Maritime Policy, Vol. 1, Issue 4, Winter 2021, pp. 43-85
ISSN: 2717-4255
Published Advance Access, December 26, 2021

The Voyage Charter Party Considerations According to International Maritime Law

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Abstract

The attempts will be made to compare and analyze the provisions and clauses of the different charter parties, demonstrate and disclose some of the disputable problems in the standpoint of views of the parties connected to the charter party, which have been existed and encountered during the performance and operation of the contract of affreightment, inter alia, the voyage charter party forms, the incorporated provisions and rider clauses. In this part of the research topic, the utmost attempt has been made to go to the root of the encountered difficulties and disputes. There has been thought of a need for reconsideration and reconciliation of the interpretation of the clauses which appeared to be assumed to lack of global uniformity. The parties to the charter party are the ship-owner and the charterer to whom, inter alia, the obligations, rights, liabilities, and risks are allocated, whereas, the review of the important aspects of the voyage charter party will be considered in due course in details. This piece of work is going to be based on shipping practices and experience of my own sea service and handling of maritime arbitration cases and consultancy for the disputed and claimed cases.

Key Words: Voyage charter party, the obligation of the parties, International Maritime Law

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Introduction

As a brief and simple interpretation, a charter party is a legal and written agreement between the owner or disponent owner of a vessel, who agrees to place a full or part of his vessel at the disposal of the charterer for the carriage of the cargo.

There are three main types of charter parties, voyage charter parties, time charter parties, and bareboat or demise charter parties, out of which, the voyage charter parties are the main subject of this research. A voyage charter party is a contract or agreement for the carriage of some cargo on a specific ship for a single voyage from one port to another. The charterer pays the freight money to the ship-owner for the use of the vessel concerning the quantity of cargo to be carried. Currently, there are many standard voyage charter party forms in use. These standard forms cover a wide range of cargoes, which may require particular terms with consideration of characteristics of special trades and commodities in accordance with the requirements by the contracting parties.

The general concept of the voyage charter party contract is going to be reviewed and highlighted problematic and disputable matters and provide reasonable solution and remedy, in particular, incorporated expressed and implied clauses and provisions, international conventions for the unification of certain rules, the approach of the innocent party against the party, who has breached the terms and conditions of the charter party contract, the ship-owner's and charterer's undertakings of their obligations, expected or estimated ready/ arrival and delay of the vessel to load port (on the other words, the lay days and the canceling date, which is often called "LAYCAN"), the voyage proceeding to load port, as the approach voyage, the nomination of the ports and the safety concern of the nominated ports, temporary obstacles, dangers and abnormal occurrences of the ports and berths.

This article is intended to describe the merits, nature, some important issues which may be considered to avoid or mitigate the anticipated disputes between the parties of a voyage charter party in which the general principle is involved in greater details. Whereas, the nature, description, and overview of a voyage charter party take place for consideration.

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paid to the ship-owner for the use of his ship in relation to the quantity of cargo carried. There are currently many standard voyage charter party forms in use. These standard forms cover a wide range of cargoes, which may require particular terms with consideration of characteristics of special trades and commodities in accordance with the requirements by the contracting parties.

1.The Theory and Practical Meaning of charter party agreement:

The general concept of the charter party agreement appears to be all about business and trade. Like any other kind of business, there may at least be two parties involved, one may provide a service or product, and the other pay the price.

As regards the carriage of cargo on board of the ships, these two parties are ship owner, who has the ship and provide space on the ship for carrying cargo and shipper and/ or charterer, (1) who has the cargo and requires a ship for carriage.

Notwithstanding with the fact that the ship owner is basically making an agreement with the charterer, does not mean that the ship owner has no relation with the shipper. The shipper and ship owner are linked with each other by the "Carriage of Goods by Sea Act" (COGSA)(2).

The charter party agreement is a formal agreement and in the meantime the supplement to the contract of carriage (bill of lading), which is governed by various laws and conventions such as Hague Rules (International Convention for the Unification of Certain Rules of Law relating to the Bill of Lading (Brussels 1924) or Hague-Visby Rules International Convention for the Unification of Certain Rules of Law relating to the Bill of Lading (Hague-Visby Rules 1968). Usually, you may find some written wordings concerning the insertion of charter party agreement in the bill of lading.

It would be noteworthy to mention that each time the ship owners and the charterers exercise to negotiate the format of the charter party agreement to make the business, they should require a lot of time. What they normally and practically do, is to use prepared and ready forms, which are used in the shipping business and developed by Independent International Stakeholders such as BIMCO (Baltic and International Maritime Council) and INTERTANKO (International Association of Independent Tanker

Owners). There are other forms, which can also be used in Tanker Trades SHELLVOY 6, (Tanker Voyage charter party Form 2005 , BIMCO printed Form) and Coal Dry Cargo Chartering, AMWELSH 93 (Americanized Welsh Coal Charter party Form, BIMCO printed Form).

Needless to highlight that if the charterer and the ship owner made the business before, they might also use the same charter party agreement for the future shipment and would, in this regard incorporate wordings. Given this fact, in the bill of lading, such charter party may be referred and written by date (3).

2.The Clauses of the voyage charter party:

The charter party appears to be a document containing written terms, clauses, and stipulations, which is negotiated, agreed, and concluded between a ship-owner and a charterer, wherein, the obligations, rights, and liabilities are defined for these two parties. The charter party is usually based on a particular edition of a recognized standard form and is sometimes referred to a specified charter party already performed by other vessels at an earlier date, in order to save effort and time in negotiating the terms and conditions.

Normally, the charter party comprises a set of useful and required standard terms and clauses on a printed form and if the content of the form does not fully cover all aspect and requirements of the parties, they may in accordance with the nature of their trade append some additional typed rider clauses. It would be worth mentioning that where there is a conflict between the printed standard and typed rider terms, the rider clauses override the standard clauses. The parties to the charter party are free to agree to make amendments to the standard clauses with having taken into consideration that the more amendments are made, the more scope for legal disputes, and therefore, it is preferable to have as a few amendments as possible.

A contract for the chartering of a ship is normally embodied in a printed form of the charter party, agreed by the parties or their agents. Under English law, however, there is no requirement that a contract for the services of a ship on a voyage should be made or recorded in any particular manner. So long as the parties have reached a complete agreement, a charter party signed by or on behalf of the parties is unnecessary (Julian Cooke and others, 1993).

3.Categorization of terms and remedy when breached by a party:

While performing the terms and conditions of the governing charter party, whenever a term is breached by one party, the other innocent party is entitled to claim either damage or to treat the breach as a repudiation of the charter contract and bring it to an end. Based upon the importance of the terms, we may divide them into three categories, namely:

(1) Conditions (Promissory Condition): a condition of the charter party contract is a promise or undertaking by one party which is of central importance to the contract, any breach of which will entitle the innocent party to terminate the contract, even if the breach is minor in degree or in effect.

(2) Warranty: a warrant is a term of the charter party contract of minor importance, a breach of which does not give right to the innocent party to terminate the contract.

(3) Intermediate-term: when an intermediate term is breached, whether the innocent party has a right to terminate, subject to the nature and effect of the breach. Whenever, the breach is very serious, and it goes to the root of the contract, thereon, the innocent party has got a right to terminate (The Hansa Nord, 1975, 2 Lloyd's Rep. 445).

4.Now the question is, how do these varieties of terms work when a term of the charter party contract is breached by a party?

On the one hand, it is simply justifiable that the right to terminate the contract by the innocent party will be waived and lost if he declares and affirms the existence by accepting and continuing to perform the contract, provided that he is aware and has knowledge of the breach by his own conducts.

On the other hand, when one party commits to a breach of condition or an intermediate-term (a sufficiently serious breach) the innocent party usually has an option either to accept the breach as terminating the contract or waive to bring the contract to an end.

In the Simona (1989 A. C. 788) case, where the charterer, before the arrival of the vessel at the loading port, announced that they would refuse to load the vessel. In due course, the owners did not accept this anticipatory breach as a repudiation, but, later on, failed to present the vessel at the loading

port by the cancelling date. Therefore, it was held that no damages were recoverable and owners could not argue that the charterers' renunciation relieved them of the necessity to meet the cancelling date. In this case, the charterers' breach was anticipatory only and though had not been accepted and a claim for damages did not arise.

