

Volume Contracts of Affreightment – Some Features and Principles

Lars Gorton

1	Introduction	62
1.1	General Background	62
1.2	Some Contractual Points	62
1.3	Frame Agreements	64
1.4	Some General Points Related to Distributorship Agreements and Volume Contracts	66
1.5	Some Further Overriding Points	67
2	Contract Forms	68
3	Law, Contract and Terminology	69
4	The SMC Rules on Volume Contracts	70
5	Characteristics of COA's	71
6	The Generic Nature of the COA	72
7	Some of the Parameters of the COA	76
7.1	The Ships Involved Under the Volume Contract	76
7.2	Time Elements in Connection with COA's	76
7.3	Cargo and Cargo Quantity and Planning of Voyages	77
8	Breach and Consequences of Breach	78
8.1	Generally, Best Efforts and Cooperation	78
8.2	Consequences of the Owners's Breach	78
8.3	Consequences of the Charterer's Breach	78
9	Some Comparisons with Distributorship Agreements in English Law	78
10	Some COA Cases Involving "Evenly spread"	82
10.1	"Evenly spread"	82
10.2	Mitigation of Damages	85
11	Freight, Demurrage and Similar	88
11.1	General Points	88
11.2	Freight Level	88
11.3	Escalation and Hardship Clauses	89
12	Concluding Remarks	90

1 Introduction

1.1 General Background

A cargo owner wishing to ship cargo by sea may choose among various types of contracts depending on the type of cargo/oes involved, the time frame, geographical areas involved, number of shipments, total quantity and quantity per shipment etc.¹

There is a tendency in accordance with present business wisdom among companies to outsource those company activities which are not regarded as core activities. Following this doctrine a trading company may therefore decide to contract with a particular logistics company undertaking to provide for all its shipping services. The logistics company in its turn may be relying upon various contracts with shipowners and other carriers.

This development has created certain new contractual relationships and features in the contract picture. The volume contract of affreightment has to be seen in this perspective, even if it is by no means a completely new contractual arrangement.

1.2 Some Contractual Points

Some general observations should be made as a starting point. One basic observation is then that chartering law forms part of the general law of contract, and it merits to be underlined that the law related to chartering combines the generality of contract law and the particular features of the ways and methods through which charter contracts are made and performed. Thus the main contract law rules and principles apply, the methods employed for the construction and interpretation of contracts are basically the same, but at the same time the particularities of individual trades, contract parties and other circumstances need to be taken into account when judging individual disputes. It is also a general observation that contractual disputes often involve a combination of contract law principles, procedural evidence rules and factual circumstances. It may therefore be hard to foresee the outcome of such disputes in the individual case.

The above means for instance that the principles generally recognized as being two pillars of the contract law, i.e. the freedom of contract and *pacta sunt servanda* (or as it could also be understood the duty to perform a contract in accordance with the contract provisions) apply also with respect to charter parties.²

Another general observation is that all agreements have certain common features. These mainly serve the purpose to identify the parties, the type of agreement and the respective rights and obligations of the parties under and in connection with the contract. A sale's agreement e.g. will normally set out the

¹ I disregard from the situation where the cargo owner has such steady flow of goods that they decide to own their own vessels for the carriage of their own goods.

² Both of these two principles have nowadays several limitations, but they are still considered to be two basic contract law principles particularly in commercial relations.

merchandise involved, quantity, quality, price and payment (currency, time and method), delivery (time and place) etc. Correspondingly a *voyage charter party* will normally identify an individual vessel to carry out the voyage (or type and size of vessel, possibly with substitute). Normal features will then also be e.g. type and quantity of cargo to be carried, freight and payment (currency, time for payment and method of payment), place of loading and discharge respectively etc.³ We may thus have to focus both on the general features of contract law and investigate the particularities of individual contract types.

In modern contract law a distinction is sometimes made between *discrete*, *relational* and *network contracts*.⁴ There are other distinctive features which may also have to be traced when it comes to charter contracts.

