The master’s role in charter performance

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In this paper Norman Lopez discusses the master’s responsibilities and discretion in performing time and voyage charters. The conclusion reached is that everyone is best served by masters having a definite interest in the charters they perform.

I. INTRODUCTION

Who really operates the vessel? The person in the shore office is more concerned with minimising operating expenses. Despite the title he or she may hold, he or she does not really operate the vessel in its day-to-day activities. It is the master of the vessel who does. Who is this person? Without becoming involved in semantics the master is the person whose name usually appeared on certificates of registry issued to ships.

In the United Kingdom since the Merchant Shipping Act 1988 came into effect, however, the name of the master is no longer required on the certificate of registry. The new Shipping Register in Hong Kong also excludes the master’s name from the certificate of registry. Is that yet another nail in the coffin of the position of the shipmaster? Perhaps the first nail was hammered in nearly a century ago. In 1896 a young Italian obtained a patent from England that sealed the fate of shipmasters. He was only 22 years old and his name was Marconi. Six years later ships began to be connected to “controllers” in the shore office by radio and the master’s autonomous position virtually died. It is significant that in 1992, almost the centenary of the death of the master’s autonomy, the GMDSS option will also begin the demise of the radio officer.

The master of old was really the master of everything that happened on the ship, as indeed the master of today must be, because of the ship’s distance from physical control on the shore. Legislation regulates the master’s role and ensures that the master’s responsibilities

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are many: amongst others safety, pollution prevention and discipline. We shall not deal with those responsibilities here.

This paper will examine the master's role which will affect the shipowner's commercial success or failure. This is not governed by legislation, because legislation is mainly concerned with safety and protection of the marine environment, not protecting shipowner's profits. The only regulatory link with the vessel's commercial activities is that under some good administrations, the examination syllabus of masters includes a subject dealing with "Business and Law". Masters are required to learn the fundamentals of charterparties together with many other aspects of shipping law that have little connection with carriage by sea. The time spent on this segment of the syllabus has to be brief and therefore restricted to attempting to give them a basic knowledge of these aspects. If more time was spent teaching them about important issues concerning charter performance, they would never be able to learn about other matters in their "Business and Law" syllabus. And yet, the performance of charter contractual obligations is so dependent on the master of the ship. This does not even take into account the many systems where applicants for certification as master do not have to undergo the above form of education.

If the legislation does not govern the master's role in the vessel's commercial operation, except rather indirectly, what does? The answer lies in the words used in the documents which comprise the contracts for the vessel's use, the charterparties. It is the charterparty which determines the master's role in many ways, but he is supposed to play this role without proper education about the implications of his activities or omissions. If these implications lead to disputes between the charterer and the shipowner someone will have to pay eventually, whether the charterer, owner or P & I Association. Solutions for these disputes are not found in legislation. Arbitrators and the courts must find them.

The master's role is to ensure that he does everything required by the charterparty in the way the charterparty requires it. This is what he is employed to do, to earn money for the owner. However, he lacks commercial control of the vessel. He does not fix the vessel or look for cargo.

Perhaps the master of old, with the considerable power to control the vessel's commercial activities, was in the "dark ages" of modern shipping. Even now, however, it must be incontrovertible that the master is still responsible for ensuring not only that the ship can perform so that it can earn money for the shipowner, but also that he performs his own functions correctly and validly as laid down in the charterparty.
II. PERFORMANCE OF THE CHARTERPARTY

The charter is a contract for the use and/or hire of the ship. We (and the master) should never forget this. Indeed, Mustill LJ said recently in *The Mexico I*:1

It is not the role of the Court to impose its own notions of what is practical common sense, or of what technical terms may signify, or of what conduct is reasonable, and so on. Nor should the Court wave the dictionary aloft, if the commercial men know well enough what a clause was intended to mean. At the same time, a contract is a contract. If the consequence of reading the contract as if it meant what it said is that, for instance, a master who is uncertain whether his ship is “arrived” or whether it is “ready” may find it prudent to give more than one notice—an inconvenient consequence—this comes about, not because Courts are more pedantic than commercial men, but because the commercial men who wrote the charter-party chose to make laytime refer to the happening of a particular event.