As Megaw L. J. said, (The Mihalis Angelos, 1971 1 Q. B. 164, 209);

"In my view, where there is an anticipatory breach of contract, the breach is the repudiation once it has been accepted, and the other party is entitled to recover by way of damages the true value of the contractual rights which he has thereby lost, subject to his duty to mitigate…"

5.Ship-owner's and charterer's obligations:

As described above, under a voyage charter party, on the one hand, the ship provides a carrying or transportation service for a specific cargo between a loading port and a discharging port with the agreed terms which specify a rate per carrying a ton. In other words, the ship-owner undertakes to carry a specific quantity of a particular commodity between two named ports at a fixed freight rate per ton (or other units of cargo measurement, like cubic meter, CBM), and further capital, operating and voyage costs are for the ship-owner's account. On the other hand, the charterer charters whole or part of the carrying capacity of a vessel for the carriage of his cargo by sea**.** The charterer is obliged to provide the agreed cargo alongside the ship and in the case of "FIOST terms"[1] are agreed in the charter party, pay extra for cargo handling expenses. The charterer is also obliged to pay the stipulated amount of freight.

However, for the sake of better understanding of the practical use of the terms, clause 5 of the GENCON charter consists of two alternative clauses, namely (a) **"**Gross Terms" under which the ship-owner receives and delivers the goods alongside and is thus responsible for most of the loading and discharging operation as well as for stowage, or (b) "F.I.O. and free Stowed/Trimmed" (F.I.O.S.T.) under which the entire operation of loading, stowing, and discharging the cargo is undertaken by the charterer. Which of these alternatives is applicable will depend upon the manner in which box 15 is completed (Julian Cooke and others, 1993).

a.Ship-owner's obligations:

The basic obligation of the ship-owner in the voyage charter party is to provide, negotiate and conclude the charter contract with a proper description of the vessel and accordingly tender the vessel with the same details. If the ship-owner innocently makes a misrepresentation of the vessel's descriptions to induce the charterer to sign the charter contract, the charterer may only sue the ship-owner for the damages, but, not being able to cancel the contract. If the owner fraudulently makes a misrepresentation about the vessel's descriptions, the charterer may repudiate the contract and claim for damages.

However, in brief, the ship-owner must undertake certain obligation before and during the performance of the voyage charter party, including but not limited to the followings:

- To provide an accurate description of the ship.
- To provide a ship that is seaworthy and cargo-worthy.
- Perform and incur the costs of the ballast voyage.
- Make the ship available at the port of loading.
- Perform the carrying voyage with reasonable dispatch.
- Not to deviate unless for the purpose of saving life or property at sea.
- Arrive at the port of discharge and have the ship ready for discharging operations.
- Deliver the cargo to the entitled and proper owner.

It would be worth stating that the breach of any of these obligations does not give the charterer the right to rescind the charter party, but allow him to sue for damages unless such breach is of a fundamental and frustrating character.

It is the responsibility of the ship-owner to make the ship available at the agreed ports/ berths. If the ship does not arrive within the stipulated time frame, then the charterer has an absolute right to cancel the charter party. The ship must load or discharge in accordance with the terms and conditions agreed.

When the voyage begins, the implied undertaking of the ship-owner is that the vessel shall be seaworthy for that particular voyage and cargo-worthy for the cargo to be carried. Indeed, the undertaking of the ship-owner contains (a) the vessel must be seaworthy at the time of sailing and (b) the

vessel must be fit to receive the particular cargo at the time of loading (Plomaritou, Evi,2014,p. 4).

If the defect of the cargo occurs after the shipment, there will be no breach of undertaking. And if the damage to the goods has been caused by the vessel's unseaworthiness or un-cargo-worthiness, the carrier would be liable for the said damage.

If the charterer discovers that the ship is unseaworthy before the voyage begins, and the defect cannot be remedied within a reasonable time, he may repudiate the contract. After the voyage has begun, the charterer is no longer in a position to rescind the contract, but he can claim damages for any loss caused by initial unseaworthiness.

Where the ship is seaworthy when she sails but becomes unseaworthy while at sea, the incidence of liability will be determined by reference to the cause of the loss. If the loss was due to an excepted peril, the ship-owner will be protected.

In the absence of an express agreement between charterer and ship owner, the provisions of customary law are effective, according to which the ship owner has a number of implied contractual obligations: to provide a seaworthy vessel, to fulfill contractual obligations with reasonable dispatch, to nominate a safe port, not to carry dangerous goods, and not to deviate from the agreed route. In respect of customary law these obligations are absolute and a breach of contract relieves both parties from any future obligation. However, such effect may be lessened by applying the Hague-Visby Rules or the exemption clauses or liberty clauses, if applicable (Oana Adascalitei and Procedia2013,p. 92,).

5.1.1Particular and Description of the Chartered Vessel:

All standard voyage charter party forms will normally have introductory clauses, which identify the contracting parties to the contract, the vessel, and the agreed voyage. In general, the question is whether the details of the vessel's description stipulated in the charter party are representations by the owner, or whether they are assumed as contractual promises. The distinction is important because it will affect the remedy of the charterer in the event of a failure to comply. The description of the vessel in the charter party is usually considered as terms of the contract that if the vessel fails to comply, the charterer will be entitled to damages for the breach of

the contract, and terminate the contract if the term is a condition and/ or goes to the root of the contract.

The vessel's description contains many items, each of which may be of importance for discussion, but, inter alia, an attempt is made to highlight more important items herewith.

One of the vessel's descriptions is its cargo capacity,(5) which seems to be serious concern of the charterer and a deficiency in the performance of the vessel appears to be at the risk and responsibility of the ship-owner.

For the sake of clarification as regards the cargo capacity of the vessel, there is a need for the explanation of Stowage Factor (SF) of the cargo owing to have been of crucial importance in the ship chartering.

In order for the ship-owner to gain a reasonable income, a higher freight rate per ton is to be negotiated for a lighter cargo(6) than for heavy cargo(7).

With having mentioned deadweight and bale capacity of the vessel in the charter contract, they are considered as intermediate terms of the charter. With regard to bale capacity, as in cargo ship case, El-Yam v. Invotra (1958), Devlin J. held that a misrepresentation of the vessel's bale capacity would only entitle the charterer to rescind if it was sufficient to make a fundamental difference between the vessel tendered and that which he had contracted to take.

In consideration of deadweight capacity, the charterer would be entitled to reject the ship if the difference between the stated and the actual deadweight was unreasonably great or such as to be of material importance to contract (Barker v. Windle, 1856, 6 E. & B. 675).

As in the GENCON charter form, the stipulation of the vessel's deadweight and bale capacity only relates to cargo and does not include bunkers, water, or stores. But, on the other hand, where the charter contract does not expressly show that either the allowance for the bunkers, water, and stores are made or not, it has been held that an allowance should be made.

It would be worth mentioning that in the Gencon charter form, the vessel's deadweight carrying capacity is accompanied by the word "about". It is indeed the margin of error if the ship does not exactly comply with the stated capacity, is assumed and protected within the margin of error

permitted by the word "about". There have been cases wherein, deadweight capacity with the "about" has been held to permit a margin of 0-5 percent. It would be needless to mention that in the absence of any words, such as "about" the ship must exactly comply with the description, subject only to the tolerance allowed by the "De Minimis rule" (Per Pearson L. J. in Margaronis v. Peabody, 1965, 2 G.B. 430, 447).(8)

5.1.2.Location/ Position of the vessel at date of charter:

In the past, it has always been held that the statements of the vessel's position in the charter party at the date of the charter found to be a condition of the contract. Although, the same conclusion has been reached with the statements that the vessel has already departed from the stated place on a specified date. Therefore, any misstatement of the above-mentioned items in the charter party has been held to allow the charterer to claim damages, and as well, he can terminate the contract if he so wishes.

As in an old case, "a charter party described the ship as being "now at Amsterdam". But at the date of the charter, she was in fact off the Dutch coast, delayed by strong winds entering the port, then she did not arrive at Amsterdam until four days later." Given this fact, it was held that the statement was a condition and the charterers were entitled to refuse to load the vessel (Behn v. Burness, 1863, 3 B. & S. 751).

The judgment of this case appears to be very old and refers back to many years ago. The question may arise whether the decisions can still be regarded as good law. The House of Lords has reaffirmed the view that terms in relation to time in a commercial contract are usually regarded as of the essence (Bunge v. Tradax, 1981, 1 W.L.R. 711).

Indeed, the statements of the vessel's position appear to be a contractual provision for the purpose of the vessel's readiness to load. Hence, from standpoint of a practical view, it may only be sufficient for the charter contract to stipulate a term concerning the estimated time of arrival and/or expected readiness to load the vessel. Therefore, the reasoning of the judgment in the case of Behn v. Burness has little or no application to be considered a condition, and perhaps, instead, the stipulation would be an intermediate-term.