On the contractual level we are thus moving along a scale where in the one end we find “quick transaction” agreements often of a “one time nature” and in the other end “partnership” and similar agreements. In the latter case the relational element is obvious. The former types of agreements often concern a particular business such as the purchase of a particular product in a single transaction and the exchange of the product for payment of the price (or similar). With respect to this type of agreements, such as the sale of a piece of machinery, the object is rather clear, and the duties of the respective party could be set out rather easily as the delivery of the machinery against the payment of the price. The seller then has a liability for the delivery of the merchandise in accordance with the contractual terms and conditions (as has the buyer for the payment of the price). If the seller fails to deliver in accordance with the agreement he will be liable (unless there is an acceptable limitation of liability clause). A related question could also be whether the performing party also has a duty to act “in good faith”.⁵

In this case one may say that following the agreement and the applicable sale of goods act there is a duty (eventually implied) on the seller to supply a product of agreed or merchantable quality.⁶ On the other hand in the relational contracts which normally run over a longer period of time with future risks less easily foreseen and accounted for, the objectives may be less precisely formulated. The particularity of the performance to be achieved may then have to be set out in a less precise way and possibly on a minimum terms basis to which is added

³ See the approach by Rodhe in his extensive treaty *Obligationsrätt*, Lund 1956 and cf. the slightly different approach applied by Hellner in his 3 volumes on *Speciell avtalsrätt*, various editions Stockholm during 1990's. See also Bengtsson, *Om civilrättens splittring*. Festskrift till Kurt Grönfors 1991 p. 29ff. For a discussion on the need of an obligatory law see Wilhelmsson, *Behövs en obligationsrätt*. Lov og rett 2003 p. 515 ff (Rev. of Hagström/Aarbakke, *Obligationsrett*, Oslo 2003).

⁴ Campbell, Collins & Wightman (eds.) *Implicit dimensions of contract. Discrete, relational and network contracts*. Oxford & Portland 2003, e.g. p. 1 ff. When reading through the book I find that the terminology used may not be clear beyond doubt, but it serves as a tool to better understand the contracting and the contractual relations from different aspects.

⁵ Apart from some brief observations I shall in this article not delve deeper into the question of “good faith”, but it is here mentioned only in order to note the difference in approach between lawyers educated in the common law and the civil law systems respectively.

⁶ Here I only wish to refer to the development of the traditional merchantability doctrine into what to-day may be rather referred to as an “implied terms doctrine”.

wording such as “the parties shall engage in xxx activities and they shall cooperate in good faith to achieve the commonly set out goals”. One could probably say that the less precision in the objective the more demands there will be on finding wordings whereby the parties have to act in good faith, have to act reasonably, have to use best efforts etc. in order to set out their common obligations.

1.3 Frame Agreements

Thus, both the similar features in contracts and the differences between various contract types have to be taken into consideration. Some agreements are to be carried out at some future point or over a period of time whereas others will be performed on a specific not too distant date or performed more or less immediately, and often close to on “Zug um Zug-basis”. Some contracts are drafted in such a manner that there is an overriding frame with general provisions covering the long term particularities of the arrangement, and added separately the terms and conditions applicable for the individual transactions. Sometimes there is no split up between the two but instead all terms and conditions are gathered in one document. Whether one or the other solution is used depends on the particularities of the transaction and the usage of the parties or that of the particular trade.

There are advantages and disadvantages with both solutions although my personal preference is to split the generalities from the particularities. When using such method, however, the contracting parties have to make sure that conflicts between the two documents are avoided.

As mentioned it is in some cases not possible to set out precisely the respective obligations of the parties in specific numbers, such as the sale of 102.000 tonnes of wheat or the carriage of 55.000 MT plus/minus 5%. Instead the parties may have to use a less specific language, for example “not less than 60.000 MT”, or “30.000 – 60.000 MT in buyer’s option”. In construction contracts the end product is often specified but the method to reach the object may not be determined in detail in advance. There may be different options which may also have to be determined in steps. In other situations even less precise wording has to be used, such as “reasonable”, “best efforts”, “evenly spread” etc. There are also contracts on “requirement” basis, where one party has the right but no obligation to call for performance within certain frames, and where nevertheless certain contractual duties will exist due to doctrines such as “implied terms”, “good faith” or similar.

