

Breach and Remedies in Chartering in the Swedish Maritime Code of 1994 Chartering and the Law of Obligations - Some Aspects from a Swedish Angle

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1 Some Introductory Remarks

1.1 General

My main purpose with this article is to illustrate certain relations between the general law of obligations and rules on chartering primarily as they appear in the revised Swedish Maritime Code (1994:1003 - below referred to as SMC). The idea is by no means to try to give a comprehensive overview but rather by selecting certain rules and principles and compare them with principles that have developed as general obligatory principles, and see how they relate in Swedish law.

It should be mentioned that Swedish law together with Danish, Finnish, Icelandic and Norwegian law belongs to the Nordic legal family which is, in a legal historical perspective, close to German law and thus part of the civil law system. This common Nordic legal feature has over the years been particularly evident in the fields of contract law, sales law, maritime law, company law etc. but during the last decades the EC aspect has gradually become more important as a common legal denominator.

Even if Swedish law does not have quite the same legal structure as German, it is based on legislation with case law as a “fill in”, for clarification and further development. Unlike the German BGB (Bürgerliches Gesetzbuch) Swedish law has no general codification of the law of obligations. There is, however, in Swedish law inter alia a contract act (1915: 218) and a sale and purchase act (1990:931 - below referred to as SGA). SGA replaced a previous purchase act from 1905 which was at its enactment considered to be an up to date and well drafted piece of legislation. During its lifetime courts and the legal doctrine came to use the old purchase act as an exponent of general obligatory principles, and very often in cases concerning other topics than sale and purchase, reference was made to the principles as set out in the purchase act.

SMC 1994 replaced its predecessor from 1891, which had, however, been gradually amended over the years particularly in connection with the legislative introduction of new international conventions. SMC has 22 chapters covering a large number of questions related to topics such as *inter alia* the nationality of ships, registration of ships, mortgages, general liability of shipowners and masters, limitation of liability, oil pollution etc. The 1994 revision was mainly geared at the restructuring of the SMC and at the substitution of previous rules on the carrier's liability for general cargo (mainly related to liner service), bills of lading and chartering. Rules on the relation between the charterer and the shipowner and between the shipper, the carrier and the consignee respectively are now found in chapters 13 and 14 of SMC. I shall here mainly focus on certain questions which are dealt with in chapter 14 of SMC, namely charter - voyage charter, time charter and so-called volume contracts.

It is, however, also necessary to take into consideration that certain rules which may apply in connection with charter relations and charter parties are found outside SMC, such as general rules on contracting, provisions on entering into contracts and invalidity of contracts, that appear in the contract act and to a large extent in case law.

In order to illustrate the relations between "general" and "special" principles I have chosen to deal with some different phases of the chartering procedure, namely with the negotiation and the contracting phase and with certain principles mainly related to breach and remedies¹ in chapter 14 of SMC. My main focus will be on voyage charter and time charter rather than on the particular rules on volume contracts. Furthermore I largely leave out questions on the carrier's liability for loss of or damage to cargo where international conventions play a fundamental role.

It may be interesting to note that SMC in spite of its broad coverage of different topics in other respects is rather narrow. SMC thus contains provisions on chartering but no particular rules on topics like sale & purchase of ships, shipbuilding contracts, management agreements, ship financing agreements etc. In these cases we shall under Swedish law have to fall back on the rules of general sales law and on standard forms etc. Thus SMC is, in spite of its rather broad coverage of various legal topics and relations, in its obligatory field basically restricted to the carriage of goods and persons and to chartering.

Chartering is, however, also a legal domain where internationally recognized contract forms have developed and have been amended over the years and play an important role for the legal development and for the relation between charterer and shipowner. These charter forms have been developed by different players in the trade, and for historic reasons (London as the shipping and financing center, the English language as the language of trade etc.) English law

¹ I here use the terminology in a rather broad sense covering various forms of "termination" as well as various forms of economic compensation. The main focus is, however, on the cancellation and the renunciation (although the latter is not a consequence of breach) provisions.

It should also be noted that "renunciation" is the concept applied in the non-official translation of SMC. Although I am not in all details enthusiastic about this translation, it is readily available and therefore useful as reference.

has come to have particular importance in the field of chartering. Generally standard form charter parties are drafted in the English language, reference is often made to English law, and frequently disputes shall be referred to arbitration in London (where American brokers and/or charterers are involved New York will often replace London). It is also true that there is in London a considerable expertise in charter business and the number of cases is abundant.

This dominance of English law in this particular legal domain has been recognized by Swedish courts in a couple of cases. In these cases (NJA 1954 p. 574 and NJA 1971 p. 474) English law was not immediately applicable, but the Supreme Court found nevertheless that in certain legal fields, such as chartering, regard should be given to the development in international and particularly in English law.

Some other general observations may also be made in this connection. The chartering chapter in SMC is basically of *non-mandatory* nature whereas the rules on the carrier's liability for damage to or loss of cargo are largely *compulsory* due to the international conventions. English and American law still have an impact on the law related to charter, due to the importance of London and New York as maritime and finance centers.

London maritime arbitration is, however, not certain, and in the drafting of the new charter rules in SMC the draftsmen stated as one of their goals to increase the choice of Swedish (Scandinavian) law which would attract international charter disputes to Stockholm (the Stockholm Arbitration Institute at the Stockholm Chamber of Commerce). Therefore the draftsmen of SMC wished to create an up to date set of charter rules also reflecting modern standard form charter principles.

I am not going to give a detailed description of the SMC charter rules, but shall assume the availability of the Stockholm Arbitration Institute and its reputation as arbitration centre for commercial arbitrations. It may be of interest to maritime lawyers to know a little of the new SMC and some of the solutions chosen therein. I have chosen not to go into the detailed rules relating to laytime and demurrage, off hire, overlap and underlap etc. but have mainly tried to focus on termination rules.

1.2 Some General Principles in the SMC

General contract rules will apply to questions whether a binding charter party has been agreed or whether the charter should be regarded as invalid. These rules in the contract act (covering in three chapters the entering into a contract, authority and invalidity of contracts) are not very detailed but have gradually been filled out with court practice.

On the other hand chapter 14 of the SMC contains rather detailed rules on the different types of chartering: voyage charter, time charter and volume contracts and lays down a number of rules which reflect principles that have developed in the "international charter business".

There are in this chapter of SMC several rules concerning the respective rights and obligations of the parties under a charter party and thus related to contractual performance and non-contractual performance respectively (whether

in the form of non-performance, late performance or, if I may call it, faulty or insufficient performance).

These rules have corresponding rules in other parts of the law, and several of them are similar to corresponding rules in the international charter forms (to a large extent depending on the legislator having considered contract practice when drafting the law provisions). Many of the rules in chapter 14 concern consequences of non-contractual performance, such as cancellation and damages, but also specific chartering remedies such as “demurrage” and “offhire”.²

On top of the contract rules and the particular SMC provisions a number of rules may be applicable which emanate from the “general law of obligations”, and which are not immediately found in the statute, e.g. the duty to mitigate loss. There is thus an interaction on several levels between “general obligatory principles”, “general contractual rules” and “special contractual rules”. Without going into detail in the questions of the various forms of economic compensation it is nevertheless necessary to keep this perspective in mind.