If “commercial men”, including shipowners, charterers and arbitrators, are supposed to know what a clause means and when laytime commences, did anyone think of telling the master about this? Or was he also supposed to be a commercial man and know about it? Therefore, when the master arrived at the port and issued by telex a document which he called a “notice of readiness” but which was in fact not a valid notice of readiness, this was not the “particular event” chosen by commercial men to trigger off the laytime.

The shipowner was very lucky in *The Mexico I*. If the discharge of the cargo took place without a valid notice of readiness being given, this would not have used up the charter’s allowed laytime and the entire discharge would have taken place in “free time”. When the discharge was completed, the charterer could have released the vessel to the owner and then been entitled to claim despatch money for the whole of the laytime. In this case, counsel for the charterers conceded that laytime began to run when the discharge of the contractual cargo actually commenced, despite the fact that no valid notice had ever been given to trigger off the laytime. In the English Court of Appeal Mustill LJ agreed that this may have made “good sense” but that it was not easy to work out precisely how that conclusion could have been reached. In future cases courts may well refuse to accept such a concession by charterers.

So, the owner escaped having to pay despatch. In the future, however, if owners want to avoid paying despatch they may have to instruct their masters to tender document after document, each called a “notice of readiness” until all the characteristics of “arrived ship” and “readiness” exist and the document is finally a valid notice of readiness. Because *The Mexico I* may not be appealed to the House of

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Lords, we have to accept the Court of Appeal's decision and masters will have to learn how to tender valid notices so that laytime is triggered. If the master is uncertain when a "notice" becomes "valid", he may have to tender such documents at frequent intervals.

Owners could argue that, although an invalid notice of readiness was tendered and "accepted", the very fact of the charterers' arranging for cargo operations to commence indicates that the charterers waived their right to laytime commencing on an event such as the master's issuing a fresh and valid notice of readiness. It is submitted that the owners would fail.

In *Pteroti Compania Naviera, SA v National Coal Board*, the charter provided that laytime would commence 24 hours after the vessel was ready to discharge and written notice had been given. Discharge commenced before the master gave a notice of readiness. It was held that notice was essential to the commencement of laytime. The owners argued in that case that by requiring "earlier" delivery of cargo (before a valid notice was given and accepted) the charterers had waived their right to a notice of readiness before they began to discharge the vessel. They also argued in the alternative that there was an implied agreement that laytime was to start from the instant the cargo operation commenced. Both arguments were rejected by the court.

If the shipowner finds it difficult to instruct the master to give notice after notice and expects him to act in a way that would be practical and legally correct, the owner may have to amend the terms of the charterparty to insist on an appropriate "time waiting" clause, or a clause providing that laytime is to commence after the tendering and acceptance of a document named "notice of readiness", even if such a document is not valid. The charterers could always bring an action against the owner for breach of the charter if the vessel is not ready but this should not affect the commencement of laytime.

In *The Mexico P* the charterparty was for a voyage of a dry cargo ship. Masters are required to perform similar obligations under time charterparties and charterparties for tankers. In a dry cargo voyage charterparty the master's tender of the notice of readiness triggers the commencement of laytime and this will be an important role. Other terms in the charterparty, such as "reachable on arrival" are external to the master's role. He cannot berth if the berth is unavailable or unreachable because of some condition outside his control. If, however, the berth is available, accessible and reachable, but the master decides not to berth the vessel because of fog, despite the harbour pilot's offer...

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3 See above n1.
to take the vessel alongside the berth, and evidence from port author-
ities that visibility was reasonable, laytime may not commence during
the waiting time and the charterers may claim damages from the
shipowners for delay.

