).
[181] Brodie (n 53) 32-46.
[182] ibid 36.
[183] ibid 38.
[184] ibid 36.
[185] ibid 38.
[186] ibid 32-46.
[187] ibid.

are also suggested for use in the other essential standard forms relating to time charterparties.

5.4 Withdrawing the time charter service and suspension

Under common law, a shipowner is not allowed to withdraw from the time charter service (withdraw the vessel)[188] when the time charterer fails to pay for the time charter service by the due date.[189] The shipowner has a right[190] to safeguard withdrawing the vessel, the Master, Officers and Crew from the time charter service, to end the time charterparty, only under the express withdrawal clause under the time charterparty if the time charterer is in default by failure to pay the instalment of payment of the time charter service[191] or does not pay for the time charter service punctually by the due date, or when too little an amount of payment of the time charter service is paid by the due date.[192] In addition, the shipowner can withdraw the time charter service for reasons other than the non-payment of the time charter service under the time charterparty.[193]

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[188] A change to these wordings is suggested. See Section 5.4.3.
[189] Christopher Hill, *Maritime Law* (6th edn Informa Professional 2003) 205.
[190] Simon Baughen, ' Case and Comment Withdrawal with Cargo Still on Board' [2012] LMCLQ 343.
[191] Girvin (n 20) 658.
[192] Baatz (n 3).
[193] For example, Clause 5 of the NYPE 46 form provides "or on any breach of this Charter Party" and this entitles the shipowner to withdraw the vessel for non-payment for the time charter service. In addition, Lord Diplock in *The Antaios (No 2)* agreed with the award of the arbitrators and he construed that "or on any breach of this Charter Party" within Clause 5 of the NTPE 46 merely applies to repudiatory breaches rather than any breach however trivial. In other words, it refers to a fundamental breach of an innominate term or breach of a term which explicitly indicates it to be a condition, such as granting the shipowner the right to

However, if the shipowner waives his/her right for the remedy of the time charterer's breach of payment for the time charter service on time, he/she will lose his/her right to withdraw the time charter service under the time charterparty.[194] Establishing the shipowner's conduct, which is treated as the waiver of his/her right to withdraw, should be equal to a clear and indubitable indication of his/her acceptance of a late payment for the time charter service as equivalent to being paid punctually, or as the time charterer being reasonably convinced of his/her delay of the payment for the time charter service as being accepted by the shipowner's delay in declining to take the payment for the time charter service.[195]

Nonetheless, when the shipowner exercises the right to withdraw the time charter service, the legal effect is that the time charterparty is terminated[196] and both contractual parties will not need to continue to perform their legal obligations under the time charterparty.[197] Therefore, if the shipowner exercises further services demanded by the time charterer, after a valid withdrawal of the time charter service by the shipowner, the shipowner has

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choose to regard the charterparty as wrongfully repudiated by the time charterer. *Antaios Compania Naviera S.A. v Salen Rederierna A.B (The Antaios (No 2))* [1984] 2 Lloyd's Rep 235 [238] (Lord Diplock); Martin Davies and Anthony Dickey, *Shipping Law* (3rd edn, Lawbook Co 2004) 396.

[194] Coghlin and others (n 1) para 16.98.

[195] Wilson (n 17) 103.

[196] Coghlin and others (n 1) para 16.86; It is arguable whether the obligation of the time charterer's payment for the time charter service punctually is under condition or intermediate terms. It is asserted by Lord Diplock in *The Afovos* that The shipowners are entitled to regard the time charterers' breaching their primary obligation to make punctual payment for time charter service of an instalment under Clause 5 of the NYPE 46 form as a breach of condition. However, it is believed that the better opinion regarding the nature of the time charterer's obligation to pay for time charter service under the time charterparty is an intermediate term. Nonetheless, this uncertain issue will wait on the House of Lords to give the issue a clear indication. *Afovos Shipping Co. S.A v R. Pagnan & F.Lli (The Afovos)* [1983] 1 Lloyd's Rep 335 [341]; Coghlin and others (n 1) para 16.130, 16.132.

[197] D. Rhidian Thomas, 'The charterparty hire: Issues Relating to Contractual Remedies for Default and Off-hire Clauses' in Thomas (n 13); Baatz (n 3).

the legal right to be remunerated[198] for those services within a new contract.[199] It may have occurred at the time of termination of the time charterparty by the shipowner, during the vessel's voyage of her carrying cargo for third parties.[200] Under this circumstance, if the bills of lading are issued by the shipowner, he/she still has legal obligation to carry the cargo to the destination.[201] Then the shipowner is entitled to recover the freight fee from the shipper unless the freight has already been paid to the time charterer or the agent of the time charterer, or the pre-paid freight is marked by the bills.[202] On the other hand, if the bills of lading are issued by the time charterer, the duty of the shipowner is as a bailee to take reasonable care of the cargo and to carry it to the destination under the bills.[203] In addition, a quantum meruit, on the basis of those further services after a withdrawal of

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[198] Robert Goff J in *The Tropwind (No 2)* [1981] 1 Lloyd's Rep 45 [53] indicated that the shipowners were entitled to remuneration for the charter service at the current market rate. Coghlin and others (n 1) para 16.111.

[199] Coghlin and others (n 1) para 16.111.

[200] The USA courts have a different approach. If it is during the vessel's voyage of carrying the cargo, the shipowner's notice of withdrawal of the vessel with the cargo on board cannot be effective until the voyage is fulfilled and the cargo is discharged. For example, *Luckenbach v Pierson*, 229 F 130 (2nd Cir.1915); *Schirmer Stevedoring Co. Ltd. v Seaboard Stevedoring Corp.* 306, F 2d 188 (9th Cir. 1962); *Ocean Cargo Lines Ltd. v North Atlantic Marine Co.* 227 F Supp 872 [881] (S.D.N.Y. 1964); *Diana Co. Maritime S.A of Panama v Subfreights of S.S. Admiralty Flyer,* 280 F Supp 607 (S.D.N.Y. 1968).See Davies and Dickey (n 193) 397, footnote 403. In addition, if there is no third party involved, such as *The Kos*, due to non-payment for the time charter service, the shipowner has lawfully withdrawn the time charter service under the SHELLTIME 3 form. It was in the fact the shipowner discharged the cargo in its own time and expense. This detained the vessel in Brazil for 2.64 days. It was held by the Supreme Court that this was not the risk that the shipowner had assumed under the time charterparty and the shipowner therefore was on the basis of the indemnity clause entitled to market rate of payment for the time charter service and the value of the bunkers consumed during the 2.64 days. However, the shipowner was also entitled under common law as a non-contractual bailee of cargo (the law of bailment) after the withdrawal of the time charter service. Nonetheless, it seems likely that the shipowner can be compensated for actual loss which covers any opportunity cost. *ENE 1 Kos Ltd. v Petroleo Brasileiro S.A Petrobras (The Kos)* [2012] 2 WLR 976 [17]; Alvin W.L and Ken T.C. Lee, 'Recovering Post-Withdrawal Costs: Indemnity Clause, Bailment and Unjust Enrichment' [2012] 6 JBL 549.

[201] ibid.

[202] *Ngo Chew Hong Edible Oils Pte Ltd. v Scandia Steam Navigation Co. Ltd. (The Jalamohan)* [1988] 1 Lloyd's Rep 443. See Christopher Smith, 'Time Charters' in Eder and others (n 39) 356.

[203] Smith (n 39).

the time charter service, may be claimed by the shipowner if the freight under the bills has not been prepaid.[204] Alternatively, in this circumstance, if the shipowner and the time charterer already have an agreement in advance regarding the shipowner being indemnified from the time charterer, or to make the shipowner entitled to remuneration in restitution or a contract for supplying this consequently post-withdrawal time charter service for the shipper, the shipowner could rely on those rights to recover his/her consequent expenses.[205]

Even though the obligation of payment for the time charter service on time under the time charterparty is absolute, it is not necessary to establish negligence or deliberate non-performance in executing the time charterparty to establish default if this payment obligation is delayed.[206] This seems to be too harsh towards the time charterer since the time charterer may be abused by the shipowner[207] as the time charterer may suffer significant losses through a small fault of their own or their bankers.[208] In addition, when the charter market rate rises, the shipowner may take advantage of the time charterer's delay by even one minute to terminate the time charterparty in order to charter his/her vessel to another at a higher rate[209] or simply to put pressure on the time charterer in order to make him/her agree to pay a higher market rate in the future or face the risk of the vessel being

[204] ibid.
[205] Thomas (n 197).
[206] *Tankexpress A/S v Compagnie Financière Belge des Pétroles S.A* [1948] 82 LIL Rep 43 [51]; Coghlin and others (n 1) para 16.73.
[207] (n 89).
[208] Coghlin and others (n 1) para 16.87.
[209] Thomas (n 197).

withdrawn.[210] These aforementioned situations may result in unfairness to the time charterer.[211]

Thus, for the purposes of diminishing the harsh impact of withdrawal of the time charter service by the shipowner, Lord Simon in *The Laconia* was concerned about the use of equitable relief against forfeiture, which is a power evolved to reduce the harsh impact of the forfeiture clauses within the leases of the land.[212] But the House of Lords in *The Scaptrade* affirmed the judgment of the Court of Appeal and decided that equitable relief is not granted in any jurisdiction if the time chartered service is withdrawn by the shipowner.[213] To aim to solve this issue in light of the strictness and disadvantages to the time charterer's position, the following anti-technicality clause is designed to adjust the legal relationship between the shipowner and the time charterer in order to avoid all the circumstances which are too harsh towards the time charterer.[214]

5.4.1 An anti-technicality clause

An anti-technicality clause is intended to alter the strictness of the withdrawal clause under the time charterparty.[215] The grounds for drafting the anti-

[210] *Tropwood AG of Zug v Jade Enterprises Ltd. (The Tropwind No 2)* [1982] 1 Lloyd's Rep 232 (CA) [234] (Lord Denning MR); Girvin (n 20) 656.
[211] Thomas (n 197).
[212] *The Laconia* (n 17); Coghlin and others (n 1) para 16.87.
[213] *The Scaptrade* [1983] 2 Lloyd's Rep 253; Coghlin and others (n 1) para 16.87.
[214] Coghlin and others (n 1) para 16.90.
[215] ibid.

technicality clause is as Lord Denning in *The Rio Sun* indicated, to give the time charterers a chance to remedy their breach before they are put at risk of losing their charter.[216] Another reason for making this clause is because it is possible for times to vary between various countries and for the working customs of the accountants and bankers also to vary, affecting when the time charterer transfers the funds (payment of the time charter service) to the shipowner.[217] In addition, it is believed that this clause is a fair method for the time charterer to avoid withdrawal of the time charter service by the shipowner for trifling delays in the circumstance where there is no sign of an enduring "final" failure to pay for the time charter service by the time charterer.[218]

As shown in *The Afovos*, an anti-technicality clause is legally allowed to be covered in the time charterparty in order to effectively and clearly prevent the withdrawal of the time charter service by the shipowner and protect the time charterer.[219] A grace period is supplied under this clause to allow the time charterer to perform his/her obligation for the payment for the time charter service before the shipowner exercises his/her right for the withdrawal of the time charter service.[220] If the time charterer pays during the specific grace period provided under the anti-technicality clause, this late payment for the time charter service is still equivalent to "regular and punctual" payment for

[216] *Italmare Shipping Co. v Ocean Tanker Co. Inc. (The Rio Sun)* [1981] 2 Lloyd's Rep 489 (CA) [496]; Girvin (n 20) 656.
[217] Girvin (n 20) 656.
[218] Explanatory notes to NYPE 93. See (n 89).
[219] *The Afovos* (n 196); Baatz (n 3).
[220] *Shipping Law* (n 10) 144.

the time charter service under the time charterparty.[221]

Unless an explicit period of notice has been stipulated under the anti-technicality clause[222] within the time charterparty,[223] a notice of the withdrawal of the time charter service has to be given by the shipowner and be received by the time charterer[224] within reasonable time of the default of the time charterer.[225] However, the notice of withdrawal of the time charter service must not be sent to the time charterer until after midnight on the expiry date of the payment of the time charter service otherwise the notice is improper.[226] In addition, normally the shortest necessary time is regarded as reasonable but what is reasonable time relies on the facts of the situation in the individual case.[227] However, "what is a reasonable time" could be criticised as being different and arguable within the minds of the shipowner and time charterer as well as increasing commercial uncertainty in the course of business dealings.[228] Thus it might be ideal to negotiate the exact specific time period in the contract in advance and subsequently provide the result for the time of notice within an anti-technicality clause.

Moreover, It is also indicated, as in *The Li Hai,* that the wording of the notice under the anti-technicality clause has to be in the form of a clear ultimatum to

[221] Girvin (n 20) 656.
[222] See the explanation of this clause below.
[223] Davies and Dickey (n 193) 394.
[224] Coghlin and others (n 1) para 16.84.
[225] *Mardorf Peach & Co. Ltd. v Attica Sea Carriers Corporation of Liberia* [1977] AC 850 [872] (Lord Wilberforce); Davies and Dickey (n 193) 394.
[226] *The Afovos* (n 196); Coghlin and others (n 1) para 16.92; *Shipping Law* (n 10) 144.
[227] As held in *Gatoil Anstalt v Omennial Ltd. (The Balder London)* [1980] 2 Lloyd's Rep 489, it is not unreasonable in these situations for there to be a delay of three days and 18 hours between the time charterer's default and the notice of withdrawal of the time charter service.
[228] Certainty of terms is one of the important doctrines in current contract law.

show that if the payment for the time charter service is overdue and the payment for the time charter service is not paid during the particular grace period, the time charter service will be withdrawn by the shipowner.[229] A 48-hour or 72-hour notice period is frequently required for the shipowner to give to the dry cargo time charterer between the time charterer's default of payment for the time charter service and the withdrawal of the time charter service by the shipowner.[230] In addition, the obvious notice of withdrawal of the time charter service has to be provided to the charterer or his/her agent.[231] Giving this notice of the withdrawal of the time charter service to the Master is regarded as insufficient.[232] Even though the NYPE 46 form[233] and the BALTIME form[234] do not provide printed anti-technicality clauses, the typescript of anti-technicality clauses is often added by the parties.[235]

Furthermore, it is necessary to note that the shipowner is also still entitled to safeguards by withdrawing the time charter service if any abuse or continuing misuse of the grace period anti-technicality clauses has been made by the time charterer.[236]

[229] *The Li Hai* (n 122); *Schelde Delta Shipping BV v Astarte Shipping Ltd. (The Pamela)* [1995] 2 Lloyd's Rep 249; Baatz (n 3).
[230] Coghlin and others (n 1) para 16.90.
[231] *The Laconia* (n 17); Wilson (n 17) 103.
[232] *The Georgios C* [1971] 1 Lloyd's Rep 7 [14]; Wilson (n 17) 103.
[233] Williams (n 15) 228-231.
[234] Thomas (n 13) 286-89.
[235] Coghlin and others (n 1) para 16.90.
[236] (n 89).

5.4.2 The shipowner's right to suspend the performance of their obligation

It is worth mentioning that the shipowner also has the right to suspend/withhold the performance of any and all of his/her obligations under the time charterparty if the payment for the time charter service remains unpaid after the grace period.[237] This can be found within Clause 11 of the NYPE 93 form[238] and Clause 8 (c) of the GENTIME form.[239]

In addition, the legal effect of the shipowner's right to suspend the time charter service temporarily cancels the performance of all contractually provided obligations of the shipowner without any possibility of subsequent legal liabilities arising within the time charterparty.[240] The shipowner is not therefore in breach of a time charterparty and the time charter has no remedy from this.[241] Because the contract still exists and is valid, the time charterer has to pay for the time charter service covered in his/her legal obligations within the time charterparty.[242] The time charterer also needs to take responsibility for the contractual indemnity resulting from the shipowner suspending the time charter service[243] and take into account any additional expenses caused by such a suspension if these agreements have already been provided under the time charterparty.[244] For example, if the bills of

[237] Thomas (n 197) 128.
[238] Line 154 to 155 of Clause 11 (a) of the NYPE 93 form.
[239] Line 201 to 202 of Clause 8 (c) of the GENTIME form.
[240] Thomas (n 197); (n 57).
[241] ibid.
[242] ibid.
[243] Thomas (n 197).
[244] See Line 157 to 158 of Clause 11 (a) of the NYPE 93 form and Line 205 to 206 of Clause 8 (c) of the GENTIME form.

lading are issued by the shipowner, the shipowner has a legal obligation to perform his/her legal obligation for carrying the shipper's goods to the destination under the bills of lading contract.[245] However, if the shipowner suspends the time charter service then possibly he/she might be subject to a claim for remedy by the shipper because the shipowner has breached the bills of lading contract and the shipowner therefore could be indemnified by this consequence from the time charterer based on this provision under the time charterparty.[246]

Even if the shipowner has been safeguarded by the aforementioned right to suspend the time charter service under the time charter service, his/her right to withdraw the time charter service under the time charterparty is not hindered.[247]

5.4.3 Reforming the withdrawal of the time charter service and suspension

As Lord Porter indicated in *Tankexpress A/S* [248] the phraseology in the time

[245] This carrier's obligation could normally be seen in the bills of lading. For example, it is stipulated in Clause 6 of CONLINEBILL that '…the carrier shall be at liability to carry the goods to their port of destination by the said vessel or vessels either belonging to the Carrier or others, or by other means of transport, pro-vessel's arrival there.' Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, *Bills of Lading: Law and Contracts* (LLP Professional Publishing 2000) para 7.4; 778.

[246] If the time charterer is not credit worthy, there might be a risk for the shipowner. Thus, it is suggested that the shipowners should never exercise the suspension of the time charter service before consulting their insurance supplier. Explanatory notes to GENTIME form. See (n 55); Thomas (n 197).

[247] Thomas (n 197).

[248] *Tankexpress A/S v Compagnie Financière Belge des Pétroles S.A* [1949] AC 76 [90].

charterparty is illusory,[249] he also asserted that the ship is not leased or withdrawn.[250] In addition, "withdrawal of the vessel" means that the time charter service is not offered.[251] Thus it is doubtful whether the wordings "the right to withdrawing the vessel from the service of the Charterers"[252] and "the right to withdraw the vessel"[253] provided in the essential standard forms of the time charterparty[254] are precise enough. The legal meaning of the contents is not complete because not only has the vessel been withdrawn from the time charter, the Master, Officers and Crew have also been withdrawn,[255] meaning that the entire time charter service is withdrawn by the shipowner.[256] Moreover, the wording, "withdraw the Vessel from the service of the Charterers" is also no different from the wording within Lines 780-781 of Clause 28 of the BIMCO BARECON 2001 form, a standard form of the demise charter.[257] It is therefore believed that this might be a result of the legal concepts of the demise charter and the time charter being mixed together. In addition, this brings uncertainty into the terms of the contract because different merchants might construe various meanings regarding those wordings which do not actually show the unique features of the time charter and the real ambit of withdrawal of the time charter service.

Even in the standard form of the time charterparty, such as the GENTIME

[249] ibid.
[250] ibid.
[251] ibid.
[252] Such as Clause 6 of the BALTIME form, Clause 5 of the NYPE 46 form and Clause 11 of the NYPE 93 form.
[253] For example, Line 187 to 188 of Clause 8 (c) of the GENTIME form.
[254] Such as NYPE 93 form and GENTIME form.
[255] Thomas (n 197).
[256] *Tankexpress A/S v Compagnie Financière Belge des Pétroles* (n 248) [90].
[257] 'The Owners shall be entitled to withdraw the Vessel from the service of the Charterers and terminate the Charter with immediate effect by written notice to Charterers…' See Mark Davis, *Bareboat Charters* (2nd edn, Informa Professional 2005) 259.

form,[258] a recent form, the wording within the withdrawal clause is still inaccurate and confusing. The wording within the withdrawal clause under the GENTIME form does not show the real ambit of withdrawal of the time charter service, i.e. withdraw the vessel, the Master, Officers and Crew. It can only be seen as '…the Owner shall have the right to withdraw the Vessel…' in Lines 187 to188;[259] and '.., shall entitle the Owner to withdraw the Vessel…' in Lines 197 to 198 within Clause 8 (c) of the GENTIME form.[260]

Therefore, it is proposed to modify the inaccurate wording in those relevant clauses under the time charterparty and to use the precise wording "withdraw the time charter service" and "the right to withdraw the time charter service" in the essential standard forms of time charterparty[261] to make the terms of the contract more precise, and the meaning of the terms of the contract more clear, certain, and complete.

A further criticism is that it is not easy to read and follow clause 8 (c) of the GENTIME form[262] and it is not an adequate draft of this clause because all the different sub-paragraphs are not clearly presented. Lacking a separate sub-heading might make it difficult for the merchants to clearly grasp and distinguish the key information within the different sub-paragraphs under

[258] (n 57).
[259] ibid.
[260] ibid.
[261] Such as Line 188 and Lines 197-98 of the GENTIME form.
[262] (n 57).

Clause 8 (c) of the GENTIME form.[263]

Therefore, it is suggested to clearly divide 8(c) of the GENTIME clause[264] into three sub-paragraphs by way of adding the underlined sub-heading of "(1) Withdrawal of the Time Charter Service" to the first paragraph of 8 (c) of the GENTIME form;[265] and "(2) Grace Period" to the second paragraph of 8 (c) of the GENTIME form,[266] meaning the anti-technicality clause. In addition, the sub-heading of "(3) Suspend the Performance of the Owners' Obligation" is to be added to the third paragraph of 8 (c) of the GENTIME form.[267]

Moreover, as mentioned in Section 5.4, the shipowner can also withdraw the time charter service based on grounds other than the non-payment of the time charter service within the time charterparty.[268] However, it should be subject to the construction by the House of Lords in *The Antaios (No 2)*[269] which interpreted the meaning of "or on any breach of this Charter Party" as only indicating the time charterer's repudiatory breaches rather than any breach however trivial under Line 61 of Clause 5 of the NYPE 46 form.[270] Furthermore, Line 150 of Clause 11 (a) of the NYPE 93 form[271] has adopted this construction by the House of Lords[272] in *The Antaios (No 2)* so that the

[263] ibid.
[264] ibid.
[265] ibid.
[266] ibid.
[267] ibid.
[268] For instance, Clause 5 of the NYPE 46 form and Clause 11 (a) of the NYPE 93 form.
[269] *The Antaios (No 2)* (n 193); Coghlin and others (n 1) para 16.126.
[270] Williams (n 15) 229.
[271] Brodie (n 53) 36.
[272] Lord Diplock, Lord Roskill, with whom the other members of the House of Lords, both indicated that the views of the arbitrators in this case were clearly right.

content in this Clause is modified to “or any fundamental breach whatsoever of this Charter Party”.[273]

The advantage of this modification within Line 150 of Clause 11 (a) of NYPE 93 form[274] is to make the content under this clause clearer and better thought out since it enables the content to fully present the view of the court[275] and allows the contractual parties to clearly recognise that the requirement of the other reason for withdrawal of the time charter service by the shipowner is necessarily restricted only to the time charterer’s fundamental breach of the time charterparty.[276] Therefore, it is suggested that if the contractual parties still insist on selecting the NYPE 46 form[277] as their form of time charterparty, it should follow exactly the content mentioned in Line 150 of Clause 11 (a) of NYPE 93 form,[278] “or any fundamental breach whatsoever of this Charter Party”. Adding this into Line 61 of Clause 5 of the NYPE 46 form[279] may be ideal for its practical applicability[280] and this may also be the best way of making the contents of this clause unambiguous.

The same suggestion will apply to Clause 6 of the BALTIME form[281] and Clause 8 (c) of the GENTIME form[282] if the contractual parties choose these

[273] *The Antaios (No 2)* (n 193); Coghlin and others (n 1) para 16.126; Davies and Dickey (n 193) 396.
[274] Brodie (n 53) 36.
[275] *The Antaios (No 2)* (n 193).
[276] ibid; Coghlin and others (n 1) para 16.126; Davies and Dickey (n 193) 396.
[277] Williams (n 15) 228-31.
[278] Brodie (n 53) 36.
[279] Williams (n 15) 229.
[280] *The Antaios (No 2)* (n 193).
[281] Thomas (n 13) 286.
[282] (n 57).

forms and negotiate as well as agreeing to allow the shipowner to have the right to withdraw the time charter service when the time charterer fundamentally breaches the contract.[283] The clear language “or any fundamental breach whatsoever of this Charter Party”,[284] is also recommended for use in these clauses.

In addition, adding the legal effect into the withdrawal provision in the time charterparty is suggested to enable merchants to fully appreciate the real legal consequences of withdraw the time charter service since the merchant might not recognise or predict the legal consequences of those wordings when they look at the legal terminology. This approach also can be seen in the draft of Line 781 of Clause 28 of the BIMCO BARECON 2001 form.[285] Thus, in order to make the legal result predictable by the contractual parties, it might be advisable to modify the relevant clauses and to provide that the “Owner shall be entitled to withdraw the time charter service and terminate the time charter” under these essential standard forms of the time charterparty.

It might also be ideal for the contractual parties to manage any possible risk regarding the consequent post-withdrawal time charter service for the third party, the shipper, in advance. It might be, therefore, an applicable method to suggest that the withdrawal clause under these essential standard forms of time charterparty clearly express that the shipowner could be indemnified

[283] (n 5).
[284] *The Antaios (No 2)* (n 193); Coghlin and others (n 1) para 16.126; Davies and Dickey (n 193) 396.
[285] Davis (n 257) 259.

from the time charterer for providing this consequent post-withdrawal time charter service for the shipper, in order to recover his/her consequent expenses.[286]

Furthermore, Lord Denning asserted in *The Rio Sun* that unambiguous and clear content giving the time charterer an ultimatum under an anti-technicality clause is required.[287] The time charterer should be given notice that he/she has not yet paid the correct payment of the time charter service.[288] In addition, the time charterer also needs to clearly be informed beyond any doubt that unless he/she makes the payment of the time charter service within specific hours, the grace period, the shipowner will withdraw the time charter service.[289] It can be found that Clause 11 (b) of the NYPE 93 form,[290] the second paragraph of Clause 8 (c) of the GENTIME form[291] and Clause 9 (a) of SHELLTIME 4[292] exemplify the anti-technicality clause under the time charterparty. These clauses have already included the significant content of a typical anti-technicality clause as Lord Denning asserted in *The Rio Sun.*[293] However, it can be seen that there is no anti-technicality clause within the BALTIME form[294] or the NYPE 46 form.[295] For the purposes of preventing too harsh an outcome for the time charterer,[296] it is recommended to add an anti-technicality clause, such as that included in the second paragraph of Clause

[286] Thomas (n 197).
[287] *The Rio Sun* (n 216) [496]; Girvin (n 20) 656; Coghlin and others (n 1) para 16.94.
[288] ibid.
[289] ibid; *The Afovos* (n 196); *The Pamela* (n 229); Coghlin and others (n 1) para 16.94; Girvin (n 20) 658.
[290] Brodie (n 53) 36.
[291] (n 57).
[292] Thomas (n 13) 338.
[293] *The Rio Sun* (n 216) [496]; Girvin (n 20) 656; Coghlin and others (n 1) para 16.94.
[294] Thomas (n 13) 286-89.
[295] Williams (n 15).
[296] Coghlin and others (n 1) para 16.90.

8 (c) of the GENTIME form,[297] and the cover heading “Grace Period”, in the BALTIME form[298] and the NYPE 46 form,[299] to give the time charterer a grace period to pay for the time charter service. In addition, it is also suggested that the contractual parties negotiate in advance and clearly provide in these essential standard forms of the time charterparties[300] that the shipowner shall give the time charterer written notice of the number of clear banking days for rectifying the failure of payment for the time charter service within specific hours of the time charter’s default.[301] It is also effective to add an extra Box in Part 1 Box Layout of these standard forms of the time charterparty[302] for filling in this specific notice period in order to draw the contractual parties’ attention to it. These changes might be ideal in making the time charterparty more thoughtful and complete if the contractual parties still choose the essential forms as their standard form of time charterparty.

In addition, it is also suggested that “Grace Period” as has been addressed in the Part 1 Box Layout of the GNETIME form[303] and the BALTIME form[304] should also be added to the Part 1 Box Layout which has been recommended for adoption by the essential standard forms of the time charterparties, such as the NYPE 46 form[305] and NYPE 93 form.[306] This would exercise the function of the Box Layout for clearly and quickly

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[297] (n 57).
[298] Thomas (n 13) 286-89.
[299] Williams (n 15) 228-31.
[300] Such as Clause 6 of the BALTIME form, Clause 5 of the NYPE 46 form, Clause 11 of the NYPE 93 form, and Clause 8 (c) of the GENTIME form.
[301] *The Afovos* (n 196); *Shipping Law* (n 10) 144.
[302] To add the Box Layout in the essential used standard forms of the time charterparties has been recommended in Section 2.6.4 of Chapter 2.
[303] (n 57).
[304] Thomas (n 13) 286-89.
[305] Williams (n 15) 228-31.
[306] Brodie (n 53) 32-46.

reminding the contractual parties how long the agreed grace period is.

It is also worth noting that it is more reasonable to require that the time charterer correct his/her default of payment for the time charter service during the normal banking days, ie, excluding Saturdays, Sundays and Holidays.[307] Thus adding "Saturdays, Sundays and Holidays excluded"[308] is also proposed to make the content within the grace period under the anti-technicality clause of the BALTIME form,[309] the NYPE 46 form[310] and the GENTIME form[311] more thoughtful.

Finally, it is also recommended that the other essential standard forms of time charterparty[312] could also adopt the provision regarding the shipowner's suspension of his/her performance of any and all of his/her obligations in Lines 200 to 206 of the third paragraph of Clause 8 (c) of the GENTIME form[313] to ensure that the shipowner has a temporary and effective weapon to protect himself/herself against the time charterer's default in payment of the time charter service before the shipowner finally decides to permanently[314] withdraw the time charter service.[315]

[307] It can be seen in the example to exclude Saturdays, Sundays and Holidays for the time charterer to rectify his default of payment for the time charter service under the anti-technicality clauses in *The Afovos* (n 196); *The Pamela* (n 229).
[308] The normal banking days might differ depending on countries. The contractual parties could negotiate these exclusions and change this.
[309] Thomas (n 13) 286-89.
[310] Williams (n 15) 228-31.
[311] (n 57).
[312] Such as BALTIME form and NYPE 46 form.
[313] ibid.
[314] Wilson (n 17) 107.
[315] Thomas (n 197).

In addition, if an event which prevents the full working of the vessel has arisen as a result of the time charterer's responsibility or his/her breach, he/she could likely not rely on the off-payment for the time charter service clause to stop his/her obligation of payment for the time charter service.[316] Hence, due to the time charterer's default on payment for the time charter service, even if there is a suspension in the performance of any and all obligations by the shipowner, and this results in the Master, Officers and/or Crew refusing to perform services when required, there is no issue of the vessel putting in an off-payment for the time charter service under 9(a) (ii)[317] of the GENTIME form.[318] Therefore, "Notwithstanding the provisions of 9(a) (ii)",[319] to be set out before the rest of the contents regarding the time charterer still needing to continue to pay for the time charter service and to take responsibility for any additional expenses caused by such a suspension in the third paragraph of Clause 8 (c) of the GENTIME form,[320] allows the whole meaning in Lines 200 to 206 within the third paragraph of Clause 8 (c) of the GENTIME form[321] to become more thoughtful and consistent with the theory of an off-payment for the time charter service.[322] This is an improvement on Lines 154 to 158 of Clause 11 of the NYPE 93 form which also provide for the shipowner's right to suspend performance of any and all

[316] See the discussion in Section 5.5.3.
[317] Clause 9 (a) (ii) of the GENTIME form provides 'any deficiency of the Master, Officers and/or Crew, including the failure or refusal or inability of the Master, Officers and/or Crew to perform services when required.'
[318] Thomas (n 197).
[319] (n 57).
[320] The third paragraph of Clause 8 (c) of the GENTIME form provides that 'Further, at any time after the period stated in Box 26, as long as hire remains unpaid, the Owners shall, without prejudice to their right to withdraw, be entitled to suspend the performance of any all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof in respect of which the Charterers hereby agree to indemnify the Owners. Notwithstanding the provisions of Clause 9 (a) (ii), hire shall continue to accrue and any extra expensed resulting from such suspension shall be for the Charterer's account.'
[321] (n 57).
[322] See Section 5.4.3.

obligations[323] but lack this sentence.[324] Thus it is also suggested that Line 156 of Clause 11 of the NYPE 93 form[325] follows the spirit of Lines 204 to 205 of the third paragraph of Clause 8 (c) of the GENTIME form[326] by adding the sentence, 'Notwithstanding the event of loss of time from default of Officers or Crew, provided in Line 220 of Clause 17'[327] in the content of the provisions of Line 156 of Clause 11 of the NYPE 93 form.[328]

5.5 Off-payment for the time charter service clause

One of the primary obligations of the time charterer[329] is that he/she must pay for the time charter service when he/she uses the vessel under the service of the time charter once the shipowner supplies the vessel, the Master, Officers and Crew that can work efficiently.[330] However, the off-payment time charter service (off-hire clause)[331] is also normally set out in the time charterparty[332] to give the time charterer the allowances for not

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[323] Brodie (n 53) 36.
[324] "Notwithstanding the provisions of 9 (a) (ii)".
[325] Brodie (n 53) 36.
[326] (n 57).
[327] This would be in the same spirit of the content of Lines 227 to 228 of Clause 9 (a) (ii) of the GENTIME form.
[328] The same suggestion also applies to other standard forms, such as the BALTIME form and the NYPE 46 form, when these forms also take the recommendation to adopt the provision regarding the shipowner's suspension of his/her performance of any and all of his/her obligations in Lines 200 to 206 of the third paragraph of Clause 8 (c) of the GENTIME form.
[329] Girvin (n 20) 644.
[330] *Mareva Navigation Co. Ltd. v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd's Rep 368 [381] (Kerr J.); Coghlin and others (n 1) para 25.2.
[331] (n 7).
[332] For example, Clause 11 of the BALTIME form, Line 97 to 99 of Clause 15 of the NYPE 46 form, Line 220 to 233 of Clause 17 of the NYPE 93 form, Clause 9 of the GENTIME form.

needing to pay for the time charter service during any period if the vessel has caused interruptions, which had been provided for in the time charterparty,[333] to the time charter service[334] and therefore making the use of the vessel unavailable to the time charterer.[335] In addition, the occurrences identified under the off-payment time charter service only make this clause applicable when these occurrences are disregarded as any fault on the part of the shipowner.[336] It is believed that it is a provision clause for allocating the risk of loss of time within off-payment for the time charter service under the time charterparty.[337] Moreover, as Bucknill L.J. indicated in *The Ilissos*, if the meanings of wording under the off-payment for time charter service clause are not clear enough, the wording should be construed in favour of the shipowner since the shipowner's right for payment for the time charter service is intended to be cut down by the charterer.[338] Furthermore, the burden of proof for the off-payment for the time charter service clause being operated in factual situations is borne by the time charterer in order for the time charterer to benefit from this clause under the time charterparty.[339]

[333] The traditional or central off-payment for the time charter service causes may be categorised as follows: '(a) breakdown, damage, deficiency, defect (including first damage) to hull, machinery and equipment; (b) drydocking and other measures necessary to maintain the vessel; (c) collision and grounding; (d) detention, seizure and arrest of the vessel; (e) deficiency/default/ strike of men; (f) deficiency of stores/ documentation; (g) unjustified deviation and putting back.' See Thomas (n 197).
[334] Coghlin and others (n 1) para 25.2.
[335] Wilson (n 17) 96.
[336] Wilson (n 17) 96-97.
[337] Johan Schelin, 'On the Interpretation of Off-Hire Clause'—"The Arica" Reconsidered' in Johan Schelin (ed), *Modern Law of Charterparties* (Jure AB 2003).
[338] *The Ilissos* (n 162) [199]; Wilson (n 17) 97; Girvin (n 20) 644.
[339] *Shipping Law* (n 10) 147.