5.1.3Expected ready to load and late arrival at the load port:

When the voyage charter is under negotiation, the precise determination and prediction of the vessel's arrival at the intended load port may turn up to become very difficult, particularly when she is under earlier contractual commitments. Therefore, it would be convenient for the ship-owners to guarantee that the ship would arrive at the intended load port during the specified date. When it comes to the knowledge of the owners that the ship cannot arrive at the load port as anticipated, the charterer will as soon as possible be informed and accordingly make alternative arrangements.

In view of the above, the term in the charter party found in the general description of the ship. It can be very significant information for the charterer enabling him in advance to plan and prepare for loading any cargo. Therefore, it can affect the "LAYCAN" 9)details. If the ship has been described as being ready to load, that is an undertaking on the part of the ship-owner or a condition in the charter party, the breach of which usually allows the aggrieved or innocent party to repudiate the contract and claim for damages too (The Mihalis Angelos, 1971, 1 Q. B. 164 and The Baleares, 1993, 1 Lloyd's Rep). Nevertheless, the remedies for the charterer might not be straight forward, owing to the Expected Readiness to Load (ERL) date is presented by the word "about", which is necessary for the charterer to show that the vessel has exceeded that tolerance which is covered by the "about".

Further, it would be noteworthy to say that in order to some extent to overcome and resolve the grey area of the readiness to load date during negotiation is to include in the charter of "expected readiness to load" date provisions, and other clauses requiring the ship to proceed to the load port with "due diligence" or "due despatch".

In charter contracts, we have sometimes come across the use of the provision of "estimated time of arrival" instead of the provision of "estimated date of readiness to load". Though these two provisions may refer to different stages as regards the ship's stay at load port, but, still they have similar legal principles applicable to both clauses in respect of the consequential breach.

5.1.4Moving towards loading port:

When the vessel completes her previous obligation, therefrom she starts to move towards the load port, which is considered the commencement of the

voyage and giving her chartered service to the charterer. This voyage is referred to and called the approach voyage.

The reference may be made to "Gencon" charter form (as revised 1922, 1976, and 1994), whereas, in clause 1, lines 7-9, in a printed format, it is stated that *". . . The said vessel shall, as soon as her prior commitments have been completed, proceed to the loading port(s) or Place(s) stated in Box 10 or so near thereto as she may safely get and lie always afloat, . . ."*

On the one hand, it is obvious that if the phrase as such "expected ready to load" or fixed date is not expressly stated in the charter, the implied obligation of the owner is to order his ship's master to proceed to load port with "reasonable dispatch". On the other hand, even though an "expected ready to load" date and an expressed obligation to proceed to the loading port are stipulated in the charter party, it is likewise an implied term for the owner's vessel to commence the approach voyage at such time that the vessel can reach the loading port by the expected ready to load date. In order to describe what has been said, the following case may be referred to:

On 2 August 1933, the owners chartered the Wythburn, described as "expected to be ready to load about September 11", to proceed with all convenient speed to Hamburg and there to load a cargo for delivery at Kilrush. The charter contained an exception of perils of the seas and of hindrances beyond the owners' control. On 31 August, the owners entered into an intermediate charter for a voyage from Porthoustock to Felixstowe, which, had it been performed without any delay, would have enabled the vessel to arrive at Hamburg on 14 September. The ship was delayed in entering the Porthoustock as a result of unusual adverse winds and did not arrive at Hamburg until 17 September. And accordingly, the charterers claimed damages for the delay.

The Court of Appeal held that the owners were liable. Although arrival by 14 September would have fallen within the meaning of "about September 11", and the making of the charter dated 31 August did not of itself involve any breach, it was the obligation of the owners to proceed to Hamburg at the time when it was reasonably certain that she could arrive by 14 September, and they had failed to do so. The exceptions had no application to difficulties that arose on the intermediate engagements and before the

chartered service commenced (Monroe Bros. v. Ryan, 1935, 2 K. B. 28. And The Baleares, 1993, 1 Lloyd's Rep. 215).

Further to the comments resting in the statement above, the delay in proceeding to the loading port arises from an intermediate engagement, upon which the vessel has already embarked by the date of the charter, will breach the implied term and will not be excused by exceptions in the charter (Louis Dreyfus v. Lauro, 1938, 60 Ll.L.Rep. 94).

There would not be any difference that this engagement is referred to in the charter party itself unless the charter party makes it clear that the obligation to proceed punctually to the loading port is subject to the punctual completion of the previous engagement. Whereas, it is explained in the below case.

In the case of The North Anglia (1956, 2 Lloyd's Rep 367)*, on 6 August 1953, the vessel was chartered to proceed with all convenient speed to Fort Churchill to load a cargo of grain. On that date, she was en route to Fort Churchill to load cargo under an earlier charter, and in the charter of 6 August she was described as "now due to arrive U.K. to discharge about 30th August; Estimating 14 days to discharge, expected ready to load under this charter party about 27th September 1953". That expectation was reasonable, but as a result of delays beyond the control of the owner, the vessel did not complete discharging in the U.K. until 6 October, and could not have arrived at Fort Churchill until about 20 October, by which time the port would probably have been closed by ice. The charterers claimed damages for non-performance.*

In this case, Devlin J. held that:

> *(I) Applying "Monroe v. Ryan" and "Dreyfus v. Lauro", that the owner's obligation was to proceed from her discharging port in the U.K. in such time as, in the absence of unforeseen circumstances, would enable her to arrive by the expected ready to load date;*
>
> *(II) The reference to the vessel's existing engagement made no difference, since the owner's obligation to proceed to Fort Churchill was not expressed to be subject to her existing engagement, and there were no grounds for implying a term to that effect.*

As highlighted in both cases above, namely, "Monroe Bros. v. Ryan" and "Evera v. North Shipping", there was an express obligation to proceed "with all convenient speed" to the loading port, whereas the GENCON only provides that the vessel must proceed to the loading port. An obligation on the owners to proceed with convenient speed, or with reasonable dispatch would, in general, be implied. Therefore, the combination of an "expected ready to load" date provision and an express obligation to proceed to the loading port creates an absolute obligation on the owner to sail for the loading port at a time when he is reasonably certain that the vessel will arrive at loading port on or about the expected date.

5.1.5. Practical Consequences of excluded perils:

The excluded perils have briefly been reviewed that the ordinary exclusion of specific perils applies only when the vessel has embarked upon the approach voyage, though, this general rule is always subject to the express terms of the charter party in clear wordings that either the exceptions apply from the date of the charter, or conversely, they only apply to the cargo-carrying voyage.

In a case, Staughton J. doubted whether the general rule was logical or sensible, he accepted that it was well-established. The incorporation of a Clause Paramount in usual terms will excuse the owners from liability for the delay on the approach voyage caused by events falling within article IV, rule 1 or 2 of the Hague Rules, but would not apply to delay on an intervening engagement (Transworld Oil v. North Bay Shipping, 1987, 2 Lloyd's Rep. 173).

In an earlier case, on the basis of "Monroe Bros. v. Ryan", the owners argued that the charterers could not rely upon the exception of "frosts" because the frosts had set in before the vessel embarked upon the approach voyage. Denning J. rejected this argument on the ground that the rule in Monroe v. Ryan case that exceptions do not apply until the approach voyage commences, did not apply to exceptions in favour of the charterer. The reason why the owners could not rely on the exceptions clause in Monroe v. Ryan was not that the excepted peril manifested itself before the approach voyage began; it was that the delay in question was the delay to the intermediate voyage, the late arrival of the vessel at loading port being no more than an inevitable consequence of that earlier delay. If the vessel had arrived punctually off Hamburg but had been prevented from

entering by ice, the owners would have been protected by the exceptions, even if the ice had formed before the approach voyage began (Pinch & Simpson v. Harrison Whitfield, 1948, 81. Ll.L.Rep. 268).

5.2.Charterer's obligations:

As for the ship-owner's obligations, there are similarly some obligations that must certainly be undertaken by the charterer, briefly described as follows:

- Provide an accurate description of the cargo for the carriage.
- Nominate safe ports/ berths so that the vessel can proceed to load and discharge operations.
- Provide the amount of the said cargo as agreed in the time period stipulated and of the quality stated.
- Bring the cargo alongside.
- Perform the loading and discharging operations with the stipulated lay-time.
- Pay the freight and other mainly related costs.