Some regard will also be given to solutions chosen in certain standard form charter parties, where there are, however, rarely any explicit provisions on economic compensation in case of breach except in respect of demurrage and off hire. As to the former see e.g. Shellvoy 5 clause 15 and in the latter case e.g. Shelltime 4 art. 21. These two latter are possibly the most common forms of economic compensation in the field of chartering. Here I shall on the whole leave them out since they are well covered in most charter party forms used. In respect of these two items the solutions chosen in charter party forms vary greatly depending on the type of ship and the type of trade concerned, whether geographically or cargowise.

Thus, Swedish law, like most other law systems, recognizes certain different consequences of a “breach” and for that matter “anticipatory breach”. One of the fundamental remedies recognized in the Swedish “law of obligations” is “specific performance” whereby a promisor may be required to perform in accordance with his promise. With a chartering focus, specific performance in Swedish law has become a matter of certain interest. Sweden, like many civil law systems, recognizes specific performance as one of the basic remedies in case a party does not fulfil his contractual obligations. In English law the situation is different. For historic reasons “specific performance” descended from the “law of equity” rather than common law, and specific performance as remedy is applied much more narrowly. This has led to the practically important question whether in Swedish law “specific performance” should be ruled out as a consequence of nonperformance or wrongful performance under a charter party. In spite of the general Swedish attitude that specific performance is one of the main remedies, it has been questioned whether it is applicable in the law of carriage of goods.³ Apart from the influence from English law in the law of

² Demurrage problems have been treated extensively in Tiberg, *The law of demurrage*, 4th ed. 1995 and problems related to “off hire” in Coghlin, Kimball and Wilford, *Time Charters*, 3rd ed. 1989 p. 295 ff.

³ Thus Grönfors, *Tidsfaktorn vid transportavtal*, Göteborg 1974 s. 65 has basically found that there is no room for specific performance. See also Hellner, *Speciell avtalsrätt II*.

chartering I do not find many good arguments why specific performance would be ruled out as a possible remedy in case of breach of a charter party. Another thing is that damages will in many cases be a more practical choice.

Another remedy is the right of cancellation, which concept I here use in its rather broad Swedish sense without referring to various common law concepts such as rescission, repudiation etc. Under certain circumstances the parties - or either of them - may also be entitled to terminate the contract due to unforeseen circumstances without any breach having occurred (e.g. force majeure - an equivalent of the frustration doctrine). Beside these consequences damages may be claimed, there may be a price reduction and furthermore there may be a requirement of "reparation".

All these consequences are generally found in many law systems.

Although there is in Sweden no written law of obligations like in e.g. Germany or France,⁴ a number of principles still exist which may be regarded as general obligatory principles. There are thus in the SMC rules on cancellation and damages, which are similar but not identical to other rules of corresponding nature. Furthermore "general obligatory principles" may apply in charter relations even though such a rule would not appear in the SMC. Thus Swedish law recognizes e.g. a general duty to "mitigate losses". To the extent that there exists in Swedish law a general loyalty principle this should probably also apply in charter relations. Furthermore the procedural law gives the court, when determining damages, a wide discretion to calculate and decide the amount, which is also an item to consider in this perspective.

1.3 Generally on the SMC and Contractual Questions

While SMC covers a large number of items, it does not cover questions related to the entering into and the binding nature of a charter agreement, intermediaries or invalidity of a charter agreement. This is an area where one has to fall back on the contract act and on general obligatory principles.

Recent Swedish case law in respect of these questions is sparse. Questions related to the negotiation and contracting procedure in chartering are important, since there seems to be an internationally recognized understanding of the practice. The step by step negotiations, agreement on "main terms subject details", the use of several different types of "subjects" etc. by no means make the procedure unique, but one has to be able to evaluate the meaning of "main terms" and "details" respectively in this particular field as well as the legal significance. "Main terms" and "details" may not always be determined in the same way in time charter and in voyage charter, and the understanding of the terms may also differ among different legal systems. Furthermore the

Kontraktetsrätt, vol. 2. Allmänna ämnen. Stockholm 1996 (below Hellner II) p. 151 with references. Selvig has treated the question extensively in *Om dom på naturalopplyselse, særlig i befraktningsforhold* in *Arkiv for Sjorett (AfS)* vol. 5 p. 553 ff, i.a. p. 570 and 579 ff, where he claims that there is little if any room to apply specific performance in connection with chartering, although such claims may not be excluded under all circumstances.

⁴ On the other hand Swedish law is much more codification oriented than classical common law.

understanding of what constitutes a finally binding contract when taking the “details” into the picture may vary between different legal systems. There are in Finnish and Swedish law a few cases which illustrate the question. Thus the Finnish Supreme Court in a case (ND 1955 p. 544) found that in spite of far reaching negotiations there was no finally binding agreement. In a case from the Stockholm City court (ND 1957 p. 385) “minor details to be finally agreed upon” did not prevent a binding contract from having been entered into. I shall not here delve further into these questions, however interesting they may be,⁵ but a general impression is that Swedish law in this respect may be somewhat closer to US law than to the stricter English law as it appears in case law.

Chapter 14 lays down at first some general principles applicable for all types of chartering. Following the general provisions there are particular rules for voyage charters, volume contracts and time charters. In many respects the provisions have not been much changed from the 1891 maritime code (as amended from time to time, although the part on volume contracts (quantity contracts) is new. The changes in chapters 13 and 14 are more radical in form than in substance. In a number of these rules the legislator has clearly formed the rule in the code based on standard contract forms, and there has thus been a gradual development and adaptation of current charter clauses to meet new requirements, despite the necessity that rules of law should have a more long lasting nature.

In SMC, like in the old code, there are various rules on cancellation and on damages, but -as already stated- there is no mention of specific performance, and no particular rules on how to determine and calculate damages.

There are several rules on cancellation in respect of charter contracts. These rules differ somewhat, depending on the situation where the inadequate performance is involved: delay in the delivery of the ship, mistake in delivery of cargo, late delivery of cargo, the ship being unfit for the service etc. There are thus in SMC a number of liability rules. These have been particularly developed in respect of the carrier’s liability for damage to or loss of goods but also in the liability rules in charter relations.

The particular maritime rules on laytime and demurrage (14:10-15 and 14:23) as well as on off hire (14:72) have been mentioned. Normally the parties use printed forms with amended provisions stapled to the basic form whereby demurrage and offhire clauses are adapted for the particular requirements of a trade. Seen in a general legal perspective, demurrage and off hire should be regarded as a kind of liquidated damages and price reduction respectively. As such the concept is rather general, but the particular requirements in the trade have to be agreed by the negotiating parties. The SMC provisions in these two matters therefore are rather general. The particularities should be left with the negotiators of individual or standard contracts. Tanker chartering differs practically from dry cargo chartering, and the practical problems may also vary in different geographical areas.