Sometimes a contract thus necessitates more of cooperation by and between the parties over time rather than a “mathematical” specification of their respective obligations, and this is particularly so when the contract covers a longer period of time and where all particularities cannot be set out in such unambiguous words or sufficient detail as to minimize the risk of future

disputes.⁷ So again there is a sliding scale from the more precise and often short term agreements to those agreements where the cooperation aspect is more in the foreground.

Also in the law of chartering there are contract types which have similar features and consists of a frame agreement covering generalities of total quantities to be carried over a period of time etc. together with a separate part covering specific issues related to individual voyages. Such contracts are known sometimes as volume contracts of affreightment, volume contracts, quantity contracts, or very often just contracts of affreightment (below I shall generally use "COA" for short).⁸

In the case of so-called Joint Venture agreements (where the objective may be described on a more cooperative basis) the "whole" contractual relation may thus consist of several underlying contracts: a frame agreement, supply contracts, licensing agreements, company by-laws, labour contracts etc. In shipping the term frequently used for such joint venture agreements is pool agreements. It is not uncommon that the pool operator enters into COA's where the pool fleet will be used for the performance of the operator's/shipowner's obligations.

Likewise the entering into a contract may vary between different trades, the way of negotiating may differ, there may be different habits and methods when negotiating a contract and reaching a binding agreement. All these particularities will have to be considered in case there is a dispute.

A matter which may be practically important to take into consideration not least in long term relations concerns the effect of changed circumstances in respect of a contract entered into. To what extent should the parties try to account for such future events when entering into the contract, and how could they be solved if there is in the contract no agreed approach to solve the problem. These problems may have a particular edge in connection with COA's.

By these general statements I wish to underline the importance to keep in mind the general development of contract law as well as the gradual evolvement of new contract types. Thus distributorship agreements as well as agency agreements will often consist of an overall main agreement to which there is also annexed an underlying particular contract for the supply of individual shipments. It is then also obvious that a number of those questions which may arise in respect of the understanding and the construction of e.g. sale's clauses in distributorship agreements will often have their counterparts in COA's. Related questions are some of the targets of this article.

I use in this article as one point of departure and for illustration the relevant sections of the Swedish Maritime Code. Since there are, however, few cases in Swedish law in this connection I have also picked a couple of English and American cases to illustrate related problems.

⁷ See e.g. the discussion in Macaulay, *The real and the paper deal: Empirical pictures of relationships, complexity and the need for transparent simple rules*, in *Implicit dimensions of contracts*, p. 51 ff.

⁸ The concept of contract of affreightment may be somewhat misleading since this expression may also be used to cover chartering agreements in general under which such arrangements as time charter, voyage charter etc. will form particular types. This would also follow the systematisation of certain maritime codifications, e.g. the Nordic and the French.

Undoubtedly like in all charters the law of contract is of basic importance and English common law then plays a central role since quite frequently charter parties refer disputes to arbitration in London with English law applicable.

1.4 Some General Points Related to Distributorship Agreements and Volume Contracts

Beside some cases illustrating problems that could arise in connection with volume contracts I shall thus use some examples from distributorship agreements for illustrative purposes. There are certain structural similarities between the two types of agreements, insofar as there is in both of them a time element, a quantity of cargo element and often also a service element, which all have to be coordinated in one way or another. In both contract types there may be a case of “requirement contract”, where the carrier has to perform in case the cargo owner so requests. If that would happen the carrier has to perform but otherwise there will not lie with him any clear performance obligation. One might see the carrier’s performance obligations as a conditional undertaking. This appears to be a rather one sided undertaking of the carrier who may not be able to rely on a specific duty of the cargo owner to perform. Such requirement contracts are nevertheless not uncommon, and they may after all prove to contain some element of performance undertaking also on the part of cargo owner.⁹

As mentioned above the distribution agreement will often embrace a combination of an overriding frame document covering the main parameters in the relation between the parties and a particular document covering the individual transactions. The frame agreement will normally set out the parties, the products involved, the geographical area involved, the total quantity covered as well as the quantity of each delivery (often on an “about” basis), the general time frame as well as the time for individual deliveries and price and payment questions. The individual contract underlying the frame agreement will then specify the particular individual features of each delivery, periods, delivery risks etc.