The charterer does not have the right to cancel until the cancelling day has been reached. It is the absolute responsibility of the charterer to furnish the agreed cargo. The charterer may be excused of his responsibility to provide cargo in the presence of intervening events that would make the agreement illegal or due to an act of God (of course, prior to the ship being placed on demurrage). The charterer must provide all the means that were agreed upon for the safe loading and discharging of the ship.

5.2.1.Fixation of the loading and discharging ports:

The loading and discharging ports for the cargo to be carried are the obligation of the charterer. In practice, in order to complete the blank boxes in charter forms may be done in some essential ways, for example; (i) incorporating a named port, such as, "Bandar Abbas", (ii) stipulating a number of named ports from which a choice is to be made, such as, "Chabahar/ Bandar Abbas/ Bandar Imam Khomeini', (iii) stipulating a number of unnamed ports within specified range, from which a choice is to be made, such as, "Chabahar/ Mahshahr range". Therefore, the loading and/ or discharging port may be specified in the charter contract so that the

charterer may be given the right to nominate a port either from a given geographical area, as such, "one safe port in the Persian Gulf", or from a list port named in the charter(10).

With having used any one of the above ways, there may be an express provision for the nomination of berths/ places at the port so chosen, such as, (i) "1/2 berths Bandar Abbas, or (ii) "1/2 berths Chabahar/ Bandar Abbas/ Bandar Imam Khomeini" or (iii) "1/2 berths 1 port Chabahar/ Mahshahr range".

Further on to highlight that there may also be express provision to nominate a berth which should be "always accessible" or "always available" or "reachable on arrival", which is considered as an absolute warranty by the charterer that the vessel must proceed into the designated berth without delay and without risk (The Delian Spirit, 1972, 1 Q.B. 103).

It would be worth mentioning that the charterer could, within the indicated range, designate a port without taking the ship-owner's convenience into account. He may nominate a busy or strike-bound port upon which the ship-owner is not entitled to complain, unless and otherwise, the resulting delay is so prolonged as to frustrate the charter party. As in the case, the charterers nominated the port of Vancouver where a strike of elevator men was already in progress. Loading of a cargo of wheat was prevented for a period of over six weeks, and there, the court held that the delay was not so unreasonable as to frustrate the adventure (Reardon Smith Line Ltd v. Minister of Agriculture, 1963, AC 691).

It is to be pointed out that when the charterer is determining a port or berth, is not obliged to consider the convenience of the owner and/ or expenses of complying with the nomination. As in case of The Vancouver Strike Cases (1962, 1 Q. B. 42), Willmer L.J. said:

"subject, however, to an implied obligation not to nominate an utterly impossible port ... the principle is well established that where a charter party provides a choice of a named place for loading or discharging, the charterer is free to exercise his option as he chooses, and in doing so is in no way bound to consult the convenience of the ship-owners ..."

It can sometimes happen that on the one hand, the charter party expressly stipulates that by whom, when, and how the nomination is to be made (The

Kostas K, 1985, 1 Lloyd's Rep. 231). On the other hand, without an express provision, the below general principles may apply;

5.2.2.(A) Who should designate loading and discharging ports:

One of the obligations of the charterer is to determine the loading and discharge ports. He may delegate this obligation of nomination to others, whereas the responsibility will still remain with the charterer. The charterer may delegate the performance of the loading and discharging port nomination to the shipper, receiver, or a port authority.

In The Erechthion (Newa Line v. Erechthion Shipping, 1987, 2 Lloyd's Rep. 180), where the discharging took place at a port where the port authority controlled and designated the berth, it was held that the charterer had simply ordered the vessel to discharge at such berth as the port authority might nominate. However, this is not to be confused with the orders by a port authority to wait for a berth that have been held not to have been given on behalf of the charterer(The Isabelle, 1982, 2 Lloyd's Rep. 81).

And further affirmed that orders which conflict with those given by the charterer clearly may not be regarded as given on their behalf (Abide, The Isabelle,1984, 1 Lloyd's Rep. 366).Given the above cases, we may conclude that where a nomination is generated by the shipper, receiver, or port authority which is not in conflict with any express order or nomination from the charterer, the owner is entitled and indeed bound to comply with the order.

5.2.3(B) When the load and discharge ports must be specified:

As regards the loading port nomination, in the GENCON form of the charter party, there is no expressly specified provision for when the designation of the load port must be clarified. As it is noted, in GENCON there is no prescribed time limit regarding the loading port/ place, so that the nomination must be made within a reasonable time. In other hand, it should be made as early as enough to ensure that the vessel encounters no delay. In respect of discharge port nomination, in the GENCON form charter party, it is specified that the nomination of the discharge port must be made "on signing bills of lading". There seem no difficulties whether the bills of lading are signed by the master or by agents on his behalf.

In the case of The Rio Sun (1985, 1 Lloyd's Rep. 350), it was held that a C.I.F buyer who had the right to nominate the discharging port, owed such a duty to his seller who had chartered the vessel.

As an alternative, the nomination must be made as such that the vessel will not be prevented from making the cancelling date (Shipping Corporation of Inia v. Naviera Letasa, 1976, 1 Lloyd's Rep. 132). Further, it would be worth mentioning that in the earlier case of The Atlantic Sunbeam (1973, 1 Lloyd's Rep. 482), the view was also so that the charterer cannot delay his nomination so as to prevent the vessel from being able to become an "arrived ship" for the purposes of the counting of lay-time.

5.2.4.Manner to specify the load and discharge ports:

As a matter of practice and indeed, there is no special format to specify the load and discharge ports. It is only the matter of receiving the designated ports by the ship-owner or his agents. There are sometimes possibilities that the charterer separately specifies a discharge port or place, which is received by the master or owner before or at the time of signing bills of lading, whereas this order can be considered to be a binding designation.

As highlighted above, the stipulation has been made in the GENCON form so that for the discharging port designation must be made "… on signing bills of lading …" the issuance of a bill of lading to the charterer, in case of a mere receipt, should be considered as a designation.

When the load and discharge port designation has validly been specified, the obligation of the charterer has been completed and has no right and obligation to change it. In other hand, the charterer's load and discharge port designation may be described as decisive nomination and is like the exercise of a right of "election" as opposed to a right of "selection".

5.2.5.Safety concern of the port nomination:

The parties to the voyage charter parties are free to negotiate and agree on however and whatever port characteristics, which may be reasonable to them. Nevertheless, the experience has shown that in practice, the parties seldom stipulate in such details, but they normally use the standard phrase instead.

Having said so, as in the earlier safe port cases, the port was already the implied concept of safety, and was unnecessary to insert the safe port. Whereas recently, the charterer is under an implied obligation to nominate

safe ports, and further on, in most charter parties this implied obligation is emphasized and reinforced with the insertion of an express term to that effect.

The definition of the safety of the ports and berths was considered in the case of The Eastern City (1958, 2 Lloyd's Rep. 127). The vessel, The Eastern City, was to proceed from one or two safe ports in Morocco t a safe port in Japan. She safely arrived and anchored in the nominated port, Mogador. Notably, this port was not safe for this size of the vessel during wintertime. At that, the weather condition was changed, and the master noticed that the anchor was dragging and thought of heaving up the anchor and leaving the port, consequentially running aground. Later on, the ship-owner claimed that the charterer was in breach to nominate a safe port for this size vessel.

Sellers L.J. while was describing the issue of the safe port, established that:

"A port will not be safe unless, in the relevant period of time, a 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"(at p. 131).

In practical stand point of view, regarding the interpretation of the above statement concerning the safe port meaning, may be described as such that whether the ship can proceed to a port, use and return from it without being exposed to any danger if not, it should be examined that whether master could exercise good navigation and seamanship to prevent or avoid danger. In other hand, if the vessel was unable to proceed to a port without being exposed to danger and then if the danger could not be prevented by a good navigation and seamanship, then it was to be determined whether the danger has been generated from any other event than an abnormal occurrence in the port. Therefore, the port could be considered unsafe.

The further definition of the safe port has been described in Wilson's "Carriage of Goods by Sea 5th edition" as such:

"A port is safe when 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. Regard must be paid to the type of vessel involved, the work to be done, and the conditions pertaining in the port at the relevant time. Thus a port

may be safe for one type of vessel but unsafe for another" (Wilson J. F. 2004).

5.2.6.Extent of "Safety" and "unsafety" of nominated ports:

As a normal practice, the charterer or his delegated person is entitled to designate load or discharge ports, which is likely accompanied by a clause in the charter party requiring the stipulated ports to be "safe" (Wilson J. F. 2004). If such clause is absent and is not expressly inserted at the charter party, in due course the common law comes to play a significant role to imply an obligation upon the charterer to nominate a safe port (See Morris LJ in Compania Naviera Maropan v. Bowaters Ltd, (1955, 2 QB 68 at p. 105).