⁵ This question is illustrated in i.a. Coghlin, Kimball & Wilford., p. 21 ff. Gorton, *Shipping and contracting*, Lund 1980 and Gorton, Ihre & Sandevärn, *Shipbroking and chartering practice*, 5 th ed. 1999, p. 27 ff., 153 ff., and 173 ff.

Thus, the parties have to form their own contracts with their own particular solutions in individual cases, and therefore the rules have to be (and are basically) non-mandatory in this respect.

The conclusion in this connection is therefore that the legal rules applicable in the individual matter may be furnished by different sources or levels: from provisions in individual/standard contracts, from non-mandatory rules related to more special maritime concepts (such as demurrage and offhire), from general but still specific rules on cancellation and damages, and finally from general obligatory rules which may supplement any of the others in one way or another, and, naturally, from trade usages.

From a practical point of view it should be emphasized that the legal foundation in the charter relation normally is the individual contract generally based on standard form contracts, as amended. Substantial deletions and additions are often made in the printed form, which may cause problems of a general contractual law nature.⁶ This is also the case when Swedish law applies to a charter party dispute.

2 The Particularities of Maritime Law

2.1 *In General*

Maritime law is a particular field of any legal system, and indeed in a broad legal perspective it may be seen as a legal specialty. This is true for the Civil law tradition⁷ as well as for the Common law tradition, where Admiralty law has been singled out as a particular topic, often involving specialised courts. It is, of course, correct to say that there are a number of particular rules governing this field. This has largely an historical explanation, since the maritime environment is international and international customs have developed over the years making their marks also in national legislation. Focusing on the law of carriage - which is an area which is the object of several international conventions - it is also evident that there is some ground for regarding this legal area as a specialty. It is one of the few *commercial* fields where compulsory legislation has been introduced in the relation between contracting parties, namely through the rules on the carrier's liability for loss of or damage to goods.

At the same time this legal field is by no means insulated from the main road of legal principles. Firstly there is a link to other contracts, where rules of carriage together with rules of sales law, the law of insurance and letters of credit law together form an important whole. Secondly, as outlined above, there is also a link between specific rules developed (whether developed through contract or through the law) in respect of the particular contract type involved, and the more general principles that may also be applicable, thus there is always an interrelation between more specific and general principles.

⁶ See e.g. Gorton, Ihre & Sandevärn, p. 173 ff. and Gram *On chartering documents*, 2. ed. by Bonnick, 1988, p.

⁷ The special maritime rules in French law appear in Code de Commerce and corresponding rules in German law are found in Handelsgesetzbuch (HGB).

2.2 *Basically on the Distribution of Duties, Costs and Risks*

The transport undertaking may be a complex undertaking involving several parties, consisting of several different undertakings and subsequent duties and liabilities on respective parties.

Let me illustrate the situation with an example: A shipowner charters a vessel to a timecharterer, who plans to use the vessel but then decides to subcharter it to a subcharterer for one voyage. The voyage charterer in his turn uses the vessel in his liner operations. The same vessel will then be used in different constellations with different parties: one time charter and one voyage charter and on top of that, there may be issued several booking notes and bills of lading.

Some of the relations (duties and liability of the respective parties) are illustrated through the following schemes:

<u>Owner</u>	<u>Timecharterer</u>
Put the vessel at the disposal of timecharterer:	Pay the hire. Employ the vessel within limits (cargo, geographical, etc. and within insurance -IWL).
Right time, right place and right ship, as per description (size, age speed, bunker consumption etc.)	Pay costs in connection with commercial use of vessel.
In good condition.	
Maintain vessel in good condition throughout charter period?	Not expose vessel to danger.
Man vessel with competent personnel.	Possible liability for damage to vessel?
Stores, provisions, nautical equipment and other equipment, spares etc.	
Cargo liability?	Cargo liability?

A similar scheme could be made up for the relation between the owner (or the timechartered owner) and the voyage charterer:

<u>Owner</u>	<u>Voyage charterer</u>
See to it that the ship is ready for loading according to charter party:	Pay freight according to charter party.
Right time and right place.	Furnish cargo according to charter party.
Right vessel or right type.	Possible liability and costs for stevedores?
Possible liability and costs for Stevedores?	
Maintain the vessel seaworthy and perform the voyage as per charter party.	Pay demurrage and similar. Possible liability for damage to vessel if caused by stevedors?
Cargo liability?	Cargo liability?

There may then be many differences in details with respect to the distribution of cost and liability as a consequence of the particular contractual solutions chosen by the parties. The main difference between voyage and time charter is, however, that the owner in connection with voyage charter largely has more duties to perform and is liable for more costs and has more responsibility than in connection with time charter.

In my chosen perspective the main point is to show the different duties and liabilities in connection with chartering, and how they appear in relation to breach and remedies depending on the type of charter and the individual terms and conditions. The discussion below only aims at covering certain features of the SMC and as an illustration also some contractual solutions.

The subsequent scheme shows the sequence of negotiation, contracting and performance of a charter party, and from that it is also evident during which sequence different contractual rules may apply and when a breach may occur with certain different consequences.

Thus in a charter party (whether time or voyage) the contractual obligations may develop along the following lines:

Market orientation	Negotiations start	Charter concluded	Voyage to loading port starts	Loading
Cargo voyage	Discharge and delivery of cargo	Claims and time bar in different relations		

During the market orientation and the negotiation periods there is hardly any contractual element involved, although, depending on the circumstances, the border line between non-contract and contract will be passed some time during this period. Also there may be implied a duty to negotiate in good faith, a vague principle which seems to be gradually emerging but is applied differently in different legal systems.⁸ To some extent there may also be some precontractual liability. In order to have a valid and binding contract the border line into contract has to be passed, although this is also a question where different legal systems may apply slightly different principles. It is during the performance of the contract that various types of breach may come up, which may lead to different consequences.

With the above as the starting point we may thus ask where in this scheme there is a possibility to terminate the contract, and/or if certain sanctions are available due to breach by one of the parties and under what circumstances a party may be relieved from his contractual obligations.

During the negotiation period both parties can freely withdraw from the relation unless there has sprung up some kind of contractual or quasi contractual relation. A party acting in bad faith during this phase may, however, be in breach of some type of duty to act in good faith.

After the conclusion of the agreement there is a contractual relation which will have some binding force, and in case of a breach the other party may have a right to terminate the contract. During the period up to loading there is undoubtedly a right of termination following the other party's breach, e.g. if the vessel does not arrive in time or, if the cargo is not ready for loading (always, however, depending on the contractual provisions). Once the cargo has been loaded onboard the vessel it is really not a practical solution to terminate the contract, and arrange for the unloading and the reloading of the cargo before it reaches the destination, but again, depending on the circumstances, such possibility may exist.