The situation is similar in respect of volume contracts. More specifically, the performing vessels or the characteristics of the vessels to perform the voyages under the COA have to be identified, type and quantity of cargoes, loading and discharging ports, type and quantity of cargoes totally as well as in relation to individual voyages, freight payments etc. Similarly also the individual contract for each voyage will set out the terms and conditions for the specific voyage including laytime etc. It is evident that there may be problems coming up i.a. in relation to the goods covered under the respective agreement, the time factor from different points of view and the vessels involved.

⁹ Cf in the case *Oglebay Norton Co. v. Armco Inc.* 56 N.E.2d 515 (1990).

1.5 Some Further Overriding Points

Gradually new or changed contract types evolve over time and they are frequently more and more specialized. There are various reasons for this development. One is the split up of functions in the owning and the operation of ships, another is the specialisation of ships where they are used primarily in particular trades and a further one is related to the time during which the ship will be used for the particular contract. Thus, all the changes in the contracting and contract types mirror changes in trading and corporate patterns, and the adaption of contracts and contractual provisions to new requirements. As mentioned the COA, like normally a distributorship agreement, illustrates the combination of a time factor and cargo quantity.

At one time ownership of a ship meant that the shipowner was responsible for all functions related to a vessel, the financing, the manning, the technical supervision, the commercial operation etc. Already several decades ago there was, however, a trend of separating different functions from the basic ownership.¹⁰

To-day it is not unusual that the ownership function related to the vessel will lie with the investor financing the ship, whereas several of the management and trading functions are placed with separate corporate entities, often residing in different countries. This means that in several cases the manning of a ship is provided by one entity, other management functions may be placed with another organization (such as the technical management, insurance etc.). Furthermore the operation of the ship (such as the scheduling, the handling of the vessel in ports etc.) may again be carried out by another separate entity and so may the trading of ship. There will then be need of several different contracts tying together the different functions, such as different types of management agreements, operation agreements and chartering agreements.¹¹

From a trading perspective it is also possible to distinguish between several trading documents representing different levels in the trading operations. Apart from the bareboat charter (sometimes very close to a leasing arrangement) which may be seen as a financing rather than as a trading arrangement there are trading arrangements of different nature. Traditionally a distinction is being made between voyage charter and time charter, but gradually more particular forms have developed depending on the the parties' need to take into consideration time factor as well as employment factor with respect to the commercial use of the vessel. Which are the needs of the cargo owner? Does he need the use of the whole of a vessel on full time basis? The cargo owner will then know that he may dispose of the vessel as he wishes within the frames of the contract but also takes the commercial risk if the cargo owner would not have sufficient goods to

¹⁰ So for instance in Gombrii, Graver, Landmark & Sandmark, *Nordisk Skibsfart under fremmed flagg*, Oslo 1979, Gorton, *Ship management agreements*, in *Journal of business law*, 1991 p. 562 ff. It should be mentioned that there is a development along similar lines in many other businesses, sometimes known as outsourcing agreements.

¹¹ Basically one could say that this reflects a law and economics perspective in relation to the basic corporate entity and the different contracts needed to keep the functions together, see in Swedish law Bergström & Samuelsson, *Aktiebolagsrättens grundproblem*, 2nd ed. Stockholm 2001.

ship or there is otherwise no alternative employment for the ship. Will he need only the use of certain parts of the vessel on a regular basis? Does he have the need of the full capacity of a vessel for a reasonably steady flow of goods at certain intervals?¹²

These and other factors will be decisive for the choice of the contract form. I shall here particularly focus on questions related to cargoes and voyages, but an overview is needed of the contract type as such and of the contract terms generally used in order to see the structure of the contract type and the relation between the frame contract and the contract for the individual voyage.

2 Contract Forms

To meet the above mentioned requirements there have developed a number of contract types taking into consideration the needs of the parties and thus dividing risks and functions between them. In the business of trading of vessels, where brokers play an important role, there have also developed a large number of standard contract forms applied for voyage charter and for time charter.