Generally, the time charterer needs to establish three basic key elements of the off-payment for the time charter service under the time charterparty.[340] To prevent the vessel from fully working is the first element;[341] the second element is that the event causes the interruption of the full working of the vessel necessary to be listed in the clauses under the time charterparty;[342] the final one is that the loss of time to the time charterer has to be the direct consequence of the inefficiency of the vessel.[343]

However, the provisions and conditions may be various in the different off-payment for time charter service clauses under the time charterparties.[344] As Staughton L.J. stated in *The Berge Sund*, it is necessary to separate concerns about the wordings in an individual off-payment for the time charter service clause under the time charterparty.[345] Whether or not it is an off-payment for a time charter service event and whether or not it is the way to calculate the loss of time suffered by the time charterer depends on the agreement of off-payment for the time charter service clause by the

[340] Coghlin and others (n 1) para 25.6.
[341] This can be found in Line 99 of Clause 15 of the NYPE 46 form, and Line 225 of Clause 17 of the NYPE 93 form. However, Lines 147 to 148 in Clause 11 of the BALTIME form provide that "hindering or preventing the working of the Vessel and continuing for more than twenty-four consecutive hours."
[342] This can be seen in Lines 143 to 146, 153 to 161 of Clause 11 of the BALTIME form, Lines 222 to 232, 234 to 236 of Clause 9 of the GENTIME form, Lines 97 to 98 of Clause 15 of the NYPE 46 form, Lines 220 to 225, 226 to 228 of Clause 17 of the NYPE 93 form, and Clause 9 of the GENTIME form.
[343] It is showed in Line 149 of Clause 11 of the BALTIME form, Line 99 of Clause 15 of the NYPE 46 form, Line 226 of Clause 17 of the NYPE 93 form, and Line 233 of Clause 9 of the GENTIME form.
[344] Thomas (n 197).
[345] *Sig Bergesen DY & Co. v Mobil Shipping & Transportation Co. (The Berge Sund)* [1993] 2 Lloyd's Rep 453 (CA); *Shipping Law* (n 10) 48.

contractual parties under the different standard forms of the time charterparties.[346]

The types of off-payment for the time charter service clauses under the time charterparty could be normally distinguished as a “period” clause or “net loss of time” clause.[347] To decide which type of off-payment for the time charter clause should be drafted within the time charterparty essentially relies on the result of the negotiation by the contractual parties in the commercial world.

Under the “period” clause, if the time charterer loses a period of the time charter service,[348] the off-payment for the time charter service period begins and he/she can stop paying for the time charter service from the occurrence of the provided event within the time charterparty until the vessel is again in a fully efficient position to recommence her service.[349] Therefore, it could be said that it does not satisfy the requirement if the vessel recovers part of her efficiency.[350]

On the other hand, under the “net loss of time” clause, “time lost” or “loss of time” refers to the “delay to the progress of the adventure”.[351] In addition, the “net loss of time” clause demands that the period of the off-payment for the

[346] Thomas (n 197).
[347] Christopher Smith, ‘Time Charters’ in Eder and others (n 39).
[348] Coghlin and others (n 1) para 25.53, 25.60.
[349] *Hogarth v Miller* [1891] AC 48 (HL) (Lord Halsbury); *Smailes v Evans* [1917] 2 KB 54; *Tynedale v Anglo-Soviet Shipping Co.* [1936] 41 Com cas 206; Coghlin and others (n 1) para 25.60; Wilson (n 17) 98.
[350] *Hogarth v Miller* [1891] AC 48 (HL); Wilson (n 17) 98.
[351] Coghlin and others (n 1) para 25.53.

time charter service be measured on the basis of the net time lost to the time charterer.[352] Moreover, the "net loss of time" clause is especially significant in dealing with the circumstance of the partial efficiency of the vessel.[353] For instance, in *The Apollonius*, the time loss resulted from a speed deficiency of the vessel.[354] Another example is the net loss of time caused by the breakdown of one of three loading cranes in *The HR Macmillan*.[355] In addition, Lord Denning, M.R, in *The HR Macmillan* asserted 'How much earlier would the vessel have been away from the port of lading or discharging if three cranes, instead of two, had been available throughout?'[356] This can be regarded as the test for assessing the net loss of time.[357]

5.5.1 The ambit of off-payment for the time charter service clause

Under some time charterparties, it can be seen that the final sweeping-up clause,[358] using the final wordings "or any other cause preventing the full working of the vessel", normally follows a list of particular occurrences which will provoke the off-payment for the time charter service clause, such as in

[352] For example, Clause 11 (A) of the BALTIME form is a "net loss of time" Clause since the words within this clause indicates 'no hire shall be paid in respect of any time lost thereby'. Coghlin and others (n 1) para 25.58; Smith (n 347).
[353] Wilson (n 17) 98.
[354] *The Apollonius* [1978] 1 Lloyd's Rep 53; Wilson (n 17) 98.
[355] *The HR Macmillan* [1974] 1 Lloyd's Rep 311 [314] (Lord Denning).
[356] ibid.
[357] *Shipping Law* (n 10) 147.
[358] Thomas (n 197).

Clause 15 of the NYPE 46 form.[359] It is asserted that, based on *ejusdem generis*,[360] "or any other cause" can be construed as the same type with the listed events under the off-payment for the time charter service clause.[361] However, the availability of operations of the principle of *ejusdem generis* is doubtful since it would be difficult to distinguish the events listed under the off-payment for the time charter service clause to be a particular enough "genus".[362] Nevertheless, the judicial approach towards the off-payment for the time charter service clause is likely to construe the clause strictly in the way that construes the exception of the clause within the time charterparty.[363] It is claimed that "other cause" should be strictly construed as those directly impacting the efficient operation of the ship and to those precluding the external occurrences which do not connect with the physical state of the ship and her Crew when the ship is delayed in executing the time charterparty.[364] Thus it is closely connected with the ship's performance so as to make it satisfy the off-payment for the time charter service clause if the vessel's delay in getting the free pratique has resulted from suspecting that the Crew was suffering from typhus.[365] However, the occurrences under the off-payment for the time charter service clause do not cover situations such as

[359] Baatz (n 3).
[360] This means that when things described by specific words have the same common features which form a genus, the general words which follow them should be restricted to things of that genus. Baris Soyer, 'Construing Terms in Time Charterparties—Beginning of a New Era or Business as Usual?' in Thomas (n 13).
[361] *The Roachbank* [1987] 2 Lloyd's Rep 498, 507 (Webster J); Thomas (n 197).
[362] *The Rijn* [1981] 2 Lloyd's Rep 267 [271] (Mustill J); Thomas (n 197).
[363] Thomas (n 197).
[364] Wilson (n 17) 97.
[365] *The Apollo* [1978] 1 Lloyd's Rep 200; Wilson (n 17) 97.

the vessel being too heavily loaded for entering the Panama Canal,[366] or the vessel's delay arising from an obstacle on the Yangtse River.[367]

Nonetheless, if the term "whatsoever" is attached after "or any other cause" within the off-payment for the time charter service clause under the time charterparty, even if the occurrences still necessary to satisfy **"**preventing the full working of the vessel" are provided in the clause and are limited to accidents as well as not covering natural causes by the ship's use,[368] the principle of *ejusdem generis* is not applied here and any occurrence is possible to satisfy taking the vessel off-payment for the time charter service.[369]

5.5.2 The consequences of exercising the off-payment for the time charter service clause

When applying the off-payment for the time charter service clause under the time charterparty, the time charterer is not exempted from his/her other obligations during this period, such as paying for port service or bunkers[370]

[366] *Actis Co. Ltd. v The Sanko Steamship Co. Ltd. (The Aquacharm)* [1982] 1 Lloyd's Rep 7; *Andre & Cie S.A v Orient Shipping (Rotterdam) BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep 139 (the port authorities refuse the vessel a permit to work); Wilson (n 17) 97.
[367] *Court Line v Dant* [1939] 44 Com Cas 345; *The Mareva AS* (n 327); Wilson (n 17) 97.
[368] *The Rijn* [1981] 2 Lloyd's Rep 267; Wilson (n 17) 97.
[369] *The Mastro Giorgis* [1983] 2 Lloyd's Rep 66; Coghlin and others (n 1) paras 25.40-25.41.
[370] *Arild v Hovrani* [1923] 2 KB 141; Wilson (n 17) 99.

provided within the time charterparty, if there is no contrast provision[371] under the time charterparty.[372] Moreover, it might be seen in practice, by the agreement of the contractual parties in advance, to count the off-payment for the time charter service period as part of the fundamental period of the time charter under the time charterparty.[373] This is because giving the time charterer the benefit of the option to extend the charter term for an equal off-payment for the time charter service period within the contract would probably disadvantage the shipowner if he/she has already settled on the next fixture of the time charter or if the time charter market rate rises.[374] However, much depends on how the contractual parties negotiate this issue and what standard form of the time charterparty they choose. For example, if the contractual parties adopt the GENTIME form, the time charterer has the option to add any time during the off-payment for the time charter service to the charter period under Clause 9 (d) of the GENTIME form.[375]

Furthermore, the time charterer may be entitled to terminate the time charterparty or claim damages as remedies instead of, or in addition to, operating an off-payment for the time charter service clause if it is the shipowner who is actually at fault and in possible breach of the time charterparty.[376] On the other hand, it is asserted that when an occurrence of the off-payment for the time charter service results from the time charterer's breach of the time charterparty, the off-payment for the time charter service

[371] For instance, Clause 20 of the NYPE 46 form provides that 'fuel used by the vessel while off hire,…to be allowed by Owners'; Williams (n 15) 231.
[372] Wilson (n 17) 99.
[373] ibid.
[374] ibid.
[375] (n 57).
[376] Baatz (n 3).

clause might be operated, however, the shipowner might also have the right to recover his/her payment for the time charter service which they had lost within the off-payment for the time charter service clause as damages for the time charterer's breach in obligation under the time charterparty.[377] There is no judgment to actually handle this issue regarding whether or not the time charter has legal right to treat the vessel as an off-payment for the time charter service when there is no provision within the time charterparty to tackle the event to prevent the full working of the vessel arising from the time charterer's responsibility or his/her breach of contract or fault.[378] Nevertheless, it was argued by the obiter of Rix J. in *The Laconian Confidence* that if the event which prevented the full working of the vessel was proven to result from a matter for which the charterer should take responsibility, this could be construed as implicitly excluded by "any other cause whatsoever preventing the full working of the vessel" under the off-payment for time charter service clause within the charterparty.[379] In addition,

[377] *Leolga Compania de Navigacion v John Glynn & Sons Ltd. (The Dodecanese)* [1953] 2 Lloyd's Rep 47; Baatz (n 3).

[378] The view of the meaning of "fault" by Steyn J. in the first instance in *The Berg Sund* is referred to as conscious wrongdoing or negligence. However, the court of appeal was concerned whether the charterers' fault resulted in a loss of time, this is exempted in the payment for the charter service under the off-payment for the time charter service within the charterparty. In addition, Staughton, L.J indicated in obiter that the shipowners had argued that the fault in this case merely pointed to a causal connection between the time lost and omission of the charterers or something done by the charterers.; *Sig Bergesen DY & Co. v Mobil Shipping & Transportation Co. (The Berg Sund)* [1992] 1 Lloyd's Rep 460; [1993] 2 Lloyd's Rep 453; Coghlin and others (n 1) para 25.49.

[379] *The Laconian Confidence* (n 366) [151]; Coghlin and others (n 1) para 25.46.; In addition, it was stated by Greer.J. in *The Megna* that when loss of time resulted from 'anything for which the charterer is responsible', the payment for the time charter service should not be ended. In *The Megna*, the delay resulted from a faulty bunker of coal. However, the event listed in the off-payment for the time charter service was only restricted to a breakdown of machinery or damage to the hull. Thus it is likely that the time charterer cannot rely on the off-payment for the time charter service clause if the working of the vessel has been stopped by something which was the time charterers' duty to provide, such as their bunkers in this case. *Junder ames Nourse Ltd. v Elder Dempster & Co. Ltd. (The Megna)* [1922] 13 LILR 197; Coghlin and others (n 1) para 25.47; John Weale, 'The NYPE Off-Hire Clause and Third Party Intervention: Can an Efficient Vessel be Placed Off-Hire?' (2002) 33 (2) JMLC. <http://heinonline.org/HOL/Page?handle=hein.journals/jmlc33&div=13&collection=journals&

the Court of Appeal held in *The Terneuzen* that the off-payment for the time charter service clause could not be operated.[380] The time charterers need to keep on paying for the time charter service under the time charterparty during the restoration of the hull of the vessel resulting from the time charterers' breach of their obligation to instruct the vessel into a safe berth.[381] In this case, the shipowner could be indemnified from the time charterer on the basis of the indemnity clause under the time charterparty.[382] Therefore, in these circumstances, it may be advisable to follow the suggestion of several convinced authorities and to deny the time charterer entitlement to place the vessel off-payment for the time charter service when the time charterer is responsible for any cause within the off-payment for time charter service clause or when he/she is in breach of the time charterparty.[383]

5.5.3 Reforming the off-payment for the time charter service clause

set_as_cursor=0&men_tab=srchresults&terms=33|J|Mar.L|cOM.2002|The|NYPE|OFF|HIRE|CLAUSE|THIRD|PARTY|INTERVENTION|CAN|AN|EFFICIENT|VESSEL|BE|PLACED|OFF|HIRE&type=matchall> accessed 22 March 2013. See also *Sig Bergesen DY & Co. v Mobil Shipping & Transportation Co. (The Berg Sund)* [1993] 2 Lloyd's Rep 453. It is indicated by the Court of Appeal in *The Berg Sund* that, in fact, to carry out further tank cleaning was the very service which the charterers demanded. The efficient working of the ship was not stopped by a necessity to engage in further tank cleaning. Coghlin and others (n 1) para 38.112.

[380] *Lensen Shipping Ltd. v Anglo-Soviet Shipping Co. Ltd. (The Terneuzen)* [1935] 52 LILR 141 (CA)

[381] ibid.

[382] ibid; Coghlin and others (n 1) para 25.48; Weale (n 379); Smith (n 347).

[383] Coghlin and others (n 1) para 25.44; 25.69.

Under the time charter, the time charterer's payment for "hire" actually refers to payment for the time charter service.[384] To make the wording of the terms of the time charterparty more precise and accurate is the consistent approach of this thesis.[385] Therefore, it is proposed to modify the wording "off-hire" in the relevant clauses under the essential standard forms of the time charterparty, such as the BALTIME form,[386] the NYPE 46[387] and NYPE 93 forms[388] and the GENTIME form,[389] to "off-payment for the time charter service".

In addition, for the purposes of avoiding unnecessary argument, it has been shown that the view of the authorities[390] is to provide "any other similar cause" within Line 225 of Clause 17 of the NYPE 93 form[391] and Line 345 of Clause 21 of the SHELTIME 4 form.[392] However, if the shipping industry is still willing to choose the NYPE 46 form[393] to be their time charterparty, it is suggested that the good draft model of this comparatively precise phrase is for them to amend Line 98 of Clause 15 of the NYPE 46 form,[394] which currently has the drawback of lacking "similar" within the phrase and is unclear regarding the real meaning of the phrase.[395] For the same reasons, it is also proposed to modify Line 146 of Clause 11 (A) of the BALTIME

[384] Coghlin and others (n 1) para 1.15.
[385] This is as the aforementioned allegation in Section 2.2 of Chapter 2, Section 4.6 of Chapter 4, Section 5.2.1, Section 5.3.1, and Section 5.4.3 of Chapter 5.
[386] Thomas (n 13) 286-89.
[387] Williams (n 15) 228-31.
[388] Brodie (n 53) 32-46.
[389] (n 57).
[390] *The Apollo* (n 365); Wilson (n 17) 97; Thomas (n 197).
[391] Brodie (n 53) 38.
[392] Thomas (n 13) 340.
[393] Williams (n 15) 228-31.
[394] Williams (n 15) 230.
[395] Thomas (n 197).

form,[396] which originally only indicates “or other accident”, to become “ or any other similar accident” to make sure this clear wording within Clause 11 (A) BALTIME form[397] presents the precise ambit of accidents of the off-payment for the time charter service clause.

Moreover, there is the practical argument as to whether or not the time charterer is entitled to put the vessel in off-payment for the time charter service when there is no provision within the time charterparty to tackle the event which prevents the full working of the vessel arising from the time charterer’s responsibility or his/her breach of contract.[398] In this circumstance, it is also believed that if the event covered the scope of the off-payment for the time charter service clause which prevents the full working of the vessel occurring from the time charterer’s responsibility or his/her fault or breach, it might be right to exclude these situations from the operation of the off-payment for the time charter service clause.[399] The time charterer could not therefore rely on the off-payment for the time charter service clause to relieve his/her obligation for the payment for the time charter service when the event preventing the full working of the vessel arises from his/her own responsibility or breach.[400]

Even though some of the standard forms of the time charterparties seem to try to deal with this issue and to express specific exclusions for applying an

[396] Thomas (n 13) 287.
[397] ibid.
[398] See (n 377)-(n 383).
[399] Coghlin and others (n 1) para 25.44, 25.47, 25.69.
[400] See (n 377)-(n 383).

off-payment of the time charter service clause in order to prevent probable issues,[401] clear and complete exclusion as to applying the off-payment for the time charter service clause still cannot be found in the essential standard forms of the time charterparty,[402] such as Clause 11 of the BALTIME form,[403] Clause 15 of the NYPE 46 form,[404] Clause 17 of the NYPE 93 form,[405] and Clause 9 of the GENTIME form.[406]

Hence, in order to make the context of the clause under these time charterparties more thoughtful and complete as well as to avoid triggering disputes between the contractual parties in the future, it is worth recommending a reform of the off-payment for the time charter service clauses by way of clearly displaying the significant exclusions as to the event preventing the full working of the vessel caused by the time charterer's responsibility[407] or his/her fault or breach of contract[408] operating the off-payment for the time charter service clause. This might also facilitate the

[401] For example, it is provided that 'Unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible' in Lines 222 to 223 of Clause 17 of the NYPE 93 form. In addition, under Clause 9 (a) (iii) of the GENTIME form, it is only excluded by any act or omission of the Charterers, their servants, agents or sub-contractors when the event is resulted from "arrest". Moreover, it is indicated "Unless brought about by the act or neglect of Charterers" in Line 174 of Clause 21 (ii) of SHELLTIME 3; Line 362 of Clause 21 (a) (v) of the SHELLTIME 4.
[402] Under the Clause 17 of the NYPE 93 form, it is only excluded by the responsibilities of Charterers, their servants, agents or subcontractors when the event of loss of time results from "arrest". It might be criticised that the contents of the off-payment for the time charter service clause does not consider all the circumstances and is not complete enough because it does not cover the other situations of exclusions.
[403] Thomas (n 13) 287.
[404] Williams (n 15) 230.
[405] Brodie (n 53) 38.
[406] (n 57); It might also be criticised that the contents of this off- payment for the time charter service clause does not consider all the circumstances and is not complete enough because it is merely excluded by any act or omission of the Charterers, their servants, Agents or sub-contractors when the event is caused by "arrest".
[407] (n 383); It is likely constructed here that the time charterers should take responsibility for their servants, agents or subcontractors of the time charterers.
[408] (n 377)-(n 383).

busy contractual parties' clear understanding, and focus further attention on the exclusions to the benefit[409] from the time charterer.

5.6 Highlighting the key reforms in this chapter

To sum up, the key reforms within this chapter can be highlighted as follows:

Consistent with the approach throughout this thesis,[410] modifications are proposed to the current easily confused, mixed-concept, and misleading wordings within the essential standard forms of the time charterparty,[411] such as "payment of hire", "withdraw the vessel", "deduction of hire" and "off-hire". More precise and clear wordings are recommended, such as "payment for the time charter service", "withdraw the time charter service", "deduction of the payment for the time charter service" and "off-payment for the time charter service", which more accurately show the unique characteristics of the time charter.[412]

In terms of reforming the payment for the time charter service, in aiming to follow modern commercial practice and make the contents of the relevant clause clearer, payment for the time charter service has to be paid in cash or 'other payment method equivalent to payment in cash under the commercial

[409] Thomas (n 13).
[410] (n 385).
[411] Such as the BALTIME form, the NYPE 46 and NYPE 93 forms, and the GENTIME form.
[412] (n 44).

practice, which can provide the shipowner the unconditional right to the immediate use of the funds.'[413] The text of the previous sentence is suggested as a reform to Clause 6 of the BALTIME form,[414] Clause 5 of the NYPE 46 form[415] and Clause 11 (a) of the NYPE 93 form.[416] In addition, according to Clause 9 (d) of the GENTIME form, the time charterer is allowed to add the period of off-payment for the time charter service by declaring his/her option in writing within a limited period of time.[417] For the purposes of following common practice and making the content clearly indicate the actual meaning in the provision, and preventing future disputes as well as saving busy merchants' time, the following is recommended: directly adopting the explanation of the explanatory notes to Clause 8 (a) of the GENTIME form[418] and adding "original" to Line 181 of Clause 8 (a) of the GENTIME form.[419] Therefore, that the contents will be shown as 'In the event that additional time charter service is payable in accordance with Clause 9 (d) of the GENTIME form[420] such time charter service shall be based on the rate applicable at the original time of ending of the time charter service'. In addition, if the contractual parties choose the BALTIME form,[421] the NYPE 46 form[422] or the NYPE 93 form[423] and offer the time charterer the option of adding the period of off-payment for the time charter service by negotiation, the rate applicable at the original time of ending of the time charter service of

[413] (n 21).
[414] Thomas (n 13) 286.
[415] Williams (n 15) 229.
[416] Brodie (n 53) 35-36.
[417] (n 57).
[418] (n 55).
[419] (n 57).
[420] ibid.
[421] Thomas (n 13) 286-89.
[422] Williams (n 15) 228-31.
[423] Brodie (n 53) 32-46.

payment for such additional time should also be clearly indicated in Clause 6 of BALTIME form,[424] Clause 4 of the NYPE 46 form[425] and Clause 10 of the NYPE 93 form.[426] Moreover, in order to correctly compute the whole payment time for the time charter service under the time charterparty [427] and to avoid practical disputes regarding whether or not the local time or the elapsed time will be applied when computing the whole time on the payment for time charter service,[428] when the shipowner and the time charterer choose the BALTIME form[429] or the NYPE 46 form[430] as their time charterparty, it is proposed to follow either Lines 137 to 138 of Clause 10 of NYPE 93 form[431] or Lines 181 to 182 of Clause 8(a) of the GENTIME form[432] and to clearly provide the elapsed time as the governing time so as to be in accordance with the court decision in *The Arctic Skou*.[433]

In terms of the reform of the deduction of the payment for the time charter service, in aiming to assist merchants—or lay parties—to rapidly absorb information and to have a clear and complete picture of the different time charterer's rights for deducting from the payment of the time charter service within the time charterparty, as well as to provide an easier and clearer way for the contractual parties to comprehend their legal rights and obligations, it is recommended to clearly organise separate pieces of information and to

[424] Thomas (n 13) 286.
[425] Williams (n 15) 229.
[426] Brodie (n 53) 35.
[427] (n 55).
[428] (n 89).
[429] Thomas (n 13) 286-89.
[430] Williams (n 15) 228-31.
[431] Coghlin and others (n 1) para 14.5; Brodie (n 53) 35.
[432] (n 57).
[433] *The Arctic Skou* (n 75).

combine them together. For the purposes of preventing any possible disputes in advance, it is also suggested that there be a clear and explicit delineation of the consequence of their negotiation regarding “the other specific circumstances”, which also permit the time charterer to deduct expenses or costs incurred under these circumstances from their payment for the time charter service within an extra sub-clause of the payment for the time charter service under the time charterparty. Thus, the recommendation is to organise the relevant provisions as well as “the other specific circumstances” together regarding the allowed deduction of payment of the time charter service and present them in this extra sub-clause of the payment for the time charter service[434] under the essential standard forms of time charterparty[435] when they are modified in the future. Moreover, in order to draw attention to the time charterer’s different rights for a deduction from the payment of the time charter service which occur within individual provisions under the time charterparty, and to efficiently save their time, it is also suggested that the relevant information is associated together in all the essential forms to highlight those differently allowed circumstances for the time charterer to deduct from the payment of the time charter service into one Box Layout, titled “deduction” and divided into several sub-columns. The various titles of the number of provisions are to be separately shown in the sub-columns under the Box for the contractual parties negotiating to select finally what they want to keep in the time charterparty. The column of “the other circumstances” under the Box is designed for filling in a newly added clause number or newly added sub-clause number in the time charterparty.

[434] The designed sample for this can be seen in Section 5.3.1.
[435] (n 411).

In terms of the reform of the withdrawal of the time charter service and its suspension, it has been critiqued that Clause 8 (c) of the GENTIME form[436] is not a sufficient draft because the paragraph is presented unclearly and are not easily read or followed. Thus it is proposed to divide Clause 8(c) of the GENTIME form[437] into three clear sub-paragraphs by way of adding three sub-headings[438] for the different sub-paragraphs. Moreover, for the purposes of making the content under Line 61 of Clause 5 of the NYPE 46 form[439] clearer and better thought out as well as practically operable,[440] it is proposed to follow exactly the content aforementioned in Line 150 of Clause 11 (a) of NYPE 93 form[441] and use the clear language "or any fundamental breach whatsoever of this Charter Party"[442] within Line 61 of Clause 5 of the NYPE 46 form.[443] The same recommendation also applies to Clause 6 of the BALTIME form[444] and Clause 8 (c) of the GENTIME form[445] if the contractual parties choose these forms and negotiate as well as agree to allow the shipowner to have the right to withdraw the time charter service if the time charterer fundamentally breaches the contract.[446] This reform has the merit of allowing the provision's content to fully present the view of the court[447] and make the contractual parties clearly identify that the other reason for withdrawal of the time charter service by the shipowner is necessarily

[436] (n 57).
[437] ibid.
[438] (1) Withdrawal of the Time Charter Service; (2) Grace Period; (3) Suspend the Performance of The Owners' Obligation.
[439] Williams (n 15) 229.
[440] *The Antaios (No 2)* (n 193).
[441] Brodie (n 53) 36.
[442] *The Antaios (No 2)* (n 193); Coghlin and others (n 1) para 16.126; Davies and Dickey (n 193) 396.
[443] Williams (n 15) 229.
[444] Thomas (n 13) 286.
[445] (n 57).
[446] See (n 193).
[447] *The Antaios (No 2)* (n 193).

restricted to the time charterer's fundamental breach of the time charterparty.[448] In addition, in order to enable merchants to know and predict the real legal consequences of withdraw the time charter service, adding the legal effect into withdrawal provision and providing that the 'Owner shall be entitled to withdraw the time charter service and terminate the time charter' is a recommended addition into these essential standard forms of the time charterparty. It is also suggested that the contractual parties seek to manage in advance any possible risk regarding the consequent post-withdrawal time charter service for the third party, the shipper. Therefore, it is worth adopting an applicable method in order for the shipowner to recover consequent expenses by clearly expressing in the withdrawal clause under these essential standard forms of time charterparty that the shipowner could be indemnified from the time charterer for supplying this consequently post-withdrawal time charter service for the shipper.[449] Furthermore, the contractual parties could still possibly choose the BALTIME form[450] or the NYPE 46 form[451] as their time charterparty. Due to the lack of an anti-technicality clause in both the BALTIME form[452] and the NYPE 46 form,[453] the addition of one is proposed, such as that covered in the second sub-paragraph of Clause 8 (c) of GENTIME form,[454] to be included under the heading "Grace Period" in the BALTIME form[455] and the NYPE 46 form[456] to give the time charterer a grace period to pay for the time charter service.

[448] ibid; Coghlin and others (n 1) para 16.126; Davies and Dickey (n 193) 396.
[449] Thomas (n 197).
[450] Thomas (n 13) 286-89.
[451] Williams (n 15) 228-31.
[452] Thomas (n 13) 286-89.
[453] Williams (n 15) 228-31.
[454] (n 57).
[455] Thomas (n 13) 286-89.
[456] Williams (n 15) 228-31.

This reform would have the advantage of preventing too harsh an outcome for the time charterer.[457] In addition, it is also recommended that the contractual parties negotiate in advance and clearly express in these essential standard forms of the time charterparties[458] that the shipwner shall give the time charterer written notice of the number of clear banking days for rectifying a failure of payment for the time charter service within a specific period of the time charter's default.[459] Also for the purposes of making the time charterparty more thoughtful and complete, and making the contractual parties pay attention, it might be an ideal and effective method to add an extra Box in Part 1 Box Layout of these standard forms of the time charterparty[460] for filling in this specific time notice period. In addition, for clearly and quickly reminding the contractual parties how long the agreed grace period is through exercising the function of the Box Layout, it is also recommended that the "Grace Period" as emphasised in the Part 1 Box Layout of the GENTIME form[461] should also be added to the Part 1 Box Layout as recommended for adoption by the essential standard forms of the time charterparties, such as the BALTIME form,[462] the NYPE 46[463] and NYPE 93 forms.[464] Moreover, adding "Saturdays, Sundays and Holidays excluded" is suggested[465] to allow the time charterer to correct a default of payment for the time charter service during the normal banking hours. This would make the content within the grace period under the anti-technicality

[457] Coghlin and others (n 1) para 16.90.
[458] Such as Clause 6 of the BALTIME form, Clause 5 of the NYPE 46 form, Clause 11 of the NYPE 93 form, and Clause 8 (c) of the GENTIME form.
[459] *The Afovos* (n 196); *Shipping Law* (n 10) 144.
[460] See (n 302).
[461] (n 57).
[462] Thomas (n 13) 286-89.
[463] Williams (n 15) 228-31.
[464] Brodie (n 53) 32-46.
[465] See (n 308).

clause of the BALTIME form,[466] the NYPE 46 form[467] and the GENTIME form[468] more reasonable. Finally, aiming to ensure the shipowner has a temporary and effective weapon to protect himself/herself against the time charterer's default in payment of the time charter service before the shipowner finally decides to permanently[469] withdraw the time charter service,[470] it is also suggested that the other essential standard forms of the time charterparty could also adopt the provision regarding the shipowner's suspension of his/her performance of any and all of his/her obligations in Lines 200 to 206 of the third paragraph of Clause 8 (c) of the GENTIME form.[471] It is also recommended that Line 156 of Clause 11 of the NYPE 93 form[472] follows the spirit of Lines 204 to 205 of the third paragraph of Clause 8 (c) of the GENTIME form[473] to add the sentence, 'Notwithstanding the event of loss of time from default of Officers or Crew, provided in Line 220 of Clause 17'[474] in the context of the provisions of Line 156 of Clause 11 of the NYPE 93 form.[475] This will enable the contents of Clause 11 of the NYPE 93 form[476] to be more thoughtful and consistent with the theory of an off-payment for the time charter service.[477] The same recommendation also applies to other standard forms, such as the BALTIME form[478] and the NYPE

[466] Thomas (n 13) 286-89.
[467] Williams (n 15) 228-31.
[468] (n 57).
[469] Wilson (n 17) 107.
[470] Thomas (n 197).
[471] (n 57).
[472] Brodie (n 53) 36.
[473] (n 57).
[474] See (n 327).
[475] Brodie (n 53) 36.
[476] ibid.
[477] See Section 5.4.3.
[478] Thomas (n 13) 286-89.

46 form,[479] when these forms also take the suggestion to adopt the provision regarding the shipowner's suspension of his/her performance of any and all of his/her obligations in Lines 200 to 206 of the third paragraph of Clause 8 (c) of the GENTIME form.[480]

In terms of reforming the off-payment for the time charter service clause, if the shipping industry is still willing to choose the NYPE 46 form[481] as their time charterparty, the following is proposed, "any other similar cause" such as that found within Line 225 of Clause 17 of the NYPE 93 form[482] and Line 345 of Clause 21 of the SHELTIME 4 form,[483] which shows the view of the authorities.[484] This is because Line 98 of Clause 15 of the NYPE 46 form[485] has a weakness of short of "similar" within the phrase and it is unclear regarding the real meaning of the phrase.[486] This amendment might make the phrase comparatively more precise and prevent any unnecessary disputes. This suggestion also applies to the modification of Line 146 of Clause 11 (A) of the BALTIME form,[487] which originally states "or other accident", into "or any other similar accident" to ensure that the precise ambit of accidental off-payments for the time charter service clause is clearly shown by clear wording within this clause. Moreover, for the purposes of making the contents of Clause 11 of the BALTIME form,[488] Clause 15 of the

[479] Williams (n 15) 228-31.
[480] See (n 328).
[481] Williams (n 15) 228-31.
[482] Brodie (n 53) 38.
[483] Thomas (n 13) 340.
[484] *The Apollo* (n 365); Wilson (n 17) 97.
[485] Williams (n 15) 230.
[486] Thomas (n 197).
[487] Thomas (n 13) 287.
[488] ibid.

