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## **THE PERIOD OF TIME UNDER A TIME CHARTERPARTY**

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### **Introduction**

This seminar is concerned with the global period of time available to the charterer under a time charter party and most particularly with mechanisms governing the proper time for the redelivery of the vessel and the allocation of liability for losses arising out of late redelivery.

The charterer will seek to maximise the number of profitable adventures that he can engage in during the charter whilst the owner will seek to minimise the time lost between the return of the vessel and its handing over to a new charterer. Inevitably, despite the apparent simplicity of hiring a vessel for a specific period of time, the uncertainty inherent in maritime ventures results in tension between the charterer and ship owner at hand over time. A ship owner can find himself exposed to liability if he is unable to deliver a vessel to a charterer because the previous charter has over run its allocated time, whether that over run / over lap is intentional or not. Where this occurs the owner will, if possible, seek to recover any consequent losses from the previous charterer who over-ran his charter, thereby causing the problem.

### **Delivery and Commencement of the Period of “Hire”**

Since the duration or global time scale for a time charter party is central to the question as to who pays for the consequences of an overrun or overlap and at what rate, it is important to determine the point of time from which computation of the charter party time scale commences. The requirements for the effective delivery of a vessel have been discussed elsewhere.<sup>1</sup> Assuming these have all been complied with delivery is complete when the ship and her crew are placed at the disposal of the charterers at the place stipulated and time starts to run from that point of time.<sup>2</sup>

In **The Madeleine**,<sup>3</sup> it was stated that “An owner delivers a ship to a time charterer under this [*Baltim*] Charter party by placing her at the charterers’ disposal and by placing the services of her master, officers and crew at the charterer’s disposal, so that the charterers may thenceforth give orders (within the terms of the charter-party) as to the employment of the vessel to the master, officers and crew, which orders the owners contract that their servants shall obey.” A failure to deliver on time may result in time not commencing and the charter party being terminated, though the charterer can choose to waive the breach, continue with the charter and reserve the right to damages, through protest, to cover any losses arising out of the late delivery. The right to terminate the charter party for late delivery of the vessel may be implied at common law and is expressly provided for in charters which stipulate a final date of delivery coupled with a cancellation clause.

**LINERTIME Clause 2 : Cancelling Clause :** “Should the Vessel not be delivered by the date indicated in Box 19, The charterers to have the option of cancelling. If the vessel cannot be delivered by the cancelling date, the Charterers, if required, to declare within 48 hours (Sundays and Holidays excluded) after receiving notice thereof whether they cancel or will take delivery of the vessel.”

**GENCON Clause 10 : Cancelling Clause :** “Should the vessel not be ready to load (whether in berth or not) on or before the date indicated in Box 19, Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before the vessel’s expected arrival at port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day she is stated to be expected ready to load, Charterers have the option of cancelling this contract, unless a cancelling date has been agreed upon.”

**BALTIME Clause 22 : Cancelling :** “Should the vessel not be delivered by the date indicated in Box 23, the charterers to have the option of cancelling. If the vessel cannot be delivered by the cancelling date, the charterers, if required, to declare within 48 hours after receiving notice thereof whether they cancel or will take delivery of the vessel.”

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<sup>1</sup> Clauses such as “..... she being in every way fitted for ordinary dry cargo service with cargo holds well swept, cleaned and ready to receive cargo before delivery under this charter” are usual.

<sup>2</sup> **The Golfstraum** – Anders Utkilens Rederi A/S v Compagnie Tunisienne de Navigation [1976] 2 Lloyd’s Rep 97. The charterer was required to nominate an “available berth where the vessel could safely lie always afloat”, for the delivery of the vessel. The court held that in the absence of the nomination of such a berth delivery was effective once the vessel reached the port. NYPE time charter forms similarly provides for delivery at the port, berth or no berth.

<sup>3</sup> **The Madeleine** [1967] 2 Lloyd’s Rep 224 per Roskill J at 238.

## The Period of Time Under Time Charterparties

Despite any references to letting or hiring, Lord Reid in **The London Explorer**<sup>4</sup> makes it clear that under a simple time charter the charterer does not in fact hire the vessel at all he merely has the power outlined in **The Madeleine** to give orders for the employment of the vessel. Even though it is common practice to refer to “the redelivery of a vessel” under a simple time charterparty, it is in fact a misnomer, according to MacKinnon LJ in **Sea & Land Securities v Dickinson**.<sup>5</sup> The charterer never takes delivery of the vessel in the first place so there is no occasion for the vessel to be redelivered. Effectively the simple time charter provides a time scale within which the owner will comply with valid orders by the charterer and “render services as a carrier by his servants and crew to carry the goods which are put on board his ship by the time-charterer”. By contrast a charterer “hires” and the owner “lets” a vessel under a demise or bare boat charter. The vessel is delivered to the demise charterer and hence the charterer will ultimately redeliver the vessel at the end of the charter. This distinction between simple and demise charters is significant since it goes to the root of the question as to whether or not an order for a last voyage which results in an overrun or overlap as it is sometimes referred to, is a breach of condition.

### Duration of charterparty

There are a wide variety of clauses providing for the duration of time charter parties. It is most common to refer to a time scale<sup>6</sup> but it is not unknown for the duration to be determined by reference to one or more voyages.<sup>7</sup> Specified voyages in such a charter are conditions. Whilst the latter have the appearance of voyage charter parties the respective rights and duties of the parties will bear the characteristics of a time charter party. Under a voyage charter the hire rate will be a fixed sum or will be determined by a formula based on the capacity of the vessel and the quantity subsequently loaded, prefaced by a duty to load a full and complete cargo. Allied rights and duties such as demurrage will apply. The hire due for the time charter party however will be based on the period of time the vessel is under the orders of the charterer. Similarly, allied time charter party rights and duties such as E&I Clauses and off hire provisions will apply.