*Consecutive voyages*¹³ are voyage charters where one voyage follows immediately upon another one for an agreed number of voyages or for as many voyages as possible within the specific time frame of the contract. In this case the voyage element is dominating, the idea being that the vessel shall be traveling consecutively with cargoes nominated by the charterer between the agreed loading and discharging ports. The time risk lies with the owner in the sense that if the vessel does not perform as quickly as contemplated or if there is weather hindrance delaying one or more voyages the owner will obtain less freight. If the number of voyages is cut down due to the lack of cargo the charterer will be basically liable for that, and the owner will be entitled to compensation. In connection with consecutive voyages the contract form used is the voyage charter party (or rather one of the many forms existing). Sometimes only one loading port and one port of discharge are identified, but in other instances the charterer may have a choice (option) among several loading and discharging ports. This means that certain voyages may be of somewhat longer and others of shorter duration, something which needs to be considered in the freight rates.

Volume contracts (COA's) differ from the other charter types in so far as they contain separately both a time element and a voyage element. It differs from consecutive voyages in that the time factor is determined separately beside the voyage element. The idea is here that the charterer and the owner¹⁴ agree that the

¹² For a description of the contract types see i.a. Gorton, Ihre & Sandevärn, *Shipbroking and chartering practice*, 5th ed. London 1999 p. 296 f. and see also Gorton & Ihre, *A practical guide to contracts of affreightment and hybrid contracts*, 2nd ed. London 1990.

¹³ There are in the SMC some particular provisions in respect of this particular contract type, in 14: 39 – 41. In the legal doctrine Falkanger has treated the contract type in *Konsekutive reiser*, Arkiv for Sjøret vol. 8, Oslo 1965-67 p. 1-243.

¹⁴ Below I shall use synonymously on the one hand shipowner, owner and carrier, and on the other hand cargo owner and charterer.

vessel shall during a certain period (6 months, 12 months, 3 years etc.) but not on a consecutive basis perform a number of voyages (not in direct continuation) concerning the carriage of a certain quantity (minimum/maximum) of goods of specified nature or within specific classes between agreed ports. The voyages should be performed on a “fairly even basis” or words to similar effect, which means that the charterer, unless otherwise agreed, is not entitled to require the owner to carry most of the cargo during a short period of the time. This reflects the particularly cooperative nature of this contract type.

This is also how the COA seems to be most frequently drafted nowadays. There is a frame agreement covering the general terms of what the respective parties shall perform, to which is added the individual voyage charter party related to the particular voyage involved.

3 Law, Contract and Terminology

The legal framework of charter/charter parties differs between different legal systems.¹⁵ Whereas in common law the law related to charter parties has developed in court practice (and very closely related to the law of contract) civil law countries have often in their legislation more or less detailed rules on transportation contract and on charter contracts.

When the Nordic countries in their Maritime Codes (the Swedish one 1994:1009) introduced their more or less modernized common rules on the law of carriage and the law of charter parties in the beginning of the 90's there were introduced in the legislation for the first time specific provisions on consecutive voyages and a new special section on volume contracts.¹⁶ Up to then the parties had had to arrange their contractual relations based on other practical experience and known rules and practices related to charter parties.¹⁷

¹⁵ A distinction is also made in relation to liner (and general cargo) traffic where cargoes are carried in relatively minor lots between predetermined ports. In this case the bill of lading is often the only contract document used. To a large extent mandatory rules have been introduced in respect of the ocean carriers' liability for loss of or damage to goods through international conventions. In the present work on a new international convention on ocean carriers with ancillary carriage there is an ongoing discussion whether COA's should be covered, although chartering and charter parties will basically be kept outside the convention. The work is presently taking place within UNCITRAL with a subcommittee of CMI assisting. Chapter 3 of the instrument (scope of application) in art. 3.3. presently spells out that "The provisions of this Instrument do not apply to charter parties, /contracts of affreightments, volume contracts, or similar arrangements/. The discussion now concerns whether so-called service contracts frequently in use in the United States should also be covered.

¹⁶ It needs to be mentioned that following what has been said in footnote 15 volume contracts are not always easily distinguishable from liner operation.