NYPE 46 form,[489] Clause 17 of the NYPE 93 form,[490] and Clause 9 of the GENTIME form[491] more thoughtful, clear and complete and to avoid unnecessary disputes between the contractual parties in the future, as well as assist the busy contractual parties to clearly notice the exclusions to the benefit[492] from the time charterer, further reform is recommended. The reform is submitted so that the off-payment for the time charter service clause can clearly provide the significant exclusions regarding the event preventing the full working of the vessel caused by the time charterer's responsibility[493] or his/her breach of contract[494] from applying the off-payment for the time charter service clause.

5.7 Conclusion

Payment for the time charter service is a fundamental obligation of the time charterer.[495] The operation of deduction from the payment of the time charter service and to request the cessation of payments within the period of off-payments for the time charter service by the time charterer, and the safeguarding of the payment for the time charter service through the suspension of performance of any and all of the shipowner's obligations and

[489] Williams (n 15) 230.
[490] Brodie (n 53) 38.
[491] (n 57).
[492] Thomas (n 197).
[493] See (n 383); (n 407).
[494] (n 377)-(n 383).
[495] Girvin (n 20) 644.

withdrawal of the time charter service by the shipowner, play a crucial role in the time charter to evenly protect the legal rights for the contractual parties.

The aforementioned recommendations may contribute to giving the current essential standard forms of the time charterparty quite unique and obvious characteristics of the time charter and make these relevant provisions under the time charterparty clearer, more organised, thoughtful and complete. Reform of the relevant clauses outlined in this chapter may consistently assist in achieving an improvement in the imperfections of the essential standard forms of the time charterparties and prevent the possibility of any practical disputes in advance.

CHAPTER 6:

EMPLOYMENT OF THE SHIP AND INDEMNITY

6.1 Introduction

The legal relationships between a Master, time charterer and shipowner under a time charterparty are more likely to be unique than those under a voyage charter and bareboat charter.[1] While the vessel is employed through the time charterer instructing the Master, to clarify the legal relationship between the Master, the time charterer and the shipowner under the time charterparty helps them to understand their legal position under the time charterparty and to avoid unnecessary controversy. It can be seen that the employment and indemnity clauses of the essential standard forms of the time charterparty[2] are in need of improvement as in their current form result in confusion and disputes for businesses. Therefore, the aim of this chapter is to solve these problems through reforming the context within the relevant clauses of these forms. Consequently, it might also be possible to bring benefits to commercial shipping industries. This chapter will first indicate key general concepts surrounding the legal relationship between the Master, the time charterer and the shipowner when the vessel is employed under the time charterer's instruction to the

[1] *The Scaptrade* [1983] 2 Lloyd's Rep. 253 [256]-[257] (Lord Diplock); Terence Coghlin and others, *Time Charters* (6th edn, Informa 2008) para 1.4.
[2] Such as the BALTIME form 1939 (as revised 2001), the NYPE 46 and NYPE 93 forms, and GENTIME form; Unless otherwise specified, all references to the BALTIME form refer to the BALTIME form 1939 (as revised 2001).

Master. Important legal issues surrounding employment clauses in time charterparties and possible recommendations for their reform will then be discussed. The shipowner's right to indemnity from the time charterer, and some important claims for indemnity in practice, will then be analysed. The crucial practical issue of identifying the contractual carrier with the bill of lading holder will then be clearly discussed and the limitations of the shipowners' right to be indemnified will be indicated. Finally, suggestions for the improvement of the indemnity clause will be given.

6.2 General key concepts surrounding the legal relationship between the Master, the time charterer and the shipowner when the vessel is employed under the time charterer's instruction to the Master

As noted in Section 1.1.3 of Chapter 1, a time charter is crucially different from a voyage charter or bareboat charter.[3] In that under a time charter, even though the Master and Crew are employed by the shipowner,[4] the time charterer pays for the charter service for a period of time[5] and the Master and Crew have to comply with the instructions given by the time charterer under the time charterparty in order to complete the time charterer's commercial task.[6] It is necessary that these unique characteristics of the time charter be fundamentally

[3] See (n 1).
[4] ibid.
[5] Coghlin and others (n 1) para 1.15.
[6] John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 108.

completed through operation by an employment clause[7] and an indemnity clause in the time charterparty's standard form.[8] These clauses deal with the legal relationship between the Master, the time charterer and the shipowner when the time charterer orders the Master to employ the vessel.[9]

The second sentence in Clause 9 of the BALTIME form exemplifies a typical employment clause and provides that the Master shall be under the orders of the charterer as regards employment, agency, or other arrangements.[10] Similar provisions also can be found within Clause 8 of the NYPE 46 form,[11] Clause 8 (a) of the NYPE 93 form[12] and Clause 12 of the GENTIME form.[13]

In addition, the charterers shall indemnify the shipowners against all consequences or liabilities caused by the Master, Officers or Agents obeying the time charterers' orders and direction.[14] For example, a typical express indemnity clause can be seen in the third sentence of Clause 9 of the BALTIME form.[15]

Moreover, if the time charterer has grounds for being dissatisfied with the performance of the Master or any Officer, it is also possible to provide a solution

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[7] Coghlin and others (n 1) para 10.92, 19.47; Howard Bennett, 'Safe Port Clauses' in D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008).
[8] ibid.
[9] Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 664; Coghlin and others (n 1) para 19.17, 19.20.
[10] Thomas (n 7) 286.
[11] Harvey Williams, *Chartering Documents* (4th edn, LLP Reference Publishing 1999) 229.
[12] Peter Brodie, *Commercial Shipping Handbook* (2nd edn, Informa 2006) 34.
[13]<https://www.bimco.org/~/media/Documents/Document_Samples/Time_Charter_Parties/Sample_Copy_GENTIME.ashx> accessed 20 July 2012.
[14] Coghlin and others (n 1) para 19.17.
[15] Thomas (n 7) 286.

within the time charterparty.[16] For instance, the fifth sentence of Clause 9 of the BALTIME form clearly stipulates that 'if the Charterers have reason to be dissatisfied with the conduct of the Master or any Officer, the Owners, on receiving particulars of the complaint, promptly to investigate the matter, and, if necessary and practicable, to make a change in the appointments.'[17] Analogous provisions are also set out in Clause 9 of the NYPE 46 form[18] and Clause 8 (b) of the NYPE 93 form.[19]

6.3 Important legal issues surrounding the employment clause under the time charterparty

This issue often causes confusion.[20] It is necessary to clarify how to construe the meaning of "employment"[21] in the words 'The Master should be under the orders of the Charterers as regards employment, agency, or other arrangements.' under Clause 9 of the BALTIME form.[22]

It is believed that in this clause, "employment" does not refer to employment of the Master and Crew.[23] Rather, it refers to "the economic utilisation of the

[16] Coghlin and others (n 1) para 22.1.
[17] Thomas (n 7) 286-87.
[18] Williams (n 11) 229.
[19] Brodie (n 12) 34.
[20] Girvin (n 9) 664.
[21] ibid.
[22] Thomas (n 7) 286.
[23] Girvin (n 9) 664.

ship".[24] Lord Wright clarified in *The Ramon de Larrinaga,*that "employment" means "employment of the ship" and refers to "the services which the ship is ordered to perform."[25] That is to say, the time charterer's orders which are given regarding the commercial operation of the ship.[26]

In *The Ramon de Larrinaga*, the ship was on requisition to the Crown under the T.99A time charter, which has a similar employment and indemnity clause to the BALTIME form, and she was instructed to move from Newport to St. Nazaire, and then to Cardiff for collaborative survey before being "redelivered".[27] However, when she discharged at St. Nazaire, she was instructed by the naval sea transport officer to immediately move to Quiberon Bay and then to assist in a convoy bound for Cardiff.[28] It was argued by the Master that he should have waited until morning to move the vessel because darkness was approaching and the weather was becoming worse.[29] Nonetheless, his opinion was disregarded.[30] The vessel was then stranded and was damaged after she set sail.[31] The shipowners, therefore, claimed an indemnity from the Crown on the basis of the consequence of the Master following the time charterer's orders.[32]

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[24] Coghlin and others (n 1) para 19.20.
[25] *Larrinaga S. S. Co. Ltd. v The King (The Ramon de Larrinaga)* [1945] AC 246 [255] (Lord Wright).
[26] Martin Davies and Anthony Dickey, *Shipping Law* (3rd edn, Lawbook Co 2004) 382.
[27] *The Ramon de Larrinaga* (n 25).
[28] ibid.
[29] ibid.
[30] ibid.
[31] ibid.
[32] *Larrinaga Steamship Co. Ltd. v The King (The Ramon de Larrinaga)* [1943] WN 53.

In the first instance, Atkinson J. held that the time charterer's order for the vessel to leave St Nazaire at once was an order within "as regards employment… or other arrangement" under the time charterparty, thus the court believed that the stranding of the vessel was a result of the Master complying as the agent of the time charterer's order against the Master's better judgment.[33] However, following the charterer's appeal, it was held by the Court of Appeal that the charterer was not liable for the ship's damage since the "employment" within the employment clause under this time charterparty was "employment of persons" and not "employment of the ship".[34] Hence, the order to sail in this case was not an order regarding "employment" in the employment clause.[35]

Nevertheless, the view of House of Lords was that the time charterer's orders to send this vessel to St. Nazaire then to Cardiff should be treated as employment of the vessel.[36] Lord Wright asserted that when construing the meaning of "employment" it was necessary to see the scheme and structure of the time charterparty as a whole.[37] "Employment of the ship", "agency"[38] and "arrangements"[39] were seen to be usually used to describe to the normal

[33] ibid.
[34] *Larrinaga Steamship Co. Ltd. v The King (The Ramon de Larrinaga)* [1944] KB 124.
[35] ibid.
[36] *The Ramon de Larrinaga* (n 25).
[37] *The Ramon de Larrinaga* (n 25) [255] (Lord Wright).
[38] '"agency" deals with another aspect of the conduct of the ship's affairs. The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charterparty is to be consigned as agent.' See *The Ramon de Larrinag* (n 25) [254] (Lord Wright).
[39] '"Arrangements" is a wider term. There it refers to disbursements which have to be made for services in connection with operating the ship.' See *The Ramon de Larrinaga* (n 25) [254] (Lord Wright).

conduct of the business of the vessel within the time charterparty.[40] Thus construing "employment" as "employment of the ship" for performing the tasks for which the charterers planned to use the vessel gave these three terms a direct link and thus a related importance within a homogeneous ambit within Clause 9 of the charterparty in the case.[41] Even so, the claim from the shipowners was still refused by the House of Lords since the damage to the vessel was held not to result from the time charterer's order.[42]

This case may be regarded as a leading authority concerning the meaning of "employment" in a typical employment clause under a time charterparty.[43] Lord Porter pointed out that if a time charterer's order is to proceed from Port A to Port B, this order is an order regarding employment of the ship.[44] However, Lord Porter believed that an order regarding the vessel's sailing at a specific time in this case was not the same as an order with respect to employment of the ship.[45] The reason for this was that the target of this order was how the vessel should have acted in the course of that employment rather than a direct order as to how the vessel should have been employed.[46] Lord Wright also stated that the sailing orders of the naval sea transport officer in this case only handled matters of navigation about performing the orders of the time charterer to move

[40] *The Ramon de Larrinaga* (n 25) [254] (Lord Wright).
[41] ibid [254]-[255].
[42] *The Ramon de Larrinaga* (n 25).
[43] Coghlin and others (n 1) para 19.22; Girvin (n 9) 664; Davies and Dickey (n 26) 382.
[44] *The Ramon de Larrinaga* (n 25) [261] (Lord Porter).
[45] ibid (Lord Porter).
[46] ibid.

to Cardiff.[47] The Master should have taken responsibility for exerting judgment in these sorts of matters of navigation.[48] In other words, the shipowners should therefore have been liable for matters of navigation since the Master was the servant of the shipowners.[49]

It is also crucial to distinguish matters of "employment" from matters of "navigation" in order to prevent misunderstandings of meaning in an employment clause.[50] Lord Hobhouse, in *The Hill Harmony,* explained that "employment" within the employment clause includes the economic aspect of benefiting from the earning potential of the ship.[51] For instance, the time charterer's orders with respect to the normal route by which the vessel is to perform a voyage are orders as to employment of the ship.[52] It was also held by Devlin J. in *The Ann Stathatos,* that an order to load specific cargo was an order regarding the employment of the ship.[53] However, "navigation" is believed to cover matters of seamanship.[54] This is, as noted in *The Ramon de Larrinaga*, whether the vessel's sailing at a specific time was a matter of navigation.[55]

Although the time charterer has the right to utilise the vessel, he/she cannot

[47] ibid [256] (Lord Wright).
[48] ibid.
[49] ibid.
[50] Coghlin and others (n 1) para 19.20.
[51] *Whistler International Ltd. v Kawasaki Kisen Kaisha Ltd. (The Hill Harmony)* [2001] 1 Lloyd's Rep 147 (HL) [159] (Lord Hobhouse).
[52] ibid; Coghlin and others (n 1) para 19.24.; Howard Bennett and Stephen Girvin 'English Maritime Law 2000: *The Hill Harmony*' (2002) LMCLQ 104.
[53] *Royal Greek Government v Minister of Transport (The Ann Stathatos)* [1949] 83 LIL Rep 228.
[54] *The Hill Harmony* (n 51) [159] (Lord Hobhouse).
[55] *The Ramon de Larrinaga* (n 25).

infringe on matters which affect the security or safety of the vessel.[56] The Master, who is the professional maritime expert, controls and takes responsibility for these matters.[57] Ship management and matters of the navigation of the ship always remain within the liability of the shipowner and their servant(s).[58]

It is important to note that even though the Master has a legal obligation to comply with the time charterer's instruction under the employment clause of the time charterparty, it is not necessary for the Master to follow the time charterer's order immediately[59] if the nature of the order makes it unreasonable for him/ her to obey without further inquiry and consideration.[60] In terms of this issue, as the Court of Appeal indicated in *The Houda*, the court will consider how a person of reasonable prudence would have acted, and whether or not there are reasonable grounds for delay in the Master's obedience to the time charterer's instruction in the circumstances of each case.[61] In addition, the Master merely needs to exert reasonable care and skill rather than having an absolute obligation to follow the time charterer's instruction.[62] Moreover, Lord Hobhouse in *The Hill Harmony* also pointed out that the Master has a duty to ensure the

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[56] *The Hill Harmony* (n 51) [152] (Lord Bingham).
[57] ibid.
[58] Coghlin and others (n 1) paras 19.20, 19.23.
[59] ibid para 19.2; For instance, London Arbitration 15/02 (LMLN 598). It is held that the Master may ask the charterers whether or not the shipper's defective cargo will be accepted by them. However, when the Master receives the charterers' confirmation of acceptance, he may not further delay the loading operation. Girvin (n 8) 665.
[60] *The Houda* [1994] 2 Lloyd's Rep 541 (CA) [555] (Millettt, L.J.); [549] (Neill, L.J.); Davies and Dickey (n 26) 383.
[61] ibid.
[62] *Actis Co. Ltd. v The Sanko Steamship Co. Ltd. (The Aquacharm)* [1982] 1 Lloyd's Rep 7 (CA).

safety of the ship, her cargo and Crew.[63] Thus the Master has a legal right not to follow illegitimate orders from the time charterer, such as an order which might endanger the vessel or cargo,[64] or an order to proceed to an unsafe port,[65] as described in Section 3.4.4 of Chapter 3. The Master also has no legal obligation to convey cargo to a person who has no legal right to take it.[66]

In brief, under the time charterparty, although the time charterer is entitled to order the Master regarding employment,[67] that is employment of the ship, signifying "the services which the ship is ordered to perform",[68] an order regarding employment does not cover matters of navigation, which are still the responsibility of the shipowner.[69]

6.4 Reforming the employment clause

As established, the view of the court is that "employment" in Clause 9 of the BALTIME form should be construed as "employment of the ship".[70] In addition, the time charterer's instruction to the Master is limited to matters of business of

[63] *The Hill Harmony* (n 51) [160] (Lord Hobhouse); See also Simon Baughen, 'Case and Comment: Navigation or Employment? *The Hill Harmony*' (2001) LMCLQ 177.
[64] For example, London Arbitration 22/05 (LMLN 679). It was found that the Master may have had the legal right to refuse to comply with charterer's order regarding the loading of cargo to an arrival draft of 11 meters since the official draft limitation at the discharge port was 10.5 meters; Girvin (n 9) 665.
[65] *The Hill Harmony* (n 51) [160] (Lord Hobhouse); Baughen (n 63).
[66] *A/S Hansen-Tangens Rederi III v Total Transport Corp. (The Sagona)* [1984] 1 Lloyd's Rep 194 [205] (Staughton, J.); David Foxton, 'Indemnities in Time Charters' in Thomas (n 7).
[67] Coghlin and others (n 1) para 19.20.
[68] *The Ramon de Larrinaga* (n 25) [255] (Lord Wright).
[69] ibid [255] (Lord Wright).
[70] ibid.

the vessel under the time charterparty[71] and not matters of navigation.[72]

Moreover, the correct way to draft time charterparty clauses is to employ clear unambiguous wording so that time charterparty standard forms are straightforward and prevent confusion and are easier for contractual parties to understand. In addition, if the draft contents within the clauses under the time charterparty can directly reflect the view of the English court, this may also benefit the contractual parties. It will make it easier for them to justify their legal rights, since these statements in clauses will also be supported by the court. This ideal can be seen in Clause 13 (a) of the SHELLTIME 4 form which tried to clarify the wording of the clause and provides “employment of the vessel” within the context of the employment clause under the time charterparty.[73]

However, it could be argued that the employment clauses within the current essential standards forms of time charterparty - the BALTIME form,[74] the NYPE 46[75] and NYPE 93 forms[76] and the GENTIME form[77] - still contain ambiguous wording. If some wording could be added to these essential standard forms to make the time charterer’s and the shipowner’s legal rights and obligations with regard to employment of the vessel more precise, this would assist both parties to more effectively comprehend their legal rights and obligations.

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[71] ibid [254] (Lord Wright).
[72] ibid; The Hill Harmony (n 51) [159] (Lord Hobhouse).
[73] Thomas (n 7) 338.
[74] Thomas (n 7) 286-89.
[75] Williams (n 11) 228-31.
[76] Brodie (n 12) 32-46.
[77] (n 13).

Therefore, it is proposed to change the unclear and confusing word ‘’employment’’ in Clause 9 of the BALTIME form,[78] Clause 8 of the NYPE 46 form,[79] Clause 8 (a) of the NYPE 93 form,[80] and Clause 12 of the GENTIME form[81] to ‘’employment of the ship’’. This may prevent busy merchants from wasting their time when considering how to construe the meaning of “employment” in the clause of the time charterparty and may also help them to avoid undesirable disputes in the future.

In addition, Clause 9 of the BALTIME form[82] and Clause 12 of the GENTIME form[83] use the words “or other arrangements”, though these words do not feature in Clause 8 of the NYPE 46 form[84] or Clause 8 (a) of the NYPE 93 form.[85] Thus in order to make the contexts of Clause 8 of the NYPE 46 form[86] and Clause 8 (a) of the NYPE 93 form[87] more complete it is suggested to add the words “and/or other arrangements”.

Moreover, in order to make the scope of the time charterer’s orders clearer and more accurate, adding the sentence, “These orders do not cover matters of navigation”, is also recommended. As a result, combining this with the previous suggestion to modify Clause 8 of the NYPE 46 form and Clause 8 (a) of the

[78] Thomas (n 10) 286.
[79] Williams (n 11) 229.
[80] Brodie (n 12) 34.
[81] (n 13).
[82] Thomas (n 10) 286.
[83] (n 13).
[84] Williams (n 11) 229.
[85] Brodie (n 12) 34.
[86] Williams (n 11) 229.
[87] Brodie (n 12) 34.

NYPE 93 form,[88] as an example, the sentence will be:[89]

> **…**The Master…(although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment **of the ship**, agency **and/or other arrangements. These orders and directions do not cover matters of navigation**….

It is also suggested that the modifications should operate within the employment clause under other standard forms of time charterparty, such as Clause 9 of the BALTIME form,[90] Clause 8 of the NYPE 46 form[91] and Clause 12 of the GENTIME form.[92]

6.5 The shipowner's right for indemnity from the time charterer

The express indemnity clause within the time charterparty[93] is established to reimburse the shipowner for any additional expenditure and liability incurred as a consequence of complying with the time charterer's order during the time charter.[94] It is believed that the express indemnities are regarded as one way of

[88] ibid; Williams (n 11) 229.
[89] Bold type indicates the suggested modifications.
[90] Thomas (n 7) 286.
[91] Williams (n 11) 229.
[92] (n 13).
[93] For example, Lines 123-28 within Clause 9 of the BALTIME form. Thomas (n 7) 286.
[94] Coghlin and others (n 1) para 19.17.

assigning risks between the shipowner and the time charterer.[95] Even if the time charterer is not in breach of the time charterparty and gives an order to the Master, the shipowner may still have a right to indemnity from the time charterer.[96] This could happen, for example, if the time charterer's orders or direction[97] involve the loading of dangerous cargo,[98] or physical damage to the vessel resulting from the time charterer's dispatching of the vessel to an unsafe port.[99] The time charterer may also need to indemnify the shipowner under the express indemnity clause when the Master signs the bills of lading at the demand of the time charterer and this results in additional liability for the shipowner.[100] This will be illustrated in Section 6.6 investigating some important claims for an indemnity in practice.

Moreover, the application of the indemnity clause is not restricted to dealing with an occurrence outside the ambit of other clauses in the time charterparty, even if this results in some overlap between the indemnity clause and other clauses.[101] However, it is argued that the indemnity clause has to be treated as a residuary

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[95] Nicholas Gaskell, 'Charterer's liability to Shipowner' in Johan Schelin (ed), *Modern Law of Charterparties* (Jure AB 2003).
[96] Simon Baughen, *Shipping Law* (5th edn, Routledge 2012) 187.
[97] ibid.
[98] *The Ann Stathatos* (n 53); *Deutsche Ost-Afrika Linie v Legent Maritime Co.* [1998] 2 Lloyd's Rep 71.
[99] *Lensen v Anglo Soviet Shipping Co.* [1935] 40 Com Cas 320; *Vardinoyannis v Egyptian Petroleum Co.* [1971] 2 Lloyd's Rep 200; Wilson (n 6) 109.
[100] Wilson (n 6) 109.
[101] As the held in *The Ann Stathatos* by Devlin J, the time charterer's order to load specific cargo is regarded as employment of the vessel, hence the order was still inside the ambit of the indemnity clause under the time charterparty; *The Ann Stathatos* was time chartered on a wartime version of the BALTIME form which had a similar statement to Clause 9 of the BALTIME form: the Master was to be ''under the orders of the charterer as regards employment''. See Coghlin and others (n 1) para 19.26; *The Ann Stathatos* [1950] 83 LILR 228 [234]-[235]; Christopher Smith, 'Time Charters' in Bernard Eder and others (eds), *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet and Maxwell Limited 2011).

one to handle matters not specifically included elsewhere in the time charterparty.[102] Nevertheless, the scope of the indemnity conferred to the shipowner will in all cases rely on accurate information relating to the indemnity clause under the time charterparty being provided.[103] As with other essential clauses within the time charterparty, the express indemnity clause has to be construed within the context of the scheme of the time charter as a whole.[104]

If the shipowner arranges the Master under the charterer's instruction, and there is no express indemnity clause, such as that in the NYPE 46 form,[105] the shipowner may be entitled to implied indemnity against suffered loss, damage or resulting liability caused by compliance with the time charterer's order.[106] The adequate costs of defending legal proceeds indicated in *The Caroline P,* exemplifies what the shipowner could claim through implied indemnity from the time charterer.[107] In addition, as declared in *The Island Archon*, which was time chartered under the NYPE 46 form,[108] an implied indemnity can be claimed not only when the shipowner's consequential loss is attributed to a time charterer's order which he/she is entitled to give,[109] but also when the resulting loss came

[102] The argument of the Attorney-General is in *The Ramon de Larrinaga* (n 25) [251].
[103] Smith (n 101).
[104] ibid.
[105] Coghlin and others (n 1) para 19.10.
[106] *Sig Bergesen DY & Co. v Mobil Shipping & Transportation Co. (The Berge Sund)* [1993] 2 Lloyd's Rep 453 (CA); *Triad Shipping Co. v Stellar Chartering & Brokerage Inc. (The Island Archon)* [1994] 2 Lloyd's Rep 227 (CA); Wilson (n 6) 110; Girvin (n 9) 667-68.
[107] *The Caroline P* [1984] 2 Lloyd's Rep 466 [476] (Neill, J.).
[108] *The Island Archon* (n 106).
[109] ibid; Francis Reynolds, 'Time Charterparties and Bills of Ladings' in Thomas (n 7); See also Girvin (n 9) 668.

from a time charterer's order which he/she is not entitled to give.[110] Moreover, it was asserted by the court that the shipowner's right to implied indemnity from the time charterer against resultant loss, damage or liabilities arising from obeying the time charterer's order is not on the basis of the time charterer's fault.[111] Furthermore, it is not necessary for an overlap between implied indemnity and other clauses, such as the off-payment for time charter service clause,[112] to be associated with inconsistency within the time charterparty.[113] Consequently, for instance, the shipowner may be capable of recovering the loss of payment for the time charter service through the implied indemnity.[114]

The justification for this implication of shipowner's indemnity stems from business efficacy.[115] The shipowner should be anticipated to allow the freedom of disposal of the vessel by the time charterer merely if the shipowner has the right under the time charterer's liability to recover the resulting loss.[116] It is also reasonable for the time charterer to bear the effects caused by his/her disposal of the vessel and instruction of the Master in order to achieve business effectiveness under the contract.[117] Another likely ground for the shipowner's right to indemnity might be based on the concept of good faith. However, this

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[110] ibid.
[111] *The Athanasia Comninos* [1990] 1 Lloyd's Rep 277; Coghlin and others (n 1) paras 19.19.
[112] It is suggested a modification of these wordings in Section 5.5.3 in Chapter 5; Girvin (n 9) 667.
[113] *Deutsche Ost-Afrika-Linie v Legent Maritime (The Marie H)* [1998] 2 Lloyd's Rep 71; Coghlin and others (n 1) para 19.15; Foxton (n 66).
[114] ibid.
[115] *The Island Archon* (n 105) [237] (Evans, L.J.); Girvin (n 9) 668; See also Wilson (n 6) 110.
[116] *The Island Archon* (n 105) [237] (Evans, L.J.); *Newcastle P & I V Gard* [1998] 2 Lloyd's Rep 387; Wilson (n 6) 110.
[117] *The Island Archon* [1993] 2 Lloyd's Rep 388 [404], [407] (Evans, L.J.); Coghlin and others (n 1) para 19.10.

might be criticised as too vague.[118] Nonetheless, as Mustill L.J. stated in *The Nogar Marin*, the time charterer's obligation to implied indemnity is not automatic.[119] It always relies on the terms of any fundamental contractual relationship and on the facts in each case.[120] Any shipowner's implied indemnity will be confined to the express terms of the indemnity clause[121] and cannot be in conflict with the provisions within the time charterparty.[122] When the time charterparty is created, if the shipowner expresses, or under a true construction implies, agreement to tolerate the liability, loss or suffered damage arising from the Master's following of the time charterer's orders and direction, there will be no right for the shipowner to be granted implied indemnity.[123]

6.6 Some important claims for an indemnity in practice

The shipowner may claim for an indemnity when the bills of lading cause the shipowner to incur a liability which is inconsistent with the terms of the time charterparty.[124] This is provided in Clause 30 (b) of the NYPE 93 form.[125] For

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[118] Stephen Bogle, 'Case Comment, Disclosing Good Faith IN English Contract Law' (2014) 18 (1) EDIN.LR. 141, footnote 24.
[119] *The Nogar Marin* [1988] 1 Lloyd's Rep 412 [422] (Mustill, L.J.); Coghlin and others (n 1) para 19.15.
[120] ibid.
[121] *The Island Archon* (n 106) [238]; Wilson (n 6) 110.
[122] *The Berge Sund* (n 106) [462] (Staughton, L.J.); Wilson (n 6) 110.
[123] *Action Avigation Inc. v Bottiglieri Di Navigazione Spa* (*The Kitsa)* [2005] 1 Lloyd's Rep 432. See Wilson (n 6) 110; Coghlin and others (n 1) para 19.34; In addition, it is noteworthy that the accurate ambit and restrictions on the implied right to indemnity are not yet completely evolved. Coghlin and others (n 1) para 1.44.
[124] Foxton (n 66); Brian Harris, *Ridley's Law of the Carriage of Goods by Land Sea and Air* (8th edn, Sweet & Maxwell 2010) 253-54.
125 Brodie (n 12) 40.

example, in practice, if bills of lading impose a wider legal obligation on the shipowner than those presumed within the time charterparty when bills of lading are signed by the Master under the time charterer's instruction, the shipowner may have the legal right for an indemnity from the time charterer regarding the shipowner's additional liability.[126]

In addition, under the time charter, there is the crucial and complex practical issue of identifying the contractual carrier with the holder of the bills of lading.[127] This will be specifically discussed in detail in Section 6.7. It is possible that a problem occurred, under the time charter, for the holder of the transferred bill of lading to identify who is the contractual carrier based on the ambiguous, confusing indication on the face of the bill of lading or contrasting indication on the face and back of the bill.[128] Therefore, when the Master signs the bills of lading for cargo as presented, the shipowner might possibly be recognised as a carrier and be sued by the bill of lading holder for loss or damage to the cargo.[129] The shipowner may then claim for an indemnity against all consequences or liabilities from the time charterer on the basis of the indemnity clause[130] under the time charterparty.[131]

Another potential claim for indemnity canbe caused when the shipowner claims

[126] Foxton (n 66); Coghlin and others (n 1) para 19.18; Baughen (n 96) 189.
[127] Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, *Bills of Lading: Law and Contracts* (LLP Professional Publishing 2000) para 3.28; Wilson (n 6) 7.
[128] Gaskell, Asariotis and Baatz (n 127) para 3.28.
[129] Coghlin and others (n 1) para 1.41, 21.21.
[130] For example, the express indemnity clause is indicated in *The Vikfrost* [1980] 1 Lloyd's Rep 560 (CA); Coghlin and others (n 1) para 21.24, 21.35.
[131] Wilson (n 6) 7.

for indemnity against the result of the time charterer delivering cargo without producing the bills of lading.[132] Under the special characteristics of the bill of lading, the carrier has to deliver the goods against the production of the bill of lading.[133] A custom of trade and the terms of the contract of carriage might request the delivery of cargo without presentation of the bill of lading.[134] However, in general, even if the vessel is under a time charter, the time charterer has no legal right to instruct the shipowner or the Master to deliver the cargo without showing them the bills of lading within a typical employment clause.[135] If the time charterer has indeed instructed the shipowner or the Master to deliver the cargo and has not produced the bills of lading and this results in the shipowner's loss, damage or liabilities,[136] the shipowner may have the right to claim for indemnity under the indemnity clause.[137] The time charterparty may have clearly granted the shipowner an indemnity from the time charterer against suffered loss, damage or liabilities caused by the shipowner or the Master delivering the cargo without the presentation of an original bill of lading.[138] In addition, even if an indemnity clause within the time charterparty is not clearly expressed, the shipowner may have the right to claim for indemnity by implied indemnity.[139] This happened in *The Strathlorne.* Cargo was released

[132] Foxton (n 66); Gaskell (n 95).
[133] Wilson (n 6) 154.
[134] *Chilewich Partners v MV Alligator Fortune* [1994] 2 Lloyd's Rep 314; *Farenco Shipping v Daebo Shipping* [2008] EWHC 2755 (Comm); [2009] 1 Lloyd's Rep 81; Smith (n 101)
[135] Foxton (n 66); Gaskell (n 95).
[136] In practice, the bills of lading are possibly signed by the Master or on behalf of the Master or other agent of the shipowner. This is why the shipowner is possibly sued by the cargo interest. See Wilson (n 6) 244. The issue of identity of the carrier will be discussed in Section 6.7.
[137] Foxton (n 66).
[138] ibid.
[139] ibid.

at the time charterer's request without presentation of the bills of lading. This led to the shipowner's liability to the third parties who held the bills of lading. Roche J applied the principle of *Dugdale v Lovering*[140] and held that the shipowner was entitled to implied indemnity against the liability arisen from the Master's obedience to the time charterer's order under the time charter.[141]

Cargo is another potential source of claim for an indemnity by the shipowner.[142] As *The Athanasia Comninos* showed, although there was nothing unusual about the characteristics of the coal which was carried by *The Georges Chr. Lemos*, the damages to the ship were attributed to an explosion of the coal gas on board.[143] Mustill J allowed the shipowner's claim for an indemnity from the time charterer, since the shipowner's loss resulted from the orders of the time charterer regarding the loading of coal.[144] In *The Ovington Court,* which involved a time charter under the NYPE 46 form, the House of Lords held that the damage to a cargo of wheat was caused by the improper stowage, stowage being the time charterer's responsibility, and thus the shipowner had a legal right for indemnity from the time charterer.[145] However, an exception to this situation is that if the time charterer can prove that the Master should have

[140] *Dugdale v Lovering* [1875] LR 10 CP 196 indicates: '…when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.' In addition, under this principle, the act for which the party claiming for an indemnity is required to 'perform must not be "manifestly tortious." 'See Coghlin and others (n 1) para 19.10; Foxton (n 66).
[141] *Strathlorne Steamship Co. Ltd. v Andrew Weir & Co. (The Strathlorne)* [1935] 50 LILR 185 (CA); Wilson (n 6) 109; Coghlin and others (n 1) para 19.10.
[142] Foxton (n 66).
[143] *The Athanasia Comninos* (n 111) [297].
[144] ibid; *The Ann Stathatos* (n 53); Smith (n 101).
[145] *Court Line v Canadian Transport* [1940] 67 LIL Rep 161 (HL).

intervened in the operation of cargo stowage as part of his/her ‘’supervision’’[146] and the loss or damage resulted from this inadequate supervision, the shipowner cannot be indemnified by the time charterer.[147] The shipowner may also be able to claim for an indemnity based on Clause 13 (b) of the NYPE 93 form for ‘any loss and/or damages and/or liability of whatsoever nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded.’[148] However, as Mance J indicated in *The Darya Tara*,[149] if the shipowners agree to the carriage of deck cargo without requesting any contractual right to indemnity, no implied indemnity against a shipowner’s suffered loss will be granted.[150]

6.7 The crucial practical issue of identifying the contractual carrier with the bill of lading holder

The significant practical difficulty of identifying who the contractual carrier with the bill of lading holder is, is discussed in detail in this section. How the problem has arisen will be shown through an exploration of the signing of bills of lading by the Master and the time charterer under the time charter and through discussion of the issue regarding the demise clause. In addition, the relationship

[146] It can been seen in Clause 8 of the NYPE 46 form. *Court Line v Canadian Transport* (n 145) [166] (Lord Atkin) [168] (Lord Wright) [172] (Lord Porter); Gaskell (n 95).
[147] Under these circumstances, even if the facts indicate that the primary responsibility lay with the time charterers, the shipowners still bear the resulting loss or damage. See *Court Line v Canadian Transport* (n 145); See also Coghlin and others (n 1) para 20.21.
[148] Brodie (n 12) 37.
[149] *The Darya Tara* [1997] 1 Lloyd’s Rep 42 [46] (Mance, J.).
[150] ibid; Foxton (n 66).

between the indemnity clause under the time charterparty and the bills of lading which are issued[151] under the time charter are also highlighted. Moreover, efforts are made to resolve this practical problem through suggested reform of the relevant clause under the time charterparty. This will subsequently be analysed in Section 6.9.