If the owner is of a view and has strong ground that the port is naturally unsafe, he has the right to refuse the charterer's nomination for the sake of minimizing the risks that as a result of this unsafe port nomination, which may consequentially arise. The risks may be included, but not limited to damage or loss of cargoes, pollution, personal injury, etc.

Further, in the light of the master's over-riding authority prevailing in the management and operation of the vessel concerning, inter alia, the safety of the personnel, ship, cargo, avoidance of incidents, pollution, e.t.c., on arrival at the port, if he finds out that there is a potential hazard, he is still entitled to refuse to enter the port.

In case, where the charterer nominates the unsafe port and the ship is subsequently damaged, he will be liable for the damage. However, the nominated port does not have to be safe for uninterrupted use, as far as the vessel can safely leave the port when the dangers arise. To that effect, in the case of "The Khian Sea", she was alongside a berth outside the breakwater at Valparaiso, bad weather arose and the master could not leave the berth until two nearby vessels had left. As a result, it was held that the charterers were liable as there was no system enabling the vessels to leave the berth promptly. In this respect, Lord Denning M. R. stated that:

". . . the following requirements must be satisfied when a vessel has to leave its berth. First, there must be an adequate weather forecasting system. Secondly, there must be adequate availability of pilots and tugs. Thirdly, there must be adequate sea-room to manoeuver. And, fourthly, there must be adequate system for ensuring that the sea-room and room

for manoeuver is always available" (The Khian Sea, 1979, 1 Lloyd's Rep. 545).

The dangers, which are avoidable by ordinary good navigation and good seamanship, will not render a port unsafe (The Eastern City, 1958, 2 Lloyd's Rep. 127, p. 131). However, on the contrary, if the danger is to be avoided, required more than ordinary skill, and beyond reasonable experience, it may not render the port a safe (The Polyglory, (1977, 2 Lloyd's Rep. 353, p. 366).

5.2.7.Safety of port for the particular vessel:

As described in the definition of safe port above, on the one hand, the relevant safety of the port for the vessel with taking the length and breadth, laden or in ballast, water, and air draughts of the vessel into account must be considered and on the other hand, the real fact is that if the other vessels have safely used the port, does not mean that the port is safe for all vessels.

The Sagoland was too large to navigate the narrow and winding approach to Londonderry through Lough Foyle without tug assistance. At that material time, no tugs were available and had to be obtained from Glasgow. The charter party provided that "discharge at a safe port" and the owners claimed the tug expenses incurred on the grounds that Londonderry was unsafe for the vessel without tug assistance. The court found that Londonderry was unsafe for this particular vessel without the use of tug, and although it was commented that Londonderry was safe for smaller vessels. In this respect, Roche J. said:

"The conclusion at which the learned Umpire arrived was that the port of Londonderry, in Northern Ireland, was not a safe port within the meaning of the charter party for the particular ship which was the subject of the charter party. Let not the finding of the Umpire be misunderstood. It was not a finding that the port of Londonderry is an entirely safe port for 99 out of 100, or an even larger proportion, of the ships which may seek to resort thereto, but merely that it was not a safe port for the ship in question, the Sagoland, which was a ship of large dimension . . . "(Axel Brostrom & Son v. Louis Dreyfus & Co., 1932, 38 Com. Cas. 79).

Given the above statement and conclusion, it would be worth describing that a port will not simply be unsafe because tug assistance is required. At ports, where tugs are readily available and customarily used, the obligation

of the master is to exercise good navigation and seamanship and use the tugs, the expenses of which are placed on the owner.

5.2.8.The length of time required for the safety of the port:

The port must be safe in order for the vessel to reach, use and leave it. The duration of the requirement of port safety, which is taken to complete these three safely, may be described as follows:

(i) **Reach:** The vessel, "The Peerless" was chartered to carry a cargo of maize and *"to discharge at a safe port in the United Kingdom . . . or so near thereto she can safely get (always afloat) and deliver the cargo in accordance with the custom of the port for steamers"*. The vessel was ordered to discharge at King's Lynn but her draught was such that it was impossible for her at any time, on any tide, to enter the dock at King's Lynn without being lightened. The owners claimed for additional expenses incurred in lightening the ship, it was held that the safe port meant a port to which the vessel can get laden and at which she can lie and discharge, always afloat, and, therefore, that King's Lynn was not safe (Hall Brothers Steamship Co. Ltd. V. R. & W. Paul Ltd., 1914, 19 Com. Cas. 384).

(ii) **Use:** The port must be physically safe for the vessel to use during that length of time, taking the port's location, size, and layout and its natural and artificial features into account. The vessel, "The Houston City" was under a voyage charter, ordered to a berth at Geraldton where vessels alongside were exposed to a northerly wind. Usually, there were two hauling Buoys and fenders alongside the berth. When the vessel arrived, one buoy was missing. During a gale, the vessel rolled and was damaged against the berth. The owner successfully claimed in respect of the damage and it was held that Geraldton was unsafe because of having these deficiencies (The Houston City, 1956, A. C. 266).

(iii) **Leave:** The port must be safe for the particular vessel in its condition to leave it. The charterers only ordered the vessel to a safe port. The vessel, "The Inishboffin" was ordered to discharge cargo at Manchester. On leaving the Manchester Ship Canal to the open sea in a light condition, she was unable to pass under a bridge without cutting down her masts. It was held that

the charterers were in breach of the safe port warranty and the judgment was given to the owners for the costs of replacing the masts (Limerick Steamship Co. Ltd. V. W. H. Stott & Co. Ltd, 1921, 1 K.B. 568).

5.2.9.Implied and Express Obligations:

Usually, an express safe port clause is found in a voyage charter party standard form (Amwhelsh 93, Cl. 27.3, line 323; Asbatankvoy, Cl. 9; Norgrain 89, Cl. 1, line 14; Synacomex 2000, Cl. 2, line 12)(11). If a voyage charter party contract has not been stipulated or inserted an express safe port obligation, whether the safety of the port warranty would be implied.

In this respect, the illustration by Morris LJ, in the case of The Stork (1954, 2 Lloyd's Rep 397, HC, and 1955, 1 Lloyd's Rep 349,CA), revealed that the warranty of the safety of the port would be automatically implied.

In a similar manner, some earlier authorities also commented that such an obligation of safe port nomination should be implied. To that end, the statement of Devlin J. in the same case of "The Stork" also appeared to be relevant and in line with the view of Morris LJ, (see also; Brostrom & Son v. Dreyfus & Co. (n 44) 138; Reardon Smith Line v. Ministry of Agriculture, Fisheries and Food, 1960, 1 Q. B. 439; The Epaphus, 1986, 2 Lloyd's Rep. 387, 391).

"There must, therefore, be an obligation to nominate at least one loading place, and there must be implicit in that some condition about safety to prevent the making of a derisory nomination. The obligation on the ship to proceed to a loading place 'or so near thereunto as she may safely get' suggests strongly that the loading place itself must be safe. And when one finds the obligation on the charterers to nominate a loading place of some sort amplified by an express right to nominate one or two safe loading places, it does not require much effort of construction to conclude that any loading place which is nominated must be safe."

5.2.10.Temporary obstacles of the ports or berths:

As described above, though, the port must be safe to reach, use, and leave from it, but temporary obstacles or dangers will not make the port unsafe,

as far as the master is aware of the temporary obstacle nature so that he can wait until they are removed.

The question of temporary dangers has been examined on the cases in London, which have been considered so that the delay occurred on a ship as a result of a temporary danger until to be cleared or weather to suddenly change does not render that port to be considered unsafe. Another example that does not make the port unsafe is that the vessel may have to await for a high tide, enabling the vessel to reach or depart from it due to a bar. The law does not require the port to be safe at the very immediate arrival of the vessel, owing to the fact that she may encounter adverse weather conditions, which may delay her voyage to or from loading and discharging ports.

However, there are possibilities that some temporary dangers may make a port or berth unsafe. For example, if a navigational aid is not in place for some reason and it is unknown to the master and as a result, the vessel is damaged, the port may be considered unsafe as a matter of law. Furthermore, it may be described that if a storm blew up and damage the vessel at berth or anchor in the port, because of not having given enough notice then the port may likely become unsafe, as there should be a system/ weather forecasting and warning by the port.