**SHELLTIME 3 Clause 3** : “Owners agree to let and the charterers agree to hire the vessel for a period of [.....] months [....] days more or less in Charterer’s option commencing from the time and date of delivery of the vessel for the purpose of carrying crude oil ..... the vessel shall be delivered by owners at [.....] at owner’s option and redelivered to owners at a safe anchorage off [.....] at charterer’s option.”

**SHELLTIME 3 Clause 18** : “ ... notwithstanding the provisions of clause 3 hereof, should the vessel be upon a voyage at the expiry of the period of this charter, Charterers shall have the use of the vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provided in this charter.”

**LINERTIME : Time Clause 1 : Period and Port of Delivery** “The owners let, and the charterers hire the vessel for a period of the number of calendar months indicated in Box 15 from the time (not a Sunday or a legal Holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers between 7 a.m. and 10 p.m. or between 7 a.m. and noon if on Saturday, at the port stated in Box 16 in such ready berth where she can safely lie (a) always afloat\* (b) always afloat or safely aground where it is customary for vessels of similar size and draught to be safe aground \* (\* state alternative agreed in Box 16)....”

**Time for Delivery** : The vessel to be delivered not before the date indicated in Box 17. The owners to give the Charterers not less than the number of days’ notice stated in Box 18 of the date on which the vessel is expected to be ready for delivery. The Owners to keep the Charterers closely advised of possible changes in Vessel’s position.

**Clause 8 : Redelivery** “The vessel to be redelivered on the expiration of the Charter in the same good order as when delivered to the Charterers (fair wear and tear excepted) at a safe and ice-free port in the Charterer’s option in the place or within the range stated in Box 29 between 7 a.m. and 10- p.m. and 7 a.m. and noon on Saturday, but the day of redelivery shall not be a Sunday or legal holiday.

<sup>4</sup> **London and Overseas Freighters v Timber Shipping Co** [1971] 1 Lloyd’s Rep 532 at 526

<sup>5</sup> **Sea & Land Securities v Dickinson** (1942) Lloyd’s Rep 159 at 162.

<sup>6</sup> The basic period such as 6 months or 1 year is sometimes referred to as “the flat period”.

<sup>7</sup> **Temple S.S. Co v V/O Sovracht** [1945] 79 Lloyd’s Rep 1 : Vessel chartered for two voyages firstly to Kara and then to African Port. At Kara the Russian authorities ordered the vessel to deliver cargo to another Russian port. Whilst the charterer had no option but to comply, it was nonetheless from the owner’s viewpoint an unlawful order entitling the owner to damages when the vessel was redelivered late at the African Port.

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Repairs for the Charterer's account as far as possible to be effected simultaneously with dry-docking or annual repairs, respectively; if any further repairs are required, for time occupied in effecting such repairs the owners to receive compensation at the hire agreed in this Charter. The Charterers always to be properly notified of the time and place when and where repairs for their account will be performed.

**Notice.** The Charterers to give the owners not less than the number of days' preliminary and the number of days' final notice as stated in Box 30 of the port of re-delivery and the date on which the vessel is expected to be ready for re-delivery. The charterers to keep the owners closely advised of possible changes in the vessel's position. Should the vessel be ordered on a voyage by which the charter period may be exceeded the charterers to have the use of the vessel to enable them to complete the voyage, provided it could be reasonably calculated that the voyage would allow re-delivery about the time fixed for the termination of the Charter, but for any time exceeding the termination date the Charterers to pay the market rate if higher than the rate stipulated herein."

**NYPE : Clause 13 :** Witneeseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for **14**. about ..... [insert instructions, for example "a trip via port or ports via the Pacific, duration for 4 – 6 months." <sup>8</sup>] .....

**BALTIME : Clause 7.** "The vessel to 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 charterer's option at the place or within the range stated in box 21 between 9 am and 6 pm and 9 am and 2 pm on Saturday, but the day of re-delivery shall not be a Sunday or legal holiday."

A typical time charter determined by the duration of a voyage might read as follows : "The Owners let and the charterers hire the vessel for one or several voyages as described in the sub-section "Trip time chartering", followed by :- Trip time Chartering Box : "One Time charter voyage with loading 1 or 2 ports in Sweden and discharging 1 or 2 ports in Brazil. <sup>9</sup> Redelivery on dropping outboard pilot at last discharging port. Total period estimated to 30 days."

Beware that even standard form contracts may be amended by the parties as with the following example, of a Baltime 1920, which was amended to read "Delivery in the Bristol Channel and redelivery in the Capetown/Lourenco Marques range for a period of one round voyage to the Kara Sea." in **Temple Steamship v Sovfracht**.<sup>10</sup> Therefore it is essential that one should not take the provision for granted and double check exactly what each charter party in fact provides. <sup>11</sup>

In **Dunsford & Co v Compania Anonima Maritima Union**<sup>12</sup> the charter was stated to be "for 6 or 7 (in charterer's option) consecutive voyages during 1910. By the time the sixth voyage had been completed there was no time left for the seventh voyage so the charterers option to send the vessel on an additional voyage was no longer available.

### Express and implied extensions to the hire period

Despite the fact that the period of a charter is frequently expressed in terms of days, weeks, months or years, it is virtually impossible for a charterer to ensure that a vessel will complete all the tasks assigned to it by a given date, some time in the distant future. Even though the charterer will seek to ensure that the last assigned voyage will terminate either at the port of redelivery, at the designated date, or at some other port which allows the vessel to proceed to the port of redelivery under ballast by the designated date, the charterer is likely to find it difficult to hit a specific target date with any precision. This can be specifically required in the charter party but will almost certainly result in either early or late delivery and thus result in a breach of the requirements of the charter party. <sup>13</sup> For this reason most charter parties provide a tolerance or "window of opportunity" for the vessel to be redelivered. Even if a "window" is not expressly provided this

<sup>8</sup> as in **The Democritos** [1976] 2 Lloyd's Rep 149.