⁸ The European Contract Principles (as well as the Unidroit Principles on Commercial contracts for that matter) mention a loyalty principle both in the negotiation of a contract and in the performance of a contract. In the former case art. 2:301 (Negotiations contrary to good faith) lays down: "(1) A party is free to negotiate and is not liable for failure to reach an agreement. (2) However, a party who has negotiated or broken off negotiations contrary to good faith is liable for the losses caused to the other party. (3) It is contrary to good faith, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party."

In the latter case art. 1:201 (Good faith and fair dealing) states:

"(1) Each party must act in accordance with good faith and fair dealing.

(2) The parties may not exclude or limit this duty."

Art. 1:202 (Duty to co-operate) in its turn spells out:

"Each party owes to the other a duty to co-operate in order to give full effect to the contract."

These quotations mirror principles which are more or less recognized in several legal systems. Although English common lawyers often claim that common law has no room for such principle, but I have a feeling that it may nevertheless also be slowly creeping in under the skin of common law. Thus, the Convention on the International sale of goods (CISG), to which the United States is a party provides in art. 7 (1) that one of the basic principles of the convention is the observance of good faith in international sales.

Thus it is a fair assumption that termination and other consequences may vary depending on when during the scheme the event takes place and depending on the type of event.

3 Breach and Consequences in SMC - an Outline

3.1 In General

Chapter 14 in SMC is new as compared to corresponding rules in the previous code but largely in form rather than in substance. A number of changes have been made, however, in order to modernize the rules and to adapt them to current chartering practice. A completely new part on quantity contracts (volume contracts) -in 14:42-14:51- has been introduced, also certain particular rules on breach and its consequences.

From the above it is apparent that there is not a single type of breach of charter, but the types of breach and the remedies vary. The events may be attributable to the owner or to the charterer, and the various obligations may be of a “primary” or of a “secondary” nature. Thus delay in delivery of the vessel under the charter party may allow the charterer to terminate the charter irrespective of the reason for the delay, whereas his right of damages may depend on the particular reason. It should also be noted that “force majeure circumstances” of various types may have an impact on the contractual relations and may lead to the postponement of or the right to terminate the contractual obligations for either party.

When going through an individual charterparty and chapter 14 in SMC it is apparent that there are several articles on the obligations of the respective party and on the consequences of their non-performance or wrongful performance of such duties.

Such rules are found in SMC 14:15, 14:28-29, 14:32-36, 14:38-39, 14:48-51, 14:55-56, 14:63-64, 14:71 and 14:73-74.

As indicated above the obligations of the negotiated clauses predominate in this sphere of the law, and the Swedish legislator has also taken into consideration a number of contractual solutions when drafting the SMC rules. I have therefore also chosen to compare certain SMC rules to some charter party clauses to illustrate the Swedish legislator’s choice of solution compared to that chosen in a particular standard form. It should also be underlined that originally rather rudimentary standard charter forms have gradually become more sophisticated in order to counteract the outcome of a court decision.⁹

⁹ Also in this sense the law related to chartering does not principally differ from other parts of the law of contracts.

3.2 *Time of Delivery of the Vessel/cargo Under the Charter Party*

3.2.1 Some General Points

Certain general observations could be made in this connection although they are not immediately connected with the question of delivery of the vessel/cargo. They illustrate, however, the structural difference between voyage charter and time charter, which is important to observe in order to understand how the clausal law has developed. This structural difference is also recognized and followed by SMC.

In voyage charters the risk of the passage of time for the sea transit lies almost invariably on the shipowner. Here the charterer is allowed a certain number of days for loading and discharging (laytime), and if he needs more time he will have to pay *demurrage*. If even longer time than demurrage time is used, then a situation may come up where the shipowner will be entitled to compensation other than demurrage, and also may be entitled to cancel the charterparty due to the charterer's breach by non-delivery of cargo.

In timecharters the situation is rather different because under the timecharter the timecharterer takes over the commercial operation of the vessel, and delays due to weather or lost trading opportunities fall on the charterer, whereas delay due to the vessel or the crew (collision, stranding, strike on board, engine problems etc) would normally be determined by off hire provisions, thus fall on the owner. There are, however, a growing number of cases where the owner in a time charter party is required to guarantee the time of the sea transit (irrespective of the weather conditions) normally counted from pilot station to pilot station. This is above all the case in a number of tanker time charter charter parties, such as Shelltime, Mobiltime etc., but similar requirements are sometimes set up by large bulk cargo charterers.

Such clauses are sometimes rather complex since they are tied to a rather far reaching description of the vessel's speed under certain circumstances (sometimes described as a warranty of speed and fuel consumption) and also to the off hire provision.

In Shelltime 4, clause 24 concerns "Detailed description and performance", which is then also tied to the off hire clause 21. In this case clause 24 states i.a.:

" Owners guarantee that the speed and consumption of the vessel shall be as follows:

The foregoing bunker consumptions are for all purposes except cargo heating and tank cleaning and shall be pro-rated between the speeds shown.

The service speed of the vessel is knots laden and knots in ballast and in the absence of Charterers' orders to the contrary---

For the purpose of this charter the "guaranteed speed at any time shall be the then - - current ordered speed or the service speed , as the case may be.

The average speeds and bunker consumptions shall for the purposes of this Clause 24 be calculated by reference to the observed distance from pilot station to pilot station on all sea passages ---."

The off hire clause 21 is tied to this speed/consumption clause through subclause (b) stating:

“If the vessel fails to proceed at any guaranteed speed pursuant to Clause 24 ---”

This type of clause serves to reduce the difference in distribution of risk between voyage charter and time charter. The structural difference between these two types of charter has a fundamental importance and should be taken into consideration by charter party draftsmen. This is not always the case, and it is not infrequent that voyage charter clauses are inserted into time charter parties where they really make no sense. This is, for example, the case with war risk clauses Chamber of Shipping 1-2, which brokers often adamantly require to be inserted into time charter parties.

3.2.2 The Charterer's Right to Terminate Due to Late Delivery of the Vessel

Timely delivery of the vessel is very important, since the charterer may face problems in other contractual relations (for example with a seller or buyer), whereby he may lose a contract or otherwise suffer an economic loss. The charterer may therefore have an interest in terminating the charter party and/or claiming damages. The risks of delay of the ship under time charters and voyage charters are similar.

In common law, particularly English law, there is an absolute duty on the owner to deliver the ship under the charter party on the agreed day, which is the *cancelling day*. This means that any delay allows the charterer to terminate the charter. In common law the owner is not even in a position to demand from the charterer a decision whether he is prepared to accept the vessel in case of a delay, but the owner is basically obliged to send the vessel for late delivery facing a risk that the charterer will refuse to accept the delivery. The charterer is not considered to have a duty to inform the shipowner. From an economic point of view this state of the law is extremely harsh on the shipowner and in practice it has become quite common that so-called interpellation clauses are inserted into charter parties. Such clauses are found both in voyage charter parties and in time charter parties. They may be drafted in different ways and may also be tied to a duty on the owner to proceed from the last port to the port of delivery under the new charter party with due dispatch.¹⁰

There is normally in charter party practice a span of time covering the earliest time when the charterer is obliged to take delivery of the ship (and from which time will count) until the last date when the owner may deliver it without risking that the charter is cancelled. Clauses containing such elements in charter parties are commonly referred to as *lay/can* clauses.¹¹ The clause thus sets out a first day when the vessel may be delivered to the charterer - the *lay* part of the clause

¹⁰ See also below before 3.2.3.