The charterparty clauses themselves determine the master's role in
the charter's performance, and whether or not the shipowner, whose
agent he is, will be disadvantaged by his not playing the required role
in an acceptable, legal manner. To explore this role, it is therefore
necessary to examine particular charterparties and their clauses to
examine what the master is supposed to do and then, for owners, to
instruct him how to do it.

III. VOYAGE CHARTER PARTIES

A. The Master's Responsibilities

In a voyage charter, while the charterer may be responsible for the
"safe port" warranty, the owner is still responsible for causing the
vessel to arrive at its contractual destination. Lord Diplock listed the
four stages of the voyage charter in *The Johanna Oldendorff* as
follows:

(a) the loading or approach voyage to the agreed loading place;
(b) the loading operation;
(c) the carrying or loaded voyage; and,
(d) the discharging operation.

The two voyage stages are under the control of the master because
he is the agent of the shipowner. Therefore the master's role is to
observe the obligation implied in the common law, if not expressed in
the charterparty, and proceed with reasonable dispatch.

To this general responsibility of the master (and shipowner) can be
added another general obligation: that the owner must generally load,
handle, stow, carry and discharge the goods on the vessel in a careful
manner. This duty is usually considered to be delegated to the master
and the cargo-related operations are under his supervision. Indeed,
clause 2 of the GENCON charterparty states that which deals with the
owners' responsibility:

Owners are to be responsible for loss of or damage to the goods or for delay in
delivery of the goods only in case the loss, damage or delay has been caused by
the improper or negligent stowage of the goods (unless stowage performed by
shippers/charterers or their stevedores or servants) . . .

And the owners are responsible for no loss or damage or delay arising from any
other cause whatsoever, even from the neglect or default of the captain . . .

Charterers may insist on the deletion of the words in brackets and
also the second paragraph, depending on the strength of the market. In
any case, a rider may be added that the cargo ‘... is to be loaded and discharged at the risk and expense of the charterers but always under the supervision of the master.’

This ‘supervision’ will be discussed below but the principles are the same. However, even if ‘supervision’ by the master is not expressly stated, the owners will be vicariously liable for the master's carelessness concerning stowage of the cargo.

When the master signs bills of lading issued under a charterparty he does so as shipowner’s agent and carelessness on his part, or failure to stand up to pressure from the shipper may cause the owner to become liable to the bill of lading holder. Obvious examples are pressure to issue “clean bills”, when the condition of the cargo or its packaging is doubtful but the shippers offer a fraudulent document which they call a “letter of indemnity”; ante-dating bills of lading — another fraudulent action; and “switching” a bill of lading, by agreeing to a change of the name of the port of shipment on the bill.

This carelessness (or sometimes sheer ignorance) on the part of the master can affect owners under dry cargo voyage charters and also tanker voyage charters. In The Mobil Courage the master was clearly at fault. This caused the owners’ claim for over US$202,000 to fail.

The vessel was a tanker on a voyage charter. The dispute was between one oil major and another. The owner of the vessel, Mobil, chartered it to Shell for a voyage from Singapore to Madras. The charter was in the Shellvoy 4 form. It contained an indemnity clause, clause 3, which provided that if the original bills of lading issued under the charter were not available when the vessel arrived at the discharging port, the charterers would have a right to demand that the owners discharge the cargo without the charterers' and/or receivers' presenting the original bills of lading. For this right, the charterers undertook to indemnify the owners against claims made against the latter because of such delivery. Two other significant clauses provided as follows:

14. Time shall not count against laytime ... when spent or lost ... (c) as a result of (i) breach of this charter by owners.

29 ... Charterer may require the master to sign lawful bills of lading for any cargo in such form as Charterers direct.

After loading and before sailing the papers were presented for the master’s signature and one set included the original triplicate of the bill of lading to be carried on board for the consignee, delivered to the

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5 See Part IV C below.
consignee at the discharging port and then presented to the master to obtain the discharge of the cargo. The master agreed to sign the onboard set after sailing because he wanted to get away quickly. The master forgot to sign the triplicate set and later even forgot he had agreed to sign it and had forgotten to do so. The Judge stated that he:


... was influenced by the facts that:

... The master agreed that his recollection was faulty in certain respects, and that he might not have been very interested in the signing operations.