<sup>9</sup> Other alternatives could include "World-wide trading within IWL" or "One time charter trip from U.K. to one or two ports Spanish Mediterranean Coast." Followed by a provision stating "Total 30 days, owners thereafter entitled to market rate if higher than charter rate."

<sup>10</sup> **Temple Steamship v Sovfracht** (1945) 79 Lloyd's Rep 1.

<sup>11</sup> See also **The Aragon** - Segovia Compagnia Nav v R Pagnam & Fratelli [1977] 1 Lloyd's Rep 343 "the period necessary to perform 1 time charter trip vbia safe port(s) East Coast Canada within specific trading limits."

<sup>12</sup> **Dunsford & Co v Compania Anonima Maritima Union** (1911) 16 Com Cas 181

<sup>13</sup> **The Arctic Skou** – Ove Skou v Rudolf Oetker [1985] 2 Lloyd's Rep 478 : Where a vessel is redelivered in a different time zone the period of hire may be calculated on the basis of the actual time involved in the hire.

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may be implied at common law. **The Dione**<sup>14</sup> provides an analysis of the various types of provision. How much leeway is provided in a charter party for redelivery was placed into three categories by Denning L in this Court of Appeal judgement.

- 1) **Implied Margin** : “3 months” “6 months” etc. An example of this is **Gray v Christie**<sup>15</sup> where the anticipated last voyage would have resulted in redelivery 4 days after the due date for redelivery. In the event the vessel was 17 days late but the court held that there was no breach of the charter party terms and hence no damages were payable. However, hire was due for the overrun period, payable at the charter party rate. If there had been a breach hire would have been due at the market rate, if that were to be higher than the charter rate. Similarly in **The Democritos**<sup>16</sup> hire was for “4-6 months”. The arbitrator declared a 5 day margin.
- 2) **No margin express or implied**. In **Watson Steamship v Merryweather**<sup>17</sup> a specific date was provided, so the vessel was required to be returned on time. This is the exception, not the rule. There is a presumption that a leeway will be allowed, so clear express words are required to rebut the presumption. However, if a specific date is provided, time becomes of the essence and detention of the vessel beyond the redelivery date results in a breach and the right to claim damages. Similarly see **The Mareva**<sup>18</sup> where the duration of the charter party was stated to be “2 to 3 months maximum” and **The Gregos**<sup>19</sup> where hire was stated to be for “about 50 to maximum 70 days”. A variation of the method of assessing the quantum of damages applies in the event of breach. The owner is not forced to accept the market rate if it should happen to be less than the charter rate according to **The London Explorer**.<sup>20</sup> He is entitled to recover whichever happens to be the highest rate applicable at that time. Consequently, there is only likely to be litigation on such issues where there is a boom in the industry and hire rates have risen substantially after the original charter was brokered.
- 3) **Express Margin**. “6 months 20 days more or less”. Despite dicta in previous cases such as **The London Explorer**, Denning held in **The Dione** that an additional margin of 8 days over and above the maximum overlap provision, allowed by the arbitrator was not permitted. Orr LJ concurred with Denning in **The Aspa Maria**<sup>21</sup> stating that it could not have been the intention of the owner to provide the charterer with the benefit of two tolerance periods. Similarly, no further extension was permitted in **The Black Falcon**<sup>22</sup> since the NYPE time charter party provision for a + or - 15 days extension at charter party rate was considered to be final.

### What is a reasonable margin ?

This is a question of fact to be determined case by case in the light of all the circumstances. In **The Berga Tasta**,<sup>23</sup> which involved a consecutive voyage time charterparty, Donaldson accepted that 10 –11 days was reasonable for a 30 month charter. Wilson suggests that a 4-5% margin would be reasonable.<sup>24</sup>

<sup>14</sup> **The Dione** – The Alma Shipping Corporation of Monrovia v Mantovani [1975] 1 Lloyd’s Rep 115. See also Cases & Materials on Carriage of Goods by Sea – Martin Dockray 2<sup>nd</sup> ed p418 et seq

<sup>15</sup> **Gray v Christie** (1889) 5 T.L.R. 577

<sup>16</sup> **The Democritos** – Marbienes v Ferrostaal [1976] 2 Lloyd’s Rep 149 : And see also The Federal Voyager [1955] AMC 880 and The Adelfoi [1972 AMC 1742

<sup>17</sup> **Watson Steamship v Merryweather** (1913) 18 Com Cas 294

<sup>18</sup> **The Mareva** – Mareva Navigation v Canaria Armadora [1977] 1 Lloyd’s Rep 368 – 5 days more or less at charter’s option.

<sup>19</sup> **The Gregos** - Torvald Klaveness A/S v Arni Maritime Corp [1994] 1 WLR 1465 and see M.Dockray Cases and Materials at p420 and A.D.Hughes Casebook on Carriage of Goods by Sea at p481

<sup>20</sup> **The London Explorer** [1972] AC 1

<sup>21</sup> **The Aspa Maria** – Gulf Shipping Lines Ltd v Compania Nav Alanje S.A. [1976] 2 Lloyd’s Rep 643 at 645. 6 months, 30 days more or less at charterer’s option.

<sup>22</sup> **The Black Falcon** – Shipping Corp of India v NSB Niederelbe [1991] 1 Lloyd’s Rep 77 – “ ... for about 9 months, charterers’ option 3 months, charterer’s option further 3 months, 15 days more or less on final period. Charterers having option to complete last round voyage under performance prior to delivery at charterparty rate.”