6.7.1 Signing of bills of lading under the time chartered vessel and related issues

The bill of lading is significant for the international sale of goods, for the financing of such sales through letters of credit and for the contract of the carriage of goods by sea.[152] A bill of lading functions as a receipt for goods shipped,[153] as prima facie evidence of the terms of the contract of carriage[154] and as a document of title.[155] Under the time charter, if the time charterer carries his/ her own goods, a bill of lading issued by the Master to the time charterer is

[151] It is indicated that the process of "issue" includes 'issue by signature and delivery by the carrier to the person entitled to the bill, generally the shipper.' See Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (Informa 2006) para 3.3.
[152] Benjamin Parker, 'Liability for Incorrectly Clausing Bills of Lading' (2003) LMCLQ 201.
[153] Traditionally, the practical process is that the carrier's agent examines whether the tallies of cargo at the time of loading on board are correct. Following this, in returning for the mate's receipt or equivalent, and for payment of any advance freight due given by the shipper, the Master or their agent computes the freight, records it on the bills of lading, signs the bill of lading as presented in conformity with the mate's receipts and then issues the bill of lading to the shipper. Wilson (n 6) 118.
[154] Wilson (n 6) 129, 247.
[155] Wilson (n 6) 132.

only a receipt of the goods under common law.[156] In addition, the rights and obligations between the shipowner and the time charterer are still exclusively dealt with by the terms of the time charterparty.[157] The bill of lading will be regarded as a potential document of title if the time charterer sells the goods to a third party while the goods are still in transport.[158]

A time charterer might run regular liner services to operate his/her own business and belongs to a price–fixing cartel-liner conference when chartering a vessel form a shipowner.[159] Even though a time chartered vessel may not be possessed by a time charterer,[160] she might be commercially painted in the time charterer's colours and identified by name as a part of the time charterer's fleet.[161] Meanwhile, in practice the bills of lading might normally be issued by other conference members to the shippers when the goods are carried by the liner and loaded on board.[162] In this circumstance, the bill of lading will serve as a receipt for goods shipped,[163] as a document of title[164] and as evidence of the contract of carriage between the carrier and the holder of the bill of lading when the bill is transferred from the shipper to the transferee, the holder of bill of

[156] *Rodocanachi, Sons & Co. v Milburn Bros* [1886] 18 QBD 67; Reynolds (n 108); Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel Publishing 2009) para 8.25; *Shipping Law* (2011/2012 edn, Witherby Publishing Group Ltd 2011) 161; Wilson (n 6) 6, 132.
[157] Wilson (n 6) 132; Guenter Treitel and F.M.B. Reynolds (eds), *Cover on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) para 3-032.
[158] Wilson (n 6) 6-7.
[159] Wilson (n 6) 5.
[160] See the characteristics of the time charter in Section 2.2, Chapter 2.
[161] Davies and Dickey (n 26) 265.
[162] ibid.
[163] Wilson (n 6) 5.
[164] Wilson (n 6) 6-7.

lading.[165] If the goods which are carried by the time chartered vessel have a problem, such as loss or damage,[166] the holder of the bill of lading might sue the carrier of carriage.[167] However, to decide who is the contractual carrier, i.e. the bill of lading carrier,[168] who is to take responsibility for the holder of the bill of lading regarding any problematic goods?[169] Is it the shipowner or the time charterer?[170] This is a significant practical difficulty.[171]

The problem in practice is possibly caused when sub-chartered vessels down several layers of charterparties are operated.[172] In this situation, there is probably no indication of who the carrier in the bill of lading is since the bill of lading could be issued by the shipowner, the time charterer, the sub-charterer or the agent of any one of these.[173] Under the time charter, if the bill of lading is signed by the Master[174] or on behalf of the Master, this complex situation would cause confusion for the transferred bill of lading holder and cause difficultly in identifying who the contractual carrier was with the bill of lading holder.[175]

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[165] Wilson (n 6) 5.
[166] Coghlin and others (n 1) para 1.41; Girvin (n 9) 177.
[167] Simone Schnitzer, *Understanding international Trade Law* (Law matters Publishing 2006) 140-41.
[168] Coghlin and others (n 1) para 1.41.
[169] Wilson (n 6) 7.
[170] Charles Debattista, 'Cargo Claims and Bills of Lading' in Yvonne Baatz (ed), *Maritime Law* (2nd edn, Sweet & Maxwell 2011); Christopher Hill, *Maritime Law* (6th edn, Informa Professional 2003); NJJ Gaskell, C Debattista and R J Swatton, *Chorley and Giles' Shipping Law* (8th edn, Pearson Education Limited 2003) 261-262, 268; William Tetley, 'Identity of the Carrier—The Hague Rules, Visby Rules, UNCITRAL' (1977) 4 LMCLQ 519.
[171] Wilson (n 6) 7.
[172] Debattista (n 170).
[173] Wilson (n 6) 244.
[174] The Master is usually regarded as the agent of the shipowner. Wilson (n 6) 244.
[175] Under English law, it is assumed that there is only one contracting carrier, either the charterer or shipowner. Gaskell, Asariotis and Baatz (n 127) para 3.28, 3.38, 3.47; Girvin (n 9) 177; Wilson (n 6) 244.

Moreover, this issue could occur when the bill of lading in the charterer's form is used under the time charter.[176] The bill of lading in the charterer's form refers to the name and/or the logo of the specific shipping liner as shown in the space on the top right within the face of the bill of lading.[177] The holder of bill of lading might believe the time charterer is the contractual carrier because the holder of bill of lading may not know there is a time charterparty between the shipowner and carrier of carriage who charters the vessel from the shipowner to run the business during a set period of time.[178] In this circumstance, deciding who is the bill of lading carrier,[179] with the cargo owner, is the paramount point to best determine the signature for whom and how the bill of lading has been signed at the foot of the bill than the operation of the bill of lading in the charterer's form.[180] Furthermore, the problem of identification of the carrier of carriage under the time charter might come from a shortfall in indicating who the contractual carrier is, or the indication contradicting the signature on the face of the bills of lading,[181] or the indication of the carrier and the indication of the signature, either or both of those provided on the face of the bills contrast with the provisions in the back of the bills.[182] This is likely to become difficult for the holder of the bill of lading, because he/she might be unsure as to whether it is better to take notice of what is on the face of the bill of lading, to look at the

[176] Gaskell, Asariotis and Baatz (n 127) para 3.47.
[177] ibid.
[178] Wilson (n 6) 7.
[179] Coghlin and others (n 1) para 1.41.
[180] Gaskell, Asariotis and Baatz (n 127) paras 3.47.
[181] For example, this dispute arose in *The Venezuela* [1980] 1 Lloyd's Rep 393; Coghlin and others (n 1) para 21.4; Aikens, Lord and Bools (n 151) para 7.64.
[182] For instance, this argument occurred in *Sunrise Maritime Inc. v Uvisco Ltd. (The Hector)* [1998] 2 Lloyd's Rep 287; Aikens, Lord and Bools (n 151) para 7.65; *Homburg Houtimport BV v Agrosin Private Ltd. (The Starsin)* [2003] 2 WLR 711. See the discussion in Section 6.7.1.2.

demise clause[183] or the identity of carrier clause which might be inserted on the back of the bills of lading.[184]

6.7.1.1 Signing bills of lading for or on behalf of the shipowner

In common law, the signing bills of lading on behalf of the shipowner is by general authority given to the Master and these signed bills of lading can bind the shipowner.[185] In addition, the Master is generally obliged to sign the bills of lading which are presented by the time charterer under the time charterparty.[186] For example, it is provided in Clause 8 of the NYPE 46 form that '…the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.'[187] However it is asserted that in some circumstances the Master is entitled to not sign the bills of lading, for example, when the bills indicate a port of discharge outside the trading limits of the time charter,[188] or when he/she knows that the bills incorrectly state that the cargo has been loaded under the deck.[189]

Moreover, when the time charterer, his/her Agent or sub-Agent signs the bills of

[183] See the discussion in Section 6.7.1.2.
[184] (n 182).
[185] *Tillmanns v Knutsford* [1908] 2 KB 385 (CA); [1908] AC 406 (HL); *Wilston v Andrew Weir* [1925] 22 LIL Rep 521; *The Rewia* [1991] 2 Lloyd's Rep 325 (CA); Coghlin and others (n 1) para 21.11; *Shipping Law* (n 156) 162.
[186] Wilson (n 6) 7.
[187] These are usually regarded as shipowner's bills. Gaskell, Asariotis and Baatz (n 127) para 3.47; Coghlin and others (n 1) para 21.30; Williams (n 11) 229.
[188] Coghlin and others (n 1) para 21.41.
[189] Coghlin and others (n 1) para 21.53.

lading and adds the words “for the Master”[190] or “on behalf of the Master”,[191] it is disputable as to whether or not these kinds of bills of lading can bind the shipowner.[192] There are various views regarding this issue both in the UK and the US.[193]

In terms of views emerging from UK cases, the charterer or the agent signing the bills of lading for the Master can bind the shipowner[194] either by getting actual authority from the Master or the shipowner through the clause within the time charterparty or the agreement after signing the time charterparty,[195] or through the authority implied by the normal terms in the time charterparty.[196] The time charterer or his/her Agents are generally given an implied authority to sign bills of lading as Agents for the Master, which likely comes from the Master following the time charterer’s orders and instructions for the employment of the vessel under the time charterparty, as Clause 8 of the NYPE 46 form provides, for example.[197] It was also indicated in *Tillmanns & Co. v S. S. Knutsford* that the time charterers could sign the bills of lading on behalf of the Master and shipowner instead of presenting them to the Master to demand that he /she sign for or on behalf of the shipowner.[198] In these circumstances, the shipowner is as

[190] Coghlin and others (n 1) para 21.13; Reynolds (n 109) para 9.23.
[191] Hill (n 170) 249-50; *Shipping Law* (n 156) 162.
[192] Coghlin and others (n 1) para 21.1, 21.13, 21.94.
[193] Coghlin and others (n 1) para 21.13, 21.94.
[194] Coghlin and others (n 1) para 1.42.
[195] *The Berkshire* [1974] 1 Lloyd’s Rep 185 (Brandon, J.); Coghlin and others (n 1) para 21.19.
[196] *Tillmanns & Co. v S. S. Knutsford* (n 185) [1908] AC.406; Coghlin and others (n 1) paras 21.18-19.
[197] Coghlin and others (n 1) para 21.18; Williams (n 11) 229.
[198] (n 196).

a party to the contract of carriage with the bill of lading holder.[199] These bills which bind the shipowner are ship's bills.[200] In short, in the UK, under the above situations, it is usual that the time charterer or his/her Agent can sign for the Master or on behalf of the Master in the bills of lading[201] and this could bind the shipowner as a carrier with the shipper.[202]

In terms of US cases, if the name of the shipowner does not show in the bills of lading and the bills were not issued by the Master, the shipowner is not personally liable for them if they are issued and signed by the time charterer "for the Master".[203] This is because the courts believe that this does not have enough legal grounds for the shipowner to take responsibility as a carrier with the shipper.[204] To bind the shipowner as the contractual party under the bill of lading, it would probably be essential for the time charterer to get authority from the Master or the shipowner when the time charterer signs the bill of lading.[205] It can be seen that the view of the courts regarding the charterer signing for the

[199] ibid; See also *Wilston v Andrew Weir* [1925] 22 LIL Rep 521. *LEP International v Atlanttrafic Express Service* [1987] 10 NSWLR 614; Coghlin and others (n 1) para 21.13; *The Berkshire* [1974] 1 Lloyd's Rep 185. Coghlin and others (n 1) para 21.18.
[200] Reynolds (n 109); Hill (n 170) 249-50; Gaskell, Asariotis and Baatz (n 127) para 1.43.
[201] (n 195)-(198); Coghlin and others (n 1) para 21.13.
[202] (n 200).
[203] Coghlin and others (n 1) para 21.94.
[204] ibid.
[205] *Yeramex Int'l v The Tendo*, 595 F.2d 943, 944,1979 AMC 1282,1283 (4th Cir.1979); *Demsey & Associates v The Sea Star*, 461 F.2d 1009 (2d Cir.1972); *Commercial Metals v The Luckyman,* 1994 AMC 673 (E. D. Pa 1993); Coghlin and others (n 1) para 21.94. It is also presumed that it would probably be necessary for the shipowner to expressly give the authority to the charterer to sign the bill of lading for the shipowner through an additional clause provided in the charterparty. *Nitram, Inc. v M/V Cretan Life*, 599 F. 2d 1359 (5th Cir. 1979); Russell W. Pritchett, 'Charterer's Authority to Sign Bills of Lading under Standard Time Charter Terms' (1980) 1 LMCLQ 21, footnote 21.

Master in the US is quite different from the view of the courts in the UK.[206] This has possibly caused conflict in international maritime law.[207] In order to prevent this potential conflict, it has been suggested that the time charterparty should be supplemented to clarify the contractual parties' intentions regarding whether the time charterer should be given the authority by the shipowner to sign for the Master.[208] The same belief is also clearly presented by Article 20 (a) (i) of the UCP 600.[209] The reforms suggested in Section 6.9 concern these suggestions and adopt the spirit of Article 20 (a) (i) of the UCP 600[210] for the relevant clause of the time charterparty.

Furthermore, apart from in some exceptional circumstances to limit the shipowner's right to be indemnified[211] when the cargo interest claims the loss or damage from the shipowner, the shipowner can subsequently claim indemnity from the time charterer against all consequences or liability directly caused by the Master, Officers or agents signing bills of lading under the time charterparty.[212] From this it may be concluded that relationships between indemnity and the bill of lading which is issued under the time charterparty are

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[206] Coghlin and others (n 1) paras 21.13, 21.18-21.19, 21.21, 21.94.
[207] Pritchett (n 205).
[208] It was also pointed out that Clause 9 of the BALTIME form and Clause 8 of New York Produce Exchange do not confer the time charterer the authority to sign the bill of lading for the shipowner. These clauses are different from the clause in *The Cretan Life*, which explicitly stipulated for an authority given in the charterer. *The Cretan Life* (n 205); Pritchett (n 205).
[209] <http://finotax.com/faq/ucpdc.htm> accessed 5 July 2013.
[210] ibid.
[211] See the discussion in Section 6.8.
[212] The explicit provision can be seen, for instance, in Clause 9 of the BALTIME form which provides that the time charterer shall indemnify the shipowner against all consequences or liabilities caused by the Master, Officers or Agents signing bills of lading. Thomas (n 7) 286; Aikens, Lord and Bools (n 151) para 3.15; Wilson (n 6) 7; If there is no explicit provision regarding an indemnity in the time charterparty, the indemnity will be likely implied. Girvin (n 9) 178.

not only likely to establish the balance of rights and obligations[213] between the shipowner and the time charterer under the time chartered vessel but also display the possible functional allocation of risk between the contractual parties by way of explicitly providing the agreement within the time charterparty.[214]

6.7.1.2 Signing bills of lading in the time charterer's own name or on behalf of the time charterer

If the time charterer or his/her agent signs the time charterers' own names in the bills of lading[215] or on their own behalf, instead of claiming to sign the bills of lading "for the Master", or "for the shipowners", the time charterer could be regarded as the only contracting party, the carrier, with the shipper under the contract of carriage.[216] In addition, it is possible to construe the Master signing on behalf of the time charterer on the basis of a clear expression in the bills of lading showing that the Master is the Agent for the time charterer.[217] It is therefore held by the court that the contractual carrier under the contract of carriage is the time charterer.[218] That is to say, in these circumstances, the time

[213] The time charterer is conferred to issue the bills of lading to the shipper and present the bills of lading to the Master to sign, in return for indemnity from the time charterer against all consequences and liabilities induced by the shipowner. Wilson (n 6) 7.
[214] Gaskell (95); Foxton (n 66).
[215] Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (3rd edn, Routledge. Cavendish 2004) 78.
[216] Coghlin and others (n 1) para 21.14; *Shipping Law* (n 156) 162.
[217] *Harrison v Huddersfield Steamship Co.* [1903] 19 TLR 386; Gaskell, Asariotis and Baatz (n 127) para 3.51.
[218] ibid.

charterer is bound by the bills of lading[219] and the shipowner is not.[220] The bills of lading are therefore recognised as charterer's bills,[221] which are under these self-evident contracts of carriage between the time charterer as the carrier and bills of lading holder.[222] This also results in it being possible for the time charterer to be regarded as carrier and claimed by the cargo interests who are holders of bills of lading if there are any issues of cargo[223] on the basis of the bills of lading contracts.[224]

6.7.2 Issues regarding the demise clause

Historically, only the shipowner can have a limitation of liability under the s. 503 Merchant Shipping Act 1894.[225] Under this circumstance, for the charterer's interest and for the purpose of getting the benefit from the limitation of liabilities to the bill of lading holder, even with the fact that the time charterer is a contractual party with the shipper, the time charterer may have an agreement with the shipowner to insert a demise clause under the bill of lading to direct cargo claims to the shipowner,[226] which can transfer his/her legal liability to the

[219] For example, see *The Starsin* (n 182); Davies and Dickey (n 26) 267.
[220] Coghlin and others (n 1) para 21.14.
[221] Coghlin and others (n 1) para 21.71; Reynolds (n 109).
[222] Coghlin and others (n 1) para 21.71.
[223] ibid.
[224] Wilson (n 6) 5.
[225] Gaskell, Asariotis and Baatz (n 127) para 3.67; John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (2nd edn, JUTA & Co. Ltd. 2009) 709.
[226] It is probable that the shipowner is willing to agree to this clause with the time charterer since the effect of doing so might decrease the net overall amount paid by interest by the shipowner to the cargo interest. In addition, it is theoretically probable that this might be a factor affecting the

shipowner.[227]

However, a demise clause, when inserted in the bill of lading, makes the issue regarding the identity of the carrier more complex[228] since it is debatable whether or not the demise clause in the bill of lading, which transfers the time charterer's liability to the shipowner, is valid.[229] Giving effect to the demise clause is refused in a lot of jurisdictions and the strict construction for the demise clause has possibly been adopted in other countries.[230]

In addition, there is a question about whether the demise clause is still meaningful. The reason for this is that, following Article 6 (2) of the 1957 Limitation of Liability in the 1957 Brussels Convention, which provided that not only the shipowner but also the demise charterer, voyage charterer and time charterer can assert the limitation of liability,[231] the time charterer is therefore

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rate of payment for the time charter service. Gaskell, Asariotis and Baatz (n 127) para 3.67; A typical example of the demise clause is as follows: 'If the ship is not owned or chartered by demise to the company or line by whom this bill of lading issued (as may be the case notwithstanding anything which appears to the contrary) the Bills of lading shall take effect as a contract with the Owner or demise charterer, as the case may be, as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof.' See Wilson (n 6) 246.

[227] Wilson (n 6) 246.

[228] Davies and Dickey (n 26) 269.

[229] *Shipping Law* (n 156) 162.

[230] It was indicated, in *Andersons* (*Pacific*) *Trading Co. v Karlander* [1980] 2 NSWLR 870, that the demise clause is operated only when the charterer acts as an agent for the shipowner showed in the face of the bill of lading. See Davies and Dickey (n 26) 269; Wilson (n 6) 246.

[231] The convention is the "International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, and Protocol of Signature" (Brussels, 10 October 1957). <http://www.admiraltylawguide.com/conven/limitation1957.html> accessed 24 June 2013. It has been superseded by Article 1.2 of the Convention of Limitation of Liability for Maritime claims 1976, which applies in the UK pursuant to s. 186 of the Merchant Shipping Act 1995. See David Foxton, 'Bills of Lading for Goods on a Chartered Ship' in Eder and others (n 101), footnote 105; Gaskell, Asariotis and Baatz (n 127) para 3.68; Hill (n 170) 249, 251; William Tetley, 'The

not necessary to transfer liability to the shipowner in order for the interests of the time charterer by way of the demise clause within the bill of lading.[232] In addition, it is asserted that the cargo shipper might merely contact the time charterer or its agents.[233] The shipper might be shocked that it is not known which shipowner is liable for his/her cargo if any cargo dispute arises.[234] Therefore, it is a cause for criticism that the demise clause might harm the achievement of justice because there may be a shortage in transparency, which is the aim of business.[235]

Nonetheless, Brandon J. commented in *The Berkshire* that the demise clause is regarded as valid in the UK.[236] In addition, it is asserted that the demise clause is acceptable because its purpose is only for identifying the party's legal liability within the Hague/Visby Rules[237] and it therefore does not contrast with Article III Rule 8 of the Hague/Visby Rules which prohibits the carrier or the ship from precluding or lessening their liability within a contract of carriage otherwise than as permitted by the convention itself.[238] Moreover, inserting an "Identity of

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Demise of the Demise Clause?' (1999) 44 McGill LJ 807 <www.mcgill.ca/maritimelaw/maritime-admiralty/demiseclause> accessed 28 December 2012.

[232] (n 226)-(n 227).

[233] Hare (n 225) 714.

[234] ibid.

[235] ibid.

[236] *The Berkshire* [1974] 1 Lloyd's Rep 185 [188]. See Wilson (n 6) 246; Davies and Dickey (n 26) 269; Hill (n 170) 249; Gaskell, Debattista and Swatton (n 170) 269.

[237] Wilson (n 6) 246-47; The Carriage of Goods by Sea Act 1971 was enacted to give the force of the law to the Hague-Visby Rules. See Gaskell, Asariotis and Baatz (n 127) para 1.9; Wilson (n 6) 6, 174.

[238] Wilson (n 6) 246-47; Girvin (n 9) 182; <http://www.admiraltylaw.com/statutes/hague.html> accessed 3 July 2013.

Carrier" clause[239] in the bill of lading by the time charterer is asserted as another alternative way in practice in the UK to avoid the time charterer's legal liability.[240]

On the other hand, in the US, there is a different view regarding the legal effect of the demise clause.[241] It was held in *Epstein v United States*[242] and *Blanchard Lumber Co. v The Anthony II*[243] that the demise clause should be invalid since the time charterer attempted to transfer his/her potential liability for the loss or damage of goods to the shipowner by the demise clause under the bill of lading which is in breach of public policy.[244] In addition, it is indicated in *Thyssen Steel Co. M/V Kavo Yerakas*[245] that such a demise clause is null and void under Section 1303(8) of Title 46 of the United States Carriage of Goods by Sea Act 1936.[246] Even though the charterer likely cannot transfer liability through a demise clause, the court in *Recovery Services International v The Tatiana L* decided that the cargo interest still had legal right to impose liability on the

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[239] A model of an Identity of Carrier clause in the bill of lading is as follows: 'The contract evidenced by this bill of lading is between the Merchant and the Owner of the vessel named herein and it is, therefore, agreed that the said shipowner alone shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of Carriage.' See Wilson (n 6) 247.

[240] It is indicated that the intended effect of identity of carrier clause and demise clause is broadly the same. Gaskell, Asariotis and Baatz (n 127) para 3.82; Wilson (n 6) 247.

[241] Coghlin and others (n 1) para 21.7.

[242] *Epstein v United States*, 86 F.Supp. 740 (S.D.N.Y.1949); Coghlin and others (n 1) para 21.137.

[243] *Blanchard Lumber Co. v The Anthony II*, 259 F. Supp. 857, 865-866, 1967 AMC 103, 120-121 (S.D.N.Y. 1966). Coghlin and others (n 1) para 21.137.

[244] Coghlin and others (n 1) para 21.137.

[245] *Thyssen Steel Co. v M/V Kavo Yerakas*, 50 F3d 1349, 1353, 1995 AMC 2317 (5th Cir 1995); Davies and Dickey (n 26) 269.

[246] The United States Carriage of Goods by Sea Act 1936 incorporates the terms of Hague Rules 1924 with some amendments. The contents of Section 1303 (8) of Title 46 U. S. C. A are the same as those of Article III Rule 8 of the Hague Rules. <<http://www.worldshipping.org/industry-issues/cargo-liability/background > accessed 19 July 2013; <http://www.law.cornell.edu/uscode/html/uscode46a/usc_sec_46a_00001303----000-.html> accessed 19 July 2013.

shipowner on the basis of the clause which identified the carrier of carriage within the bill of lading.[247] Notwithstanding, it is held that the demise clause or identity of the carrier clause will still be valid under at least three circumstances.[248]

Firstly, as *Yeramex International v. S. S. Tendo*[249] revealed, the demise clause, which identified the time charterer as the sole carrier, was upheld and the shipowner did not need to take responsibility as the carrier.[250] This was because the charterer signed "For Master" but the charterer had not been conferred authority to sign by the shipowner.[251] Secondly, a clause which identifies the time charterer as the carrier is effective if the charterer has been authorised to sign his/her own name instead of "For Master" within the bills of lading.[252] Differently, in the third circumstance, the demise clause which identifies the shipowner as the carrier is also valid when the shipper finds it hard to believe that the carrying of its goods has been agreed by the original charterer.[253] This occurs when the shipowner agrees to give the original charterer authority to sign "For Master" instead of signing the name of the original charterer, or the sub-charterer is a carrier who solicits the goods for the vessel which is sub-chartered from the original charterer.[254] Under these circumstances, the original time

[247] *Recovery Services International v The Tatiana L*, 1988 AMC 788 (S.D.N.Y.1986). See Coghlin and others (n 1) para 21.138.
[248] Russell W. Pritchett, 'The Demise Clause in American Courts' (1980) 4 LMCLQ 387.
[249] *Yeramex International v S. S. Tendo*, 595 F. 2d 943 (4th Cir.1979); Pritchett (n 248).
[250] Pritchett (n 248).
[251] ibid.
[252] ibid.
[253] ibid.
[254] ibid.

charterer should be excluded from the carrier liability when he/she issues the bills of lading on behalf of the sub-charterer and the original time charterer signs the bills of lading "For Master",[255] or when the bills of lading were issued "For Master" by the sub-charterer.[256]

The inconsistent decisions from courts in the UK and the US show that the controversial issue about whether the demise clause or the identity of the carrier clause should be regarded as valid might need further investigation.[257] Even though it could be found that the US cases are likely to be in favour of the invalidity of a demise clause or identity of the carrier clause,[258] it might be arguable that these clauses are still valuable since they provide further evidence of the intentions of relations between the shipowner and the charterer.[259]

It is also worth noting the important case of *The Starsin* when determining whether the words on the face of the bill of lading or the context of the demise clause and the identity of the carrier clause on the reverse side of the bill of lading, takes a dominating effect.[260] *The Starsin* was a carrier under a time charter by Continental Pacific Shipping Ltd., who issued the bills of lading.[261] The port agent signed for the time charterer as the carrier on the face of the bill

[255] ibid.
[256] ibid.
[257] Coghlin and others (n 1) para 21.55, 21.137-21.138; (n 236).
[258] Coghlin and others (n 1) paras 21.137-38; Pritchett (n 248).
[259] Pritchett (n 248).
[260] *The Starsin* (n 182).
[261] ibid.

of lading[262] and this signature was identified at the foot of the face of the bill of lading.[263] However, there was a demise clause which stipulated that the shipowners were under effect of a contract of carriage by the bill of lading.[264] In addition, it was provided in the identity of the carrier clause that the shipowners and the cargo owners were the parties entered into the contract of carriage as evidenced by the bill of lading.[265] The two clauses were both in the small print on the back of the bill of lading.[266] Due to bad storage before the voyage started, part of the cargo was damaged.[267] The bill of lading holder sued the shipowner as a carrier on the basis of the two clauses.[268] The House of Lords held that the shipowners did not need to take responsibility for the cargo owners because the bills of lading were charterers' bills.[269] The court construed the bill of lading from the commercial angle to confirm the intentions of the contractual parties and provide a business sense to the bill of lading.[270] The court believed that, in this case, reasonable merchants in their course of normal dealings would no doubt believe that the time charterer would accept the liability of the carrier from reading the words on the face of the bill of lading, especially covering the manner of the signature.[271] Therefore, the court indicated that the contractual carrier could be determined from the indication on the face of the bill

[262] The signature was indicated as "As agent for Continental Pacific Shipping (The Carrier)".
[263] *The Starsin* (n 182).
[264] ibid.
[265] ibid.
[266] ibid.
[267] ibid.
[268] ibid.
[269] ibid.
[270] ibid.
[271] Aikens, Lord and Bools (n 151) para 7.68; Coghlin and others (n 1) para 21.7.

of lading, which covered the words specially inserted in the signature box[272] and had an overriding effect on the contexts of the demise clause and the identity of the carrier clause inserted on the back of the bill of lading.[273] That is to say, in this circumstance, given that there was a "clear and unambiguous" indication regarding the contractual carrier of the carriage on the face of the bill of lading,[274] the significance of the face of the bill of lading was shown.[275] There were no grounds for the court to examine the demise clause or the identity of the carrier clause on the reverse side of the bill of lading.[276] It was also not necessary to try to resolve any differences between the face and back of the bill of lading.[277]

The decision by the House of Lords satisfies the expectation of a business to clearly, easily and quickly ascertain who the carrier is.[278] This is an exclusive advantage for considering the transferability of the majority of bills of lading and therefore enables the transferee, under the determination of the court, to identify the contractual carrier from the indication of the bills of lading.[279] In addition, the judgment also confirms banking practice[280] and guides shippers and bankers

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[272] See (n 262).
[273] ibid; Coghlin and others (n 1) para 21.2.
[274] Coghlin and others (n 1) para 21.2, 21.7.
[275] Girvin (n 9) 183-84.
[276] Coghlin and others (n 1) para 21.7.
[277] Davies and Dickey (n 26) 270.
[278] *The Starsin* (n 182); Aikens, Lord and Bools (n 151) para 7.69.
[279] Foxton (n 231).
[280] The decision in *The Starsin* by the House of Lords was affected by Article 23 (a) (i) of the ICC Uniform Customs and Practice for Documentary (UCP 500). See Gaskell, Asariotis and Baatz (n 127) para 3.34; Coghlin and others (n 1) para 21.8; Girvin (n 9) 184; Hill (n 170) 252-53; *Shipping Law* (n 156) 162; <http://digilander.libero.it/Viniciuss/ucp500.pdf> accessed 5 July 2013; In addition, it is indicated that banks do not need to check the back of any bill of lading when they are called upon to make payment for the transaction of international trade. See Hare

toward easily identifying who the bill of lading carrier is.[281] The decision of this case is therefore noted as being pragmatic[282] and likely to have brought a "strong commercial outcome".[283]

However, *The Starsin* has been criticised in that it only solved the difficulty as to clear indication on the face of the bill of lading overriding the clause shown on the reverse side of the bill.[284] It would still be problematic in practice if an unclear bill of lading presented an apparent contradiction with respect to the name of the charterer at the head of the bill of lading and the signature on the bottom of the bill, and the provision indicated in the demise clause[285] and the identity of the carrier clause, both on the reverse side of the bills.[286] Meanwhile, if the bills of lading are transferred to a third party or transferred down several layers, this might not protect the third party, who is the holder of the bills of lading.[287]

This confusing conflict regarding the bills of lading might result in further problems in identifying the correct carrier when the bill of lading holder, normally a lay person, needs to claim for damage from the carrier of carriage. The legal

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(n 223) 711-12. The current revision is 2007 Revision, ICC Publication no.600 ("UCP"). Debattista (n 156) para 8.38; <http://www.letterofcredit.biz/UCP_600.html> accessed 5 July 2013.

[281] Coghlin and others (n 1) para 21.7.

[282] Foxton (n 231).

[283] Girvin (n 9) 184.

[284] Reynolds (n 109); Aikens, Lord and Bools (n 151) para 7.58.

[285] This clause aims for the time charterer to transfer contractual liability with the shipper to the shipowner; Wilson (n 6) 246.

[286] (n 284).

[287] Wilson (n 6) 246.

proceeding must be taken within one year of the event under Article III Rule 6 of the Hague/Visby Rules.[288] If the bill of lading holder might pass the time bar to commence legal proceedings, he/she would therefore bear the mistake in respect of the identification of the incorrect carrier.[289] The difficulty triggers further concern about appropriate solutions when reforming the time charterparty and this is discussed in Section 6.9.