... His version of events seems inconsistent with the documents that he signed, and with the common practice under which oil tankers carry negotiable bills of lading on board, to deliver to the consignees, to enable discharge to take place immediately on arrival ...

My conclusion is that [Shell's water clerk] presented the triplicate to the master for signature, and required him to sign it, within the terms of cl. 29(1) of the charter-party. I accept that the master did say that he would sign them ... on the way. Even if he had not, I would have held that the circumstances of the presentation of the bundles, and the terms of the bills of lading, the distribution of documents statement and the master's receipt of documents amounted to a presentation of the triplicate for signature, to a master who is obviously experienced in dealing with cargo documents. Mobil were therefore in breach of cl. 29(1) when the master failed to sign the triplicate bill of lading that was presented to him for signature.

Before the vessel arrived at Madras, Mobil told Shell that they would not discharge cargo against a bill of lading carried on board; and that if no original was produced Mobil required indemnification under the indemnity clause. Shell refused to give a letter of indemnity.

The original and duplicate bills were eventually sent to Madras by Shell. The discharge commenced nearly 3 weeks after the vessel had arrived and tendered notice of readiness. Because the master had forgotten to sign the triplicate set of original bills of lading, the owners were in breach of the voyage charter. The fact that there was no signed negotiable bill in Madras prevented discharge. The consequent delay was a result of the breach and therefore, under clause 14(c)(i), did not count against laytime. The owner's claim for laytime failed.

It was stated above that the master must resist pressure from shippers when carrying out activities specified in the charterparty, such as signing bills of lading. An example of a French arbitration in 1988 may illustrate one way in which the master's role was incorrectly performed, thus penalising the shipowner.

The vessel was chartered on the Synacomex form for the carriage of grain. The charterers' agents provided the master with a "stowage factor" for the grain and cargo calculations were based on the vessel's grain capacity and this stowage factor. The actual stowage factor was

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7 Above n6, 658-659.
lower. The loading berth also had depth restrictions and the vessel was touching bottom. It was not possible to carry out a proper draft survey to ascertain the quantity actually loaded. The master had doubts about the weight loaded and felt that, because the stowage factor given to him earlier was incorrect, the vessel could not have loaded more grain.

The negotiable bill of lading was prepared by the shippers showing a quantity based on the original, assumed stowage factor which was more than the quantity actually loaded. The master signed the bill without noting his doubts and reservations, thereby confirming the quantity declared by the shippers. He did present a separate letter of protest to the shippers but it was held that this did not exempt him from the obligation to alter the clauses on the bill of lading. He had committed a serious breach, resulting in a loss suffered by the charterers, who had to indemnify the buyers under the negotiable bill. The charterers could claim damages from the owners.

The charterer's obligation to nominate a "safe port" will not be dealt with in this paper. However, in another recent tanker voyage charter case, *The Kanchenjunga*, the master's role (and discretion) with regard to nomination of a safe port came into question. The Iran-Iraq war caused many disputes after September 1980 dealing with frustration of charters and breaches of the safe port warranty.

In this case, which eventually went on appeal to the House of Lords, the vessel was on the Exxonvoy form of charter and the trading option was "1/2 safe ports Arabian Gulf excluding Fao and Abadan". The charterers ordered the vessel to load a cargo of crude oil at Kharg Island. On 21 November 1980 the owners instructed the master to proceed to Kharg Island. The vessel arrived, anchored on 23 November and gave notice of readiness. By 1 December the vessel had not berthed. On the same day Iraq bombed Kharg Island. The master weighed anchor immediately and proceeded 25 miles out to sea.