<sup>23</sup> **The Berga Tasta** - Skibsaktieskapet Snefonn, Skibsaksjeselskapet Bergehus & Sig Bergesen DY & Co v Kawasaki Kisen Kaisha Ltd [1975] 1 Lloyd’s Rep 422

<sup>24</sup> J.F.Wilson - Carriage of Goods by Sea 3<sup>rd</sup> Ed, Pitman p92. He also draws attention to the US view that the overlap/underlap option requires the charterer to choose a final voyage which brings the redelivery closest to the charter party target date – Britain S.S. Co v Munson Line (1929) 31 F2d 530.

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### Options to Shorten or Extend the Charter Period

Where the charter party contains an express provision for the extension of the charter party the provisions regarding notice become critical. If there is a requirement that in order to take advantage of the option to extend then, according to **The Trado**,<sup>25</sup> once a charterer exercises that option the charterer cannot subsequently cancel the option and return to the original hire period. The notice is regarded as being final since in reliance on the notice the owner is likely to have made follow on arrangements for the employment of the vessel. Presumably the same rationale would apply to notice to exercise an option to redeliver early, as where the margin is stated as + or – 15 days. A failure to provide notice if required by the charter party may result in the charter party date becoming final.

### The effect of Options to Cancel or Suspend Hire on the Redelivery Date

If the charterer exercises an option to cancel the charter due to the occurrence of a specified event the redelivery date becomes irrelevant. According to **Kawasaki Kisen Kabushiki, Kaisha v Belships**,<sup>26</sup> time lost during the course of a time charter due to the operation of off hire clauses and other clauses entitling the charterer to suspend hire such as a war, cannot be added on to the tail end of the charter by either the owner or the charterer. Any option so provided must be exercised within a reasonable time or it will be forfeited.

### Notice of Redelivery.

“The charterers to give the owners not less than 10 days notice at which port and on which day the vessel will be redelivered. Should the vessel be ordered on a voyage by which the charter period will be exceeded the charterers to have the use of the vessel to enable them to complete the voyage provided it could be reasonably calculated that the voyage would allow re-delivery about the time fixed for the termination of the charter, but for any time exceeding the termination date the charterers to pay the market rate if higher than the rate stipulated herein.”

Clauses can provide options to renew the charter party or to extend the charter party for a specific period, normally subject to a notice period. Any late delivery can result in on extra months hire being payable and the charter party being extended for that month. The problem for such provisions and regarding extensions generally, for the ship owner, is that the vessel may be committed to a new charter with another charterer and the ship owner needs to take possession of the vessel in time to deliver it to the new charterer.

### Early Re-delivery

If a party attempts to wrongly repudiate a contract the innocent party can reject the wrongful repudiation and continue the contract according to **White & Carter v McGregor**.<sup>27</sup> However in **The Puerto Buitrago**<sup>28</sup> the Court of Appeal stated that in respect of the early return of a vessel damages would be sufficient and the owner could not insist on hire till the end of the charter period.<sup>29</sup> Thus if the owner mitigates his loss by rehiring the vessel he would receive the old hire rate for a period of unemployment of the vessel but once rehired out he would only receive the difference, if any, between the old and new hire rates as damages. Despite the fact that one might imagine that there is a duty on the owner to attempt to rehire the vessel and thus mitigate his potential losses, in **The Odenfeld**<sup>30</sup> Ker J held that for a limited period the owner may continue to hold the vessel at the charterer’s disposal and continue to claim hire. In **Reindeer Steamship v Forslind**<sup>31</sup> a clause was worded in such a way that hire was payable right up to the termination date irrespective of early redelivery. Hire was stated to be payable half monthly, in advance, until redelivery for the term of six calendar months.

<sup>25</sup> **The Trado** – Mareille Fret S.A. v D.Oltmann Schiffahrts Gmbh & Cook G [1982] 1 Lloyd’s Rep 157 and **Atlantic Lines and Navigation Co Inc v Didymi Corp** [1984] L Lloyd’s Rep 583. Note that many charterparties contain a provision requiring the charterer to keep the owners informed of developments on a regular basis.

<sup>26</sup> **Kawasaki Kisen Kabushiki, Kaisha v Belships** (1939) 63 Lloyd’s Rep 175

<sup>27</sup> **White & Carter v McGregor** [1962] AC 413

<sup>28</sup> **The Puerto Buitrago** [1976] 1 Lloyd’s Rep 250

<sup>29</sup> In **The Ocean Frost** – Armagas Ltd v Mundogas S.A. [1986] 2 Lloyd’s Rep 109 the House of Lords confirmed that an owner, subject to the duty to mitigate his losses, would be entitled to damages for early re-delivery, but in the circumstances, since the charterer’s agent had exceeded his authority in committing the charterer to the charterparty, the contract was invalid. There was no charterparty and thus no early redelivery when the charterer notified the owner that the purported charter party was cancelled, and thus no damages were payable.

<sup>30</sup> **The Odenfeld** [1978] 2 Lloyd’s Rep

<sup>31</sup> **Reindeer Steamship v Forslind** (1908) 13 Com Cas 214 : See also **Trechmann S.S. Co v Munson Line** (1913) 203 F 692.