¹¹ See e.g. Gram *On chartering documents*, 2. ed. by Bonnicksen, London 1988 p. 4 ff., 17 and 63, and Gorton, Ihre & Sandevärn, *Shipbroking and chartering practice*, 4. ed. London 1995 p. 158 ff. Related problems are treated in depth in i.a. Cooke et al., *Voyage charters*, London 1993 p. 57 ff. and in Wilford et al., *Time charters*, p. 292 ff.

- and the last day when the vessel has to be accepted by the charterer – the *can* (cancellation) part. Actually the delivery may also be defective in the sense that the vessel has to be in accordance with the description of the charter party, failing which timely delivery may not be regarded to have taken place. The owner is normally allowed this span as a matter of practice, since it is often hard to deliver a vessel on an exact date, and it is of course a way of striking an economic balance between the interests of the owner and the charterer to allow such span.

There are in SMC similar rules on delay of delivery of the ship under the charter party in 14:28 (voyage charter) and 14: 55 (time charter).¹²

Thus art. 14:28 states (and 14:55 is similar):

“If the vessel must be ready to receive cargo within a fixed limit of time (cancelling time), the voyage charterer may cancel the charterparty if the vessel is not ready to commence to take in goods or notice of readiness to load has not been given before the end of the time limit.

If the carrier gives notice that the vessel will arrive after the end of the cancelling time and if he states a moment when the vessel will be ready to begin to take reception, the voyage charter may cancel the contract if he does so within reasonable time. Unless the contract is so cancelled, the notified moment becomes the ship’s new cancelling time. ”

On top of that art. 14:55, part 3 prescribes that in other cases of late delivery (for example such cases where no cancelling date has been agreed) the charterer is entitled to terminate the charter, if the delay is considered as a substantial breach. 14:29 contains a similar provision in respect of voyage charters. This article also has to be read in conjunction with art. 14:52 which has to some extent a corresponding rule in 14:8 in respect of voyage charter in so far as seaworthiness is concerned. 14:52 states:

“The carrier shall place the vessel at the time charterer’s disposal at the place and time agreed.

On delivery the carrier shall ensure that the vessel’s condition, prescribed documentation, manning, victualling and other equipment fulfil the requirements of ordinary carriage in the sailing range stated in the time charter party.---”

The time factor and the state of the vessel are thus interrelated in so far as a non-contractual state or “substandard”¹³ of the vessel in this respect may be converted into delay allowing the cancellation, but there may also be a case of damages. This is also made explicit in 14:56 stating:

“If upon delivery there is a defect in the vessel or her equipment, the time charterer shall be entitled to make deduction from the hire, or if the breach of

¹² See e.g. Michelet, *Håndbok i tidsbefraktning*, 1997, and also Grönfors, *Sjölagens bestämmelser om godsbefordran*, Stockholm s. 195 ff. The question of cancellation was considered by Grönfors in *Befraktarens hävningsrätt* (Gothenburg Maritime Law Association 1959).

¹³ I am aware that I use the word “substandard” somewhat carelessly, since that concept has been used in political settings which I am not here discussing at all.

contract is essential, cancel the charter party. This does not apply if the carrier repairs the defect without such delay as would entitle the time charterer to cancel the contract under section 55.”

Furthermore, the shipowner has in accordance with 14:28 and 14:55, as already indicated, a right of interpellation

Thus in this respect Swedish law follows international practice, and the Code also has a provision on a right of interpellation. Such right of interpellation is by the way now also found in the Swedish Purchase Act art. 24 (cf. also art. 48. 2-4 in CISG).

There will hardly be any claim for damages by the charterer if at the time when the charter party was concluded the owner gave fair and relevant information to the charterer on the prospects of the possibility for the vessel to reach the loading port in time, although the charterer may still be entitled to cancel the contract.

If, on the other hand the shipowner has tried to make an extra voyage, or has made some deviation for his own personal economic benefit then there may be ground for a claim for damages against the shipowner.

14:57 thus states (cf. 14:31 in respect of voyage charter):

“The time charterer shall be entitled to damages for loss resulting from delay or any defect on delivery. If the carrier shows that the delay or the defect is not due to his own fault or neglect, or that of any one for whom he is responsible, there shall be no right to such damages.---”

Like all charter parties Shelltime 4 and Shellvoy 5 contain different clauses covering related items. Thus Shelltime 4 in clause 5 rather briefly prescribes:

“The vessel shall not be delivered to Charterers before and Charterers shall have the option of cancelling this charter if the vessel is not ready and at their disposal on or before .”

There is no mention of damages but the charterer will have to rely on general rules on damages. Shellvoy 5 clause 11 is more elaborated and also contains a right of interpellation:

“Should the vessel not be ready to load by noon local time on the termination date set out in Part I(C) Charterers shall have the option of terminating this charter unless the vessel has been delayed due to Charterers’ change of orders pursuant to Clause 26, in which case the laydays shall be extended by the period of such delay.

The provisions of this Clause and the exercise or non-exercise by Charterers of their option to terminate shall not prejudice any claims which Charterers or Owners may have against each other.”

There are, however, certain restrictions in SMC as to the voyage charterer’s right to cancel. According to 14:29 he may not cancel “if discharging of the goods would cause essential damage or inconvenience” to another charterer.

There is also a duty on the charterer to notify the shipowner. Only rarely do standard form charter parties contain any precise provisions concerning damages, but charter parties normally lay down the rights and obligations of the respective parties and then the remedies will follow from the law. Normally the charter party spells out certain specific remedies, e.g. as in the case of demurrage or off-hire, but there are also individual charter parties laying down particular provisions from other remedy domains.

As already mentioned this development is more clearly observed in common law where the law of chartering has developed in parallel with the law of contract, and the interrelation between these two parts of the law is more obvious. Also in Swedish law where there seems to be somewhat more closed doors between chartering and general contract law the particular SMC chartering provisions may have to be supplemented with more general rules.

In order to compare this solution with clausal law I have chosen to quote clause 16 (Delivery/Cancelling) from the relatively new NYPE 93 (New York Produce Exchange form 1993):

“If required by the Charterers, time shall not commence before ... and should the Vessel not be ready for delivery on or before ...but not later than ...hours, the Charterers shall have the option of cancelling this Charter Party.