On 2 December the owners informed the charterer of the bombing and requested them to nominate a safe port. The charterers replied, repeating their orders and insisting that the master proceed to Kharg. After the owners found they were unable to change the nomination, they instructed the master to comply with the voyage instructions and go to Kharg Island. The master rejected these instructions.

When the dispute was referred to arbitration, the arbitrators found that the charterers were in repudiatory breach and that the owners were entitled to treat the charter as at an end and claim damages. On appeal at first instance, Hobhouse J in the Commercial Court held that

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9 See *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (HL).
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proceeding to a nominated port did not deprive the shipowner of any rights, but that the duty to mitigate or avoid loss did require that the master should refuse to enter the port or, if already there, leave it to safeguard the vessel. The owners had demonstrated that they were willing that the vessel should proceed to Kharg Island.

In the Court of Appeal, it was confirmed that the owners had accepted Kharg Island as a nomination and had lost their right to refuse to load at Kharg Island. They failed in their claim for damages for the charterers' alleged wrongful repudiation. However, nothing the owners did could be construed as waiver of the master's discretion under clause 20(iv)(b), which stated:

> ... If owing to any war, hostilities etc. entry to any such port of loading ... or the loading ... of cargo at any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited ... the Charterers shall have the right to order the cargo ... to be loaded ... at any other safe port ...

The owners appealed to the House of Lords on the issue of the waiver. The House dismissed their appeal. The master gave notice of readiness on arrival. Thereafter, the owners were asserting that the vessel was available to load. The House of Lords held that they were thereby asserting a right inconsistent with their right to reject the charterers' orders. This resulted in their choosing not to reject the nomination.

In *The Kanchenjunga* the charterers ordered the vessel to berth in a particular place which was unacceptable to the master. He was using his discretion in refusing to go to Kharg. By comparison, in another recent voyage charter case, *The Ulyanovsk*, the charterers ordered the vessel not to berth and load a cargo but the master ignored that order, proceeded to the berth and loaded.

The charterers had to pay their cargo suppliers, the shippers, by reference to a formula based on the averages of the prices on the bill of lading date and two days before. They anticipated a falling market and it suited them to delay berthing orders despite possible demurrage. The charterers therefore ordered the master not to berth until instructed. The master disregarded the instructions, berthed, tendered notice of readiness and commenced loading on 6 December. The loading was completed and the bill of lading issued on 7 December. From 6 December, the market price had dropped drastically. The charterers could not re-sell the cargo at the price they had had to pay.

They claimed damages for breach of contract. The owners counter-claimed for demurrage for delay before discharge because the char-

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10 Above n8, 359. Emphasis added.
11 Above n8.
terers could not sell the cargo at an acceptable price. The dispute was referred to arbitrators who held that the charterers were entitled to more than US$865,500 because of the breach of contract caused by the master's disobedience of the charterer's instructions.

On appeal the judge held that until loading had been completed the vessel was at the charterers' disposition concerning loading and the commencement of loading. The arbitrators were therefore correct in concluding that the orders given to the vessel to wait and not to berth were lawful and should have been obeyed.

B. The Master's Discretion

While the discretion of the master was recognised in The Kanchenjunga, it is up to the master to exercise that discretion appropriately and reasonably. For example, even if not expressed in the charterparty itself, there is an implied obligation that there must be no unjustified deviation from the usual and customary route for the voyage contemplated in the charter. The master must be very careful not to deviate. However, he has the discretion to choose the route which in his opinion, and at the time he makes his decision, will give the best passage, taking the safety of the vessel and cargo and the charterers' interests into account. Otherwise, the "reasonableness" of his decision may come into question.

Two other essential clauses in a voyage charterparty give the master considerable discretion and freedom of action. These are the "War Clause" and the "Ice Clause".