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### The relevant time for providing final orders

The question as to what is the appropriate time for judging the legitimacy of an order for the last voyage was left unclear in **The Matija Gubec**<sup>32</sup> and was only finally settled by the House of Lords in **The Gregos**.<sup>33</sup> Their Lordships held that where it became clear at the time of the order that the voyage would take too long because of changing circumstances the order may be rejected and a fresh order requested. However, if it appears legitimate at the time, the owner cannot reject it immediately. The significant time is not when the order is made but when it is time for performance. It is desirable that the order is given as early as possible since it provides the parties with an opportunity to make appropriate arrangements. Nonetheless the ship owner is not bound by the order until the time of performance. In this particular case, at the time of performance it had become clear that it was an illegitimate order. The owner initially refused to comply and requested a fresh order. The charterer refused but subsequently agreed to an indemnity provision. The owner asserted in court that the illegitimate order was a repudiatory breach. The court rejected this assertion. The unlawful order could be put right. However, if as in this particular case the charterer refused to make a new lawful order, the owner could refuse to comply with the illegitimate order and the owner had the right to terminate the charter and claim damages.

## DAMAGES FOR LATE REDELIVERY

### Introduction

The central issue is firstly, can an owner refuse to accept an illegitimate order, namely an order which would inevitably result in the vessel being redelivered after the expiry of the charter period (including any extension time expressly or impliedly provided for) and demand that the charterer produce a new order which complies with the charter period? and secondly, if the owner accepts either a lawful last voyage order or complies with an unlawful or illegitimate last voyage order what happens if or when the vessel is redelivered late? Should the additional time be paid at the charter party rate or at the current market rate<sup>34</sup> if it is higher, or is the owner entitled to damages, including damages for loss of subsequent freight and or any costs paid to subsequent charterer's for failure to deliver the vessel?

### Damages payable for late delivery following lawful last orders.

Where the last voyage orders under a traditional time charter party were lawfully made, but due to subsequent events beyond the control of the parties the vessel is eventually redelivered late the charterer will pay for all extensions covered by the charter party at the charter party rate<sup>35</sup> but will pay for all subsequent time at current market rate if higher than the charter party rate.<sup>36</sup> No other damages will be payable for other losses incurred by the owner, such as lost freight or damages payable to later charterers. However, where lawful last voyage orders are for a round trip as required under the terms of the charterparty but due to subsequent events beyond the control of the parties the vessel is eventually redelivered late, the charterer is protected against any claim for damages and will pay for all periods involved at the charter party rate according to Donaldson LJ in **The World Symphony and The World Renown**.<sup>37</sup> Clearly delays causing late delivery caused by the owner will preclude the recovery of damages by the owner and are likely to place the vessel off hire for a period of time in any case, thus negating any hire due for late delivery. Presumably if the redelivery beyond the final cut of date is the fault of the charterer, the charterer could be held liable in damages, though what these might be, namely payment of hire at market rate if higher than the charter rate or

<sup>32</sup> **The Matija Gubec** – *Jadranska Slobodna Plovida v Gulf Shipping Line* [1983] 1 Lloyd's Rep 24 – 12 months 45 days more or less in charterer's option.

<sup>33</sup> **The Gregos** [1995] 1 Lloyd's Rep 1 House of Lords per Lords Templeman/Mustill/Slynn/Woolf

<sup>34</sup> In **Hector v Sovfract** [1945] KB 343 it was specifically provided that any overrun would be payable at market rate. **The Johnny** – *Arta Shipping Co v Thai Europe Tapioca Service* [1977] 2 Lloyd's Rep 1 discusses computation of the appropriate market rate. Vessel chartered "minimum 11 / maximum 13 months." The owner sought to recover at current market rate for a theoretical voyage charter party – but the court applied the current market rate for an 11/13 month charter.

<sup>35</sup> **The Dione** [1975] 1 Lloyd's Rep 115. Since it is impossible to predict exact redelivery time the court will imply an extension of a few days at charter party rate even if there is no express provision in the charter for this (but will not imply an extension if delivery date is express). The charter party rate will apply even if the market rate is more or less than the charter party rate per Lord Reid in **Timber Shipping Co SA v London & Overseas Freighters Ltd** [1971] 1 Lloyd's Rep 523. The vessel was redelivered 4 months late due to strikes. The market rate had fallen below the charter party rate but nonetheless the charter rate applied.

<sup>36</sup> *British S.S. Co v Munson Line* (1929) 31 F2d 530 – but note that an express provision to pay at charter party rate for all overrun periods would displace the common law rule eg Clause 7 *Baltim* supra.

<sup>37</sup> **The World Symphony and The World Renown** - *Chiswell Shipping Ltd & Liberian Jaguar Transports Inc v National Iranian Tanker Co* [1992] 2 Lloyd's Rep 115

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something more extensive is not clear. Nor is it clear what the charterer could do apart from ordering the vessel on the last voyage which would be considered to be fault. Perhaps a failure to pay dues to the authorities resulting in detention of the vessel would fall into this category.

**The Lendoudis Evangelos II**<sup>38</sup> involved a “Time charter for a trip duration “70/80 days without guarantee”. The trip in fact took 103 days. The owner sued for damages and sought to recover the current market hire rate for the overrun period. The court held that if, as in this case, the order was given in good faith, the charter party rate applied for the overrun period. However, by implication, if the charterer had been well aware of the probability that there would be an overrun then damages would have been payable. The term “without guarantee” was crucial. Contrast **The Black Falcon**<sup>39</sup> where a charterer undertook a final voyage too late to be able to redeliver on time. The NYPE time charter party allowed a + or - 15 days extension at charter party rate. However, the court held that this only applies if redelivered within the 15 days. Here there was an illegitimate last voyage and the court held that hire was payable at the market rate for the whole of the period of excess hire prior to redelivery.

This would mean that the benefit of extensions at charter party rates are lost if an illegitimate order is given resulting in the vessel is delivered beyond the final cut off date and all hire after the express date is payable at the market rate where higher than the charter rate. In the absence of liability for wider damages a charterer can attempt to order a vessel to undertake such a voyage with impunity if the charter rate and the current market rate are the same, assuming that the owner accepts the order.