5.2.11.Abnormal occurrences in the ports and berths:

If the cause of the danger is an abnormal occurrence, it will not be considered any breach of charterer's obligation to nominate a safe port/ berth. The occurrence is either abnormal or unexpected, but it does not include the occurrences which are expected.

On the one side, the safe port warranty was not meant to be a guarantee that the port should completely be without risks. In other hand, the charterer should guarantee that the nature and inherent characteristics of the port would present no danger to the ship. It would seem from the definition above, the charterer's obligation to provide a safe port does not include abnormal and unexpected occurrences and risks.

In order to understand the abnormal risks, we should raise questions as to what kind of risks would fall within the abnormal category. To answer this question, Mustill J suggested in The Mary Lou (1981, 2 Lloyd's Rep 272)

case that *everything not constituting the normal characteristics of the port is abnormal* (p. 278).

As a good example could be considered in the case of "The Evia No. 2 (1983, 1 A. C. 736), it was stipulated in the charter party that the vessel was to be employed **"only between good and safe ports"**, the House of Lords upheld the charterer's argument. In that Lord Roskill said:

". . . since Basrah was prospectively safe at the time of nomination, and since the unsafety arose after the Evia's arrival and was due to an unexpected and abnormal event, there was at the former time no breach of Cl. 2 by the charterers . . ."

Whereas, in practice, it has been experienced that normal risks can cause abnormal consequences to result in damage and loss to the ship. Sometimes, risks of some unpredictable gale may form an inherent characteristic of the port, but the consequences of one particular gale can unexpectedly cause so severe abnormal occurrences.

5.2.12.Negligence of the master or vessel:

As discussed above, the charterer is only and likely liable for loss or damage which was caused by the breach of safe port nomination. But when the effective cause of the loss is not the unsafety of the port and indeed the causation is negligent of the master, owner, or his servants or agents, the charterer shall be liable.

Therefore, on the one hand, there appears to be a clear distinction between the exposure of the vessel by the master to dangers which can be avoided by good navigation and seamanship, and where charterer has not breached the safe port nomination, and on the other hand, the exposure of the vessel to unavoidable dangers, in breach by the charterer, where the master's negligence is the actual cause of loss and damage. As in The Dagmar (1968, 2 Lloyd's Rep. 563, p. 571), Mocatta J. stated that:

"If Cape Chat was unsafe for this vessel and if her master and crew were negligent, the difficult question arises whether in law the proper conclusion should be that the casualty was caused by such negligence in the sense that it constituted a break in the chain of causation between the unsafety of Cape Chat and the casualty, or whether the unsafety was notwithstanding what may have been done by those onboard or omitted to be done, nevertheless still the direct and effective cause of the casualty."

5.2.13.Or so near thereto as she may safely get:

The ship-owner's primary obligation is to bring the ship to the port stipulated in the charter party or nominated by the charterer. This obligation is frequently qualified by the phrase or words as such, ***"or so near thereto as she may safely get"***. There were many cases in which suggested that the ship-owner can only rely on such clause when the ship is prevented from entering a port by a hazard or obstruction of a permanent nature or one which, from a commercial standpoint of view, would delay the vessel for an unreasonable length of time.

As discussed above, temporary obstacles such as high winds or unfavourable tides would not qualify and the clause could not be invoked.

For the sake of a good sense of understanding, there was an old case, in which, a vessel had been chartered to load cargo to Taganrog, a port in the Sea of Azov, or so near thereto as she could safely get. On arrival in mid-December, the Sea of Azov was found to be closed by ice and it was unlikely that a passage would be free before the following April. The ship-owner was not allowed to invoke the clause and discharged the cargo at the mouth of the Sea of Azov because the court regarded the obstruction as being temporary one (Metcalfe v. Britannia Ironworks, 1877, 2 QBD 423). Further, it was partly explained by the fact that the ship-owner should have been aware of the condition in the Sea of Azov at that time of year.

On the other hand, in the case of The Athamas (1963, 1 Lloyd's Rep 287), the pilotage authorities on the Mekong River refused to allow the vessel to proceed upstream to the port of Pnom Penh while a strong river current persisted. The Court of Appeal allowed the master to invoke the clause to justify unloading the cargo at Saigon when it was established that the river passage would not have been "safe" for the next five months.

Furthermore, in addition to the charterer's obligation described above, the various duties have to be performed by the charterer as follows;

- Must not load dangerous goods without first notifying the ship-owner of their particular characteristics, dangerous cargoes such as corrosive or explosive.
- Must procure the quantity and quality of cargo as agreed in the charter party and have the cargo ready on the quay as per the agreed lay-can.

- In order to avoid delay, he must bring the cargo alongside the ship for loading as per the agreed terms and conditions.
- Must load a full and complete cargo. Where the charterer fails to load a full and complete cargo as agreed, the ship-owner is entitled and has the right to claim for dead freight and in the meantime, exercise due diligence to find other cargo in order to minimize the loss.
- Must load within the agreed period of time, as known lay-time, on the contrary, the charterer should pay the compensation either as damages for detention or demurrage, as the case may be. The former is unliquidated damages and the rate of compensation is not agreed in advance by the parties and may be determined by an arbitrator or a court, while the latter is liquidated damages agreed in advance. Demurrage shall not be subject to lay-time exceptions, which is known as **"once on demurrage, always on demurrage".**

On the other hand, if the charterer loads the cargo faster than the lay-time, the vessel is released earlier to the owner's control, which is advantageous to the owner, who pays the amount of money as compensation to the charterer, known as dispatch or despatch. It is normally agreed as half of the demurrage rate.

- Also, the charterer's primary obligation is to pay the agreed freight. In practice, there are different types of freight. When the method of the freight payment is not stipulated in the charter party, the freight is payable on delivery of the goods at the discharge port and is calculated on the amount of cargo actually delivered. Given the fact of this method, the freight will not be payable, unless the goods are delivered in the same condition as shipped at the load port. Generally speaking, how the freight is practically earned and payable depends upon the stipulation in the charter party. It can be negotiated and agreed that the freight may be paid in advance or on delivery of the cargo at discharging port or with a combination of both. The owner's right to obtain the freight is exposed to risk, when the owner fully or partially fails to carry the cargo and fulfill his obligation where he loses his right to collect freight. For example, when the vessel sinks with having had cargo onboard and considered the cargo of total loss, the owner is not entitled to freight, however,

in the case of an agreed term that the freight is prepaid, there is no return of the earned freight to the charterer(12). Sometimes, in order to minimize the freight risk, the ship-owner may use specific contractual stipulation, whereas the owner is entitled to distance freight, which is earned proportionate to the distance actually carried as compared with the total distance. Further to highlight that if a part of the cargo is delivered at the port of destination, the owner is entitled to proportionate freight for the cargo actually delivered. It would be noteworthy to mention that if the cargo is delivered in a damaged condition at the port of destination, the ship-owner is entitled to freight if the cargo is in a merchantable condition and is still the same kind of cargo. As in this situation, the ship-owner's right to collect freight and the charterer's right to claim for the damaged cargo for compensation should not be mixed. In case of a lump-sum freight is agreed, the ship-owner is entitled to full freight if some part of the cargo reached the port of delivery, but if all cargo is lost, as mentioned above, the ship-owner is not entitled to freight.

If there are "FIOST terms" (Free In, Out, Stowed, and Trimmed) incorporated in the charter party, the charterer is responsible for the payment of cargo handling expenses. However, a charter party may stipulate "liner terms" or "gross terms", in which case the loading and discharging costs are covered by the freight (paid by the ship-owner).

5.2.14.The Cargo for the Voyage Carriage:

The owner's and the charterer's obligations have been illustrated above. As regards the cargo for carriage, the ship-owner's obligation to receive and the charterer's to load the cargo arise when the vessel has reached the agreed loading place. On the one hand, the ship-owner is, of course, under the prior obligation to bring the ship there and on the other hand, the charterer may also be under a prior obligation, on their part to have the cargo available for loading.

Generally, in the charter party form, clause 1 imposes a mutual obligation upon the owners to receive on board and upon the charterers to supply a full and complete cargo(13). A full and complete cargo is one which, when properly stowed, occupies the full volume of the ship's cargo spaces or utilizes her full deadweight capacity.

It is the charterers' obligation to prepare the cargo for shipment in the manner customary at the loading port, and if they fail to load a full and complete cargo as mutually required, the charterer will be liable for dead freight.

The question may arise so that when the vessel is unable to load the agreed quantity of cargo as a result of a bar or other draught restriction, which party must bear the consequence? If the problem is resolved by the cost of the lighterage method, who should bear that cost?