Extension of Cancelling

If the Owners warrant that, despite the exercise of due diligence by them, the Vessel will not be ready for delivery by the cancelling date, and provided the Owners are able to state with reasonable certainty the day on which the Vessel will be ready, they may, at the earliest seven days before the Vessel is expected to sail for the port or place of delivery, require the Charterers to declare whether or not they will cancel the Charter Party. Should the Charterers elect not to cancel, or should they fail to reply within two days or by the cancelling date, whichever shall first occur, then the seventh day after the expected date of readiness for delivery as notified by the Owners shall replace the original cancelling date. Should the Vessel be further delayed, the Owners shall be entitled to require further declarations of the Charterers in accordance with this Clause.”

This clause which differs to some extent from corresponding clauses in the *Baltimex* and the *Gencon* charterparties sets up certain time limits before which the shipowner may not notify the charterer respectively within which the charterer has to reply. This is a type of clause which is relatively seldom amended in the finally agreed charterparty.

3.2.3 Delay in Delivery of Cargo

There is thus a relatively strict duty on the shipowner to deliver the vessel timely and in an agreed state. The question may then be raised whether there is a corresponding duty on the charterer to deliver the cargo. In other words, in case the charterer is late in delivering the cargo (or if the cargo is delivered in a bad shape) could the shipowner terminate the charter and/or claim damages?

The situation is here somewhat more complex, since the owner under a time charter is entitled to hire as soon as the vessel has been delivered and the charterer has thus taken over the commercial risk. Under a voyage charter the owner is normally allowed demurrage in case the laytime is exceeded. This means that the basic principle here is money remuneration, in case of time charter since hire is payable, and in case of voyage charter because demurrage may have to be paid. Correspondingly the scope for cancellation is much more limited, particularly as far as time charter is concerned.

There are, however, certain limitations to the main voyage charter rule, which may be to the benefit of the charterer or the owner as the case may be. Thus 14:32 states:

“If the voyage charterer renounces the charterparty before loading has commenced or if, after indicating such intention, he has not at the end of loading delivered all the goods covered by the contract, the carrier shall be entitled to compensation for loss of freight and other loss.---

In determining the compensation, regard shall be paid to whether the carrier failed without due cause to bring other cargo.

There shall be no right of compensation if the means of delivering, carrying or importing the cargo to the place of destination must be considered precluded by causes which the voyage charterer ought not to have contemplated at the time of concluding the contract, such as export or import prohibition or any other measure of authorities, the destruction of all goods of the kind contracted for or any similar circumstance. The same shall apply if the contract was for specific goods which were accidentally destroyed.”

In case the charterer would not deliver all the cargo contracted for section 14:33 in its turn gives the owner a right to give the charterer an additional time within which to pay compensation or put up security, failing which the owner is entitled to cancel the charter party and demand damages.

Para. 3 of section 14:32 is, of course in part a force majeure provision, which shall be discussed somewhat further under 3.4. Section 14:35 para 3 contains a special provision in case no demurrage time has been agreed whereby the owner shall be entitled to terminate the charter party if the delay would cause substantial loss or inconvenience in spite of the demurrage payable.

Also in certain voyage charter parties there is a force majeure clause due to late delivery of goods because of inadequate train service to carry goods to or from the port or because there is late delivery or receipt of the goods for other reasons. Such clauses are common in coal charter parties of type Americanized Welsh coal charter amended 1979 and similar. Amwelsh in art. 4 on loading states i.a. (with a similar provision in art. 9 on discharge):

“--- Any time lost through ---occasioning a stoppage of pitmen, trimmers or other hands connected with the working or delivery of the coal for which the vessel is stemmed, or by reason of accidents to mines or machinery, obstructions, embargo or delay on the railway or in the dock; or by reason of --- beyond the control of the Charterer affecting mining, transportation, delivery and/or loading of the coal not to be computed as loading time...- In the event of any stoppage or stoppages arising from any of these causes continued for the period of six

running days from the--- being ready to load, this Charter shall become null and void,---”

This is an exception clause putting on the owner a rather far reaching risk, which for economic reasons I believe would be better placed with the charterer. This type of clause is seldom found in so-called “owner oriented charter parties”.

3.3. Delay in Payment of Freight/hire

One of the charterer’s main duties is to pay freight or hire (as well as certain other costs) as agreed (expressly or impliedly). This is one of the situations, where the structural difference between voyage charter and time charter shows clearly, and the consequences of late payment differs considerably between the two contract types.

In English law freight is payable upon delivery of the cargo after carriage. This principle is often amended in voyage charters through the insertion of an earned and prepaid clause into the charter party and/or the bill of lading. In voyage charter parties lien clauses may give the shipowner rights against the cargo in case of unpaid freight and other charges, thus in this respect a system of relative protection for the shipowner.

As to the payment of freight (and for that matter demurrage) SMC has established different rules. In 13:10 a freight prepayment rule is established with respect to general cargo. Here the legislator has thus decided to adapt the law to a common principle applied in bills of lading. SMC 14:6 contains a freight provision concerning voyage charters. From the text of 14:6 it is not clear when freight is payable but the travaux préparatoires resolves the problem. Freight is then payable upon delivery of the cargo at the port of discharge. There is no explicit provision on the consequence of delay in payment of the freight. SMC 14:15, par.3, however, contains a provision on delay in payment of demurrage:

“ If the compensation is not paid or security lodged, the carrier shall be entitled to enter the claim into the bill of lading. If he does not do so he may instead prescribe an additional period for the voyage charterer’s payment. Unless the period is unreasonably short, the carrier may upon not receiving payment within the additional period cancel the charterparty and claim damages for any loss resulting from the non-performance of the voyage.”

Compared to the old maritime code this new rule in SMC has been modelled upon the purchase act. SMC also contains corresponding rules on consecutive voyages (14:36, par 2) and volume contracts (14:50).

In time charters, on the other hand, a lien clause will seldom provide useful protection for the shipowner, since the charterer is normally not owner of the cargo carried on board the vessel, and the *charterer* is the party liable to pay the hire. Instead the principle has evolved and has been established in more or less all time charter parties that charter hire is payable in advance. This is also the main principle in respect of hire and rent payment in many legal systems. In respect of time charter hire the rules on late payment of hire has been considerably amended in SMC as compared to the corresponding rule in the

previous code. There had been a rather strict rule, although it was never applied as strictly as in English law in respect of a corresponding provision.¹⁴ Under English law any delay in payment of hire entitled the owner immediately to terminate the charter and withdraw the vessel from service.¹⁵ Certain adjusting principles later developed to counteract in some cases the effects of the draconian application of the English rule in certain cases.

In SMC there is now a new rule in SMC 14:71, which is based on a primary liability of the time charterer to pay interest because of delay - a principle which is in Swedish law normally applicable in cases of any late payment. The owner also has a duty to inform the charterer of the delay. "When such notice has been sent off, the carrier (owner) may suspend performance of the charterparty, and also refuse to load cargo and issue bills of lading." The article further adds that the owner shall be entitled to cancel the charter if hire payment has not been received within 72 hours. This means, of course that the rule in SMC has been modelled on the so-called "antitechnicality clauses" which were developed in charter party practice to counteract the effect of the English harsh practice against late payment.¹⁶

From a general perspective the question could be raised whether legislation should have such narrow wording, particularly since Scandinavian courts already had already established a principle of reasonableness in the application of the previous rule.