**The World Symphony & The World Renown** discusses round voyage extensions undertaken whilst the vessel is in the redelivery range. This concerned a Shelltime 3 charter party<sup>40</sup> which contained a redelivery clause (clause 3) at + or - 15 days of a specific date with an extension clause (clause 18) to cover any last voyage, notwithstanding the provisions of clause 3. The court held that the voyage ordered would inevitably exceed the 15 days extension, but **ANY** voyage within the accepted charter party range was a legitimate last voyage due to the specific wording of the round voyage extension clause even though it was clear that the 15 day target would be met. Donaldson LJ however made it clear that the mere fact that it was a round voyage extension clause would not in itself be sufficient to legitimise any last voyage. It was the words “notwithstanding” that were crucial to this decision. The same outcome arose out of **The Pacific Sun**<sup>41</sup> and **The Narnian Sea**,<sup>42</sup> concerning clause 11 Texacotime 2 – phrased on identical terms. It is likely that the Beepeetime 2 provisions which omit the notwithstanding phrase would not legitimise an order for a voyage which would result in a breach of the final date for redelivery, see **The Peonia**.<sup>43</sup>

Lord Donaldson in **The World Symphony and World Renown** provided the following overview:- “Here the general principles are not, I think in doubt in the light of the Dione and Hyundai. They are that

- 1) A charter for a fixed period will have a small implied tolerance or margin in its duration.
- 2) A charter for a fixed period with an expressed tolerance or margin ... will have no further implied tolerance or margin.
- 3) In either of these cases, in the absence of a “last voyage” clause, charterers will be in breach of contract if the vessel is redelivered after the expiry of the fixed period extended by the implied or expressed tolerance or margin, unless the late delivery arises out of a cause for which the owners are responsible.
- 4) A “last voyage” clause is needed and will protect the charterer if he orders the vessel to undertake a last voyage which can reasonably be expected to enable the vessel to be redelivered punctually, but without fault on his part in the event such redelivery proves impossible.
- 5) If a “last voyage” clause is to protect a charterer from being in breach by late redelivery in circumstances in which he has ordered a voyage which is likely to or must have this result, the intention to provide this protection must be clearly expressed.”

<sup>38</sup> **The Lenoudis Evangelos II** [1997] 1 Lloyd’s Rep 404 : and see also **Benship International Inc v Deemand S.S. Co** [1988] see J.Wilson infra at 93.

<sup>39</sup> **The Black Falcon** [1991] 1 Lloyds Rep 77

<sup>40</sup> For text of Clauses 3 & 18 see supra p3

<sup>41</sup> **The Pacific Sun** [1983] AMC 830

<sup>42</sup> **The Narnian Sea** [1990] AMC 274

<sup>43</sup> **The Peonia** [1991] 1 Lloyd’s Rep 100.

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### **Damages payable for late delivery following unlawful<sup>44</sup> last orders.**

The general rule appears to be the owner can refuse to perform an order to perform an illegitimate last voyage. If the owner agrees to perform the voyage the owner can do so on condition that the charterer pays an enhanced rate and can again refuse to perform in the absence of such an agreement. Alternatively, if the owner agrees to perform the voyage without imposing any conditions on performance the charterer will pay hire at the charter party rate up to the final date expressly provided for redelivery of the vessel and will pay at the market rate, if higher than the charterparty rate, for any overrun period.

**The Gregos**<sup>45</sup> concerned a NYPE charter party for a period of 50 to maximum 70 days, redelivery to take place at or off a port in Gibraltar, Hamburg range, vessel to be delivered at Antwerp. The vessel was scheduled, a long time in advance, to perform a final voyage which would at that time have resulted in the vessel being redelivered in time. However by the time the sailing orders were actually given it was clear that due to a port blockage the 70 day redelivery date would not be met. The owner initially refused to comply with the order and requested a new order. The charterer refused to issue a new order. The owner then offered to perform the order as a fresh spot charter at a highly advantageous rate. The charterer refused these terms but eventually the owner and the charterer agreed to go ahead at the original charter rate without prejudice to the rights of the party. Thus the question as to the quantum of damages due for the charterer's alleged breach (if any) fell to be decided, first by arbitration, then subsequently through appeals to the High Court, the Court of Appeal and finally by the House.

The House held that the relevant date judging the legality of last voyage orders is primarily at the time of giving the order, but that this evaluation is not final and the validity of the order must ultimately be judged at the time of performance. An initially valid order may subsequently be rendered invalid by events. The charterer can only escape liability for late redelivery if the delaying event becomes apparent after legitimate sailing orders have been given. In the event the order was illegitimate. The court further held that the mere issuing of an illegitimate order is not a repudiatory breach of contract. The duty to make a valid order is an "innominate term." The owner can reject the order and request that a fresh valid order be given. However, if the charterer refuses to issue a valid order, the charterer evinces an intention to be discharged from the contract. This amounts to an anticipatory repudiatory breach of the contract by the charterer. The owner can accept the charterer's repudiation, treat the charter as being at an end and sue for damages. Such damages would of course have if possible to be mitigated by the owner seeking to recharter the vessel. Alternatively the owner can waive the breach, perform the voyage and seek damages in respect of the overrun period.

In the circumstances the owner was entitled to the difference between the charter party rate and the rate that the owner would have received had he engaged in a spot charter (in this case the price quoted by the owner to the charter for a spot charter). The fact that this happened to provide the owner with a windfall was of no import. The charterer could have avoided this by making a valid order but chose not to. The owner would have received a mere \$35,000 rather than the \$300,000 damages awarded by the arbitrator if he had complied with the order without the protest and without having proposed that special spot charter rate. Clearly, faced with an illegitimate last voyage order owners would be well advised in future to engage in hard negotiations with charterers, assuming the market permits.