¹⁷ It has to be underlined that in the Nordic Maritime Codes the rules on bills of lading and the contract of carriage (chapter 13) are basically mandatory whereas the rules on charter parties (chapter 14) are basically non-mandatory. See generally Gorton, *Sjöhävning – Hur särskild är den särskilda kontraktsrätten*, in *Ånd og rett, festskrift til Birger Stuevold-Lassen*, Oslo 1997 p. 369 ff., Hellner, *Sjörätten och den allmänna kontraktsrätten*, i *Festskrift till Jan Sandström*, Stockholm 1997 p. 169 ff., id., *Sjölagen 1994. Några lagstiftningstekniska*

When contracting, parties have frequently started from an established voyage charter party and supplementing the standard form with additional clauses.¹⁸ From a structural point this is hardly an ideal solution, but relatively few cases have been reported which are specifically oriented towards volume contract questions.¹⁹ Gradually, however, the parties to a larger extent started to set out the contract provisions in an overriding frame agreement together with the provisions related to the individual voyages in a particular charter party. Also, it was only relatively late (in charter party terms) that standard forms of volume contracts were developed.

There are presently, as far as I know, two generally used frame contracts of standard type: the InterCOA for tanker business to which the Intertankvoy is intended to be annexed and the VOLCOA basically for dry cargo, to which a chosen charter party form is annexed. The former has been drafted by Intertanko and the latter by BIMCO. There are also volume contracts tied to liner shipping, sometimes known as “space charter”, sometimes referred to as “service contracts”.

4 The SMC Rules on Volume Contracts

The Nordic countries in their respective Maritime Codes thus introduced specific rules on COA’s. In the SMC these rules are found in chapter 14:42 – 14:51 and they have to be judged together with the specific rules on voyage charter or time charter for that matter if those would be applicable in the individual case.²⁰

The SMC thus lays down the following:

14:42 defines volume contracts.

14:43 spells out the right of the charterer to choose the cargo quantity if the contract provides for options.

The owners decide on the quantity for each voyage.

14:44 contains provisions on shipping plans, and the relation between shipments, times and quantities.

synpunkter, in Essays in honour of Hugo Tiberg, Stockholm 1995 p. 89 ff. and Tiberg, in Svensk Juristtidning 1995 p. 89 ff., 522 ff. and 874 ff.

¹⁸ I have actually also come across examples where a time charter party has been used as the basis when drafting a COA. The solutions then achieved were not particularly clear.

¹⁹ The reason may be that this is a contract form where the cooperation between the parties is particularly needed, and that legal problems coming up have been possible to solve through agreements. It may, however, also be that in many cases the legal disputes arising are related to traditional charter party problems and not strictly to volume contracts.

²⁰ The Swedish and the Finnish Codes have used a division of the Code into different chapters with separate sections whereas the Danish and Norwegian Codes use running sections. Thus the Norwegian § 364 corresponds to the Swedish 14:44. See e.g. Falkanger, *Kvantumskontrakten i lys av formularene Intercoa och Volcoa samt Sjolovskomiteens utkast til lovregler 1985*, in Marius no. 110, Oslo 1986.

- 14:45 puts on the charterer a duty of notification concerning the particular voyages.
- 14:46 states that when notification has been given by charterers then owners have to nominate the vessel.
- 14:47 ties the frame contract to the individual CP.
- 14:48 deals with delays in the notification of shipments and shipment plans.
- 14:49 concerns delay in the nomination of a vessel.
- 14:50 contains provisions on delay in the payment of freight.
- 14:51 deals with war situations.

As is evident from the above several of the provisions deal with various cooperation aspects under the COA in order that the performance of the parties' respective obligations are facilitated and made more efficient. The various rules also mirror terms and conditions frequently found in COA's.

The structure in the maritime code reflects the solution that there are general rules to cover the overriding frame to which the particular rules related to the individual voyages are found in the section on voyages charter.

5 Characteristics of COA's

Typically COA's cover cargoes of a homogenous and specific type, the cargo quantities are rather large and the contract time is often rather long (normally at least one year), except sometimes in short haul trades. The ships to be used for the performance of the contract are not seldom determined generically with some general description of size and type of vessels but sometimes with particular reference vessels being denominated or at least a class of vessels set out, the ports to be covered are determined as well as the contemplated number of voyages. These are all characteristics which may vary depending on the individual needs of the contracting parties. The freight will, of course, also be set at least in a general way, but it may prove impossible to determine in general terms the detail of the freight payments to apply for all types of voyages and cargoes that could be involved under the COA. The freight for the individual voyage may depend on the type of cargo, the quantity of cargo, the type of vessel, the individual voyage (the ports involved) etc. The freight clause may therefore have to be based on several parameters and it may be predetermined due to voyage, cargo quantity etc.