3.4 Right of Termination During Contract Period

3.4.1 In General

As soon as goods have been loaded on board the vessel the situation becomes different, and generally it may be said that the scope for cancellation is at least practically more limited (see 14:29 para. 2). If the vessel does not meet the charter party provisions or if the owner otherwise would not perform, the charterer may be entitled to different remedies including, in some cases the right to terminate the contract. Obviously the owner may also be entitled to remedies in case the charterer does not perform his other contractual obligations beyond the duty to pay the hire. There are several different types of situations involved which may sometimes be regarded as a contractual breach. The situation is different from the owner's perspective or the charterer's perspective depending on the structure of the various types of charter parties. There may occur delay during the transit for various reasons which may be caused by either party (or for that matter by none of them). The vessel may face risk of damage for

¹⁴ In Scandinavia there is some case law, for instance ND 1932 p. 453 (Matti-Supr. Ct. Sweden), ND 1970 p. 432 (Sunny Lady - arbitration) and ND 1974 p. 186 (Kingsnorth-arbitration). Michelet has also dealt with related matters in depth in *Håndbok i tidsbefraktning* p. 259f f.

¹⁵ See for example in Wilford et al., *Time charter* p. 206 ff.

¹⁶ See among others in Gorton, Ihre & Sandevärn, p. 274 ff. and *Gram on chartering documents* p. 70.

different reasons and so does the cargo. The different situations lead to various difficulties which, require different solutions.

Damage (or risk of damage) may be caused to the vessel because of heavy weather, grounding, machinery break down, war, acts by the crew, acts by authorities, dangerous cargo on board the vessel, and ports being unsafe. The risks may be treated differently depending on the cause, the type of vessel involved and type of trade, and the parties may evaluate and treat those risks differently. Different standard form charter parties may also have different solutions. Is it a risk for which the owner is liable or should it rather be on the charterer, or is it a risk for which neither the owner nor the charterer is primarily liable, but where different approaches could be applied depending on the individual circumstances?

In bareboat charters (normally more a financing than a trading arrangement) all risks are basically on the charterer and he has to pay the hire “come hell and high water”.

In time charters the charterer likewise has the duty to pay hire as long as the owner performs, i.e. as long as the vessel (and the crew) performs the charter party. In this case there may therefore be a number of circumstances under which the charterer may be relieved of his duty to pay hire and also be entitled to economic compensation and even be entitled to terminate the charter party. As long as the charterer pays the hire he is entitled to use the vessel but always within the frame of the charter party (geographical area, type of cargo etc).¹⁷

In voyage charters the situation differs; more obligations rest with the owner, and the charterer will have to pay freight for the obligations performed by the owner in accordance with the provisions of the charter party. In case of delay in loading or discharge the charterer may have to pay demurrage as additional freight or other economic compensation to cover the owner’s loss, but this depends basically on the contract (also on the risk distribution laid down by the legislator in basically non-mandatory rules). The right of terminating the charter party is generally more limited for either party as soon as the cargo has been loaded.

3.4.2 Certain “Events of Default” During the Contract Period

Some of the events dealt with below are only rarely encountered in a charter party form.

SMC 14:22 contains a provision on dangerous cargo, whereby the owner may be entitled to discharge such goods, “render them innocuous or destroy them without any duty to pay compensation”. A corresponding provision in respect of time charter is found in 14:58 para.3. As mentioned above the charterer may not after loading cancel the charter party “if discharging of the goods would cause essential damage or inconvenience to any other charterer”, see 14:29 para. 2 which should also be compared to 14:34 which contains a similar rule but also adds that the charterer is not entitled to demand discharge of the cargo after

¹⁷ In this article I shall not go into the question of the carrier’s liability for damage to cargo during the transit, but the perspective should not be forgotten.

loading if this would cause harm or inconvenience to the owner. This latter rule seems to aim at the situation after the vessel has left the port of discharge.

SMC 14:36 concerns delay after loading or during the voyage:

“If the ship is delayed after loading or during the voyage and if this depends on a circumstance on the voyage charterer’s side, the carrier shall be entitled to compensation, unless the voyage charterer shows that neither he nor any one for whom he is responsible has been guilty of fault or neglect. The same shall apply if the vessel is delayed during discharge because it has not been possible for the carrier to warehouse the goods according to section 26.”

The charterer is also liable to pay damages to the owner if the vessel has been damaged by the cargo due to the charterer’s fault or neglect or by the stevedores’ employed by the charterer. Such items are often covered by particular charter party provisions.

In time charters the basic provisions concerning the owner’s duties are 14:52 and 14:58, where 14:52 lays down the principle that the carrier shall see to it that the vessel is maintained in good order and condition (including manning) during the charter period. 14:58 in its first para. spells out that the owner during the charter “shall perform the voyages which the time charterer orders in accordance with the charter party. He shall also be responsible for the continuous maintenance of the vessel as required in section 52 second paragraph.” Time charter parties invariably contain provisions on the owner’s basic duties and obligations like those mentioned.

Time charter parties invariably contain provisions on the owner’s basic duties and obligations.

Breach of any of these duties may lead to a right for the charterer to cancel the charter and/or demand damages according to 14:64.

3.4.3 The Final Voyage Under Time Charter Parties

Some words should be mentioned of a particular problem, where the distribution of risk between the owner and the charterer is obvious and where there is particular need of cooperation between the parties in order that an optimum economic result is achieved. The problem relates to the final voyage under a time charter party and is tied to the concepts of “overlap” and “underlap” respectively.¹⁸

The base problem is a consequence of the time charter as a time related contract. The period cannot always be easily linked to the time charterer’s right to use the vessel during the time charter period. Sometimes the charterer may be in a position where he has to judge whether it will be possible for him to send the vessel for another cargo voyage when the end of the charter period is approaching. If the freight market is favorable (in relation to the charter hire that he pays) the charterer is likely to extend the use of the vessel as much as possible. If the freight market is low, on the other hand, the charterer will wish

¹⁸ The question of redelivery is discussed by Michelet, p. 200 ff.

to rid himself of his obligations under the charter party as soon as possible. The owner's interest will normally be the opposite.

The owner may also be interested in the return of the vessel in time to meet a new commitment, failing which, the owner may risk the cancellation of such subsequent charter party. During the negotiation of the time charter it is, of course impossible to foresee the situation at the end of the charter period, and therefore the parties will have to try to find a solution that will be mutually acceptable to them.

This is a type of dispute which has been before courts and arbitrators on a number of occasions. SMC 14:68 and 69 prescribe:

“68 §. The time charterer shall redeliver the vessel to the carrier at the place and time agreed.

69 §. The carrier shall be obliged to let the vessel proceed upon a new voyage although the agreed time for redelivery is thereby exceeded. This shall not apply if the excess is more than can be considered reasonable or if a set period for redelivery has been agreed upon.