In order to answer and clarify these problems, the reference should be made to the incorporation of the terms of the charter as a whole. If the charterers have given an express or implied warranty as to the safety of the port, the risk will prima facie fall upon them (The Archimidis, 2008, 1 Lloyd's Rep. 597), although this risk is often qualified by a warranty given by owners as to the vessel's draught.

Sometimes, the vessel's description of cubic or deadweight capacity is stipulated in the charter party, therein, whether or not the obligation to load a full and complete cargo can justify this description. There are propositions as an authority in some old cases that the charterers' obligation to load a full and complete cargo may not be limited to the representation of the vessel's capacity in the charter party. Nowadays, the description of the vessel's capacity in the charter is regarded as a term of the charter contract rather than representation and the vessel would be loaded to a full and complete cargo, if this obligation is breached by the charterer, there, the owner may claim and recover damages in the form of '**dead-freight'** and in the event that the owner's description is declared inaccurate, he will be liable in damages accordingly.

A particular problem may arise in relation to the charterer's obligation to provide a 'full and complete cargo'(14) when the variety of different and particular cargoes are of different shapes and sizes, he is not allowed to leave broken stowage.

5.2.15.Loaded cargo in breach of the terms of the charter:

When the cargo has been loaded does not comply with the agreed and stipulated terms and conditions of the charter party.

What are the rights, remedies, and consequences available for the ship-owners?

The charterer has breached the charter party terms and the owner is entitled to recover damages for the loss caused by that breach. If the breach consists of loading dangerous goods, the owner may also rescind the charter party on the reasoning that the breach relates to a fundamental term (Chandris v. Isbrandtsen-Moller Co. Inc. 1951, 1 K.B. 240). If the charter party is rescinded, the owner is entitled to the freight on the basis that he deserves for the carriage actually performed, also for the damages for any further loss suffered.

6. Conclusion:

In conclusion, the main and practical intention of the maritime law may be referred to as the responsibilities of the parties engaged in the legal issues of the governing contract of carriage. The moment at which one party carries out his responsibility and shifts to the other party to also perform his obligation of responsibility.

In this article, the intention has been made to highlight and find the disputable area in relation with the theory and practical process of negotiation of the charter party contract, the types of the terms and remedy for the parties when the provisions are breached, ship-owner's and charterer's obligation, description of the chartered vessel and the safety of the nominated loading and discharging ports.

The risk in the different stages in each voyage is allocated to the ship-owner or charterer in the charter party contract. As Lord Diplock in The Johanna Oldendorff (1973, 2 Lloyd's Rep. 285, p. 304) divided the voyage charter party into four different stages:

1. The loading voyage(15).
2. The loading of the cargo to the vessel.
3. The carrying voyage (John F Wilson, 2001, p. 55).
4. Discharging operation, the cargo is discharged from the vessel.

Given Lord Diplock's demonstration about the voyage charter party stages, we may conclude that in stages 1 and 3, only the ship-owner appears to be responsible for the performance, but in stages 2 and 4, the ship-owner and charterer have joint responsibility. In order to determine the risk of delay, the concept of an arrived ship is to be taken into consideration. To that end, we need to know the specified destination for

which there are three different forms of voyage charter parties inclusive of port, berth, and dock charter parties, where an arrived ship can be considered and the risk of delay can be transferred from ship-owner to charterer or vice versa. In other words, before the vessel reaches her specified place, the risk of delay will remain with the ship-owner. Except, some special clauses are agreed and incorporated in the charter party, for example; "Whether In Berth Or Not" (WIBON) and "Whether In Port Or Not" (WIPON) Clauses.

As a general rule, in the absence of specific terms in the charter, the risk of any such accidental delay has to be borne by the party responsible for performing the particular stage during which the delay occurs. It is, of course, possible for the parties to include a clause in the charter transferring this risk, such as, for example, incorporating an exception suspending the running of lay-time in the event of a strike (John F Wilson, 2001, p. 55).

Although, the negotiation and drafting of the berth charter party may encounter and cause difficulties and dilemma for the parties, since there appears to have understanding, sensible, and clear definition of the berth, the controversies about this type of charter can fairly be remedied and a practical solution can be found for the problem and dispute. The port voyage charter party type appears to be more complicated, problematic and disputable area for the parties involved.

Therefore, before or at the time of negotiating and agreeing to the terms and conditions of the voyage charter party between the ship-owner and charterer, the precise arrival of the subject vessel at the specified load port or place is very difficult to be predicted, especially when the vessel is still performing the previous charter party commitments. With the consideration of the parties' interests and responsibilities, on the one side, the ship-owner does not naturally wish to guarantee that his vessel will arrive at the load port by the specified date. The majority of the voyage charter party will not normally force the absolute contractual obligation to the ship-owner. However, the charter party should also place the charterer in the same position, whereas, he may also have contractual commitments in relation to a contract of sale or sub-chartering difficulties. In case, when the vessel does not arrive at the agreed date, the charterer will need to be informed as early as possible for any alternative arrangements.

Of course, these concerning matters or difficulties may to some extent resolved by incorporation of some provisions, for example, "Expected Readiness to Load" provision and other clauses, which is required from the ship-owner to instruct his master of the vessel to proceed to load port with "Due Diligence" or "Due Despatch". Further, it is likely a normal practice to incorporate "Cancelling Clause" by which if the vessel does not arrive by that cancelling date, the charterer may have contractual right to terminate the charter party contract.Now, there comes a question, which party takes the risk of delays before the commencement of the approach voyage?

The charterer may rely upon two clauses if the vessel arrives late at a specified load port or place. (a) The provision of the vessel's present position and expected readiness to load. (b) The provisions are the ship-owner's obligation to proceed to the specified load port. The charter party contracts mostly contain provisions either the vessel's present position or expected readiness to load or both of them. However, the charter party contract sometimes incorporates and uses "Estimated Time of Arrival" (ETA) instead of "Expected Readiness to Load" (ERL), to which the same legal principles will be applied.

Having said the above, based upon English law, when there is the incorporation of "Expected Readiness to Load" and/ or "Estimated Time of Arrival" in the charter party agreement and a clause requiring the vessel to proceed with utmost dispatch or convenient speed, there comes an absolute obligation and responsibility upon the ship-owner to start the approach voyage in order to arrive at the port of loading by that provided date.

Although, in the recent case, it was held that if the "Estimated Time of Arrival" and "Expected Readiness to Load" date was not incorporated in the charter, the obligation would still remain on the ship-owner to commence the approach voyage to reach by that date. On the contrary, if the ship-owner failed to arrive, the breach occurred and the charterer was entitled to claim for damages.

Therefore, in order to describe the practical answer for the above question, as it appears, the answer is likely for the interest of the charterer, whereas the risk of delay is the responsibility of the ship-owner. Howsoever, on the one side, it is for the benefit of the charterer to incorporate and have

estimated time of arrival and expected readiness to load date in the charter party. On the other side, the ship-owner is also willing not to include estimated time of arrival and expected readiness to load date in the charter party.

To some extent to support the above view, it may be worth mentioning that in the recent case, The Pacific Voyager, 2018, EWCA Civ 2413), the charter party was to perform the charter with utmost dispatch to proceed to the port of loading. To highlight that the contract did not have an "ERL" date or "ETA" clauses, but the charter had the anticipated timetable for completion of the previous voyage. The said timetable contained expected date of discharge of the cargo under the previous charter "on the basis if all goes well/ weather permitting" ("IAGW/ WP"). The charter party also had a cancelling clause. On the way to the port of discharge, in the Suez Canal, the vessel collided with a submerged object. As a result of this incident, the vessel sustained potential damage and needed some months to have the damaged part repaired. Based upon the cancelling clause, the charterer cancelled the charter party and also claimed damages due to the ship-owner's failing to commence the approach voyage to the port of loading.

The decision under English law is that when the charter party contained an "ERL" and/ or "ETA", under which the vessel was required to proceed with utmost dispatch/ all convenient speed and that there was an absolute obligation on the ship-owner to commence the approach voyage to ensure his vessel to arrive by the "ERL" and/ or "ETA" date.

Though this case did not contain the "ERL" and/ or "ETA" clause, there was still an absolute obligation on the ship-owner to commence the approach voyage, the breach of which would allow the charterer to claim for damages (Helen Barden, 19/12/2018, Double Trouble for Owners).