**The Peonia**<sup>46</sup> makes it clear that where a charterer orders a vessel on a last voyage which would inevitably result in the vessel being redelivered beyond the final delivery date, including any allowances legitimately afforded for mishaps and miscalculations, then the charterer is liable for general damages for late delivery and cannot simply continue to pay at the standard charter party rate. The only excuse for late delivery resulting in payment of the standard charter party rate is where a legitimate voyage is delayed for circumstances beyond the charterer's control. The charterer sub-chartered the vessel for a last voyage which would result in delivery a month after the final redelivery date. The ship owner offered to undertake the voyage for extra money. The charterer refused so the ship owner withdrew the vessel. Bingham LJ held that whilst the court would always imply a reasonable addition to the charter period or enforce the extension time provided in a charter party, if the order would clearly result in the vessel being redelivered after that time the

<sup>44</sup> In **The London Explorer** [1972] AC 1 HL Lord Reid refers to legitimate and illegitimate last orders. This expression was adopted by Denning in **The Dione**, and subsequently used in **The Democritos**, **The Aspa Maria** [1976] 2 Lloyd's Rep 643, **The Mareva A.S.** and **The Matija Gubec**.

<sup>45</sup> **The Gregos** [1995] 1 Lloyd's Rep 1 House of Lords per Lord Mustill,

<sup>46</sup> **The Peonia** : Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd [1991] 1 Lloyd's Rep 100 – see also Casebook on Carriage of Goods by Sea – A.D.Hughes – Blackstone Press 2<sup>nd</sup> ed at p472.

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ship owner is entitled to an additional rate plus damages or alternatively the owner could withdraw the vessel. Contrast this with **The World Symphony & The World Renown**.<sup>47</sup>

### **REDELIVERY REQUIREMENT**

#### **The Appropriate Place For Delivery / Redelivery**

The port of redelivery is either nominated in the charterparty, or prescribed as being within a certain defined range, for example “Vessel to be delivered (redelivered) on dropping outward pilot at XYZ town” or “Vessel to be delivered (port at owner’s option) and redelivered (port at charterer’s option) in the Mediterranean”. It fell for the court to decide in **The Sanko Honour**<sup>48</sup> whether or not the charterer’s chosen port of redelivery complied with the charter terms, namely within a “Range from Japan to Persian Gulf”. The court held that this geographical range embraced Japan to Honolulu, the port where the vessel was delivered. Hobhouse J indicated that under the provision Japan was the central locus. Hence, the charterer was not in breach of the redelivery clause.

Parker J held in **The Bunga Kenanga**<sup>49</sup> that damages for delivery at the wrong location are assessed at net loss to the owner after taking into account any remuneration received for alternative employment. The vessel was re-delivered at Rotterdam when a Far East port was specified in the charter party. However, Mustill J in **The Rijn**<sup>50</sup> held that where a particularly disadvantageous substitute fixture back to the nominated port was negotiated by the owners, after a vessel had been redelivered to the wrong port, damages would be based on the most economic form of voyage that would have righted the wrong. In this case the cheapest solution would have been to sail the vessel back into range under ballast. The court may not have been that sympathetic with the owners since they had rejected an invalid order for a final voyage which would have got the vessel back in range albeit outside the charter period. It would appear that the poor condition of the vessel had resulted in extensive off hire periods which in turn contributed to the issuing of the invalid order. However, since an arbitrator had held that the poor condition of the vessel was not so bad as to invalidate the charter itself, there were no grounds for concluding that the owners had caused the problem in the first place.

#### **Condition of the vessel on redelivery**

The ship owner can recover from the charterer for any damage suffered by the vessel which is attributable to the charterer, in particular incidents covered by E & I Clauses. Thus in **The Maestro**<sup>51</sup> Staunton J held that the charterer was liable for the costs incurred by the owner in cleaning the vessel in readiness for a subsequent hire. It was held that since it is the owner’s duty to maintain the vessel, the charterer would not be liable for defects that the owner had a duty to repair. It is common for the charter party to provide a clause such as the following :- “the vessel to be redelivered on the expiration of the charter in the same good order as when delivered to the charterers (fair wear and tear excepted)” in **Chellew Navigation v Appelquist**<sup>52</sup> Fair wear and tear would embrace any damage that would be normally attributable to the conduct of a particular trade and thus not recoverable.

It is clear that the owner cannot refuse to accept redelivery if the vessel has not been repaired as stated in, **Wye SS Co v Compagnie Paris-Orleans**,<sup>53</sup> but having taken delivery he is then entitled to have the work done and bill the charterer, according to **The Puerto Buitrago**<sup>54</sup> which concerned a demise charter party and subsequently confirmed in **The Rozel** [1994] 2 Lloyd’s Rep 161.<sup>55</sup> In such a case the ship owner cannot claim hire for the repair time. However, the owner can claim lost profit which perhaps amounts to the

<sup>47</sup> **The World Symphony & The World Renown** [1992] 2 Lloyds Rep 115.

<sup>48</sup> **The Sanko Honour** – Reardon Smith Line Ltd v Sanko Steamship Co Ltd [1985] 1 Lloyd’s Rep 418.

<sup>49</sup> **The Bunga Kenanga** - Malaysia International S.S. Corp v Empresa Cubana de Fletes [1981] 1 Lloyd’s Rep 518

<sup>50</sup> **The Rijn** [1981] 2 Lloyd’s Rep 267

<sup>51</sup> **The Maestro** - Aurora Borealis Compagnia Armadora SA & Buenamar Compagnia Nav S.A. v Marine Midland Bank N.A. [1984] 1 Lloyd’s Rep 646

<sup>52</sup> **Chellew Nav Co v Appelquist Kolimport AG** (1933) 38 Com Cas 218

<sup>53</sup> **Wye SS Co v Compagnie Paris-Orleans** [1922] 1 KB 617.