For such excess of time as is permissible according to the first paragraph, the time charterer shall pay current hire, though not less than the agreed hire, and compensation for any damage which the delay causes the carrier.”

It should be noted that there is a specific mention of damages in this connection. Different solutions are often found in standard charter forms. Normally there is a system of redelivery notices to be given. Shelltime 4 in clause 19 sets out a rule on the final voyage, which is rather favourable to the charterer:

“---

If at the time this charter would otherwise terminate in accordance with Clause 4 the vessel is on a ballast voyage to a port of redelivery or is upon a laden voyage, Charterers shall continue to have the use of the vessel at the same rate and conditions as stand herein for as long as necessary to complete such ballast voyage, or to complete such laden voyage and return to a port of redelivery as provided by this charter, as the case may be.”

This clause does not contain any rules on the charterer's duty to contemplate before sending the vessel on the last last voyage, whether it could be reasonably foreseeable that the vessel will be able to finish the voyage within the time charter period and does not even compensate the owner with a higher hire in case the market would be higher during the overlap period (cf e.g. Linertime clause 8).

Neither SMC or Shelltime or Linertime contain any provision on underlap, but there may in such case be a discussion on whether there is a duty on the owner to mitigate loss.

3.5 *The Right to Terminate Due to Causes Beyond Either Party's Control*

SMC 14:58, para 2 contains certain restrictions in respect of the carrier's duty to perform a voyage:

“The carrier shall not be obliged to perform a voyage on which the vessel, persons on board or the cargo may be exposed to danger as a consequence of war, warlike conditions, ice or any other danger or essential inconvenience which he could not reasonably have contemplated when the contract was concluded.”

Situations may occur where there are new unexpected or unforeseeable circumstances. War and warlike circumstances may be one reason. Acts of nature may likewise cause such a situation. Charter parties almost invariably contain clauses taking care of war situations, either through war clauses or war cancellation clauses, which are aimed at different situations.

SMC 14:38 and 14:40 contain certain provisions concerning war risk and lay down as a main principle that in case there is a war or warlike situation coming up, the risk of which has not been foreseen, or where the risk has considerably increased each of the parties may “renounce the contract without any duty to pay compensation even if the voyage had begun.” 14:40 adds, that costs coming up for reasons mentioned shall be treated as general average, before “the charter party is renounced”.

With respect to time charters there is a corresponding provision in 14:74, which also contains rules on payment of certain additional costs for war risk insurance and for war risk bonus to the crew.

One further provision of importance in this connection is 14:73 laying down that in case the vessel is lost during the charter period or requisitioned (or something similar) the charter party shall cease.

Now going more directly into questions related to the right to terminate a contract of affreightment it is necessary first to set out the basic principles for the respective party involved. Then the question must be asked, are the rights of termination parallel for the owner and the charterer?

A quick glance at one of the charter party solutions to the problem can be mentioned here: The NYPE 93 contains several clauses covering these types of events. Under clause 31 (Protective clause) there is in subclause (e) a War clause; clause 32 is a war cancellation clause; clause 33 deals with ice problems; 34 with Requisitions; and 21 Mutual Exceptions - a clause which is also in the earlier versions of NYPE form and is also found in other standard forms as well as in negotiated charterparties. The clause reads:

“The act of God, enemies, fire, restraint of princes, rulers and people, and all dangers and accidents of the seas, rivers, machinery, boilers, and navigation, and errors of navigation throughout this Charter, always mutually excepted.”

It is a clause that does not explain itself very easily, although the essence of it is understandable describing those risks that neither owner nor charterer will accept. To some extent the words in it remind one of the exceptions in the Hague Rules and the Hague-Visby Rules, but there are also certain elements

which could be found in an off hire clause. Basically the clause aims at relieving both parties from their duties to perform under certain obligations, but is it a postponement or does it allow each party to terminate the contract, or does it only amount to relieving both parties from damages? It is unclear, and one should probably be able to demand a little more. On the other hand, the clause has been in existence for a long time and seems to be workable in practice.

The difference between the War clause (in many cases also referred to as war risk clause) and the War cancellation clause is that the former deals with certain problems in connection with certain war or warlike situations where the question could come up whether the shipowner but for the clause would have a duty to let the vessel enter into a belligerent port or not. Another item concerns additional wage bonus, and who will have to provide and pay for extra war insurance. As we have seen SMC 14:74 covers similar items although not in such great detail.¹⁹

Neither the requisition nor the ice clause has any immediate corresponding solution. The NYPE solution is that any requisition period shall be considered as off hire period, but that the owner shall be entitled to any requisition money is not an unusual contractual solution but SMC would not give a similar result. The other part of the clause, namely that in case the requisition period exceeds a number of months “either party shall have the option of cancelling this Charter Party, and no consequential claim may be made by either party” is rather closer to the solution in the SMC although the problem is not directly addressed.

4 Summing Up

Contracts of affreightment have a complex legal nature, where several different types of obligations rest with the respective parties. As we have seen the negotiation and contracting procedure differs somewhat from a corresponding procedure in other trades. Equally, it is evident that there are many particularities in a trade which demand a particular contractual solution. At the same time we also find that there are also similarities, where in spite of the peculiarities of the trade the legal solution may be more or less of a general character.

The duties and obligations of the respective parties in a charter party are manifold, and they are more or less equal whether mandated by law or contract. Swedish law is not much different in this perspective, although there are some particular inventions. In respect of wrongful performance or non-performance the consequences may sometimes be more precise and varied in an individual contract than in statutory law. In this respect Swedish law seems to have tried to adapt to contract practice more than follows in other legal systems.

Above I have given an overview mainly of the termination rules in the chartering chapter of SMC. Apart from the termination rules as consequences of wrongful performance or non-performance, SMC also works with general economic compensation rules without setting out any particular rules on how to calculate damages. The rules on demurrage (SMC 14:14-15) and off-hire (SMC

¹⁹ Michelet, p. 478 ff. discusses related questions.

14:72) are particular chartering provisions, where the former is a type of liquidated damages and the latter is a kind of price reduction. Apparently legal provisions cannot meet all detailed trade differences etc. but such variations have to be left to the contracting parties, although the generality is laid down already in the text of the SMC.

Undoubtedly the SMC principles in this sphere differ from corresponding common law principles. At the same time it is important to recognize that standard contract provisions prevail over the legal principles to a large extent. Nevertheless the SMC principles and general obligatory principles fill out the picture. Thus, when it comes to the question of calculating damages, general principles will have to be applied, and certain other general obligatory features will have to be taken into consideration, such as the duty to mitigate loss. And here the SMC does not lead, but the right of termination principles laid down in chapter 14 of SMC have much in common with corresponding general obligatory principles.

It remains to be seen whether the international charter market will be attracted to arbitration in Stockholm, applying Swedish law. The new rules in chapters 13 and 14 have encountered certain criticism for various reasons, but charter parties are largely based on international standard form contracts, and on the whole these rules could serve to fill gaps in international chartering.