The best solution for modern situations involving war risks is the Voywar 1950 published by BIMCO. Clause 3 of Voywar 1950 states:

The Master shall not be required to load cargo or to continue loading or to proceed on or to sign bill(s) of lading for any adventure on which or any port at which it appears that the vessel, her Master and crew or her cargo will be subjected to war risks. In the event of the exercise by the Master of his right under this Clause after part or full cargo has been loaded, the Master shall be at liberty either to discharge such cargo at the loading port or to proceed therewith... In the event of the Master electing to proceed with part cargo under this Clause freight shall in any case be payable on the quantity delivered.

This appears to give the master considerable discretion in performing the charter if war risks threaten. Clause 4 of Voywar 1950 provides that if the master chooses to proceed with part or full cargo under the above clause, and it appears that further performance of the charter will subject the vessel, master, crew and cargo to war risks, the cargo can be discharged at another port, chosen by the charterers or, if they fail to do so, by the owners. The typewritten words "to the master in his absolute discretion" may be added to this clause after the word

13 Above n8-9
"appears". The effect of these words is not as wide-ranging as it may seem, as the exercise of the master's discretion must not be arbitrary. It must be fair and reasonable.

The BIMCO Special Ice Clause (Nordice) and the GENCON General Ice Clause take into account the dangers of navigation in ice conditions and minimise exposure of the vessel to ice risks. These clauses allow masters the choice of whether or not to proceed to the contractual destination if ice is a threat. Some other charterparties have no printed ice clauses thus increasing the potential for costly delays or ice damage and heavy repair costs.

The GENCON General Ice Clause provisions illustrate the master's discretion in this regard:

(a) In the event of the loading port being inaccessible by reason of ice when vessel is ready to proceed from her last port or at any time during the voyage or on vessel's arrival or in case frost sets in after vessel's arrival, the Captain for fear of being frozen in is at liberty to leave without cargo, and this Charter shall be null and void.

(b) If during loading the Captain, for fear of vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports including port of discharge . . .

IV. TIME CHARTERPARTIES

Ice clauses, war clauses and discretion on deciding passage routes are as significant for time charters as they are for voyage charters. While under voyage charters laytime provisions as to "arrived ship" and "notice of readiness" determine the master's role, these are not critical for time charters. However, two other time charter clauses and obligations under these clauses are influenced greatly by the master's role. These are the "employment clause" and the "off-hire clause".

There are also other clauses which require the master to perform specific roles such as supplying the "... Charterers, their agents or supercargo, when required, with a true copy of daily logs, showing the course of the vessel and distance run and the consumption of fuel". There is a similar clause in the Baltime form, BIMCO's uniform time charterparty.

Of course, the ultimate sanction lies in the hands of the time charterer. This is found in clause 9 of the widely used NYPE form, which states:

... if the charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

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14 Clause 11 of the New York Produce Exchange (NYPE) form.
A similar clause is found in Balttime. Other clauses state that:

12. The Captain shall use due diligence in caring for the ventilation of the cargo.

26. Nothing herein stated is to be construed as a demise of the vessel to the time charterers. The owners to remain responsible for the navigation of the vessel . . . as when trading for their own account.

A. The "Off-Hire Clause"

This last clause implies that the master, as an agent of the owner, is responsible for the vessel's navigation. If the navigation is faulty for reasons over which he has control and there is a delay, the off-hire provisions may begin to operate. If the vessel grounds, this could be due to faulty navigation. If there is loss of time because of the grounding the time charterer may contend that the vessel is off-hire from the moment of grounding until berthing when the performance of the vessel is reinstated under the time charter. This question was considered in The Marika M.\textsuperscript{15}

The vessel was on an NYPE charter. She arrived at the loading port but grounded about a day before the scheduled berthing. When refloated 10 days later, she had to wait for a berth to become available and finally berthed another 10 days later. The NYPE off-hire clause allows the charterer to cease payment of hire for time lost in the event of grounding. In this case, the charterers attempted to claim that the vessel was also off-hire from refloating to berthing, because the "time lost" provision in the clause could extend to consequent loss of time. Fortunately for the owners, both the arbitrators and the Commercial Court held that as soon as the vessel refloated she was once again at the charterers' disposition, was fully efficient as a ship and was not, therefore, off-hire until berthed.