This being said it is important to recognize that whereas the single voyage contract, due to the functional split between the parties, distributes the risks between the owner and the charterer in one way, where the freight covers most costs except expenses due to delays in the port. In time charter the risk distribution has often been described in a way that the owner carries the nautical

risk whereas the charterer has the commercial risk for the vessel during the charter period. In practice it has become more and more frequent that certain time risks for voyages under the time charter has to be borne by the owner, e.g. the weather risk in particular as regards large tanker vessels.

In respect of COA's the time element has been molded together with the voyage element, and the cooperation element by and between the parties seems to be of practical importance in many cases. Since the shipowner will have the use of the vessel(s) between the voyages to be performed for the charterer it is important that he knows well in advance when the charterer needs the vessel for a subsequent voyage. There is thus need of planning before the individual voyages are to be performed and thus also need of a well developed system of notification. This is also one of the characteristic features of the COA and is also recognized by the Nordic legislators, as shown above (art. 14:43-46) and it is also apparent in the Volcoa cl. 14 – 16, 19.

Like in other contracts the question of jurisdiction and choice of law should be considered by the parties and such clauses are also found in Volcoa and Intercoa.²¹

6 The Generic Nature of the COA

A time charter party (CP) will always spell out the individual vessel to be used, and there will seldom be a provision for an option vessel involved in the deal.²² This is also evident in cases where the performing vessel is out of service due to breakdown of machinery. In such situation there is no duty on the shipowner to provide a substitute vessel, but depending on the circumstances and the contractual provisions the shipowner may be liable in damages for the effects of nonperformance.

In voyage charter parties the CP sometimes spells out that "MS X or a vessel of same type and size shall perform the contract", and the CP (particularly in connection with consecutive voyages) may also state more generally that "a vessel of a certain type and of a certain size and possibly flying a certain flag (or

²¹ One aspect of related problems is illustrated in *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation /1971/ A.C. 572*. In this case the contract was based on the old London Form voyage charter party. The choice of law clause in the London Form stated that the ship's flag was decisive, and it had not been struck out. Disagreement occurred on which law was applicable, and it then became evident that during the first four months of the contract, vessels had been used flying six different flags. It goes without saying that it is not very easy to determine the choice of law in such situation, and as a general memento it could be underlined that the parties had better beware when using standard forms. There is also in *Hi-Fert Pty. Ltd and Cargill Fertilizer Inc. v. Kiukiang Maritime Carriers Inc. and Western Bulk Carriers (Australia) Ltd. /1999/ 2 Lloyd's Rep. 782* an illustration to related questions.

²² This follows from the general nature of the time charter as geared towards the charterer's rights of using the individual ship in his trading operation. If the ship has been lost whether due to the fault of the owner or as a consequence of an accident there will seldom be a right for the charterer to require that another vessel will perform or for the owner to demand that he has the right to perform with another vessel.

rather excluding certain flags)” shall be used for the voyage(s). It will then fall upon the owner to nominate the individual vessel before the individual voyage.

As a contrast, in liner shipping of present days the individual ship plays a much more limited role than it used to do. The standard of the vessels will, however, be of great significance. Before the loading of the vessel the shipowner’s undertaking to carry the cargo may be of a generic nature, but after the loading of the cargo on board a particular vessel, there is an individualization of the performance,²³ and after that moment the carrier may normally not require a replacement cargo nor the cargo owner request a substitute vessel, in case the vessel/cargo is lost.

COA’s are basically of a generic nature, and should one of the vessels contemplated for the performance “fall out” before the loading of a cargo there will often remain a duty on the shipowner to provide a substitute vessel. In case the cargo has been loaded on board a nominated vessel the situation will in most cases be different, and it will often be important that the parties make clear provisions with respect to their intentions.