6.8 Limitations to the shipowner's right to be indemnified

There are some limitations to the shipowner's right to be indemnified by the time charterer.[290] First of all, the shipowner cannot recover the resulting loss if the types of risks involved are within the scope of the shipowner's responsibility.[291] The shipowner remains liable for all matters with respect to ship management and matters of navigation.[292] For example, Evans L.J., in the Court of Appeal in *The Island Archon,* indicated that time charterers may be held responsible for their instructions to the Master within the express indemnity clause but that this liability does not cover the loss caused by the navigation risks which the

[288] Gaskell, Asariotis and Baatz (n 127) para 3.31; Davies and Dickey (n 26) 266; Wilson (n 6) 246; Foxton (n 231); Schnitzer (n 167) 141.
[289] ibid.
[290] Wilson (n 6) 109.
[291] ibid.
[292] Coghlin and others (n 1) para 19.23.

shipowner has consented to bear.[293] In addition, the shipowners are not entitled to be indemnified by the time charterer against the losses of ordinary expenses of navigation which occur following the time charterer's orders.[294] Lloyd J. in *The Aquacharm* also indicated that when expenses are incurred in the course of normal navigation, even when these are a result of the shipowner's compliance with the time charterer's instruction, for example, for ballasting, the shipowner cannot be entitled to an indemnity from the time charterer.[295]

Secondly, as Devlin J. in *Grace v General Steam Nav Co.* stated, the Master is not obliged to act on the time charterer's orders or instructions which are obviously beyond the time charterer's authority.[296] Hence the shipowner will not be reimbursed from the resulting loss on the basis of the indemnity clause if, for instance, the Master does not act in good faith and/or acts unreasonably[297] in following the time charterer's orders to move to an apparently unsafe port.[298] In addition, as held by Mustill L.J. in *The Nogar Marin*, the clean bills of lading are signed but the Master did not verify the condition of the goods and did not fully recognise the fact that some of the coils were rusty when shipped.[299] Thus the shipowner was not entitled to be indemnified by the charterer since the Master's

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[293] *Per* Devlin J. in *The Ann Stathatos* and Mustill J. in *The Georges Christos Lemos* (third party proceedings) [1991] 2 Lloyd's Rep 107); *The Island Archon* (n 106) [236] (Evans, L.J.); Coghlin and others (n 1) para 19.31.
[294] Foxton (n 66); Coghlin and others (n 1) para 19.30.
[295] *Actis Co. Ltd. v The Sanko Steamship Co. Ltd. (The Aquacharm)* [1980] 2 Lloyd's Rep 237 [244]-[245] (Lloyd, J.); Wilson (n 6) 109; Coghlin and others (n 1) para 19.30.
[296] *GW Grace & Co. Ltd. v General Steam Nav Co.* [1950] 83 LIL Rep 297 [307]; Wilson (n 6) 110.
[297] Wilson (n 6) 110.
[298] *GW Grace & Co. Ltd. v General Steam Nav Co.* (n 296); Wilson (n 6) 110.
[299] *The Nogar Marin* [1988] 1 Lloyd's Rep 412 (CA) [417], [421]-[422] (Mustill, L.J.); Girvin (n 8) 669-70; Coghlin and others (n 1) para 21.45.

act of obeying the charterer's directions or instructions was manifestly tortious or improper.[300] The rule of public policy is also applied here.[301] Under contract, if someone can claim an indemnity against the results of what is known by both parties to be an illegal act, this is an illegal contract and it cannot be enforceable.[302]

Thirdly, the shipowner cannot be indemnified by the time charterer against suffered loss, damages or liabilities if he/she cannot prove his/her loss, damages or liabilities were the result of obeying the time charterer's order,[303] or if the link is too remote.[304] As an illustration, in *The Aquacharm*, the overloading of the vessel is likely to have occurred on account of the Master's negligence.[305] In order to be permitted to transit the Panama Canal, the overloaded vessel needed to trans-ship some of the cargo.[306] Griffiths L.J. indicated that the shipowner failed to prove that the transhipment costs were suffered as a direct result of obeying the charterers' order.[307] Therefore, it was held that the shipowners had no legal right to an indemnity from the charterer against the transhipment cost which arose from following the time charterer's orders to move through the Panama Canal.[308] In addition, as held by Lloyd J. in *The*

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[300] ibid; Foxton (n 66); Charles G. C. H. Baker, 'The Safe Port/Berth Obligation and Employment and Indemnity Clauses' 1 (1988) LMCLQ 43.
[301] Foxton (n 66); (n 140).
[302] ibid.
[303] *A/B Helsingfors Steamship Co. Ltd. v Rederiaktiebolaget Rex (The White Rose)* [1969] 2 All ER 374 [382] (Donaldson, J.). Wilson (n 6) 110; Coghlin and others (n 1) para 19.27.
[304] *The Aquacharm* (n 62) [244]-[245]; Wilson (n 6) 109; Coghlin and others (n 1) para 19.30.
[305] *The Aquacharm* (n 62) [244]-[245].
[306] ibid.
[307] *The Aquacharm* (n 62); Coghlin and others (n 1) para 19.27.
[308] ibid.

Aquacharm, the shipowner had no right to recover extreme weather damage solely based on the assertion that if the charterer had instructed the vessel on a different voyage, the extreme weather damage would not have happened.[309] This was because the link between the extreme weather damage and the shipowner's compliance with the time charterer's order was too remote.[310] Moreover, as Roche J. stated in *The Hillcroft*, if the shipowner's loss does not "directly" arise from the time charterer's order, which could be the case, if, for example, the chain of causation is broken by some act of the Master or Crew's negligence or intervention by some marine casualty, the shipowner's indemnity will not operate.[311] Above all, the vital examination in practice is as follows: to award the shipowner a right to claim for an indemnity from the time charterer, the shipowner's resulting loss, damages or liabilities should be the direct consequence of conforming to the charterer's instruction.[312] Meanwhile, an unbroken causal chain between the shipowner's resulting loss or liabilities and the time charterer's order is also essential for this type of claim.[313]

In short, the shipowner may have the right to indemnity from the time charterer against suffered loss, damage or liabilities because of the Master's compliance

[309] *The Aquacharm* (n 62) [244]-[245] (Lloyd, J.); Wilson (n 6) 109; Coghlin and others (n 1) para 19.30.
[310] Wilson (n 6) 109.
[311] *Portsmouth Steamship Co. Ltd. v Liverpool & Glasgow Salvage Association (The Hillcroft)* [1929] 34 LILR 459 [462] (Roche, J.); Girvin (n 9) 668.
[312] ibid; *The Island Archon* (n 106) [236] (Evans, L.J.); Wilson (n 6) 110; Girvin (n 9) 668-69; Coghlin and other (n 1) para 19.27, 19.30.
[313] Foxton (n 66); Girvin (n 9) 669; Lachmi Singh, The Law of Carriage of Goods by Sea (Bloomsbury professional Ltd 2011) 126.

with the time charterer's order.[314] However, there are still some limitations, as noted above.[315]

6.9 Reforming the indemnity clause

As mentioned previously Roche J. in *The Hillcroft*, indicated that under the time charter, the shipowner's right to indemnity should be based on consequences which arise ''directly'' from the time charterer's order.[316] The word "directly" indicates that the chain of causation is not interrupted by any of the aforementioned factors.[317]

Therefore, it is recommended that the view of court, to add "directly" after the words showing causation in the indemnity clause under the time charterparty, be adopted. This may make contractual parties more aware that in order for the shipowner to successfully claim his/her right to indemnity from the time charterer, there should be no intervening event which breaks the chain of causation between the shipowner's resulting loss, damage or liability and the shipowner's compliance with the time charterer's order.[318] For example, adding "directly" to the third sentence of Clause 9 of the BALTIME form[319] would

[314] See Section 6.5.
[315] See Section 6.8.
[316] *The Hillcroft* (n 311) [462] (Roche, J.); Girvin (n 9) 668.
[317] ibid.
[318] ibid.
[319] Thomas (n 7) 286.

change it to state: 'The Charterers shall indemnify the Owners against all consequences or liabilities arising directly from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders…'[320]

The same suggestion is made for improving other separate clauses regarding narrower[321] shipowners' rights to indemnity,[322] for example, in terms of the carriage of deck cargo, the shipowner's rights of indemnity provided in Clause 13 (b) of the NYPE 93 form,[323] and in terms of the bills of lading, the shipowner's right of indemnity stipulated within Clause 30 (b) of the NYPE 93 form[324] and Clause 17 (e) of the GENTIME form.[325]

Specifically, Clause 18 (f) of the GENTIME form provides that the shipowner and the time charterer 'agree to indemnify each other against all loss, damage or expenses arising or resulting from any obligation to pay claims, fines or penalties for which the other party is liable in according with this Charter Party…'[326] From the standpoint of allocating risk,[327] it is believed that it is also fair and reasonable for the person who has any obligation under the time charterparty to indemnify another contracted party on the grounds of directly causing another's loss, damage or expenses. Therefore, it is also proposed to

[320] ibid.
[321] Foxton (n 66).
[322] The principle of *expression unius est exclusio alterius* is applied. Foxton (n 66).
[323] Brodie (n 12) 37.
[324] Brodie (n 12) 40.
[325] (n 13).
[326] (n 13).
[327] Foxton (n 66).

add “directly” to Clause 18 (f) of the GENTIME form so the phrase becomes “…arising or resulting directly from…”[328]

Moreover, as previously mentioned, in practice, the shipowner’s claim for indemnity can often be seen where the bills of lading expose the shipowner to a liability which is inconsistent with the terms of the time charterparty.[329] In order to solve the dispute in practice, one possible solution is to ensure that the terms under the bills of lading do not change the terms applied within the time charterparty and to make the bills of lading subject to the time charterparty.[330] Thus a term is often included under the time charterparty indicating that the Master sign the bills of lading “without prejudice to this Charterparty’’ or “without prejudice to the terms and conditions of the Charter party” or with some other similar wording,[331] as with Clause 30 (b) of the NYPE 93 form,[332] Clause 17 (a) (i) of the GENTIME form[333] and Clause 13 (a) of the SHELLTIME 4 form.[334]

However, it is unclear why Clause 9 of the BALTIME form[335] and Clause 8 of the NYPE 46 form[336] lack this important provision. It seems likely to have been an

[328] (n 13).
[329] Foxton (n 66).
[330] Gaskell (n 95).
[331] These words only confirm that the time charterparty be kept unaffected by the signature of bills of lading in likely various terms. Coghlin and others (n 1) para 21.35; Gaskell (n 95); Hare (n 225) 760; Gaskell, Asariotis and Baatz (n 127) para 21.5.
[332] It provides “without prejudice to this Charter party”. Brodie (n 12) 40.
[333] It provides “without prejudice to the terms and conditions of the Charter party”. (n 13).
[334] It provides “without prejudice to this charter”. Thomas (n 7) 339.
[335] Thomas (n 7) 286.
[336] Williams (n 11) 229.

omission when these two clauses were drafted under the BALTIME form[337] and NYPE 46 form.[338] Therefore, for the purpose of avoiding the terms under the bills of lading making alterations to the terms under the time charterparty, it is suggested that Clause 9 of the BALTIME from[339] and Clause 8 of the NYPE 46 form[340] could follow the sample of Clause 30 (b) of the NYPE 93 form,[341] and Clause 17 (a) (i) of the GENTIME form,[342] to add 'All bills of lading or other documents shall be without prejudice to the terms and conditions of this Charter' under these clauses. This may make the shipowner's and the time charterer's legal liability within the bills of lading the same as those under the time charterparty. It is expected that this could simplify the legal relationship between the shipowner, the time charterer and the bills of lading holders.

In addition, it is important to avoid the aforementioned issues in Section 6.6 from occurring in practice, especially regarding inaccurate records of the statements in the bills of lading or other documents, for example, inaccuracies regarding the number of packages or pieces, the quantity, the weight or the apparent order or condition of the cargo.[343] Moreover, it is asserted that, even though there is no provision regarding the Master signing bills of lading for cargo as presented in Clause 9 of the BALTIME form,[344] it could be likely to conclude this from the

[337] Thomas (n 7) 286-89.
[338] Williams (n 11) 228-31.
[339] Thomas (n 10) 286.
[340] Williams (n 11) 229.
[341] Brodie (n 12) 40.
[342] (n 13).
[343] (n 299)-(300).
[344] Thomas (n 7) 286.

contents provided in this clause.[345] Therefore, this position within Clause 9 of the BALTIME form[346] is no different from what is provided in Clause 8 of the NYPE 46 form,[347] Clause 30 (a) of the NYPE 93 form[348] and Clause 17 (a) (i) of the GENTIME form.[349] Nonetheless, it is unclear why the shortage is not filled or clearly displayed in Clause 9 of the BALTIME form.[350]

It is important to make the contractual parties aware of their legal obligations and to make the context of the time charterparty more complete. It is therefore also recommended that further details should be added to Clause 9 of the BALTIME form[351] to indicate that the Master shall sign bills of lading or other documents for cargo as presented in conformity with mate's receipts. This would mean that the clause would be more consistent with other similar clauses in standard forms, such as Clause 8 of the NYPE 46 form,[352] Clause 30 (a) of the NYPE 93 form,[353] and Clause 17 (a) (i) of the GENTIME form.[354] This would also make the context of Clause 9 of the BALTIME form[355] clearer and more

[345] Thomas (n 7) 286; Clause 9 of the BALTIME form provides that the Master is under the order of the time charterers regarding employment and agency and that the time charterer indemnifies the shipowners against all consequences or liabilities resulting from the Master or agents signing the bills of lading; In addition, it is likely that the time charterer was conferred implied authority to sign the bill of lading on behalf of the shipowners. *MB Pyramid Sound NV v Briese Schiffahrts GmbH & Co. and Latvian Shipping Association Ltd (The Ines)* [1995] 2 Lloyd's Rep 144 [149] (per Clarke, J.); Coghlin and others (n 1) para 21.21; In other words, the shipowners are bound as a contractual carrier with the bills of lading holder.
[346] Thomas (n 7) 286; Coghlin and others (n 1) para 21.21.
[347] Williams (n 11) 229; Coghlin and others (n 1) para 21.21.
[348] Brodie (n 12) 40.
[349] (n 13).
[350] Thomas (n 7) 286.
[351] ibid.
[352] Williams (n 11) 229.
[353] Brodie (n 12) 40.
[354] (n 13).
[355] ibid.

complete under the time charterparty.

Furthermore, as described in Section 6.7, the issue regarding identifying the contractual carrier with the bill of lading holder under the time charter may cause significant dispute in practice.[356] This could incur unnecessary trouble to the shipowner in practice.[357] Even though the shipowners could eventually be indemnified by the time charterers against all consequences and liabilities,[358] their business would be disturbed by the bill of lading holder, and the possible course of action brought to them by the bill of lading holder[359] might also result in them suffering a time consuming and possibly costly[360] and harmful blow to their commercial reputation and it may be necessary to take a further effort to recover their business reputation.

It could be found that the root of this issue arose from varying ways of running the business under the time charter but there is possibly a lack of obvious indication as to who is the contractual carrier or there may be an unclear, conflicting signature on the fact of the bills of lading[361] or the inconsistent context with those as to who is the carrier provided for on the reserved side of

[356] See the discussion in Section 6.7.
[357] Gaskell, Asariotis and Baatz (n 127) para 3.31.
[358] Wilson (n 6) 7.
[359] Gaskell, Asariotis and Baatz (n 127) para 3.31.
[360] Hill (n 170) 253.
[361] It is surmised that that because of the clear indication on the facts of bills of lading in *The Starsin*, it is held to ignore what was on the reverse side of the bills. However, the problem still resulted while the clear face of bills of lading was not shown. Reynolds (n 109).

the bill of lading.[362]

It has been asserted that, in theory, it is necessary to identify who takes responsibility as the carrier for the cargo owner shown on the charterparty.[363] However, the lack of a clear provision indicating the name of the carrier in the bill of lading can be found in relevant clauses in major standard forms of the time charterparties, such as Clause 9 of the BALTIME form,[364] Clause 8 of the NYPE 46 form,[365] Clause 30 of the NYPE 93 form,[366] and Clause 17 (a) (i) of the GENTIME form.[367] For the purpose of preventing a future potential practical issue, to echo and reflect the decision by the House of Lords in *The Starsin*, [368] and to confirm the customs and practice applied in banking,[369] it is also recommended that the spirit of Article 20 (a) (i) of the UCP 600[370] be adopted in the relevant clauses in the essential standard forms of the time charterparty.[371] This reform could have merit because it benefits consistently with contextualizing the time charterparty with the current practical view dealing with the aforementioned disputable issue. This will ensure that the way to solve the practical issue becomes applicable since the reform within the time charterparty

[362] *The Starsin* (n 182).
[363] Gaskell, Asariotis and Baatz (n 127) para 3.28.
[364] Thomas (n 7) 286.
[365] Williams (n 11) 229.
[366] Brodie (n 12) 40.
[367] (n 13).
[368] *The Starsin* (n 182); See the discussion in Section 6.7.2.
[369] This refers to *The Uniform Customs and Practice for Documentary Credits*. See (n 280).
[370] The provision is regarding a bill of lading accepted by the bank under a letter of credit. There is no big difference between the contents of Article 20 (a) (i) of the UCP 600 and the content of Article 23 (a) (i) of the UCP 500. See Debattista (n 170); <http://finotax.com/faq/ucpdc.htm> accessed 5 July 2013.
[371] (n 364)-(n 367).

would comply with the court's view[372] and banking practice.[373]

As discussed in Sections 6.7.1.1 and 6.7.1.2, in commercially practical situations, the bills of lading could be distinguished by two different legal effects:[374] the ship's bills[375] and the charter's bills.[376] However, it cannot be found that the provision regarding charterer's bills is shown in the relevant clauses in the essential standard forms of the time charterparty.[377] In order to make the legal concepts and contents of the relevant clauses more clear, complete, considerate and elaborate, it is suggested that the relevant clauses in all the essential standard forms of the time charterparty provide two options:[378] one in which the shipowner is the contractual carrier of carriage with the bills of lading holder,[379] and another in which the time charterer as the contractual carrier of carriage with the bills of lading holder.[380]

It is recommended that the shipowner and the time charterer should agree to which option to take[381] in order to allocate risk[382] in relation to who the contractual carrier is for carrying goods. If the shipowner and the time charterer

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[372] *The Starsin* (n 182).
[373] Article 23 (a) (i) of the UCP 500 and Article 20 (a) (i) of the UCP 600; (n 280); (n 370).
[374] The shipowner is bound as a contractual carrier with the bills of lading holder; and the time charterer is bound as a contractual carrier with the bills of lading holder.
[375] Details can be found in Section 6.7.1.1.
[376] Details can be found in Section 6.7.1.2.
[377] (n 364)-(n 367).
[378] ibid.
[379] In other words, these are ship's bills. The shipowner is bound as a contractual carrier with the bills of lading holder. This is discussed in Section 6.7.1.1; (n 200).
[380] In other words, these are charterer's bills. The time charterer is bound as a contractual carrier with the bills of lading holder. This is discussed in Section 6.7.1.2; (n 221).
[381] Wilson (n 6) 6.
[382] (n 214).

had agreed which option to take within the post-reform context to the relevant clause in the essential standard forms of the time charterparty,[383] it is also suggested as necessary for them to delete the opposite parts of the context. For example, if the shipowner and the time charterer agree that the shipowner is the carrier, the paragraph regarding the indicated name of the time charterer as a carrier of carriage should be deleted.

It is also important for the shipowner and the time charterer to agree to which option to take regarding who can sign for or on behalf of who regarding the bills of lading and that they then ensure that the conclusion of their optional agreement is clearly presented in the relevant clause in the essential standard forms of the time charterparty when they conclude the time charterparty.[384] This is, as noted in Section 6.7.1.1, aimed to clearly show the contractual parties' intentions regarding who has been explicitly given authority to sign for who[385] by indicating the capacity of the signatory[386] in the relevant clause in the essential standard forms of the time charterparty.[387] It is also suggested to clearly identify the signature as that of the carrier, the Master or the agent on the face of the bills of lading or other documents within the relevant clause in the essential standard forms of the time charterparty.[388]

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[383] (n 364)-(n 367).
[384] It has been recommended by Russell W. Pritchett that a clause supplementing the standard form of the time charterparty is needed in order to make clear the contractual parties' intention regarding the breadth of the time charterers' authority. See Russell W. Pritchett (n 205); See also the discussion in Section 6.7.1.
[385] (n 208)-(n 209).
[386] Debattista (n 170).
[387] (n 364)-(n 367).
[388] (n 208)-(n 209); (n 364)-(n 367).

Moreover, to avoid any situations in which the bills of lading holder is confused, it is recommended that any potentially inconsistent context referring to who the carrier is on the reverse side of bills of lading[389] should be avoided, first through examination, and then by either not misleadingly inserting any details or by ensuring that any misleading information be deleted if it is pre-printed in the bills when the bills are issued. It is also proposed that this be provided as a contractual obligation of the shipowner and the time charterer in the relevant clauses of the essential standard forms of the time charterparty.[390]

By exercising this more considerate approach and providing clear contractual obligations in the the relevant clauses of the essential standard forms of the time charterparty,[391] the shipowner and the time charterer would be more aware that the contractual obligations are essential and they would be functionally reminded[392] to accurately perform these obligations under the time charterparty; otherwise they would probably be in breach of contract.[393]

In addition, it is believed that due to the clear agreement between the shipowner and the time charterer under the relevant clause in the essential standard forms of the time charterparty,[394] adopting the aforementioned suggestions into the bills of lading and other documents may contribute to achieving consistency

[389] For example, the contexts provided in demise clause and identity of carrier clause conflict with the indication in the face of the bills of lading. See the discussion in Section 6.7.2.
[390] (n 364)-(n 367).
[391] ibid.
[392] Gaskell, Asariotis and Baatz (n 127) para 3.34.
[393] Coghlin and others (n 1) para 21.61.
[394] (n 364)-(n 367).

between the indications of the contractual carrier in the bills of lading and other documents, and the indications in the time charterparty, and therefore solidify the indication in the bills of lading and other documents without prejudice to this time charterparty.[395] These essential recommendations might also help to guide the shipowner and time charterer in how to edit a proper bill of lading or any other documents and help avoid disputes if they want to produce their own bill of lading for business.

By way of imposing this clear contractual obligation within the relevant clauses in the essential standard forms of the time charterparty,[396] the bona fide bills of lading holder, who is endorsed and has transferred the bills, may be sufficiently better protected.[397] This is because if there is a problem with any goods being carried under the time chartered vessel, the bills of lading holder could easily, quickly[398] and effectively identify the correct contractual carrier with him/her from the bills of lading or other documents and could then sue the carrier within the limited time bar, one year, under Article III, Rule 6 of the Hague/Visby Rules.[399] It is therefore possible to solve the practical difficulties and possibly contribute to avoiding unnecessary controversy as noted in Section 6.7. The prosperity of commercial shipping activities and international trade might then also be indirectly enhanced.

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[395] Coghlin and others (n 1) para 21.35; Gaskell, Asariotis and Baatz (n 127) para 21.5.
[396] (n 364)-(n 367).
[397] (n 287)-(n 289).
[398] (n 278).
[399] <http://www.admiraltylawguide.com/conven/haguerules1924.html> accessed 8 April 2011; <http://www.admiraltylaw.com/statutes/hague.html> accessed 5 February 2011.

The suggested reform aiming to establish clear contractual obligations within the time charterparty would also provide contractual parties under the time charterparty with less room to make excuses and opposing assertions. This might also possibly assist the bills of lading holder,[400] the shipowner and the time charterer, in reducing the stress of the burden of proof and decreasing the stress of raising evidence to defend themselves when investigating who the bills of lading carrier is if the dispute of who the contractual carrier is with the bills of the lading holder arises. The reform already suggests a straightforward negotiation between the shipowner and the time charterer into the clear provisions of the time charterparty. Consequently, if an argument regarding the identity of the contractual carrier with the bills of lading holder occurs, these clear provisions within the time charterparty will make the bills of lading holder,[401] the shipowner and the time charterer better able to raise the time charterparty as evidence to support their claim or defence. This clear evidence might also further facilitate saving public resources through saving the court time in investigating the evidence and also save costs of further hearings of the case.

Solidly contractual obligations could also logically and finely connect to the provision of indemnity under the time charterparty. If any unclear or conflicting

[400] Tetley (n 170).
[401] ibid; Even if the bills of lading holder is not a contractual party of the time charterparty, if they want to sue either the shipowner or the time charterer, they need to seek possible evidence to back up their claim. If they can obtain the time charterparty, this might be useful for them because they have the burden of proof when they try to sue either the shipowner or the time charterer.

indication on the bill of lading causes the shipowner to possibly directly incur a liability to the the bill of ladings holder, the shipowner could be no doubt indemnified by the time charterer by way of claiming his/her right for indemnity under the time charterparty.[402]

6.10 Highlighting the key reforms in this chapter

It is worth addressing here, for better facilitating information sharing amongst merchants, that if relevant contents as discussed in the provision under the time charterparty are too long, such as Clause 9 of the BALTIME form,[403] it is urged that the longer context might be possibly born in mind if it may be better to divide them into several suitable sub-clauses with underlined sub-headings. Therefore, combining and clarifying all ideas and suggested recommendations in this section we can make concrete modifications and amendments to the employment and indemnity clauses under the time charterparties. As an example, the relevant parts of Clause 9 of the BALTIME form[404] could become:[405]

(A) <u>Charterers' Order</u>

[402] For instance, it is stipulated in Clause 9 of the BALTIME form that '…The Charterers shall indemnify the Owners against all consequences or liability arising from the Master, officers or Agents signing Bills of Lading or other documents…'
[403] Thomas (n 7) 286.
[404] ibid.
[405] Bold type indicates the suggested modifications.

…The Master shall be under the orders **and directions**[406] of the Charterers as regards **employment of the ship**, agency, **and/**or other arrangements. **These orders and directions do not cover matters of navigation.**

(B) **Signing of Bills by the Master**

The Master shall sign Bills of Lading or other documents for cargo as presented in conformity with the mate's receipts.[407] **All Bills of Lading or other documents shall be without prejudice to the terms and conditions of this Charterparty.**

(C) **Identifying the Shipowner as a Carrier**

The name of the Owner as a carrier should be clearly identified on the face of the Bills of Lading or other documents. The Bills of Lading or other documents should be signed by the Master or a named Agent for or on behalf of the Master.

(D) **Identifying the Carrier and the Signing of the Bills by the Charterer**

If the Charterer is as a carrier, the name of the Charterer as a carrier should be clearly identified on the face of the Bills of Lading or

[406] This can be found in Clause 8 (a) of the NYPE 93 form and Clause 12 of the GENTIME form. Brodie (n 11) 34; (n 13).

[407] 'A mate's receipt is a document issued, on the receipt of shipment of goods, by or on behalf of the shipowner. It acknowledges his receipt of the goods and states their quantity and condition, and it may also state the name of the shipper or owner of the goods.' Treitel and Reynolds (n 157) para 8-018.

other documents. The Bills of Lading or other documents should be signed in conformity with the mate's receipts by the Charterer or a named Agent for or on behalf of the Charterer.

(E) Signature Identification

Any signature by the carrier, Master or Agent should be identified as that of the carrier, Master or Agent.

(F) Agent Signature

Any signature by an Agent should indicate whether the Agent has signed for or on behalf of the carrier or for or on behalf of the Master.

(G) Precluded Inconsistency

Any inconsistency between the named carrier on the reverse side of Bills of Lading or other documents, and the named carrier on the face of the Bills of Lading or other documents, the named carrier on the reverse side of Bills of Lading should be precluded.

(H) Indemnity

The Charterers shall indemnify the Owners against all consequences or liabilities arising **directly**[408] from the Master, offices or Agents signing Bills of Lading or other documents or otherwise **the Master** complying

[408] *The Hillcroft* (n 311) [462] (Roche, J.).

with such orders **and directions**[409] **as provided in (A)**, as well as from any irregularity in the Vessel's papers or for overcarrying goods. …'

6.11 Conclusion

The employment and indemnity clause will have an impact on the legal responsibilities of the shipowner and the time charterer.[410] It is vital when operating these clauses under the time charterparty that particular special features of the time charter work in practice.[411] This chapter has proposed some key amendments. The suggested reforms reflect the view of court [412] and practical banking practice[413] in order to make the provisions in the time charterparty practically applicable. The suggested reforms to the time charterparty, may contribute to making the contexts in the relevant clauses of the essential standard forms of the time charterparty[414] more accurate, clear and complete and help to avoid misunderstanding. They may also help the provision work better in functionally allocating risk.[415] Finally, they may even more effectively solve practical issues, protect merchants more, and, consequently, indirectly increase the prosperity of commercial shipping activities.

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[409] See clause 8 of NYPE 93 form. Brodie (n 12) 34.
[410] Foxton (n 66).
[411] See (n 1).
[412] *The Ramon de Larrinaga* (n 25) [255] (Lord Wright); *The Starsin* (n 182).
[413] (n 373).
[414] (n 364)-(n 367).
[415] (n 214).

CHAPTER 7:

EXEMPTIONS

7.1 Introduction

The provision of the exemptions clause[1] plays a vital role within the time charterparty**.** It not only clarifies the scope of the legal responsibilities of the shipowner and the time charterer but also establishes a foundation for resolving connected legal issues beyond the time charterparty, such as those relating to commercial activities.[2] The objective of this chapter is to solve the key problem of the exemptions clause[3] under the essential standard forms of the time charterparty. In order to accomplish this, the general key concepts of the exemptions clause will firstly be outlined in this chapter. Then, the crucial legal issues with respect to the exemptions clause will be analysed and discussed. Finally, possible recommendations regarding the exemptions clause will be proposed and conclusions drawn.

7.2 General key concepts of the exemptions clause under the time charterparty

[1] For example, Clause 12 of the BALTIMEform 1939 (as revised 2001). See Terence Coghlin and others,*Time Charters* (6th edn, Informa 2008) para 37.53.
[2] The legal right of the third party might be involved.
[3] Clause 27 of the draft of the NYPE 2014 form is an example of “allocation of liability”, which could be equivalent to the exemption of liability. However, as indicated in Section 1.1.4 in Chapter 1, the uncertain, immature and changeable draft of the NYPE 2014 form is not intended to be within the scope of this thesis.

It is normal for the time charterparty to cover provisions to cope with the shipowner's and the time charterer's exemptions from their legal liabilities.[4] The general key concepts of the exemptions clause under the BALTIME form,[5] the NYPE 46[6] and NYPE 93 forms[7] and the GENTIME form[8] will now be introduced.

7.2.1 The exemptions clause under the BALTIME form

Clause 12 of the BALTIME form provides that the shipowner is only liable for a delay in the delivery of the vessel or for delay during the currency of the charter; and for loss or damage to goods onboard, if this delay or loss results from a want of due diligence on the part of the shipowner or their manager in making the vessel seaworthy and fitted for the voyage,[9] or from any other personal act or omission or default by the shipowner or their managers.[10] In addition, the shipowner should neither take responsibility for any other

[4] Such as Clause 12 of the BALTIME form 1939 (as revised 2001), Clause 16 of the NYPE 46 form, Clause 21 of the NYPE 93 form, and Clause 19 of the GENTIME form.
[5] The BALTIME form 1939 (as revised 2001). Unless otherwise specified, all reference to the BALTIEM form refer to the BALTIME form 1939 (as revised 2001). D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 286-89.
[6] Harvey Williams, *Chartering Documents* (4th edn, LLP Reference Publishing 1999) 228-31.
[7] Peter Brodie, *Commercial Shipping Handbook* (2nd edn, Informa 2006) 32-46.
[8] <https://www.bimco.org/~/media/Documents/Document_Samples/Time_Charter_Parties/Sample_Copy_GENTIME.ashx> accessed 10 August 2012.
[9] The responsibility of the shipowner is discussed as aforementioned in Section 2.5.3 of Chapter 2.
[10] Thomas (n 5) 287.

circumstances nor for delay or damage howsoever and whatsoever caused, even if this results from the fault of or neglect by their staff.[11]

In this situation, in order to exclude legal liability, the shipowner should prove how the delay, loss and damage occurred and that this is included within Clause 12 of the BALTIME form.[12] That is to say, to establish an exemption from liability as provided in the exemptions clause, the shipowner needs to prove that the delay, loss or damage did not result from want of due diligence on his/her or his/her manager's part.[13]

It is also stipulated in this clause that the shipowner should not take responsibility for loss or damage resulting from strikes,[14] lock-outs or stoppage[15] or restraint of labour related to the Master, Officers or Crew, whether partial or general.[16]

[11] ibid.
[12] Coghlin and others (n 1) para 37.66.
[13] *The Roberta* [1938] 60 LIL Rep 84 (Greer, L.J.)
[14] Lord Denning in *The New Horizon* [1975] 2 Lloyd's Rep 314 gave a definition of "strike" as 'a concerted stoppage of work by men done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or supporting or sympathizing with other workmen in such endeavour. It is distinct from a stoppage which is brought about by an external event such as a bomb scare or by apprehension of danger'. Coghlin and others (n 1) para 37.80.
[15] "Stoppage" is not limited to interruptions resulting from labour disputes, for example, if the interruption occurs due to a fear of disease or workmen refuse to work. This refusal would seem to be a "stoppage". *The New Horizon* [1975] 2 Lloyd's Rep 314. In addition, "stoppage" within Clause 12 appears alongside the words "whether partial or general". Thus it may cover incomplete interruptions. However, it is believed that "stoppage" does not include a "go slow" or "work to rule"**;** Coghlin and others (n 1) para 37.84-85.
[16] Clause 12 of the BALTIME form. Thomas (n 4) 287.