It is, therefore, to be noted that where an incident causes the delay to the ship before the commencement of the approach voyage, the owner may be willing to weaken the dispatch obligation since the delay occurs before the commencement of the approach voyage, the excepted perils clause will not protect the owner. Given this fact, what wordings and clauses the ship-owner may insert in the charter party to protect his interest. The "If All Going Well" and Weather Permitting" clauses have been used, but, in accordance with the recent cases, these clauses will not sufficiently assist

the ship-owner, because the causation of delay refers to the previous commitments. Therefore, there should be clear and sufficient wording to be generated and inserted in the charter party to limit the wide obligation of the owner before the commencement of the approach voyage. The wording may be suggested as such:

". . ., as soon as the vessel's previous voyage has been completed, the vessel shall proceed to load port(s), . . .".

In the standpoint of the ship-owner's and charterer's view, we may likely consider that;

(a) Fixing the charter party may make many difficulties to maintain flexibility

(b) A lay/can or cancelling date provision can be assumed absolute obligation on the ship-owner, if it is not met, the charterer can claim damages

(c) The ship-owner cannot be self-satisfied in case of missing the cancelling date to just terminate the charter without being responsible for the damages

(d) In each and every charter party contract, the allocation of risk should be clearly negotiated and agreed upon, and

(e) As highlighted above, the charterer's interest is to insist on the "Estimated Time of Arrival" clause, like ship-owner, the charterer also needs to take many factors into consideration to make contracts with the shippers or sellers.

With regards to the ship-owner's and charterer's obligations, which were described as above, there have been many disputes and difficulties for the parties and costly for legal proceedings, lawsuits, and time-consuming. Therefore, in order to avoid and/ or mitigate these grey areas of a causative disputes, the parties shall pay special attention to express their requirements and engage an expert to clearly and legally negotiate and conclude the contract of carriage in accordance with the parties' needs.

In respect of the duties and responsibilities of the ship-owner in voyage charter party, out of which, the vessel's descriptions and particulars are of considerable importance to be represented to the charterer correctly. Since the ship-owner's earning is a fixed freight rate per ton and the charterer is

to pay the freight, any misrepresentation by the ship-owner may bring financial and charter party difficulties.

Having said the above, in order for the ship-owner to negotiate and determine the anticipated freight rate to decide whether or not the proposed voyage will be profitable or not, some variables must be calculated and considered in advance, such as "lay-days/ cancelling days"[2] and "lay-time"(17).

It would be noteworthy to reiterate that the ship-owner's innocent misrepresentation concerning the vessel's description shall only entitle the charterer to the damages. But, in case of the fraudulent misrepresentation, the charterer shall be entitled to repudiate the charter party and sue for damages.

The ship-owner's implied obligation is to provide a seaworthy ship for that voyage and cargo-worthy for the carriage of that cargo. At what stage, the seaworthy becomes effective is that the ship must be seaworthy at the time of departure and cargo-worthy at the time of loading. The interpretation is that assuming the vessel becomes technically defective after the cargo is loaded, the ship-owner does not breach the implied seaworthiness and cargo-worthiness. Other possibilities are that assuming the charterer finds out that the vessel has been unseaworthy before departure, if the cargo has not yet been loaded and the unseaworthiness cannot be remedied in a reasonable time, the charterer is in a position to rescind the charter party. If the cargo has already been shipped, there is left no chance for the charterer to repudiate the charter party, but, can be entitled to sue the ship-owner for the losses and damages attributed to that unseaworthiness. Another alternative is that if the vessel has been seaworthy before departure and becomes defective at sea, the liability of the carrier is determined by the cause of that defect or damage, if the defect or damage caused by an excepted peril, the ship-owner will be exempted from liability.

As regards the charterer's obligation in the voyage charter party, the nomination of the safe ports for loading and discharging is an implied obligation. This implied obligation can sometimes be emphasized by the insertion of an express term in the charter party.

The definition of the safe port was correctly and sufficiently described in the above mentioned different types of cases. Further, it would be worth

mentioning that when a particular port, berth, or place at some material time appears to be safe for a specific vessel with a special condition, it does not mean that the same port, berth, and place can also be safe for other vessels.

The legal comparison and importance between the safe port warranty, the obligation of the charterer, and the warranty of seaworthiness of the vessel, the obligation of the ship-owner may be considered in equal level of stand in respect of compliance and non-compliance by the parties.

Notably, the obligation of the charterer's safe port warranty is considered as a continuing and absolute guaranty of the safety of the port during the time it is used, whether expressed in the charter party or not.

It is also to be considered that when the charterer's nominated port, berth or place is inherently unsafe and the ship-owner becomes aware of the fact of unsafety, then, he is entitled to reject the charterer's nomination for the sake of avoiding and/ or minimizing the risks. Further, other possibilities can occur that for example, if the master of the vessel on arrival at the port becomes aware of potential danger or high risks, he has also the authority to reject to enter the part.

The additional obligation of the charterer, may include but not limited to not to loading dangerous cargo without the ship-owner's consent and knowledge, must load the quantity and quality of cargo as agreed in the charter party, depending upon the agreed incoterms terms, must bring the cargo alongside the vessel to avoid the risk of delay during loading performance, must load full and complete cargo as agreed, on the contrary, the ship-owner become entitled to claim dead-freight and in the meantime exercise due diligence to find alternative cargo to minimize the loss, must load during and within the stipulated time (known as lay-time) and if it takes longer than this time, the ship-owner is entitled to "demurrage" or "damages for detention"(18).

End Note

1. The charterer is the party, who has chartered the ship and if the shipper has chartered the whole space of the ship, then, the

1.shipper will also be the charterer. In most cases, the charterer may play the role of a middle man between the shipper and the ship owner.

2.It is so that the ship owner will be required to issue bill of lading to the shipper against the cargo, which has been loaded onboard. With that the shipper has entered into an agreement with the ship owner, which is called “Contract of Carriage” (COC).

3.The wording may be expressed as such; The shipment is carried pursuant to charter party agreement between “charterer’s name” and “carrier’s name” dated 01 January, 2016

4.Free in, out, stowed and trimmed and elaboration of the FIO chartering terms whereby the vessel owner is not responsible for the costs of loading, unloading, stowage, trimming. This is the opposite of gross terms.

5.Cargo capacity will normally expressed in terms of dead weight tonnage, which means the weight of the cargo the vessel is capable of carrying when loaded down at its maximum permitted draught.

6.Light Cargo: the ship’s holds are full before all the ship’s deadweight cargo capacity is utilized.

7.Heavy Cargo: full deadweight cargo capacity can be reached with space still available in holds, but that space is unusable.

8.Will excuse a contracting party from absolutely exact compliance with the terms of his obligation if “the departure from the precise terms of his obligation is so small as to be negligible”, the failure by the charterer to supply or by the owners to receive on board the precise quantity of cargo will therefore be ignored if the deviation is so small that it has no practical or commercial significance.

9.This the abbreviation used for the “Lay-days and cancelling clause” in a charter party. This clause provides for earliest time when the charterer expects the master of the vessel to give a Notice of Readiness and for lay-time to commence and also gives the charterer an option to cancel the charter if this event does not occur before a certain date.

10Notably, the same rules are equally applicable to the situation when the charterer is entitled to nominate the port of discharge.

11.Such clauses are found quite commonly in voyage chartering standard forms.

12When the freight risk lies with the ship-owner, a special freight risk insurance can be taken to cover the situation where the cargo is lost during the transportation.

13.Clause 1 reads as such: ". . . and there load a full and complete cargo (if shipment of deck cargo be agreed same to be at charterer's risk) as stated in box 12.

14.Is often accompanied by a clause stipulating maximum and minimum quantities and imposing liability on the charterer to load either a full cargo or the specified maximum, whichever is less. Another alternative is that the quantity is accompanied by an allowance of, for example, '5 percent more or less', or is qualified by 'about', or 'thereabouts'.

15.The vessel is on her journey to the contractual place for loading.

16.Or "lay-can" the period within which the ship must be presented for loading. If the ship arrives earlier than the first day, the charterer does not have to accept the vessel until the first lay-day and if she arrives after the final lay-day, the charterer may be entitled to reject the ship.

17.The period is allowed for the charterer to load and/ or discharge without any additional payment of the freight.

18.The main difference between these terms, "demurrage" or "damages for detention" is that the former is "liquidated damages" agreed in advance and the latter is "unliquidated damages", that is, the rate of compensation is not agreed in advance by the parties and may be determined by an arbitrator or judge. It is to be noted that demurrage shall not be subject to lay-time exceptions and this is known as "once on demurrage, always on demurrage".

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