Another recent case examined the charterers' claim that the vessel was off-hire, for a very different reason, although the master was also involved. In The Roachbank,\textsuperscript{16} the owners chartered their vessel on a NYPE form. The vessel loaded some cargo on delivery at Singapore and then sailed for Kaohsiung to load further cargo. A week after delivery, on the way to Taiwan, the master embarked Vietnamese "boat people" in the South China Sea and continued his voyage to Kaohsiung. The boat people were in a very pitiful condition. Masters are expected — and indeed required — to aid people in distress at sea.

On arrival at Kaohsiung, the authorities refused to allow the boat people to land there and required the vessel to remain outside the port. Nine days later, the vessel was allowed to enter and berth, various

\textsuperscript{15} Eastern Mediterranean Maritime (Liechtenstein) Ltd v Unimarine SA (The Marika M) [1981] 2 Lloyd's Rep 622.

\textsuperscript{16} CA Venezolana de Navegacion v Bank Line Ltd (The Roachbank) [1988] 2 Lloyd's Rep 337.
guarantees having been provided by the owners. The charters relied on the off-hire clause in NYPE and claimed that the vessel was off-hire for the 9 days. The dispute was referred to arbitration and the majority of the arbitrators held that the vessel remained on hire. On appeal, the Court of Appeal held that the carriage of the boat people did not make the vessel inefficient and unable to render the service under the charter. The lack of port facilities was outside the master's control. The arbitrators' decision was therefore upheld.

B. The "Stevedore Damage Clause"

In the Asbatime charterparty, which is derived from, and is a much-needed updating and modernisation of the 1946 NYPE form, suggested "rider clauses" deal with the master's other roles such as his responsibilities if there is stevedore damage. The "Stevedore Damage Clause" in Asbatime states:

Any damage caused by stevedores during the currency of this Charter shall be reported by Captain to Charterers or their agents in writing, within 24 hours of the occurrence or as soon as possible thereafter. The Captain shall use his best efforts to obtain written acknowledgement by responsible parties causing damage unless damage should have been made good in the meantime...

Stevedore damage is repaired at the charterer's cost and in the charterer's time. This seems to clarify the owner's remedies under the "employment clause" of the NYPE form, which includes the words that "... Charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain". It is submitted that damage to the vessel caused by the stevedores may be recoverable by the owners unless the charterers can raise the issue of the master's supervision. Accordingly, the Asbatime rider clause seems to improve the owner's position.

The Baltime charterparty also requires the charterers to pay for all cargo operations and makes them responsible for loss or damage caused to the vessel by improper or careless cargo operations. There is, however, no "stevedore damage clause" specifying the master's role.

C. The "Employment Clause"

The 1946 NYPE form states clearly that:

... the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency...

The Baltime form contains a similar clause but differs from NYPE in two respects. It contains an "indemnity" provision in case the owner faces claims because of errors in signing bills of lading.17 Baltime also

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17 The Asbatime form also contains an indemnity provision.
contains in the same clause a provision dealing with the removal of the master on a complaint by the charterer. In NYPE, removal is dealt with under a separate clause which means that the master can probably be removed for any failure to perform his role under the charterparty. The "employment" specified in the clauses is, of course, not the master's employment, but that of the vessel.

The NYPE clause also contains a provision requiring the charterers to "load, stow and trim the cargo . . . under the supervision of the captain." If the cargo is damaged by bad stowage caused by the master's interference or arrangements, the charterers will not be responsible. In Canadian Transport Co Ltd v Court Line Ltd[18] Lord Atkin said that:[19]

The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage no doubt that might enable them to escape liability.

In the same case,[20] Lord Wright noted that this clause would relieve the shipowners of:

. . . liability for bad stowage, except as qualified by the words "under the supervision of the captain" . . . These words expressly give the master a right which I think he must in any case have, to supervise the operations of the charterers in loading and stowing . . . It follows that to the extent that the master exercises supervision and limits the charterers' control of the stowage, the charterers' liability will be limited in a corresponding degree.