Moreover, the charterers' responsibility is also set out in the final sentence of Clause 12 of the BALTIME form.[17] The charterers shall be responsible[18] for loss or damage[19] to the vessel or to the shipowner by goods being loaded in opposition to the terms under the time charterparty; or by improper or careless bunking or loading, stowing or discharging of goods whether or not they are carried out by independent contractors appointed by the time charterer or Agents or time charterer's servants;[20] or 'some other improper or negligent act of whatsoever nature on the part of the time charterers or their servants.'[21] In addition, under these circumstances, as was held in *The White Rose,* in order to win the case, the shipowner needs to prove that the "loss or damage" results from one of the aforementioned events as provided in the final sentence of this clause.[22]

7.2.2 The mutual exemptions clause under the NYPE 46 and 93 forms

It can also be seen that mutual exemptions for the time charterer and the shipowner are provided in some time charterparties in order to protect either the time charterer or the shipowner from legal liability or from damage caused by any particular situations set out under these clauses.[23] For

[17] ibid.
[18] The word "responsible" here means no more than "legally liable". See *Tor Line A.B. v Alltrans Group of Canada Ltd. (The TEL Prosperity)* [1984] 1 WLR 48 (HL) [53] (Lord Roskill)
[19] The scope of "loss or damage" will be analysed in Section 7.3,
[20] *A/B Helsingfors Seamship Co. Ltd. v Rederiaktiebolaget Rex (The White Rose)* [1969] 2 Lloyd's Rep 52 [60] (Donaldson, J.); Coghlin and others (n 1) para 37.89.
[21] ibid.
[22] ibid; Coghlin and others (n 1) para 37.88.
[23] Coghlin and others (n 1) para 27.1, 27.45.

example, acts of God,[24] enemies,[25] fire, restraint of princes, rulers and people,[26] and all dangers and accidents of the seas, rivers,[27] machinery, boilers and navigation,[28] and errors of navigation throughout the Charter are always mutually excepted under Clause 16 of the NYPE 46 form[29] and Clause 21 of the NYPE 93 form.[30]

As indicated by Cockburn L.J. in *Nugent v Smith*, if a prudent and experienced carrier takes all reasonable precautions and cannot control an outcome due to a storm or other natural agency, he is under the exemption of "act of God".[31] Moreover, if the shipowners or the time charterers are individuals, "enemies" within the exemptions includes the action of enemies of those states of the contractual parties.[32] On the other hand, if the shipowners and time charterers are a company, the "enemies" within exemptions includes the actions of enemies of the state within which the shipowners and the time charterers are registered.[33] In addition, the actions of enemies also include the actions of enemies of the state under whose flag

[24] "Act of God" is also set out in Section 1304 (2)(d) of Title 46 of the United States Carriage of Goods by Sea Act. See Coghlin and others (n 1) 815.
[25] "Act of public enemies" is provided within Section 1304(2)(f) of Title 46 of the United States Carriage of Goods by Sea Act. It probably covers piracy. See Coghlin and others (n 1) para 27.8; 815.
[26] Some wider exceptions are provided in Section 1304(2)(g) of Title 46 of the United States Carriage of Goods by Sea Act. These are listed as "Arrest or restraint of princes, rulers, or people, or seizure under legal process". Coghlin and others (n 1) para 27.20; 815
[27] The exemptions are set out in Section 1304(2)(c) of Title 46 of the United States Carriage of Goods by Sea Act as "Perils, dangers, and accidents of the sea or other navigable waters"; Coghlin and others (n 1) 815.
[28] If the occurrence has arisen as a result of negligence, the exemption will not provide protection. Coghlin and others (n 1) para 27.25.
[29] Williams (n 6) 230.
[30] Brodie (n 7) 38.
[31] *Nugent v Smith* [1876] 1 CPD 423 [437]; In addition, in *Siordet v Hall* [1828] 4 Bing.607, it is stated that 'apart from extraordinary conditions of wind or sea, lightning or frost may amount to "act of God". Coghlin and others (n 1) para 27.6.
[32] *Russell v Niemann* [1864] 34 LJCP 10; Coghlin and others (n 1) para 27.7.
[33] ibid.

the vessel flies.[34] Nonetheless, this exemption will not provide protection if the occurrence is the result of negligence by the contractual parties.[35]

"Restraint of Princes, Rulers and People" within the exemptions includes forceful interference[36] or actions taken by the state or government which hinder the performance of the time charterer.[37] However, if actions are committed by anyone who does not hold ruling power or act on behalf of the ruling power of the country, the exemptions will afford no protection.[38] In addition, the exemptions will not be effective if the vessel is arrested or detained under the normal judicial process.[39] The exemptions will also not apply if a restraint comes from a state of affairs which exists when the charterparty is established and the contractual parties recognise this legal restriction or control.[40] Moreover, if a restraint arises from the negligence of the contractual parties, the exemption will not apply.[41] In terms of "dangers and accidents of the Seas, Rivers", these contain risks and hazards specific to seas or rivers or to the navigation of the vessel at sea or in rivers which

[34] ibid.
[35] Coghlin and others (n 1) para 27.9.
[36] A risk of forcible interference will also be included in these words when the restraint is actually in being and will impact on the action of the charter if an alternative method is not selected. In addition, the test is 'whether a reasonable man would consider performance likely to be affected by the restraint.' See *Watts v Mitsui* [1917] AC 227(HL); *Phosphate Mining v Rankin* [1915] 21 Com Cas 248; *Nobel's Explosives v Jenkins* [1896] 2 QB 326; Coghlin and others (n 1) para 27.16.
[37] For example, 'the imposition of restrictions on trade, action taken pursuant to customs or quarantine regulations, action to protect the government's own proprietary interests in the cargo or action taken for political reasons.'
[38] *Nesbitt v Lushington* [1792] 4 TR 783; Coghlin and others (n 1) para 27.19.
[39] *Finlay v Liverpool* [1870] 23 LT 251; Yet the express extension of this exemption covers a "seizure under legal process" within Section 1304 (2) (g) of Title 46 of the United States Carriage of Goods by Sea Act. Coghlin and others (n 1) para 27.19; 815.
[40] *Ciampa v British India* [1915] 2 KB 774; Coghlin and others (n 1) para 27.19.
[41] Coghlin and others (n 1) para 27.19.

cannot be prevented by the exertion of reasonable care.[42] Therefore, if the damage comes from an extraordinarily severe[43] gale the exemption applies where no negligence of the contractual parties is involved.[44] In addition, this exemption applies to accidents and dangers of the sea rather than on the sea.[45] For instance, rain is a risk on the sea, but not a risk of the sea.[46] Moreover, the damage caused from necessary action taken to reasonably combat dangers and accidents of the sea or rivers will be within the exemption.[47] For example, damage which comes from closing ventilators to avoid the entry of seawater during a storm is within the exemption.[48]

However, the normal exemptions clause cannot remove the time charterer's liability for breach of an undertaking not to carry cargo excluded under the time charter, or for an undertaking regarding the safety of ports or berths, or for an undertaking of shipping lawful cargo under the time charter,[49] even if

[42] Coghlin amd others (n 1) para 27.21.
[43] Even if the weather is not severe, the entry of seawater may be included in the exemption. For instance, 'this exception covers its entry following the striking, without negligence, of an iceberg or a sunken rock or another ship being negligently navigated or as result of rats gnawing through a lead pipe.' See *The Xantho* [1887] 12 App Cas 503 (HL); *Hamilton, Fraser v Pandorf* [1887] 12 App Cas 518 (HL). See also Coghlin and others (n 1) para 27.22.
[44] It is common under American Law to adopt a narrow view of exemption. See the decision of the High Court of Australia in *The Bunga Seroja* [1999] 1 Lloyd's Rep 512; The US court indicates that to have "a peril on the sea" weather condition, it is necessary to consider the time of year and location. It must not have been foreseeable. See *Thyseen Inc. v The Eurounity*, 21 F.3d 533, 1994 AMC 1638 (2d Cir.1994); Coghlin and others (n 1) para 27.21, 27.70.
[45] Coghlin and others (n 1) para 27.23.
[46] *Canada Rice Mills v Union Marine* [1941] AC 55 (PC) (Lord Wright); Coghlin and others (n 1) para 27.23.
[47] ibid; Coghlin and others (n 1) para 27.22.
[48] ibid.
[49] In *The Greek Fighter*, for example, it was construed that, for the exemption clause to be applied, "arrest or restraint" within the mutual exemption clause under the SHELLTIME 4 form must not be caused by carrying unlawful cargo. *Ullises Shipping Corp. v Fal Shipping Co. Ltd. (The Greek Fighter)* [2006] 1 Lloyd's Rep 99 [292] (Colman, J.); Coghlin and others (n 1) para 27.28.

damage might immediately result from one of such excluded risks.[50] In addition, when it does not tend to provide the time charterer with protection from liability in the event of negligence or that of their servants, then it will not mutually exempt the shipowner from liability in these events of negligence.[51] Moreover, it is necessary to comply with the principle of construct to restrict the meaning and effect of the ambits of exemptions of liabilities under the exemptions clause.[52] For example, except for the demonstration of obvious intention by the contractual parties, negligent navigation cannot be included within the errors of navigation,[53] which is an error in some aspects of seamanship,[54] indicated in the context under Clause 16 of the NYPE 46 form[55] and Clause 21 of the NYPE 93 form.[56]

When Clauses 24 of the NYPE 46 form[57] and 31 of the NYPE 93 form[58] are not modified, the United States Carriage of Goods by Sea Act 1936[59] is incorporated into the NYPE 46[60] and NYPE 93 forms[61] by the paramount clause,[62] which is covered in Clause 24 of the NYPE 46 form[63] and Clause

[50] ibid.
[51] Coghlin and others (n 1) para 27.28.
[52] *Photo Production v Securicor* [1980] 1 Lloyd's Rep 545 [554] (Lord Diplock); Coghlin and others (n 1) para 27.1, 27.26.
[53] *The Emmanuel C* [1983] 1 Lloyd's Rep 310; *The Satya Kailash* [1984] 1 Lloyd's Rep 588; Coghlin and others (n 1) para 27.4, 27.26.
[54] Coghlin and others (n 1) para 27.27.
[55] Williams (n 6) 230.
[56] Brodie (n 7) 38.
[57] Williams (n 6) 231.
[58] Brodie (n 7) 40-41.
[59] The Hague Rules 1924 are incorporated into this Act. <http://www.shipinspection.eu/index.php?action=page_display&PageID=242> accessed 12 April 2011.
[60] Williams (n 6) 228-31.
[61] Brodie (n 7) 32-46.
[62] Simon Baughen, *Shipping Law* (5th edn, Routledge 2012) 191.
[63] Williams (n 6) 231.

31 of the NYPE 93 form.[64] In addition, if there is a conflict between the provisions of the Act,[65] which is incorporated by Clause 24 of the MYPE 46 form[66] or Clause 31 of the NYPE 93 form,[67] and the other terms under the NYPE 46 form[68] and NYPE 93 form,[69] the incorporated Act will override[70] the terms under the NYPE 46 form[71] and NYPE 93 form.[72] Yet if there is no conflict, the provisions of the Act, those of the terms under the NYPE 46 form[73] and NYPE 93 form,[74] will be supplemented by the provisions of the Act.[75]

Moreover, all contractual activities to be performed by the shipowner[76] under the time charter will be protected within the exemptions in Section 1304(2) of Title 46 of this incorporated Act,[77] as well as "load, handling, stowage, carriage, custody care and discharge of goods" provided in Section 1302 of this Act.[78] In addition, when the United States Carriage of Goods by Sea Act is incorporated into the NYPE 46 form[79] and NYPE 93 form,[80] the

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[64] Brodie (n 7) 40-41.
[65] The United States Carriage of Goods by Sea Act 1936.
[66] Williams (n 6) 231.
[67] Brodie (n 7) 40-41.
[68] Williams (n 6) 228-31.
[69] Brodie (n 7) 32-46.
[70] *The Agios Lazaros* [1976] 2 Lloyd's Rep 47; Coghlin and others (n 1) para 37.74; Coghlin and others (n 1) para 27.4, 27.29, 34.18, 34.21, 37.73.
[71] Williams (n 6) 228-31.
[72] Brodie (n 7) 32-46.
[73] Williams (n 6) 228-31.
[74] Brodie (n 7) 32-46.
[75] Coghlin and others (n 1) para 34.18.
[76] For instance, it also covers the ballast voyage. *The Satya Kailash* [1984] 1 Lloyd's Rep 588 (CA) [596] (Robert Goff, L.J.); Coghlin and others (n 1) para 34.23.
[77] The United States Carriage of Goods by Sea Act 1936; Coghlin and others (n 1) 815.
[78] *The Satya Kailash* (n 76) [596] (Robert Goff, L.J.); Coghlin and others (n 1) para 27.4, 34.23; 813.
[79] Williams (n 6) 228-31.
[80] Brodie (n 7) 32-46.

exemptions under Section 1304(2) of the Act[81] may have a great impact on the shipowner.[82] For instance, as already mentioned, errors of navigation[83] are provided in Clause 16 of the NYPE 46 form and Clause 21 of the NYPE 93 form[84] but these do not include an exemption for negligence.[85] However, when Section 1304(2)(a) of Title 46 of the United States Carriage of Goods by Sea Act[86] is incorporated into the NYPE 46 form[87] and NYPE 93 form[88] by Clause 24 of the NYPE 46 form[89] and Clause 31 (a) of the NYPE 93 form,[90] Section 1304(2) will give the shipowner wider protection from his/her liability[91] since 'act, neglect or default of the Master, mariner, pilot, or the servants of the carrier in the navigation[92] or in the management of the ship'[93] will exempt the shipowner from liability.[94]

When Section 1304(2)(b) of Title 46 of the United States Carriage of Goods by Sea Act is incorporated[95] into the NYPE 46 form[96] and NYPE 93 form[97] by

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[81] Coghlin and others (n 1) 815.
[82] Yvonne Baatz, 'Clause Paramount in Time Charterers' in Thomas (n 5).
[83] It does not include negligence errors of navigation. Baatz (n 82).
[84] Coghlin and others (n 1) para 27.4.
[85] *The Emmanuel C* [1983] 1 Lloyd's Rep 310; *The Satya Kailash* (n 76); Coghlin and others (n 1) para 27.4, 27.26, 34.10.
[86] Coghlin and others (n 1) 815; <http://www.law.cornell.edu/uscode/html/uscode46a/usc_sec_46a_00001304----000-.html> accessed 26 May 2012.
[87] Williams (n 6) 228-31.
[88] Brodie (n 7) 32-46.
[89] Williams (n 6) 231.
[90] Brodie (n 7) 40-41.
[91] Coghlin and others (n 1) para 27.29; 815.
[92] *Aliakmon Maritime Corporation v Transocean Continental Shipping Ltd. and Frank Truman Export Ltd. (The Aliakmon Progress)* [1978] 2 Lloyd's Rep 499 (CA); *The Satya Kailash* (n 76); Coghlin and others (n 1) para 34.10, 34. 20.
[93] *Actis Co. Ltd. v The Sanko Steamship Co. Ltd. (The Aquacharm)* [1982] 1 Lloyd's Rep 7 (CA); Coghlin and others (n 1) para 34.20.
[94] Baatz (n 82).
[95] (n 86).
[96] Williams (n 6) 228-31.
[97] Brodie (n 7) 32-46.

Clause 24 of the NYPE 46 form[98] and Clause 31 (a) of the NYPE 93 form,[99] the exemptions as to "Fire, unless caused by the actual fault or privity[100] of the carrier"[101] on the basis of Section 1304(2)(b) of Title 46 of the Act[102] will be provided instead of "fire"[103] in Clause 16 of the NYPE 46 form[104] and Clause 21 of the NYPE 93 form.[105] Under these circumstances, although the fire is resultant from the negligence of the shipowner's staff and agents, the shipowner can still be protected by the exemption in Section 1304(2)(b) of Title 46 of the Act.[106] However, if the fire is caused by unseaworthiness, as a result of the shipowner's failure to exert due diligence to make the vessel seaworthy before and at the beginning of each voyage, the shipowner cannot be exempted from his/her liability[107] by Section 1304(2)(b) of Title 46 of the Act.[108] In addition, it is necessary to note that when the shipowner is a corporation, "the actual fault or privity" will refer to who has directorial responsibility at the core of the corporation.[109] Thus, as the obiter in *The*

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98 Williams (n 6) 231.
99 Brodie (n 7) 40-41.
100 '"The word "privity" really means " knowledge" which the carrier had or should have had but failed to pass on or otherwise properly make use of.' Christopher Hill, *Maritime Law* (6th edn Informa Professional 2003) 272.
101 The burden of proof is placed on the claimant to prove that the carrier has actual fault and privity. See Hill (n 100) 272.
102 (n 86).
103 "Fire" means a flame and it does not cover heating which has not arrived "at the stage of incandescence or ignition". This is explained by Wright J in *Tempus Shipping Co. v Louis Dreyfus Co.* [1930] 1 KB 699 [708]. Under these circumstances, if the cargo damage is caused by heat for a period of time before the fire begins to result in further damage, the protection includes both causes of damage within the exemption. *Greenshields,Cowie & Co. v Stephens & Sons, Ltd.* [1908] AC 431 (HL); William Tetley, *Marine Cargo Claims*, Vol 1 (4th edn, Thomson Carswell 2008) 995-96.
104 Williams (n 6) 230; Coghlin and others (n 1) para 27.4.
105 Brodie (n 7) 38.
106 Baughen (n 62) 114; Coghlin and others (n 1) para 27.56.
107 *Maxine Footwear Co. Ltd. v Canadian Government Merchant Marine Ltd.* [1959] 2 Lloyd's Rep 105 (PC); Coghlin and others (n 1) para 27.11; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 474.
108 (n 86).
109 *Lennards Carrying Co. v Asiatic Petroleum* [1915] AC 705 [713]; *The Lady Gwendolen* [1965] 1 Lloyd's Rep 335; Coghlin and others (n 1) para 37.58, 37.60.

Apostolis indicated, the fault of the general manager or the shipowner or shipowners established "fault or privity of the carrier".[110]

Nonetheless, if the vessel is registered in the United Kingdom, the shipowner and charterer[111] can additionally benefit from the exemptions where any property on board[112] the vessel is lost or damaged for reason of fire [113] under Section 186 of the Merchant Shipping Act 1995.[114] This statutory protection will only be overruled by Article 4 of the Convention on Limitation of Liability for Maritime Claims 1976, which is attached to Part I of Schedule 7 of the Act,[115] 'if it is proved[116] that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'.[117] Yet the shipowner will not lose his/her protection from the exemption when the unseaworthiness

[110] *The Apostolis* [1996] 1 Lloyd's Rep 475 QB.
[111] This is statutory protection for the shipowner, any charterer, manager and operator. The statutory protection also extends its protection to the Master and Crew of the ship when they are acting in the course of their employment. Bernard Eder and others (eds), Scrutton on Charterparties and Bills of Lading (22nd edn, Sweet and Maxwell Limited 2011) 469; However, Section 1304(2)(b) of Title 46 of the United States Carriage of Goods by Sea Act 1936 applies to the "carrier", as defined within Section 1301(a) of the Act. "Carrier" covers the owner or the charterer who establishes the contract of carriage with a shipper. Coghlin and others (n 1) 812.
[112] Section 1304(2)(b) of Title 46 of the United States Carriage of Goods by Sea Act 1936 is different from Section 186 of the Merchant Shipping Act 1995. It can be used in "the period from the time when the goods are loaded on to the time they are discharged from the ship" provided in Section 1301(e) of Title 46 of the United States Carriage of Goods by Sea Act 1936. This period is usually interpreted as including "tackle to tackle". John F. Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 181; Girvin (n 107) 475.
[113] Coghlin and others (n 1) para 27.12, 27.14; It is held in *The Diamond* that the damage by smoke and by water used to extinguish the fire is damage by reason of the fire under the meaning of earlier legislation (Section 502 (I) of the Merchant Shipping Act 1894); *The Diamond* [1906] P 282; Lachmi Singh, The Law of Carriage of Goods by Sea (Bloomsbury Professional Ltd 2011) 237.
[114] Brian Harris, Ridley's Law of the Carriage of Goods by Land Sea and Air (8th edn, Sweet & Maxwell 2010) 185.
[115] Eder and others (n 111) 469.
[116] The burden of proof is on the cargo owner. See Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 371.
[117] Christopher Smith, 'Liability of Shipowner for Loss of, or Damage to, Goods Carried' in Eder and others (n 111).

of the vessel is proved to have caused the fire, through no "personal act or omission" as provided in Section 186 (3) of this Act.[118] In addition, under this circumstance, the shipowner's right to a general average contribution will not be removed.[119]

Furthermore, it is worth mentioning *Clyde Commercial S.S. Co. v West India S.S. Co.*, which is the leading American case regarding the application of mutual exemptions.[120] In this case, because of the deficiency of the Crew, the vessel was first delayed at Panama.[121] The court decided that the time charterer could be exempted from his/her obligation to pay payment of the time charter service for the time lost since "deficiency of men" had been provided in the off-payment of the time charter service clause of the time charterparty exempting the charterer from the payment of the time charter service if delay resulted from such deficiency.[122] However, the delay occurred again when the vessel moved during the voyage.[123] This was caused by a quarantine order dealing with vessels from Panama, which were presumably infected.[124] It was indicated by the court that the mutual exemptions clause only exempts either contractual party from liability to the other as a result of

[118] *Louis Dreyfus & Co. v Tempus Shipping Co.* [1931] AC 726 (HL). This case involved interpretation of Section 502 of the Merchant Shipping Act 1894. This Act has a similar effect to Section 186 of the Merchant Shipping Act 1995. Smith (n 117); Baughen (n 62) 115, footnote 126; Coghlin and others (n 1) para 27.13.
[119] *Louis Dreyfus & Co. v Tempus Shipping Co.* (n 118); In addition, under the exemptions as to "fire on board" within Section 186 of the Merchant Shipping Act 1995, the shipowner's liability for general average contribution to the owner of goods cannot be absolved when the goods are damaged by water utilised in extinguishing a fire on board. *Schmidt v Royal Mail Co.* [1876] 45 LJ QB 646; *Greenshields v Stephens* [1908] AC 431; Smith (n 117).
[120] *Clyde Commercial S.S. Co. v West India S.S. Co.*169 F.275 (2d Cir.1909); Coghlin and others (n 1) para 27.45, 27.49.
[121] ibid.
[122] Coghlin and others (n 1) para 27.49.
[123] ibid.
[124] ibid.

the breach of any charterparty on his part, where it comes from any one of the events provided in the exemptions clause.[125] However, the legal rights and obligations of either party within the off-payment for the time charter service provision would not be affected by the mutual exemptions clause under the time charterparty.[126] Therefore, it was held by the court that the charterer still needed to pay the payment of the time charter service for that period.[127] The decision of the court also indicated that the shipowner can escape his liability since this latter delay resulted from a restraint of princes, which is one of the events provided for in the mutual exemptions clause in the time charterparty.[128] From the conclusion of this case by the American court, it seems likely the result would be the same if the governing law was English law.[129]

7.2.3 The mutual exemptions clause and exemption clause in the GENTIME form

It is necessary to note that the mutual exemptions of the time charterers' and the shipowners' liability as well as the exemptions for shipowners within Clause 19 under the GENTIME form[130] do not apply to the cargo claims

[125] ibid.
[126] ibid.
[127] ibid.
[128] ibid.
[129] The Oliver [1972] 1 Lloyd's Rep 458 [460] (Mocatta, J.); Coghlin and others (n 1) para 27.33.
[130] (n 8).

which have been dealt with exhaustively in Clause 18(a) of the GENTIME form.[131] If loss, damage, delay or failure in the performance of the charterparty has arisen from any of the grounds listed in Lines 645 to 646 of this clause,[132] the mutual exceptions provision exempts the contractual parties from responsibility in order to avoid the parties claiming for damages against each other.[133] In addition, it is indicated that the principles of the Hague-Visby Rules[134] are obeyed by the shipowners' exemptions in Lines 649 to 652 in this clause.[135]

Moreover, Clause 19 of the GENTIME form in particular also provides that there is no way to affect the provision regarding the off-payment for the time charter service clause, which is provided in Lines 653 to 654 of this clause.[136] However, it lacks express provision concerning exemptions that in no way affects the provisions as to the off-payment for the time charter service under Clause 12 of the BALTIME form,[137] Clause 16 of the NYPE 46 form[138] and Clause 21 of the NYPE 93 form.[139] Therefore, it is believed that the clear expression in Lines 653 to 654 in Clause 19 of the GENTIME

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[131] <https://www.bimco.org/Members/Chartering/BIMCO_Documents/Time_Charter_Parties/GENTIME/Explanatory_Notes_GENTIME.aspx> accessed 17 August 2012.
[132] "Act of God, act of war, civil commotions, strikes, lockouts, restraint of princes and rulers and quarantine restrictions."
[133] ibid.
[134] <http://www.admiraltylaw.com/statutes/hague.html> accessed 25 August 2012.
[135] 'Any act, neglect or default by the Master, pilots or other servants of the Owners in the navigation or management of the vessel, fire or explosion not due to the personal fault or the Owners or their manager, collision or stranding, unforeseeable breakdown of or any latent defect in the Vessel's hull, equipment or machinery.'
[136] ibid.
[137] Coghlin and others (n 1) para 37.66.
[138] Williams (n 6) 230.
[139] Brodie (n 7) 38.

form[140] should be given credit because it might help to solve some practical disputes.[141]

Furthermore, because there is nothing dealing with the cargo claims[142] under Clause 19 of the GENTIME form,[143] it is believed that when Article 4(2) of the Hague-Visby Rules[144] is incorporated into the GENTIME form[145] by the paramount clause which is provided in part B of Appendix A of the GENTIME form,[146] except responsibilities for cargo claims,[147] how to construe the incorporation of Article 4(2) of the Hague-Visby Rules[148] into the GENTIME form[149] will be the same as for the aforementioned incorporation of Section 1304(2) of Title 46 of the United States Carriage of Goods by Sea Act[150] into the NYPE 46[151] and NYPE 93 forms.[152]

7.3 Crucial issues under the exemptions clause

[140] (n 8).
[141] For example, the dispute in *The Aquacharm* (n 93); *Clyde Commercial S.S. Co. v West India S.S. Co.* (n 120).
[142] It is provided in Clause 18 (a) of the GENTIME form.
[143] (n 8).
[144] (n 134).
[145] (n 8).
[146] ibid.
[147] (n 142).
[148] (n 134).
[149] (n 8).
[150] The provisions within the Article 4(2) of the Hague-Visby Rules are the same as the Section 1304(2) of Title 46 of the United States Carriage of Goods by Sea Act 1936. Coghlin and others (n 1) 815.
[151] Williams (n 6) 228-31.
[152] Brodie (n 7) 32-46.

There is considerable debate regarding whether or not the damage indicated in Clause 12 of the BALTIME form[153] not only includes physical damage but also covers financial loss.[154]

In *The Charalambos N. Pateras*,[155] which was chartered under the earlier version of the BALTIME form, the time charterers claimed damages against the shipowners because they alleged loss of time and additional expenses caused by the Master's wrongful refusal to call at the port of Ampala in Nicaragua, Central America.[156] On the other hand, in order to defeat the time charterers' claim, the shipowners proceeded to justify the Master's refusal basing their defence on an exemptions clause under the charterparty.[157]

The court of Appeal held that "damage" in Clause 13 (now Clause 12 of the BALTIME form)[158] should be widely construed to include both physical damage and financial loss.[159] Therefore, the shipowners were protected by the exemptions clause and they were exempt from their liability for both physical damage and financial loss due to the second sentence in this clause of the charterparty.[160]

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[153] Thomas (n 5) 287.
[154] Coghlin and others (n 1) para 37.53.
[155] *Nippon Yusen Kaisha v Acme Shipping Corporation (The Charalambos N. Pateras)* [1972] 1 WLR 74.
[156] ibid.
[157] ibid.
[158] Thomas (n 5) 287.
[159] *The Charalambos N. Pateras* (n 155).
[160] It is provided in Clause 13 of this version of the BALTIME charterparty that 'The owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants'.

Subsequently, the decision in *The TFL Prosperity*[161] by the Court of Appeal allowed the shipowners' exemption because the rule in *The Charalambos N. Pateras* was applied.[162] The court also held that "damage" in Clause 13 within the earlier version of the BALTIME form (now Clause 12 of the BALTIME form)[163] covered physical damage and financial loss.[164] However, it was held for the time charterer in *The TFL Prosperity* by the House of Lords.[165] The judgment of the Court of Appeal was reversed and the ruling in *The Charalambos N. Pateras*[166] was overruled by the House of Lords.[167]

The TFL Prosperity, which was chartered under the earlier version of the BALTIME form, offered "roll-on, roll off" liner service.[168] The exemptions clause and additionally typed Clause 26, which particularly prescribed fixed structural features of the vessel, were listed within this printed time charterparty.[169] It was indicated under Clause 26 that the free height under the main deck was 6.10 metres.[170] However, when the vessel was delivered to the time charterer, the main deck of the vessel could not load a double stacked trailer with 40 ft. containers since, in fact, the height of the main deck was merely 6.05 metres, which was less than the description supplied in Clause 26 within the time charterparty.[171] Therefore, the time charterers claimed for financial loss and damages resulting from the shipowners' breach

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161 *The TEL Prosperity* (n 18); Coghlin and others (n 1) para 37.53.
162 *The Charalambos N. Pateras* (n 155).
163 Thomas (n 5) 287.
164 *Tor Line A.B. v Alltrans Group. of Canada Ltd. (The TEL Prosperity)* [1983] 2 Lloyd's Rep18 (CA).
165 *The TEL Prosperity* (n 18).
166 *The Charalambos N. Pateras* (n 155).
167 *The TEL Prosperity* (n 18).
168 ibid.
169 ibid.
170 ibid.
171 ibid.

of warranty as to description.[172] On the other hand, the shipowners stated that there had been no personal default on their part on the basis of the exemption clause within the time charterparty.[173]

The House of Lords in *The TFL Prosperity* indicated that the shipowners only have legal liability (according to the shipowners' express acceptance of "responsibility" in the first sentence of this clause[174]) for two specific types of delay and one specific type of physical loss or damage, i.e. loss or damage to goods on board, if they arose from the stated causes within the first sentence under Clause 13 (now Clause 12 of the BALTIME form).[175] In addition, the view of the court in this decision was to construe that the second sentence in this clause should be linked with the first sentence.[176]

Thus the exemption from the shipowners' liability in the second sentence,[177] which provides that the shipowners shall not be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if this arose from the neglect or default of their servants, should be construed to be merely limited to the same types of delay and physical loss or damage to

[172] ibid.
[173] ibid.
[174] The first sentence of this clause provides that the Owner should only be responsible for a delay in delivery of the vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their manager. See *The TEL Prosperity* (n 18).
[175] *The TEL Prosperity* (n 18) [54] (Lord Roskill).
[176] *The TEL Prosperity* (n 18).
[177] The second sentence in this clause sets out that the owners are not to be held responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants. See *The TEL Prosperity* (n 18).

goods on board[178] as in the first sentence within the same clause.[179] Accordingly, the court did not allow the shipowners' defence, based on the exemptions clause, against the charterers' claim for suffered financial losses caused by the shipowners' breach.[180] In addition, the court indicated that the exemption of the shipowners' liability within the exemptions clause could not be interpreted to exclude the shipowners' liability for the breach of a term regarding descriptions under the time charterparty.[181]

It is worth mentioning that Lord Roskill asserted that the second sentence in this exemptions clause is intended for circumstances not included by the first sentence.[182] Therefore, instead of looking forward to the third sentence[183] and fourth sentence in this exemptions clause,[184] a more natural approach is to regard the second sentence as looking back to the first sentence in this clause while looking at this clause as a whole.[185] In addition, he believed that if ''damage'' in the first and the second sentences contained financial loss or damage, ''damage'' and ''delay'' become difficult to differentiate because financial loss of some type would be caused by any delay.[186] Furthermore, he pointed out that the third sentence obviously protects the shipowners by

[178] It is opposed to financial loss or damage; Coghlin and others (n 1) para 37.53.
[179] *The TEL Prosperity* (n 18).
[180] ibid.
[181] ibid.
[182] *The TEL Prosperity* (n 18) [54] (Lord Roskill).
[183] The third sentence of this clause stipulated that the owners are not liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour or vehicles (including the Master, Officers or Crew) whether partial or general. *The TEL Prosperity* (n 18).
[184] The fourth sentence of this clause provides that the charterers are responsible for loss or damage caused to the vessel or to the owners by goods being loaded contrary to the terms of the charter or by improper or careless bunking or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants. See *The TEL Prosperity* (n 18).
[185] *The TEL Prosperity* (n 18) [55] (Lord Roskill).
[186] *The TEL Prosperity* (n 18) [54] (Lord Roskill).

excluding loss or damages caused by risks such as strikes and so on which were not exempted by the first two sentences.[187] Moreover he held that the phrase “loss or damage’’ within the third and fourth sentences covered physical and financial loss or damage.[188]

Furthermore, he believed that the true common intention of the parties under the time charterparty should be that the time charterers pay for the time charter service in return for the charter service and that the vessel should be as promised in the shipowners’ description.[189] Thus, it was, for Lord Roskill, unconvincing to argue that the exemptions clause could be construed to allow a breach of the warranties regarding description provided in Clause 26 without the shipowner being liable for financial loss or damage to the time charterers.[190]

Even though it is believed that the exemptions clause was correctly construed as a whole in *The TFL Prosperity* by the House of Lords,[191] it could be noted that it is confusing to apply a different meaning to apparently the same phrase “loss or damage” between the first sentence and third and fourth sentences of the exemptions under the time charterparty. This may confuse a lay person, the merchant. Consequently, it is essential to reform the exemptions clause in order to resolve this issue.

[187] ibid.
[188] *The TEL Prosperity* (n 18) [54]-[55] (Lord Roskill).
[189] *The TEL Prosperity* (n 18) [58]-[59] (Lord Roskill).
[190] *The TEL Prosperity* (n 18) [59] (Lord Roskill).
[191] *The TEL Prosperity* (n 18) [53] (Lord Roskill).

7.4 Reforming the exemptions clause

The drawback of the current exemptions clause in the BALTIME form[192] is that it is necessary to apply the construction of the current exemptions clause in the BALTIME form by the court in order to really understand it.[193] As a result, it is necessary to improve the exemptions clause by making it clear and straightforward so both contractual parties understand the true meaning of the provisions under the time charterparty.

Integrating common law in the time charterparty might not only help the contractual parties to accurately comprehend the provisions of the standard form under the construction of the court, but also guarantee that the content does not conflict with common law. Thus directly adopting the construction of the House of Lords in *The TFL Prosperity*[194] within Clause 12 of the BALTIME form is suggested.[195]

Firstly, even though the word “loss” is not used in the second sentence within the exemptions clause, Clause 12 of the BALTIME form,[196] the view of the court was to construe that “loss” should also be covered within the context of this second sentence.[197] Thus it is proposed to add the word “loss” to the

[192] Thomas (n 5) 287.
[193] *The TEL Prosperity* (n 18).
[194] ibid.
[195] Thomas (n 5) 287.
[196] ibid.
[197] *The TEL Prosperity* (n 18) [54] (Lord Roskill).

second sentence of Clause 12 of the BALTIME form[198] to make the content complete and avoid unnecessary confusion.

Secondly, it is recommended that the whole clause should be separated into Part (A) and Part (B). In addition, Part (A) should be subdivided into (i), (ii) and (iii). It might be better to add individual section headings in Parts (A) and (B) in order to deal with two topics. One is “The Exemptions of the Owners’ Liability” and another is “The Charterers’ Liability”. In addition, the most significant of these divisions is cataloguing the different scope of each type of “loss or damage’’. This is because the ambit of the type of “loss or damage’’ is, as mentioned, differently construed by the court within the first two sentences and the remaining sentences of the clause.[199] Hence, Part (A), concerning ”the Exemptions of the Owners’ Liability”, should be divided into three sub-paragraphs, (i), (ii) and (iii), to show different extents of the type of “loss or damage’’. This may assist the contractual parties in distinguishing between the differences in scope of the types of “loss or damage’’ between the first two sentences and the third sentence under Clause 12 of the BALTIME form,[200] which are all relevant to the shipowners’ exemption from liability.