<sup>54</sup> **The Puerto Buitrago** – Attica Sea Carriers Corp v Ferrostaal-Poseidon Bulk Reederei GmbH [1976] 1 Lloyd’s Rep 253 and see M.Dockray at p424. The facts are peculiar. The vessel was so old and decrepid the charterers had it towed across the Atlantic, discharged cargo then had it towed to Kiel. The vessel was worth a mere \$500,000 in scrap but required \$2M repairs. Even if repaired its value would only be \$1M. The charterers admitted liability for \$400,000 worth of repairs.

<sup>55</sup> **The Rozel** [1994] 2 Lloyd’s Rep 161

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same thing, or better even since this would be based on the market rate in any case.<sup>56</sup> Mustill J confirmed that the charter party must be terminated in **The Rijn**.<sup>57</sup> An express clause to cover this might be as follows “Against paying x \$ in lump sum compensation to the owners, charterers have the right to redeliver the vessel in lieu of cleaning.” In **The Pantelis A Lemos**<sup>58</sup> it was specified that the owner only had to take redelivery of the vessel in the event of general damage but that in the event of damage affecting the vessel’s class repairs had to be effected before redelivery. Nonetheless where the charterer failed to carry out the repairs the owner could not refuse to take redelivery of the vessel.

It is usual for the charter party to provide for a survey at termination either by independent surveyors or by surveyors appointed by the charterer or owners or even both. For example :- “Unless otherwise mutually agreed the owners and charterers shall each appoint surveyors for the purpose of determining the condition of the vessel at the time of delivery and redelivery hereunder. Surveys whenever possible to be done during service, but if impossible any time lost for on-hire survey to be for owners’ account and any time lost for off-hire survey to be for charterer’s account.” *or alternatively* “A joint survey at delivery to be arranged by owners and effected in their time. A joint survey on redelivery to be arranged by charterers and effected in their time. Cost for both surveys to be shared equally.”

### Fuel/ bunkers and port dues on delivery and redelivery.

Subject to the express provisions of the charter party it is usual for the charterer to become liable for fuel costs<sup>59</sup> and port and lighterage dues or the duration of the charter party. Thus :-

**Linertime : Clause 6 Bunkers :** The charterers at port of delivery and the owners at port of re-delivery<sup>60</sup> to take over and pay for all fuel remaining in the vessel’s bunkers at (a) current price, at the respective ports\* (b) a fixed price per ton\* (\*state alternative agreed in Box 24)

**Clause 5** (see also *Baltim*): The Charterers to pay all dock, harbour, light and tonnage dues at the ports of delivery and redelivery (unless incurred though cargo carried before delivery or after re-delivery).

In **The Eurostar**<sup>61</sup> a hire clause provided “charterer to pay for all bunkers on board on delivery : ship owner to reimburse for bunkers on board during redelivery : hire for last hire period can be reduced to take into account remaining bunkers.” The vessel broke down. The owner had mortgaged the vessel to the plaintiffs who redeemed the mortgage following a default on repayments by the owners. The court appraised and sold the vessel. The charterers as interveners claimed payment out of the fund, held by the court as a result of the sale, for bunkers remaining on board. The court held that the bunkers remained the charterer's property and so the charterers were entitled to a claim from the fund.

## CONCLUSION

Given the uncertainty that inevitably attaches to maritime ventures, no matter how careful an owner or charterer is, late delivery always be a feature of chartering practice. There is no excuse for either party deliberately misleading the other or for deliberately engaging in conduct which jeopardises the interests of the other. Good management practice can minimise the occurrence of late delivery but cannot completely guarantee that it will not occur. Whilst the legal rules governing the allocation for responsibility for late delivery and late redelivery are complex, they are at least reasonably certain. Minor issues may be clarified as time passes but no major changes are likely. That being the case, the most significant reason for future litigation for late delivery or late redelivery is likely to arise out of bad contract draftsman-ship. Theoretically, the parties are free to allocate responsibility for such risks in the contract. In reality, the balance of contractual power will depend upon the economic cycle. The allocation of risk will favour charterers during recession and owners during boom times. There is no need for the law to seek to establish a fair balance between the parties. Over the period of a trade cycle balance is achieved naturally.

<sup>56</sup> **Wye SS Co v Compagnie Paris-Orleans** [1922] 1 KB 617

<sup>57</sup> **The Rijn** – Santa Martha Baay Scheepvaart & Handelsmaatschappij NV v Scanbulk A/S [1981] 2 Lloyd’s Rep 267 – and see M.Dockray at p426

<sup>58</sup> **The Pantelis A Lemos** – Somelas Corp v Gerrards Rederi A/S [1980] 2 Lloyd’s Rep 102

<sup>59</sup> In the absence of a provision to the contrary the owner will repay at a reasonable market rate – and not necessarily at the rate paid by the charterer – **The Good Helmsman** – Harmony S.S. Co SA v Saudi-Europe Line Ltd [1981] 1 Lloyd’s Rep 377.

<sup>60</sup> **The Captain Diamantis** – Mammoth Bulk Carriers Ltd v Holland Bulk Transport BV [1978] 1 Lloyd’s Rep 346 – the charterer is only allowed to bunker for the purposes of the charter period. If the charterer deliberately seeks to engage in excess bunkering the owner can order the master not to take the excess on board and can refuse to pay for any excess present on the vessel on redelivery.

<sup>61</sup> **The Eurostar** [1993] 1 Lloyds Rep 106