Some charterers insist on the words "and responsibility" being inserted after "supervision" in the employment clause. This would transfer the entire liability of the cargo operations from the charterers to the owners unless there is clear evidence that the charterers interfered in the cargo handling. This responsibility of the owner would cover damage not only to the cargo but also to the vessel. The position of the master, as the owner's agent, is clear in this situation. His role is even more specific if words such as "the master shall supervise the stowage of the cargo thoroughly and let one of his officers control all loading, handling, stowage and discharge of the cargo" are inserted into the time charterparty.

Such an addition was made to the charterparty in The Shinjitsu Maru No 5.[21] The vessel was time chartered to load cargo in New

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[18] [1940] AC 934.
Zealand for West Africa. There was a conflict between the shippers, master and stevedores about the stow. Indeed, the stevedores ignored the master’s protests. They employed a surveyor who certified that the stow would be secure with certain lashings. In fact it was not and the vessel was unseaworthy on sailing. The cargo shifted and the vessel had to return to re-stow the cargo with loss of time and expense. The arbitrators held that the master was negligent but apportioned liability between the owners and charterers as at 60 per cent to 40 per cent. On appeal Neill LJ held that the dominant and effective cause of the loss was the master’s negligence, having regard to his responsibility for stowage and the seaworthiness of the vessel. Accordingly, the owners were completely liable.

In The Argonaut,’ reported in the same year, the vessel was time chartered, and a similar clause specifying the “responsibility and supervision” of the master was inserted in the charterparty. There were two discharging ports. The vessel was damaged by cargo handling methods and equipment used by stevedores at both ports. When the dispute was referred to arbitration, it was held that at the first port the master was not responsible because the stevedores’ equipment was inadequate and this was outside his “province”. This may be taken as a reference to the master’s “sphere of control”. The arbitrators decided that he should have insisted on better precautions at the second port.

However, on appeal Leggatt J held that the primary duty of cargo operations was placed on the owners and that, in the absence of actual interference by the charterers themselves, the owners were responsible for all cargo operations whether or not within the master’s “province”. The charterers were therefore not liable for damage at either discharging port.

The above two decisions and their effects on the shipowner’s position were followed in The Alexandros P.’

V. CONCLUSION

The role of the master in the performance of the voyage charter or time charter is crucial to the vessel owner’s success or failure. In the old days, before excessive shore-office control of ships, the master probably had the correct attitude to be a commercial man as well as to be in real command of his vessel. In Rodney Elden’s Ship Management, written in 1962, he says:

To be objective we should ask why . . . the captain cannot be his own manager . . . when we know that most ship captains were eminently qualified to do so in the

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21 MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co Ltd (The Argonaut) [1985] 2 Lloyd’s Rep 216.
1860s. This is particularly so of the Yankee shipmaster of the clipper era whose shrewdness as a trader was legend . . . Shipmasters of the early nineteenth century were often either part owners or full owners of their vessel and not infrequently their cargo. The incentive to conserve expenditure with such an equity in the venture cannot be duplicated.

In the 1860s it was said by a person from another maritime country, when discussing American masters: "We have no masters who can match the masters of American vessels, and until we do, and allow them full control of our vessels, we cannot compete successfully."

Some Greek and German masters may be in the category of the American masters of the 19th century. They have a definite interest in the success — and therefore the reduction of costs and liability — of the charters which they are required to perform.

How many other masters can enjoy such praise? How many owners, employing these masters who have no personal or financial interest in their charters, will find themselves losing P & I cover because of damage or claims under charters where the masters have not played their part correctly in the performance of the contract? P & I and other "audit" systems are beginning to take off but it is bound to be a while before standards are raised. In the meantime, standards are dropping and it is necessary to attempt to show shipowners and shipping professionals how to make practical decisions that will assist in protecting themselves despite falling crewing standards.