Thirdly, the type of “loss or damage’’ within the first and the second sentences, does not cover financial loss or damage.[201] However, the type of “loss or damage’’ within the third and fourth sentence, includes both physical

[198] Thomas (n 5) 287.
[199] *The TEL Prosperity* (n 18) [53]-[57] (Lord Roskill).
[200] Thomas (n 5) 287.
[201] *The TEL Prosperity* (n 18) [53]-[54] (Lord Roskill).

loss or damage and financial loss or damage.[202] Consequently, it is suggested to clearly add that 'The type of "loss or damage" within the first two sentences here only refers to physical loss or damage' after the second sentence of the aforementioned Part (A) (i). Moreover, after (A) (ii), which provides the rest of the exemptions of the shipowners' liability, the statement 'Aforementioned "loss or damage" covers physical as well as financial loss or damage', should be added. In addition, at the end of Part (B), which deals with the time charterers' liability, the statement 'Aforementioned "loss or damage" covers physical as well as financial loss or damage', should also be added.

Furthermore, in practice, some disputes have arisen because the time charterer has tried to excuse himself/herself from the payments of the time charter service by way of the exemptions clause in the time charterparty.[203] Therefore, to avoid unnecessary disputes in the future and to make the exemptions clause clear, a further amendment is recommended for (A) (iii) regarding the exemptions of the shipowners' liability. Similarly to the last paragraph of Clause 19 within the GENTIME form,[204] the exemptions clause, 'The above provisions regarding the exemptions of the Owner's liability shall in no way affect the provisions as to off-payment of the time charter service in the Charter Party' should be added.

7.5 Highlighting the key reforms in this chapter

[202] *The TEL Prosperity* (n 18) [55] (Lord Roskill).
[203] *The Aquacharm* (n 93); *Clyde Commercial S.S. Co. v West India S.S. Co.* (n 120).
[204] (n 8).

Combining and demonstrating all of the aforementioned proposals for modifying the exemptions clause under the time charterparty, if Clause 12 of the BALTIME form,[205] for instance, were to adopt these suggestions, it would become: [206]

Clause 12 Responsibility and Exemption

(A) **<u>The Exemptions of the Owners' Liability</u>**

(i) The Owner only shall be responsible for delay in delivery of the vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager. The Owners shall not be responsible in any other case, not for **loss or** damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants. **The type of "loss or damage" within the first two sentences here only refers to physical loss or damage.**

(ii) The Owners shall not be liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour (including the Master, officers or crew) whether partial or general. **Aforementioned "loss or damage" covers physical as well as financial loss or damage**.

[205] Thomas (n 5) 287.
[206] Bold type indicates the suggested modifications.

(iii) <u>Off-payment for the Time Charter Service and the Above Exemptions</u>

The above provisions regarding the exemptions of the Owner's liability shall in no way affect the provisions as to off-payment for the time charter service in the Charter Party.[207]

(B) <u>The Charterers' Liability</u>

The charterers shall be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunking or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants. **Aforementioned "loss or damage" covers physical as well as financial loss or damage.**

7.6 Conclusion

Contractual parties can protect themselves from liability in advance by negotiating an exemptions clause under a time charterparty.[208] However, the exemptions clause still needs to follow the law and be constructed restrictively.[209] Thus in order to reform the unclear and incomplete exemptions clause under the essential standard forms of the time

[207] Clause 19 of the GENTIME form. (n 8).
[208] *Photo Production v Securicor* (n 52) [554] (Lord Diplock).
[209] *Photo Production v Securicor* (n 52).

charterparty,[210] adopting common law regarding interpretation of the exemptions clause might be a good method to reduce the weaknesses within this clause. This may also have the advantage of making the exemptions clause practicably applicable if any dispute occurs in the future.

[210] Such as the BALTIME form, the NYPE 46 and NYPE 93 forms, and the GENTIME form.

CHAPTER 8:

CONCLUSION

This thesis has dealt with the significant legal issues in crucial clauses under the current essential standard forms of the time charterparty.[1]

The aim of this thesis has been to provide a perspective for reform of important clauses in the time charterparty. The rationale for reforming these important clauses is to provide accessible and explicit terms that will prevent unnecessary wasted time and help avoid misunderstandings and legal disputes between the contractual parties.

The time charterer uses only the time charter service, starting from the beginning of the period of the time charter until the end of its contractually allowed period,[2] and pays for the time charter services.[3] The vessel is still controlled and possessed by the Master and Crews who have been hired by the shipowner.[4] The shipowner takes responsibility for navigation.[5] In addition, the initial seaworthy obligation of the shipowner under a time

[1] Such as the BALTIME form 1939 (as revised 2001), the NYPE 46 and NYPE 93 forms, and the GENTIME form. Unless otherwise specified, all reference to the BALTIEM form refer to the BALTIME form 1939 (as revised 2001).
[2] *The Berge Tasta* [1975] 1 Lloyd's Rep 442 [424] (per Donaldson, J.); Terence Coghlin and others, *Time Charters* (6th edn, Informa 2008) para 1.13; Christopher Hill, *Maritime Law* (6th edn, Informa Professional 2003) 171. The relevant discussion is presented in Chapters 2-4.
[3] The relevant discussion is presented in Chapters 5.
[4] *Sea & Land Securities v Dickinson* [1942] 72 LlL.Rep 159 [163] (MacKinnon, L.J.); *The Hill Harmony* [2001] 1 Lloyd's Rep 147 [156] (Lord Hobhouse); Coghlin and others (n 2) para 1.10. The relevant discussion can be seen in Chapters 2 and 6.
[5] The shipowner's liability is discussed in Chapters 2 and 6.

charter normally attaches the maintenance obligation to the shipowner[6] within a time charterparty.[7] However, it is also usually found that the time charterparty includes a provision to deal with the shipowner's and the time charterer's exemptions from their legal liabilities.[8]

The time charterer can order the Master to use the vessel to operate his/her business and complete his/her commercial goal[9] during the period of time[10] within the contractual permission.[11] There are both the time charterer's trading limits[12] and safe port undertaking of the time charterer to restrict the time charterer's use of the time charter service under the time charterparty.[13] In addition, the time charterer's orders given to the Master are necessarily relevant to the commercial operation of the ship.[14] If the time charterer has grounds to be dissatisfied with the performance of the Master and any officer, it is also possible to make a change in the appointments, if necessary and practicable, under the time charterparty.[15]

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[6] *Snia Societa di Navihazione v Suzuki & Co.* [1924] 18 LIL Rep.333; [1924] 17 LIL Rep 78 (KB) [88] (Gree, J.); Coghlin and others (n 2) para 11.7.
[7] John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 12; Lars Gorton and others, *Shipbroking and Chartering Practice* (7th edn, Informa Law 2009) 261.
[8] For example, Clause 12 of the BALTIME form, Clause 16 of the NYPE 46 form, Clause 21 of the NYPE 93 form and Clause 19 of the GENTIME form. This is discussed in Chapter 7.
[9] *Larrinaga S.S. Co. Ltd. v The King (The Ramon de Larrinaga)* [1945] AC 246 [255] (Lord Wright); Martin Davies and Anthony Dickey, *Shipping Law* (3rd edn, Lawbook Co 2004) 382. This is discussed in Chapter 6.
[10] This is shown in Chapter 4.
[11] This is dealt with in Chapter 3.
[12] Coghlin and others (n 2) para 5.4. This is indicated in Chapter 3.
[13] Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 307, 309, 318, 319; Charles G. C. H. Baker, 'The Safe Port/Berth Obligation and Employment and Indemnity Clauses' [1988] LMCLQ 43; This is discussed in Chapter 3.
[14] See (n 9).
[15] For example, Clause 9 of the BALTIME form. D. Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 286-87; Clause 9 of the NYPE 46 form. Harvey Williams, *Chartering Documents* (4th edn, LLP Reference Publishing 1999) 229;

For the purposes of safeguarding payment for the time charter service, the shipowner has the right to withdraw the time charter service[16] and the right of suspension of the time charter service on the basis of the time charterparty.[17] On the other hand, the time charterer also has his/her rights protected by an adjustment to deduct costs from the payment of the time charter service.[18] The time charterer may also request the cessation of payments within the period of an off-payment for the time charter service[19] if he/she cannot obtain the service of the time charter from the shipowner and/or, consequently, suffers loss of time.[20]

Moreover, the express indemnity clause under the time charterparty[21] exists to reimburse the shipowner against all consequences or liabilities resulting from the Master, Officers or Agents signing bills of lading or other documents according to the time charterer's orders during the time charter.[22] Any shipowner's implied indemnity will be restricted to all the requirements under the express terms of the indemnity clause[23] and cannot contradict the provisions within the time charterparty.[24]

Clause 8 (b) of the NYPE 93 form. Peter Brodie, *Commercial Shipping Handbook* (2nd edn, Informa 2006) 34; Coghlin and others (n 2) para 22.1.

[16] These wordings are recommended to be changed in Section 5.4.3 of Chapter 5.

[17] ibid; D. Rhidian Thomas, 'The charterparty hire: Issues Relating to Contractual Remedies for Default and Off-hire Clauses' in Thomas (n 15).

[18] Wilson (n 7) 100; A change of these wordings is suggested in Section 5.3.1 of Chapter 5.

[19] It is proposed to change the wordings in Section 5.5.3 of Chapter 5.

[20] Coghlin and others (n 2) para 25.2.

[21] For example, Lines 123-28 within Clause 9 of the BALTIME form. Thomas (n 15) 286; This is discussed in Chapter 6.

[22] *Milburn v Jamaica Fruit* [1900] 2 QB 540 (CA); Coghlin and others (n 2) para 19.17, 21.67.

[23] *The Island Archon* [1994] 2 Lloyd's Rep 227 (CA) [238]; Wilson (n 7) 110.

[24] *The Berge Sund* [1993] 2 Lloyd's Rep 453 (CA) [462] (Staughton, L.J.); Wilson (n 7) 110.

Furthermore, the earlier discussion in Chapters 2 to 7 highlighted imperfections within the current essential standard forms of the time charterparty[25] which potentially make further practical disputes more likely. The original contributions in this thesis, regarding the recommendations for reform of these prominent clauses under the current significant standard forms of the time charterparty,[26] have attempted to achieve the aims set out in the introduction of this thesis. By way of achieving this, this thesis has done the following:

(1) Demonstrating a clear, systematic, connected, logical, and meaningful structure throughout the whole thesis:

The discussion in chapters of this thesis has focused on exploring the crucial legal issues of the important clauses within the current essential standard forms of time charterparty.[27] These represent the specific core characteristics of the time charter[28] and therefore may shape the most important aspects of the legal liability of the shipowner and the time charterer under the time charterparty.[29] In addition, this thesis has provided a comparative analysis of the strengths and weaknesses of these important clauses in these time charterparty forms and has further made an effort to resolve the vital problems identified with these clauses by proposing various reforms.

[25] (n 1).
[26] ibid.
[27] ibid.
[28] See (n 2)-(n 7).
[29] ibid.

(2) Making the contexts of the clauses in the time charterparty[30] more precise, clear and certain through these reforms:

(A) This can be seen in the consistent suggestions for using precise and clear legal concepts under the time charter instead of a misleading and confusing use of legal concepts within the clauses of the time charterparty.[31] This could prevent merchants from mixing up legal concepts such as the time charter with the demise charter and voyage charter. The following modifications have been suggested:

(a) Under **Chapter 2, Section 2.2**, use the term “beginning of the time charter service” instead of “delivery of the vessel”.

(b) In **Chapter 4, Section 4.6**, change the wording of “redelivery of the vessel” to “ending of the time charter service”.

(c) Change the wording of “payment of hire” to “payment for the time charter service” as shown in **Chapter 5, Section 5.2.1**.

(d) An amendment of the wording “deduction of hire” to “deduction of the payment for the time charter service” under **Section 5.3.1, Chapter 5**.

[30] (n 1).
[31] ibid.

(e) Under **Section 5.4.3, Chapter 5**, changing the wording "withdrawal of vessel" to "withdraw the time charter service".

(f) Change the wording "off-hire" to "off- payment for the time charter service" in **Section 5.5.3, Chapter 5**.

(B) Within **Section 2.4.1, Chapter 2**, clearly indicate the real intention of both parties by adding "when" it is necessary for the vessel to be consistent with "which" details of the description of the vessel[32] at the end of the preamble of the BALTIME form,[33] the NYPE 46[34] and NYPE 93 forms,[35] as well as the GENTIME form.[36] This revision may also prevent future arguments and the waste of judicial resources as well as both parties' time and expense.

(C) Under **Section 4.3.2, Chapter 4**, in order to achieve significant commercial certainty within shipping industries,[37] and also avoid practical disputes, it has been suggested that wording specifies either the minimum and maximum duration of the time charter or a clearly explicit margin in Line 14 of the NYPE 46 form[38] instead of having the problematic word "about".

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[32] The suggested sample is shown in Section 2.4.1 of Chapter 2.
[33] Thomas (n 15) 286-89.
[34] Williams (n 15) 228-31.
[35] Brodie (n 15) 32-46.
[36]<https://www.bimco.org/~/media/Documents/Document_Samples/Time_Charter_Parties/Sample_Copy_GENTIME.ashx> accessed 29 March 2011.
[37] Lord Hoffmann, 'The Achilleas: Custom and Practice or Foreseeability?' (2010)14 (1) Edin. LR 47.
[38] Williams(n 15) 228.

(D) Within **Section 6.4, Chapter 6**, a modification has been recommended to the ambiguous and confusing word “employment” in Clause 9 of the BALTIME form,[39] Clause 8 of the NYPE 46 form,[40] Clause 8 (a) of the NYPE 93 form[41] and Clause 12 of the GENTIME form[42] to a clearer wording of “employment of the ship”[43] in order to directly reflect the view of the English court.[44] This reform can therefore make the contents of these clauses more precise, clear and straightforward and help the contractual parties more effectively comprehend their legal rights and obligations as well as help merchants avoid wasting time when considering how to construe the meaning of “employment” in this clause of the standard forms of the time charterparty. In addition, this would make it easier for them to justify their legal rights and be beneficial in preventing undesirable disputes in the future because the construction of the clause will also be supported by the court.[45]

(E) It has been proposed in **Section 6.4, Chapter 6**, that in order to ensure that the ambit of the time charterer’s orders is more accurately and clearly presented, the sentence, ‘These orders do not cover matters of navigation,’ should be added within the employment clause under the time charterparty, such as Clause 9 of the BALTIME form,[46]

[39] Thomas (n 15) 286.
[40] Williams (n 15) 229.
[41] Brodie (n 15) 34.
[42] (n 36).
[43] This ideal can also be found in 13 (a) of the SHELLTIME 4, which already provids the clear wording, “employment of the vessel”.
[44] *The Ramon de Larrinaga* (n 9) [255] (Lord Wright).
[45] ibid.
[46] Thomas (n 15) 286.

Clause 8 of the NYPE 46 form,[47] Clause 8 (a) of the NYPE 93 form[48] and Clause 12 of the GENTIME form.[49]

(F) Under **Section 7.4, Chapter 7**, a further modification is recommended to Clause 12 of the BALTIME form,[50] which is relevant to a shipowner's liability and exemptions. In addition, similarly to the last paragraph of Clause 19 within the GENTIME form,[51] the exemptions clause, it was suggested that (A) (iii) within Clause 12 of the BALTIME form,[52] 'The above provisions regarding the exemptions of the Owner's liability shall in no way affect the provisions as to off-payment for the time charter service in the Charter Party' be added. If the contractual parties still choose the BALTIME form[53] as their time charterparty, this reform will not only make the exemptions clause clear but could also prevent unnecessary practical disputes which arise from the time charterer trying to excuse himself/herself from paying for the time charter service through the exemptions clause**.**

(3) Making the context in the time charterparty[54] more complete and thoughtful through these reforms:

[47] Williams (n 15) 229.
[48] Brodie (n 15) 34.
[49] (n 36).
[50] Thomas (n 15) 287.
[51] (n 36).
[52] Thomas (n 15) 287.
[53] Thomas (n 15) 286-89.
[54] (n 1).

(A) Under **Section 3.4.5 in Chapter 3**, providing a complete listing of excluded ports and countries at the time of beginning of the time charter service, ending of the time charter service, and during the time charter in the time charterparty, has been recommended.[55]

(B) Making the contexts within provision consistent with the Box Layout by way of reform can be found in **Section 3.4.5 of Chapter 3**. Excluded ports and countries which are listed as a recommendation in part 1 Box Layout of the standard forms of the time charterparty were proposed as also being consistently and clearly "mirrored" within the clause in these forms.[56] This may also make the whole of the essential forms more complete, clear, well organised, less confusing and much easier to follow.

(C) This aim in **(3)** could be achieved by recommendations in **Section 3.4.5 of Chapter 3**. A revision has been proposed to add the point of view of Morris LJ in *The Stork*[57] and the view of convinced authority[58] within the context of the legal effect of the time charterer's breach of safe port undertaking in the time charterparty[59] in order to make sure the Master's novus actus interveniens[60] is included. Therefore, it has

[55] Such as Clause 2 of the BALTIME form, Lines 15, 27 to 34 of the NYPE 46 form, Clause 5 of the NYPE 93 form, and Clause 2 (a) of the GENTIME form.
[56] ibid; It is suggested that add Part 1 Box layout be added to the NYPE 46 and NYPE 93 forms. See (6) (A).
[57] *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd. (The Stork)* [1955] 2 QB 68 [104] (Morris, L.J).
[58] Yvonne Baatz, 'Charterparties' in Yvonne Baatz (ed), *Maritime law* (2nd edn, Sweet & Maxwell 2011).
[59] See (n 55).
[60] Girvin (n 13) 334.

been suggested to stipulate that if the Master deliberately[61] or recklessly ignores[62] the vessel outside the trading limits and/or the obvious dangers of a nominated port, does not reject the time charterer's order and obeys the time charterers' order outside trading limits and/or to proceed to or enter into the unsafe port, then the time charterer is not liable for the shipowners' suffered damage.[63] The advantage of the reform also allows the provision to more closely reflect the various circumstances in the reality and is more complete and thoughtful.

(D) Under **Section 5.2.1, Chapter 5**, for the purpose of making the contexts of the clause regarding payment for the time charter service more complete and to also follow modern commercial practice**,** as Brandon, J. asserted in *The Brimnes*,[64] it has been recommended that payment for the time charter service has to be paid in cash or by 'other payment method equivalent to payment in cash under the commercial practice, which can provide the shipowner the unconditional right to the immediate use of the funds'[65] This reform would apply to Clause 6 of the BALTIME form,[66] Clause 5 of the NYPE 46[67] and Clause 11 (a) of the NYPE 93 form.[68]

[61] *The Stork* (n 57) [104] (Morris, L.J.).
[62] Baatz (n 58).
[63] ibid; *The Stork* (n 57) [104] (Morris, L.J.).
[64] *Tenax Steamship Co. Ltd. v The Brimnes (Owners)* (*The Brimnes)* [1972] 2 Lloyd's Rep 465 [476]; Coghlin and others(n 2) para 16.30.
[65] ibid.
[66] Thomas (n 15) 286.
[67] Williams (n 15) 229.
[68] Brodie (n 15) 35-36.

(E) Under **Section 5.4.3 of Chapter 5**, for the purpose of avoiding too harsh an outcome for the time charterer,[69] if the contractual parties still choose the BALTIME form[70] or NYPE 46 form,[71] as their time charterparty, it has been suggested that an anti-technicality clause be added, such as that within the second paragraph of Clause 8 (c) of GENTIME form,[72] and that this be included under the heading "Grace Period", in the BALTIME form[73] and the NYPE 46 form[74] to give the time charterer a grace period to pay for the time charter service.

(F) Within **Section 5.4.3 of Chapter 5**, it was also asserted that the contractual parties should negotiate in advance and clearly set out provisions regarding the withdrawal of the time charter service under the time charterparty[75] so that the shipowner shall give the time charterer a written notice of the number of clear banking days for correcting the failure of payment for the time charter service within specific hours of the time charterer's default.[76] This would not only make "specific hours" reflect the contractual parties intention through the contractual parties' negotiation but also make the time charterparty more complete and thoughtful.

(G) Under **Section 5.4.3 of Chapter 5**, aiming to make the context within

[69] Coghlin and others (n 2) para 16.90.
[70] Thomas (n 15) 286-89.
[71] Williams (n 15) 228-31.
[72] (n 36).
[73] Thomas (n 15) 286-89.
[74] Williams (n 15) 228-31.
[75] Such as Clause 6 of the BALTIME form, Clause 5 of the NYPE 46 form, Clause 11 of the NYPE 93 form, and Clause 8 (c) of the GENTIME form.
[76] *Afovos Shipping Co. S.A v R Pagnan & F Lli (The Afovos)* [1983] 1 Lloyd's Rep 335; *Shipping Law* (2011/2012 edn, Witherby Publishing Group. Ltd 2011) 144.

the grace period under the anti-technicality clause of the BALTIME form,[77] the NYPE 46 form[78] and the GENTIME form[79] more complete and to reflect the reality in banking practice, adding “Saturdays, Sundays and Holidays excluded,” has been recommended.[80] The time charterer will therefore rectify his/her default of payment for the time charter service during normal banking days.

(H) It was suggested in **Section 5.4.3, Chapter 5**, that Line 156 of Clause 11 of the NYPE 93 form[81] adopt the spirit of Lines 204 to 205 of the third paragraph of Clause 8 (c) of the GENTIME form[82] by adding the sentence, ‘Notwithstanding the event of loss of time from default of Officers or Crew, provided in Line 220 of Clause 17’[83] in the context of the provisions of Line 156 of Clause 11 of the NYPE 93 form.[84] This will bring benefit to the contexts under Clause 11 of the NYPE 93 form[85] by demonstrating more thoughtful consistency with the theory of an off-payment for the time charter service.[86] The same suggestion also applies to other standard forms, such as the BALTIME form[87] and the NYPE 46 form,[88] when these forms also take the recommendation to adopt the provision regarding the shipowner’s suspension of his/

[77] Thomas (n 15) 286-89.
[78] Williams (n 15) 228-31.
[79] (n 36).
[80] The normal banking days might differ depending on countries. The contractual parties could negotiate these exclusions and change this.
[81] ibid 36.
[82] (n 36).
[83] This would be in the same spirit as the contents of Line 227 to Line 228 of Clause 9 (a) (ii) of the GENTIME form.
[84] Brodie (n 15) 36.
[85] ibid 36.
[86] See Section 5.4.3 of Chapter 5.
[87] Thomas (n 15) 286-89.
[88] Williams (n 15) 228-31.

her performance of any and all of his/her obligations in Lines 200 to 206 of the third paragraph of Clause 8 (c) of the GENTIME form.[89]

(l) Under **Section 5.5.3 of Chapter 5**, it has been recommended that the off-payment for the time charter service clause, such as Clause 11 of the BALTIME form,[90] Clause 15 of the NYPE 46 form,[91] Clause 17 of the NYPE 93 form,[92] and Clause 9 of the GENTIME form[93] should clearly provide significant exclusions. These regard the events preventing the fully working vessel from applying the off-payment for the time charter service clause when this is caused by the time charterer's responsibility or his/her breach of contract.[94] Thoughtful reform of these clauses might also make the context of the off-payment for the time charter service clause more complete and might help the busy contractual parties clearly notice the exclusions to benefit the time charterer,[95] and might also possibly avoid unnecessary disputes between the contractual parties in the future.

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[89] (n 36).
[90] Thomas (n 15) 287.
[91] Williams (n 15) 230.
[92] Under Clause 17 of the NYPE 93 form, it is only excluded by the responsibilities of Charterers, their servants, agents or subcontractors when the event of loss of time results from "arrest". The content of the off-payment for the time charter service clause might be criticised as having not considered all the circumstances of exclusions and not being complete enough.
[93] (n 36); Under Clause 9 (a) (iii) of the GENTIME form, it is only excluded by any act or omission of the Charterers, their servants, agents or sub-contractors when the event results from "arrest". It might also be criticised that the content of the off- payment for the time charter service clause does not consider all circumstances of exclusions and is not complete enough.
[94] Coghlin and others (n 2) para 25.44, 25.69. It is likely constructed here that the time charterers should take responsibility for their servants, agents or subcontractors of the time charterers.
[95] Thomas (n 17).

(J) Within **Section 6.4 of Chapter 6**, in making the context of Clause 8 of the NYPE 46 form[96] and Clause 8 (a) of the NYPE 93 form[97] more complete, it has been suggested that the merits[98] of Clause 9 of the BALTIME form[99] and Clause 12 of the GENTIME form[100] be brought into these clauses, adding "and/or other arrangements"; this may make these clauses more ideal.

(K) Under **Section 6.9 of Chapter 6**, for the purposes of making the legal concepts and contents clearer, more complete, thoughtful, and elaborate within the time charterparty, such as Clause 9 of the BALTIME form,[101] Clause 8 of the NYPE 46 form,[102] Clause 30 of the NYPE 93 form,[103] and Clause 17 (a) (i) of the GENTIME form,[104] it has been proposed to clearly divide two options within these relevant clauses.[105] One is where the shipowner is the contractual carrier of carriage with the bills of lading holder,[106] and the other is where the time charterer is the contractual carrier of carriage with the bills of lading holder.[107] However, it was also recommended, for example, if

[96] Williams (n 15) 229.
[97] Brodie (n 15) 34.
[98] Line 122 to 123 of Clause 9 of the BALTIME Form and Line 307 to 308 of Clause 12 of the GENTIME form already provides "or other arrangements" This is more complete content than Clause 8 of the NYPE 46 form and Clause 8 (a) of the NYPE 93 form.
[99] Thomas (n 15) 286.
[100] (n 36).
[101] Thomas (n 15) 286.
[102] Williams (n 15) 229.
[103] Brodie (n 15) 40.
[104] (n 36).
[105] (n 101)-(n 104).
[106] In other words, these are ship's bills. The shipowner is bound as a contractual carrier with the bills of lading holder. This is discussed in Section 6.7.1.1 of Chapter 6.
[107] In other words, these are charterer's bills. The time charterer is bound as a contractual carrier with the bills of lading holder. This is discussed in Section 6.7.1.2 of Chapter 6.

the shipowner and the time charterer agree to which option to take[108] in order to allocate risk[109] regarding who is the contractual carrier of carrying of goods and therefore decide that the shipowner is the carrier, that the suggested paragraph relevant to the indication of the name of the time charterer as a carrier of carriage should be deleted.

(L) It has been suggested in **Section 6.9 of Chapter 6** to adopt the view in *The Hillcroft*[110] and to add "directly" after the words showing causation in the indemnity clause in the time charterparty.[111] This may also make contractual parties fully aware that in order for the shipowner to successfully claim his/her right to indemnity from the time charterer, there should be no intervening event to break the chain of causation between the shipowner's resultant loss, damage or liabilities and the shipowner's obedience to the time charterer's order.[112] The same recommendation may also improve other separate clauses regarding narrower[113] shipowners' rights to indemnity,[114] for instance, in terms of the carriage of deck cargo, where the shipowner's rights of indemnity are provided in Clause 13 (b) of the

[108] Wilson (n 7) 6.
[109] Nicholas Gaskell, 'Charterer's liability to Shipowner' in Johan Schelin (ed), *Modern Law of Charterparties* (Jure AB 2003); David Foxton, 'Indemnities in Time Charters' in Thomas (n 15).
[110] *Portsmouth Steamship Co. Ltd. v Liverpool & Glasgow Salvage Association (The Hillcroft)* [1929] 34 LILR 459 [462] (Roche, J.); Girvin (n 13) 668.
[111] (n 1); For instance, adding "directly" in the third sentence of Clause 9 of the BALTIME form to make the content of this clause clearly show that 'The Charterers shall indemnify the Owners against all consequences or liabilities arising directly from the Master, offices or Agents signing Bills of Lading or other documents or otherwise complying with such orders…'
[112] *The Hillcroft* (n 110) (Roche, J.).
[113] Foxton (n 109).
[114] ibid.

NYPE 93 form,[115] and in terms of the bills of lading, where the shipowner's right of indemnity is stipulated within Clause 30 (b) of the NYPE 93 form[116] and Clause 17 (e) of the GENTIME form.[117] Particularly, the original contents in Clause 18 (f) of the GENTIME form provides that the shipowner and the time charterer 'agree to indemnify each other against all loss, damage or expenses arising or resulting from any obligation to pay claims, fines or penalties for which the other party is liable in accordance with this Charter Party…'[118] The reform also suggests adding "directly" within Clause 18 (f) of the GENTIME form to change the sentence to "…arising or resulting directly from…"[119] The person who has any obligation under the time charterparty to indemnify another contractual party is provided with limits on the grounds of "directly" causing another's loss, damage or expenses. The clear, complete and thoughtful limitation through this reform might also support contractual parties in allocating risk in the aforementioned provisions.[120]

(4) Reducing the risk of default of the time charterparty through reform according to the following recommendations:

[115] Brodie (n 15) 37.
[116] Brodie (n 15) 40.
[117] (n 36).
[118] ibid.
[119] ibid.
[120] Foxton (n 109).

(A) The goal, as stated above in **(4)**, can be seen in **Section 3.4.5 of Chapter 3**. It has been proposed that the time charterparty[121] provide for the situation in which the time charterer insists on ordering the vessel outside the trading limits[122] or on proceeding to an unsafe port. In this case the Master or the shipowners have complied with an invalid order and the shipowners are entitled to payment for the time charter service at the current market[123] rate if it is higher than the charter rate during the period of the invalid order during time charter. This reform may not only be consistent with the view of the court[124] but also reduce the risk of the time charterer invalidly ordering the vessel outside the trading limits or proceeding to an unsafe port. The reason for this is that paying a higher payment for the time charter service might not meet the time charterers' intentions if the current market rate ends up being higher than the contractual rate.

(B) This achievement stated in **(4)** can be also found under **Section 4.6 of Chapter 4**. It has been submitted that, within the time charterparty,[125] a difference be made in the legal consequences of a late ending of the time charter service depending on whether

[121] See (n 55).
[122] This is an adoption of the court view in *Rederi Sverre Hansen v Van Ommeren* [1921] 6 LIL Rep 193.
[123] The market refers to the market for the equivalent vessel for period time charters on terms similar to the contractual charter. *The Johnny* [1977] 2 Lloyd's Rep 1 (CA); Coghlin and others (n 2) para 4.56.
[124] ibid.
[125] Such as Clause 7 of the BALTIME form, Clause 4 of the NYPE 46 form, Clause 1 of the NYPE 93 form, and Clause 4 (d) of the GENTIME form.

it is a legitimate or illegitimate final voyage.[126] This proposal may reduce illegitimate final voyages being ordered by the time charterer because the aforementioned reform ensures the negative legal impact of a late ending of the time charter service under an illegitimate final voyage.

(C) Within **Section 5.4.3 of Chapter 5**, it has been proposed that the BALTIME form[127] and the NYPE 46 form[128] could also adopt the provision regarding the shipowner's suspension of his/ her performance of any and all of his/her obligations in Lines 200 to 206 of the third paragraph of Clause 8 (c) of the GENTIME form.[129] This would provide the shipowner with a temporary and effective weapon to protect himself/herself against the time charterer's default in payment of the time charter service before the shipowner finally chooses to permanently[130] withdraw the time charter service.[131]

(5) Creatively finding a way to logically solve the practical problem of the legal issues under the time charterparty; and to avoid future possible disputes as well as controlling uncertainty and properly

[126] The suggested example can be seen in Section 4.7 of Chapter 4.
[127] Thomas (n 15) 286-89.
[128] Williams (n 15) 228-31.
[129] ibid.
[130] Wilson (n 7) 107.
[131] Thomas (n 17).

and effectively pre-managing potential legal risks in advance through the following reforms:

(A) In **Section 2.5.2 of Chapter 2**, it was suggested to adopt clear wording, as in the content under Article 3 (1) (a), (b), (c) of the Hague Rules[132] or the Hague-Visby Rules[133] instead of the original description concerning the shipowner's seaworthy obligation, within an added sub-clause under Clause 1 of the BALTIME form,[134] Clause 1 of the NYPE 46 form,[135] Clause 2 of the NYPE 93 form[136] and Clause 11 of the GENTIME form.[137] It is worth mentioning that the recommendation harmonizes the legal concept of seaworthiness within the standard forms of the time charterparty and makes these clauses more complete and clear, and could also probably avoid future disputes. In addition, in order to make the shipowner's obligation for seaworthiness and maintenance under the time charterparty more consistent, it has been suggested in **Section 2.6.1 of Chapter 2** that, in order to avoid a repetition of the definition of seaworthiness, it can simply be set out that the shipowner should be obliged to maintain the vessel's class if contractually required and to keep the vessel seaworthy during the period of the time charter in the provision

[132] <http://www.admiraltylawguide.com/conven/haguerules1924.html> accessed 8 April 2011.
[133] <http://www.admiraltylaw.com/statutes/hague.html> accessed 5 February 2011.
[134] Thomas (n 15) 286.
[135] Williams (n 15) 228.
[136] Brodie (n 15) 33.
[137] (n 36).

regarding maintenance, such as Clause 3 of the BALTIME form,[138] Clause 1 of the NYPE 46 form,[139] Clause 6 of the NYPE 93 form[140] and Clause 11 of the GENTIME form.[141] These consistent and connected provisions can also contribute technically to making the contents of the shipowner's seaworthy and maintenance obligation within the time charterparty more logical, clear and simple.

(B) Adding the legal effect of the contractual parties' breach in the clauses under the time charterparty through reform in order to make it clearer and easier to predict the legal result:

(a) It has been recommended in **Section 2.6.4 of Chapter 2** that the contractual parties should negotiate to provide a clear expression of the maximum period for repairing the vessel and the consequences of this breach within the time charterparty when the contract is established. If any argument occurs, this reform would facilitate a judgment as to whether any relevant breach is "going to the root of the contract"[142] and "deprive[s] substantially the whole benefit of the contract"[143] as well as clarifying the legal result for both parties. This might also help the time charterer take steps to

[138] Thomas (n 15) 286.
[139] Williams (n 15) 229.
[140] Brodie (n 15) 34.
[141] (n 36).
[142] *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. (The Hongkong Fir)* [1962] 2 QB 26.
[143] ibid.

manage his/her risk[144] and any possible uncertain outcomes in advance. The recommendation[145] could be added as a sub-clause of the maintenance clause[146] of the BALTIME form,[147] the NYPE 46 form,[148] the NYPE 93 form,[149] and the GENTIME form.[150]

(b) Within **Section 3.4.5 of Chapter 3**, it has been suggested that, in the provision under the time charterparty regarding trading limits and safe port,[151] to set out that the Master has a legal right to reject an invalid order by the time charterer, which instructs the vessel to perform a service outside trading limits[152] or nominates the vessel to proceed to an unsafe port,[153] and to request another valid order.[154] If the time charterer insists that the initial order should be followed under protest, the shipowners are entitled to choose to terminate the time charterparty[155] and claim for damages.[156] This reform provides a clear indication of the legal

[144] See (n 288) in Section 2.5.6 of Chapter 2.
[145] The designed example can be seen in Section 2.6.4 of Chapter 2.
[146] Such as Clause 3 of the BALTIME form, Clause 1 of the NYPE 46 form, Clause 6 of the NYPE 93 form, and Clause 11 of the GENTIME form.
[147] Thomas (n 15) 286-89.
[148] Williams (n 15) 228-31.
[149] Brodie (n 15) 32-46.
[150] (n 36).
[151] See (n 55).
[152] Coghlin and others (n 2) para 5.12.
[153] *The Hill Harmony* (n 4) [160] (Lord Hobhouse).
[154] Baatz (n 100).
[155] ibid; Coghlin and others (n 2) para 5.18.
[156] *Rederi Sverre Hansen v Van Ommeren* [1921] 6 LlL Rep 193; Janet O'Sullivan and Jonathan Hilliard, *The Law of Contract* (4th edn, OUP 2010) para 18.38.

consequences on the basis of the court's view.[157] A persuasive submission[158] in the provision might also have the advantage of making it more complete and make the approach more practical, applicable and convincing.

(c) Under **Section 3.4.5 in Chapter 3**, it was proposed to clearly provide that if the time charterer still insists on the initial invalid order, the shipowner could also choose to waive his /her right to refuse this order by the time charterer and comply with the initial order outside the trading limits or to proceed to an unsafe port.[159] In addition, the shipowner could still be entitled to claim for suffered damages based on the charterer's breach of the trade limits[160] and safe port undertaking.[161] This reform sets out the legal effect in the provision within the time charterparty as to trading limits and the time charterer's safe port undertaking[162] which might assist in reducing the dispute because it not only might help the contractual parties more clearly and easily predict the legal result but also might get credits in covering possible

[157] *The Hill Harmony* (n 4) [160] (Lord Hobhouse); *Rederi Sverre Hansen v Van Ommeren* (n 156).
[158] Coghlin and others (n 2) para 5.12, 5.18; Baatz (n 58).
[159] This adopts the view in *Motor Oil Hellas* (*Corinth*) *Refineries S.A v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (HL); Coghlin and others (n 2) para 10.64.
[160] Coghlin and others (n 2) para 5.14.
[161] *The Kanchenjunga* (159); Girvin (n 13) 333.
[162] See (n 55).

situations in the provision and make the provision more complete and thoughtful.

(d) Within **Section 4.6 of Chapter 4**, it was recommended that the contents regarding the ending of the time charter service within the time charterparty, Clause 7 of the BALTIME form,[163] Clause 4 of the NYPE 46 form[164] and Clause 1 of the NYPE 93 form[165] and Clause 4 (d) of the GENTIME form,[166] should all include the following: (i) the legal effect of the early ending of the time charter service; (ii) the legal effect of the late ending of the time charter service under legitimate final voyage ordered by the time charterer; and (iii) the legal effect of an illegitimate final voyage ordered by the time charterer. This suggestion is also to keep the advantages regarding the definition and the legal effect of illegitimate ordering of the final voyage by the time charterer, which is provided in Clause 4 (d) of the GENTIME form,[167] while integrating the court's view[168] by modifying the contents within those clauses. This reform[169] would also make the contents regarding ending the time charter service

[163] Thomas (n 15) 286.
[164] Williams(n 15) 229.
[165] Brodie (n 15) 32.
[166] (n 36).
[167] ibid.
[168] *Torvald Klaverness v Arni Maritime (The Gregos)* [1995] 1 Lloyd's Rep 1 (HL); *Hyundai Merchant Marine v Gesuri Chartering (The Peonia)* [1991] 1 Lloyd's Rep 100 (Commercial Court and CA). *Timber Shipping Co. S.A v London and Overseas Freighters (The London Explorer)* [1971] 1 Lloyd's Rep 523 (HL).
[169] The suggested example is shown in Section 4.7 of Chapter 4.

within these clauses more complete and thoughtful as well as prevent future disputes.

In addition, the recommendation of distinguishing whether or not there exists an available charter market[170] contributes to clearly setting up a measured way of determining damages from the early or late ending of the time charter service under a legitimate and illegitimate final voyage within the time charterparty. More certainty and predictability[171] regarding the contractual parties' legal positions under the time charterparty might be brought about by this reform. Clear agreement could also assist the claimant in reducing the burden of proof and might make his/her loss easier to recover[172] if any argument occurs in the future.

(e) It has been suggested in **Section 5.4.3, Chapter 5**, to include the legal effect of "withdraw the time charter service" into the withdrawal provision to make the legal consequence predictable for the merchants. Therefore the wording 'The owner shall be entitled to withdraw the time charter service

[170] Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5th edn, Sweet & Maxwell 2013) 328-29.
[171] Ewan McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 362.
[172] See (n 165) in Section 4.6 of Chapter 4.

and to terminate the time charter' in the time charterparty[173] was proposed.

(C) Within **Section 6.9, Chapter 6**, it was found to be unclear why Clause 9 of the BALTIME form[174] and Clause 8 of the NYPE 46 form[175] fail to include "without prejudice to this Charterparty"[176] or "without prejudice to the terms and conditions of the Charter party"[177] or similar words.[178] It was noted that an omission of this important provision seems likely when these two clauses were drafted. For the purposes of eliminating a practical dispute which may arise from the shipowner's claim of indemnity where the bills of lading possibly expose the shipowner to a liability which is inconsistent within the terms of the time charterparty,[179] it was proposed that Clause 9 of the BALTIME form[180] and Clause 8 of the NYPE 46 form[181] could follow the model of Clause 30 (b) of the NYPE 93 form,[182] and Clause 17 (a) (i) of the GENTIME

[173] Such as Clause 6 of BALTIME form, Clause 5 of NYPE 46 form, Clause 11 (b) of NYPE 93 form, and Clause 8 (c) of the GENTIME.
[174] Thomas (n 15) 286.
[175] Williams (n 15) 229.
[176] For example, Clause 13 (a) of the SHELLTIME 4 Form provides "without prejudice to this charter". Thomas (n 15) 339.
[177] For instance, Clause 17 (a) (i) of the GENTIME form provides "without prejudice to the terms and conditions of the Charter party". (n 36).
[178] These words only confirm that the time charterparty should be kept unaffected by the signature of bills of lading in likely various terms. Coghlin and others (n 2) para 21.35; John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (2nd edn, JUTA & Co. Ltd 2009) 760; Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, *Bills of Lading: Law and Contracts* (LLP Professional Publishing 2000) para 21.5.
[179] Foxton (n 109).
[180] Thomas (n 15) 286.
[181] Williams (n 15) 229.
[182] It provides "without prejudice to this Charter party". Brodie (n 15) 40.

form,[183] by adding 'All bills of lading or other documents shall be without prejudice to the terms and conditions of this Charter under these clauses.' These reforms might assist in preventing the terms within the bills of lading under the time charter being altered under the time charterparty and ensure that the bills of lading are subject to the time charterparty[184] as well as keep the shipowner's and the time charterer's legal liabilities within the bills of lading the same as those under the time charterparty. It is therefore anticipated that this could also simplify the legal relationship between the shipowner, the time charterer and the bills of lading holders.

(D) It has been suggested in **Section 6.9, Chapter 6**, that in order to prevent issues arising from inaccurate records of the statements in the bills of lading or other documents, such as the number of packages or pieces, quantity, weight and apparent order and condition of the cargo,[185] that further details should be added within Clause 9 of the BALTIME form[186] to indicate that the Master shall sign bills of lading or other documents for cargo as presented in conformity with the mate's receipts. Adding these further details would also have the advantage of making the contents of Clause 9 of the BALTIME form[187] clearer and more complete. In addition,

[183] It provides "without prejudice to the terms and conditions of the Charter party". (n 36).
[184] Gaskell (n 109).
[185] *The Nogar Marin* [1988] 1 Lloyd's Rep 412 (CA) [417], [421]-[422] (Mustill, L.J.); Girvin (n 13) 669-70; Coghlin and others (n 2) para 21.45; Foxton (n 109) para 19.14; See also Charles G. C. H. Baker, 'The Safe Port/Berth Obligation and Employment and Indemnity Clauses' 1 (1988) LMCLQ 43.
[186] Thomas (n 15) 286.
[187] ibid.

this recommendation would make the contractual parties' important legal obligations more obvious and noticeable and make this clause more likely to be consistent with the clauses in other standard forms, such as Clause 8 of the NYPE 46 form,[188] Clause 30 (a) of the NYPE 93 form,[189] and Clause 17 (a) (i) of the GENTIME form.[190]

(E) Under **Section 6.9 of Chapter 6**, in order to prevent confusion for the bills of lading holder which may result in a possible argument, it has been proposed to ensure the contractual obligation of the shipowner and of the time charterer in the time charterparty and to provide that 'Any inconsistent context, which refers to who is carrier in the reverse side of the bills of lading or other documents, with the face of the bills of lading or other documents, should be precluded' within the time charterparty, such as in Clause 9 of the BALTIME form,[191] Clause 8 of the NYPE 46 form,[192] Clause 30 of the NYPE 93 form[193] and Clause 17 (a) (i) of the GENTIME form.[194]

(F) Integrating the court's view (common law) into the time charterparty[195] to ensure that the reforms are practically

[188] Williams (n 15) 229.
[189] Brodie (n 15) 40.
[190] (n 36).
[191] Thomas (n 15) 286.
[192] Williams (n 15) 229.
[193] Brodie (n 15) 40.
[194] (n 36).
[195] (n 1).

applicable, as follows:

> The reforms may benefit contractual parties allowing them to more easily justify their legal rights if the content of the time charterparty is also supported by the court. This may also help to avoid confusion and unnecessary disputes between the contractual parties and save court resources when the case appears before the court.

(a) Under **Section 3.4.5 in Chapter 3**, it was noted that in order to clarify what the real meaning of the time charterers' express undertaking to nominate a safe port is, it is recommended that a clause regarding the time charterers' safe port undertaking in the time charterparty[196] should adopt the court's view in *The Evia* (*No.2*)[197] as follows:

'The Charterers' safe port undertaking makes it necessary for this port to be prospectively safe at the time of nomination.'

(b) Within **Section 5.2.1 in Chapter 5**, it was suggested that Clause 6 of BALTIME form[198] and Clause 4 of the

[196] See (n 55).
[197] *Empress Cubana de Fletes v Kodors Shipping Corporation (The Evia (No.2))* [1982] 2 Lloyd's Rep 307.
[198] Thomas (n 15) 286.

NYPE 46 form[199] should follow either Lines 137 to 138 of Clause 10 of the NYPE 93 form[200] or Lines 181 to 182 of Clause 8(a) of the GENTIME form[201] and clearly provide the elapsed time as the governing time, to comply with the court's decision in *The Arctic Skou*.[202] This will help correctly compute the whole payment time for the time charter service under the time charterparty [203] and preclude a practical dispute regarding whether or not the local time or the elapsed time will be applied when computing the whole time regarding the payment for the time charter service.[204]

(c) It has been recommended in **Section 5.4.3, Chapter 5**, to apply the court's view in *The Antaios (No 2)* and to provide clear language "or any fundamental breach whatsoever of this Charter Party"[205] within Line 61 of Clause 5 of the NYPE 46 form.[206] This suggestion could also help the contractual parties clearly identify that the other reason for the withdrawal of the time

[199] Williams (n 15) 229.
[200] Coghlin and others (n 2) para 14.5; Brodie (n 15) 35.
[201] (n 36).
[202] *The Arctic Skou* [1985] 2 Lloyd's Rep 478.
[203]<https://www.bimco.org/Members/Chartering/BIMCO_Documents/Time_Charter_Parties/GENTIME/Explanatory_Notes_GENTIME.aspx> accessed 28 December 2012.
[204]<https://www.bimco.org/en/Chartering/Documents/Time_Charter_Parties/NYPE93/Explanatory_Notes_NYPE93.aspx> accessed 28 October 2012.
[205] *Antaios Compania Naviera S.A. v Salen Rederierna A.B (The Antaios (No 2)* [1984] 2 Lloyd's Rep 235 [238] (Lord Diplock); Davies and Dickey (n 9) 396.
[206] Williams (n 15) 229.

charter service by the shipowner needs to be restricted only for the time charterer's fundamental breach of the time charterparty[207] and could make Clause 5 of the NYPE 46 form[208] clearer and better thought out. The same proposal to use clear language applies in the amendment of Clause 6 of the BALTIME form[209] and Clause 8 (c) of the GENTIME form.[210]

(d) Under **Section 5.5.3 of Chapter 5**, it has been proposed to comply with the view in *The Apollo*[211] and to modify Lines 98 to 99 in Clause 15 of the NYPE 46 form,[212] adding "similar" into the original statements and making it 'or other "similar" cause preventing the full working of the vessel' in order to prevent disputes. This is because the absence of "similar" in the original statement makes the real meaning of the statement unclear[213] and this might cause an unnecessary problem of interpretation if a merchant is still willing to choose the NYPE 46 form[214] to be their time charterparty. This modification will ensure that the

[207] Line 150 of Cause 11 (a) of NYPE 93 form had reflected the view of House of Lords in *The Antaios (No 2)*; *The Antaios (No 2)* (n 205); Coghlin and others (n 2) para 16.126.
[208] Williams (n 15) 229.
[209] Thomas (n 15) 286.
[210] (n 36).
[211] *The Apollo* [1978] 1 Lloyd's Rep 200; Wilson (n 7) 97.
[212] Williams (n 15) 230.
[213] Thomas (n 15); The Line 225 of Clause 17 of the NTPE 93 form and Line 345 of Clause 21 of the SHELTIME 4 form had already showed "any other similar cause". Brodie (n 15) 38; Thomas (n 15) 340.
[214] Williams (n 15) 228-31.

precise ambit of accidents of off-payment for the time charter service clause is clearly presented by clear wordings within this clause and it is ideal for making the phrase comparatively precise. This recommendation also applies in the modification of Line 146 of Clause 11 (A) of the BALTIME form[215] where the original phrase would change from “or other accident”, to “or any other similar accident.”

(e) It has been recommended in **Section 7.4, Chapter 7**, that to directly adopt the construction of the House of Lords in *The TFL Prosperity*[216] within Clause 12 of the BALTIME form[217] to improve on its imperfect wording. The word “loss” is to be added in the second sentence of Clause 12 of the BALTIME form[218] in order to make the content complete and prevent unnecessary confusion. Separating the contents in this clause into Part (A), The Exemptions of the Owners’ Liability, and Part (B), The Charterers’ Liability, is also suggested. For the purposes of cataloguing different extents of the type of “loss or damage’’ construed by the court, dividing (A) into three sub-paragraphs, (i), (ii), and (iii), is suggested. Therefore, the suggestion is to clearly

[215] Thomas (n 15) 287.
[216] *Tor Line A.B. v Alltrans Group of Canada Ltd. (The TEL Prosperity)* [1984] 1 WLR 48 (HL).
[217] Thomas (n 15) 287.
[218] The designed provision is showed in Section 7.5 of Chapter 7.

add that ‘The type of “loss or damage’’ within the first two sentences here only refers to physical loss or damage’ after the second sentence of the aforementioned Part (A) (i). The statement ‘Aforementioned “loss or damage” covers physical as well as financial loss or damage’ should also be added to the end of Part (A) (ii). The indication ‘Aforementioned “loss or damage” covers physical as well as financial loss or damage’ is also proposed as an addition at the end of Part (B).[219] This reform might contribute to ensuring that the content in Clause 12 of the BALTIME form[220] does not contradict common law and it also might make the content of this clause clearer, more straightforward and consequently assist both contractual parties in accurately comprehending the differences in scope of the types of “loss or damage’’ in this clause.

(G) Directly adopting the explanatory notes from the GENTIME form into content under the clauses of the standard forms of the time charterparty through the following reforms:

Within **Section 5.2.1, Chapter 5**, aiming to comply with

[219] ibid.
[220] Thomas (n 15) 287.

common practice[221] of making the real context clearly stipulated in the time charterparty provision to avoid future disputes and to save busy merchants' time in making further checks, it has been proposed to directly adopt the explanation of the explanatory notes to Clause 8 (a) of the GENTIME form[222] and add the "original" in Line 181 of Clause 8 (a) of the GENTIME form.[223] The content should provide that, 'In the event that additional time charter service is payable in accordance with Clause 9 (d) of the GENTIME form[224] such time charter service shall be based on the rate applicable at the "original" time of ending the time charter service.' The same suggestion also applies to Clause 6 of the BALTIME form,[225] Clause 4 of the NYPE 46 form[226] and Clause 10 of the NYPE 93 form.[227]

(H) This reform also integrates practical trading usage into the clauses of the essential forms[228] in order to effectively connect international trade and further resolve the practical problem of the legal issues under the time charter:

[221] See (n 203).
[222] ibid.
[223] (n 36).
[224] ibid.
[225] Thomas (n 15) 286.
[226] Williams (n 15) 229.
[227] Brodie (n 15) 35.
[228] (n 1).

It has been proposed in **Section 6.9 of Chapter 6**, that reform is needed to avoid a future potential practical issue regarding identifying who the contractual carrier is with the bill of lading holder under the time charter,[229] to prevent the shipowner from incurring unnecessary trouble in practice,[230] and to echo and reflect the decision by the House of Lords on *The Starsin*[231] as well as to confirm the customs and practice applied in banks for international trade.[232] Therefore, it has been suggested to adopt the spirit of Article 20 (a) (i) of the UCP 600,[233] to clearly provide the name of the contractual carrier on the face of the bills of lading or other documents, clearly indicating the capacity of the signatory[234] and make the signature by the carrier, Master or Agent necessary to identify the carrier, Master or Agent[235] in the relevant clause in the time charterparty, such as Clause 9 of the BALTIME form,[236] Clause 8 of the NYPE 46 form,[237] Clause 30 of the NYPE 93 form,[238] and Clause 17 (a) (i) of the GENTIME form.[239] This reform could ensure that the way to solve the practical issue becomes readily applicable by being not only consistent with

[229] See the details of discussions in Section 6.7 in Chapter 6.
[230] Gaskell, Asariotis and Baatz (n 178) para 3.31.
[231] *Homburg Houtimport BV v Agrosin Private Ltd. (The Starsin)* [2003] 2 WLR 711; See the details of discussion in Section 6.7.2 in Chapter 6.
[232] This refers to *The Uniform Customs and Practice for Documentary Credits.*
[233] <http://finotax.com/faq/ucpdc.htm>accessed 5 July 2013.
[234] Charles Debattista, 'Cargo Claims and Bills of Lading' in Baatz (n 58).
[235] The designed sample can be seen in Section 6.10 of Chapter 6.
[236] Thomas (n 15) 286.
[237] Williams (n 15) 229.
[238] Brodie (n 15) 40.
[239] See (n 36).

the court's view[240] but also complying with banking practice.[241] In addition, it might benefit the business of the shipowners by reducing any possible disruption through the course of action brought to them by the bill of lading holder[242] and might also release the shipowner from consequently suffering the time consuming, possible costly[243] and harmful impact on their business reputation. In addition, it is believed that this reform might supply a more considerate approach because a reform imposing these clear contractual obligations in the provision would make the shipowner and the time charterer notice its essential obligations and therefore be formally reminded[244] to then accurately perform these obligations; otherwise they would probably bear the risk of a breach of contract.[245] The clear agreement provided in the time charterparty might achieve consistency as to the indications of the contractual carrier in the bills of lading, or other documents under the time charter, with those in the time charterparty and therefore solidify the indication in the bills of lading or other documents without prejudice to the time charterparty.[246] This might also help to guide the shipowner or the time charterer in how to edit a proper bill of lading or other documents to help avoid disputes if they want to produce their own bill of lading for

[240] *The Starsin* (n 231).
[241] Article 20 (a) (i) of the UCP 600.
[242] Gaskell, Asariotis and Baatz (n 178) para 3.31.
[243] Hill (n 2) 253.
[244] Gaskell, Asariotis and Baatz (n 178) para 3.34.
[245] Coghlin and others (n 2) para 21.61.
[246] Coghlin and others (n 2) para 21.35; Gaskell, Asariotis and Baatz (n 178) para 21.5.

business. Also the bona fide bills of lading holder who is endorsed and has transferred the bills might likely be sufficiently better protected.[247] This is because if there is any problem regarding goods which are carried under the time chartered vessel, he/she could easily, quickly[248] and effectively identify the correct contractual carrier from the bills of lading or other documents and could then correctly sue the that carrier within the limited time bar of one year, under Article III, Rule 6 of the Hague/Visby Rules.[249] Then this might also indirectly enhance the prosperity of commercial shipping activities and international trade. Moreover, these clear provisions within the time charterparty will ensure the contractual parties have no space to make excuses or argue different statements to each other. This will also enable the bill of lading holder,[250] the shipowner and the time charterer to more easily raise the time charterparty as evidence to support their claim or defence and therefore reduce the stress of establishing who is the bill of lading carrier under the time charter, when a dispute has arisen. This clear evidence might also further facilitate saving public resources through reducing court time for investigating the evidence and also saving the

[247] Wilson (n 7) 246; Gaskell, Asariotis and Baatz (n 178) para 3.31; Davies and Dickey (n 9) 266; David Foxton, 'Bills of Lading for Goods on a Chartered Ship' in Bernard Eder and others (eds), *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet and Maxwell Limited 2011) para 6-036; Simone Schnitzer, *Understanding international Trade Law* (Law Matters Publishing 2006) 14.
[248] *The Starsin* (n 231); Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (Informa 2006) para 7.69.
[249] (n 132)-(n 133).
[250] William Tetley, 'Identity of the Carrier—The Hague Rules, Visby Rules, UNCITRAL' (1977) 4 LMCLQ 519.

costs of further hearing the case. Furthermore, the reform might be ideal since it imposes the contractual obligations into the aforementioned provisions to logically and consistently connect to the provision of indemnity under the time charterparty.

(6) By way of reform, to manage and organise the presentation style of the standard forms[251] and to make these forms more functional for reminding contractual parties clearly, easily, and quickly of their own legal obligations and rights.

(A) It has been suggested in **Section 2.4.1, Chapter 2**, that the essential standard forms should be presented in a more organised manner, by adding Part 1 Box Layout[252] to the NYPE 46[253] and the NYPE 93 forms.[254] It was also recommended in **Section 2.6.4 of Chapter 2** that to attach an index to the BALTIME form,[255] the NYPE 46[256] and NYPE 93 forms,[257] as found in the GENTIME form.[258] This is because Part 1 Box Layout and an index can allow the contractual parties to clearly and quickly identify their legal rights and obligations.

[251] (n 1).
[252] NYPE 46 form and NYPE 93 form are lack of Part 1 Box Layout.
[253] Williams(n 15) 228-31.
[254] Brodie (n 15) 32-46.
[255] Thomas (n 15) 286-89.
[256] Williams(n 15) 228-31.
[257] Brodie (n 14) 32-46.
[258] (n 36).

(B) Under **Section 2.6.4, Chapter 2**, for the purposes of more easily and efficiently presenting information in the clauses of the time charterparty, adding an underlined heading at the front of each section has been suggested, as shown on the GENTIME form[259] when the BALTIME form,[260] the NYPE 46[261] and the NYPE 93 forms[262] are chosen and modified by the contractual parties.

(C) Within **Section 2.6.4 in Chapter 2**, the recommendation was to add a Box to highlight the maximum period for repair of the vessel in the time charterparty in Part 1 Box Layout of the essential forms[263] in order to ensure that both parties are effectively reminded of the period by way of the emphasised key words in the Box Layout.

(D) It has been suggested in **Section 3.4.5 of Chapter 3** that a Box Layout be added to emphasise “trading limits”, “excluded ports” and “excluded countries” in the essential forms.[264] A clearer divide has also been proposed “at the time of beginning of the time charter service”, “at the time of ending of the time charter service” and “during the time charter” within “excluded ports” and “excluded countries” for guiding the contractual parties with discretion and

[259] ibid.
[260] Thomas (n 15) 286-89.
[261] Williams(n 15) 228-31.
[262] Brodie (n 15) 32-46.
[263] (n 1).
[264] ibid.

flexible choice for negotiating these and to fill these in in order to deal with different situations.

(E) Within **Section 4.3.2 in Chapter 4**, it has been suggested that this is divided into “margin on the early ending of the time charter service” and “margin on the late ending of the time charter service” in Box 6 (a) in Part 1 Box Layout of the GENTIME form[265] to make it clearer. Adding another box of minimum and maximum was also proposed for the duration of the time charter in Box Layout of the GENTIME form[266] in order for the contractual parties to be free to have an alternate choice. It is worth mentioning that these recommendations not only help contractual parties to effectively pay attention to the negotiated margin and remind the time charterer to comply with it but provide further benefits by allocating commercial certainty for the duration of the time charter. These suggestions could also guide a direction for adding the Box Layout regarding the duration of the time charter on the BALTIME form,[267] and the NYPE 46[268] and NYPE 93 forms[269] in order to improve their defects when any of these forms are chosen and modified by the merchants.

(F) Under **Section 5.3.1 of Chapter 5**, it was recommended that the

[265] (n 36).
[266] ibid.
[267] Thomas (n 15) 286.
[268] Williams(n 15) 229.
[269] Brodie (n 15) 32.

relevant information be connected together to allow for different circumstances under which the time charterer can deduct from the payment for the time charter service under the essential forms[270] to appear in one Box in the Box Layout which is titled “deduction” and is then divided into several sub-columns. The various clause numbers of provisions regarding deducting from the payment for the time charter service would then be separately presented in the sub-columns under the Box for the contractual parties negotiating to select finally what they want to keep in the time charterparty. In addition, the column of “the other circumstances” under the Box is available for newly added clause numbers or newly added sub clause numbers in the time charterparty. This reform could not only quickly help the contractual parties to clearly notice the time charterer’s different rights for deduction from the payment of the time charter service which occur in individual provisions under the time charterparty but also efficiently save the merchants’ time.

(G) It has been proposed in **Section 5.4.3, Chapter 5**, that an extra Box in the Part 1 Box Layout of these standard forms[271] be added for contractual parties to fill in the specific hours of notice of the time charter’s default[272] in order to highlight the period within which it is necessary for the shipowner to give the time charterer a written notice of the number of clear banking days for rectifying the

[270] (n 1).
[271] ibid.
[272] ‘A telexed notice of withdrawal sent before the time the payment has truly expired is improper’. *The Afovos* (n 76); *Shipping Law* (n 76) 144.

failure of payment for the time charter service. This might be ideal for effectively reminding both contractual parties of this necessity.

(H) Under **Section 5.4.3 of Chapter 5**, it has been suggested that "Grace Period" as addressed in the Part 1 Box Layout of the GNETIME form[273] should be also added to the Part 1 Box Layout proposed for the other essential forms, such as the BALTIME form,[274] the NYPE 46[275] and NYPE 93 forms.[276] This might help the contractual parties more easily identify how long the agreed grace period is through operating the function of the Box Layout.

(7) Integrating and applying dynamic knowledge, risk management,[277] psychology, and the economical point of view to apply a fresh way of thinking into the legal field in order to evaluate possible issues from different angles to then further reform the clauses in the time charterparty[278] to solve problems:

(A) It is worth noting here that this thesis has not only followed the knowledge of managing legal risk,[279] it has applied the knowledge

[273] (n 36).
[274] Thomas (n 15) 286-89.
[275] Williams (n 15) 228-31.
[276] Brodie (n 15) 32-46.
[277] Thoughtful draft of contents of contract can manage the legal risk. See Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Informa Law 2009) 1018, 1026, 1028; Michel Crouhy, Dan Galai and Robert Mark, *The Essentials of Risk Management* (McGraw-Hill 2006) 1-2, 9, 31.
[278] (n 1).
[279] See (143).

of managing legal risk to transforming the important clauses of the standard forms[280] by way of raising constructive suggestions to reform the draft of provision under the essential forms.[281] This is exemplified in **(5)** (B) (a).

(B) Concerning the issue of applying psychological knowledge to better organise and manage the legal contexts through reform:

(a) **Section 5.3.1 of Chapter 5** applied the knowledge of psychology into the reform. For the purposes of helping contractual parties—normally lay parties—to simplify the burden of reading a complex time charterparty and quickly capture information as well as clearly providing a whole picture of the time charterer's different rights for deducting from the payment of the time charter service under the time charterparty, it has been recommended to clearly manage separate contexts under the same concept of the time charterer's rights for deducting from the payment of the time charter service under the time charterparty in the relevant provisions. Combining them together is demonstrated in the same clause within the time charterparty.[282] This will aid the contractual parties to more easily comprehend their legal

[280] (n 1).
[281] ibid.
[282] Such as Clause 5 and Clause 15 of the NYPE 46 form, Clause 11(d) and Clause 17 of the NYPE 93 form, and Clause 8 (d) and 13 (e) of the GENTIME form.

rights and obligations.[283] To avoid any possible dispute in advance, it was also recommended that the charterparty clearly and explicitly provide the consequences of their negotiation regarding “the other specific circumstances”, which also allow the time charterer to deduct the expenses or costs incurred under these circumstances from their payment for the time charter service within an extra sub-clause of the payment for the time charter service. Therefore, the proposal raised aims to organise and manage the relevant provisions and “the other specific circumstances” together regarding the permitted deduction of payment of the time charter service. These are to be presented in this extra sub-clause of the payment for the time charter service[284] under the time charterparty when they are amended in the future.

(b) Under **Section 5.4.3 of Chapter 5**, in order to improve the imperfection of Clause 8 (c) of the GENTIME form,[285] the recommendation was to add three underlined sub-headings[286] for clearly separating the different sub-paragraphs. Organising contractual paragraphs to be clearly presented might not only contribute to making the forms easier to read, follow and understand in terms of the content of the clause regarding a

[283] See footnote 173 in Section 5.3.1 of Chapter 5.
[284] The designed sample of this provision is demonstrated in Section 5.3.1 of Chapter 5.
[285] (n 36).
[286] (1) Withdrawal of the Time Charter Service; (2) Grace Period; (3) Suspend the Performance of The Owners’ Obligation.

withdrawal of the time charter service and suspension of the time charter service under the standard forms of the time charterparty[287] but also allow better management of their legal risk.[288]

(c) **Section 6.10 of Chapter 6** urged that in order to enable the merchants to more easily receive and digest the information provided, in those cases where the contents of the provision under the time charterparty are too long, such as Clause 9 of the BALTIME form,[289] the longer contents might better be divided into several suitable sub-clauses with underlined sub-headings.[290]

(C) A consideration of the economical point of view is presented in **(2)**(B), **(5)**(F), **(5)**(H). Reforming the important clauses of the standard forms of time charterparty[291] achieves effectiveness and efficiency in relation to economic value through time savings, a management of expenses in commercial dealings and an avoidance of having to make unnecessary efforts to recover business reputation, as well as saving public resources.

[287] (n 1).
[288] See (n 144).
[289] Thomas (n 15) 286.
[290] The example can be seen in Section 6.10 of Chapter 6.
[291] (n 1).

(8) The impact of the above reforms is that it improves on the important clauses of the time charterparty.[292] In addition, the reforms could bring the benefit of realistically reducing any impracticalitiesand in solving any practical problems.[293] They would therefore provide additional protection to contractual parties[294]and also possibly indirectly boost commercial activity in the time charter as well as prompting the development of international trade.

To sum up, reforming the important clauses of the essential standard forms of the time charterparty[295] can creatively transform these clauses to become clearer, simpler, more accurate, organised, and creative, and can indeed effectively and efficiently solve important legal issues under the time charterparty and eliminate any possible practical dispute. The recommendations could also contribute toward guiding the modification of the crucial clauses of the essential forms[296] when these forms are updated in the future. Moreover, before these forms are actually amended, contractual parties could also be guided by the reforms to negotiate and adopt the suggestions in the thesis to modify these important clauses of the essential forms[297] themselves when they establish the contract, if these forms are chosen as their time charterparty. Thus, the reforms might possibly better enable the essential forms[298] to effectively exercise their guiding function and allow the contractual parties to better conclude their rights and obligations in

[292] (n 1).
[293] It can be found, for instance, in (5) (H).
[294] For example, see (5) (H).
[295] (n 1).
[296] ibid.
[297] ibid.
[298] ibid.

the time charterparty. The reforms might likewise contribute to supplying some constructive ways, basis and directions for flexibly solving the problems in the rest of the clauses and reforming the clauses within these essential forms[299] or direct reform in other standard forms of charterparty.

Due to the limitations of research time and the word count of this thesis, it has only been possible to focus on the important legal issues within the significant clauses in the essential forms[300] which shape the core characteristics of the time charter[301] and then consider associated reforms. Future researchers who are interested in the field could base work around the principles and spirit of reforming the clauses under the essential forms[302] which have been provided in this thesis to examine the rest of the clauses in these essential forms[303] and other standard forms of charterparty. Moreover, it is worth mentioning that when the NYPE 2014 form[304] further evolves into its final and certain stages and there are enough authorities, future researchers interested in the new development of issues in the NYPE 2014 form[305] can also continue to explore this area in more depth.

[299] ibid.
[300] ibid.
[301] ibid.
[302] ibid.
[303] ibid.
[304]<https://www.bimco.org/~/media/News/2014/NYPE_93_v_NYPE_2014_comparison.ashx?RenderSearch=true> accessed 10 September 2014.
[305] ibid.

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