There may, however, also be situations, where only one vessel is involved in the performance of a COA, but this is probably not very common. Let me mention one very particular situation.

A tanker vessel was built to be used by the charterer during a five year period. The vessel was to be used as a storage vessel during that period of the year when the weather allowed for this type of storage. During the rest of the year the vessel was to be trading in the market carrying oil products. Now the question at the time of the contract was, which of the parties was going to trade the vessel and in whose name and for whose risk and benefit. Would the risk of the trading be on the charterer or on the owner? What would happen if the vessel was late for a new storage period? In this situation the parties thus had to consider a number of questions and then to draft the agreement between them to fit their precise needs. It is unlikely that this type of agreement should be regarded as a COA, but it illustrates problems that may arise, and some considerations that the parties may have to make under such circumstances.

The advantage with COA’s is that it allows a certain flexibility and a certain adaption to the needs of the charterer and the possibilities of the owner to meet the needs related to the particular voyage.²⁴ Sometimes the contract spells out a number of vessels of a certain type and class, “to be nominated, TBN” to be used for the performance of the different voyages. It will then be the duty of the owner to nominate the individual vessel for the individual voyage. In other cases the parties have agreed on the vessels to be used by enumerating them by name. In such case the owner has a duty to perform with one of these vessels. The more general the description is of the vessels involved (e.g. a drycargo vessel of size

²³ Falkanger, *Kvantumskontrakten: kvantum, mislighold og force majeure*, in Marius no.144, Oslo 1987 p. 19 ff. Some illustration of related questions is found in *Sanko Steamship Co. Ltd. and others v. Eacom Timber sales Ltd (Sanko Iris and Sanko Venus) /1987/ 1 Lloyd’s Rep. 487.*

²⁴ See *i.a.* Falkanger, *Kvantumskontrakten: kvantum, mislighold og force majeure*, p. 19 ff. and *id.*, *Quantity contracts: Transportation by sea without reference to a named vessel*, in 21 Scandinavian Studies in law, Stockholm 1977 p. 65 ff.

25-50.000 mt) the wider are the options as well as the duties of the owner to perform with a vessel of such description.

There is, of course, some practical business problems related to COA's, namely that when freight rates rise above the contract level the owners are inclined to try to reduce the number of voyages and in stead use their vessels in the open market at better rates, and vice versa when freight rates go down below the contract rate the charterers are tempted to try to reduce the number of shipments in order to charter in stead vessels in the open market at lower freight rates. Disputes arising in connection with COA's are frequently a consequence of such game or because the cargoes are not distributed "evenly spread" over the contract period, or that the owner is lacking tonnage and wishes to avoid chartering tonnage in the spot market (at higher freight rate).²⁵

There will be a transition from a generic to a more specific performance at a certain time, but which one; the nomination, the loading, the issuing of the bill of lading?

In Scandinavian law some different views have been expressed when it comes to the determination of the point when the generic undertaking becomes a specific undertaking. According to SMC 14:47 the provisions for the individual voyage will apply upon the nomination of the vessel, provided that an orderly nomination has been made following the provisions of sec. 14:46. Different views have been expressed with respect to the moment when the individualization will take place, which could happen upon the nomination of a specific vessel, upon the start of loading or when the bill of lading has been issued.²⁶

On the other hand the specificity of the contractual undertaking starts at an earlier moment, namely when the goods are being ascertained and marked or possibly when they are on their way to the port of loading for carriage. From the shipowner's point of view it may be at an even earlier point when the ship starts its voyage to the port of loading. The individualisation may in the first instance depend on three circumstances:

- 1) the description of the ship in the contract,
- 2) the rules on substitution, and
- 3) rules on the determination of shipment programme.

As indicated already there are several different methods of determining the vessel(s) intended for the performance of the owner's obligations under the contract. One decisive factor with respect to the question specifically discussed here will be the wording used to determine the vessels, the nomination procedures, possible options and planning provisions etc.

²⁵ One case illustrating the problems in connection with long term charter arrangements is *Panocean – Anco et al. v. Esso Chemical* (arb.) New York March 20, 1981, Society of Maritime Arbitrators, no. 1526.

²⁶ Ihre, *Kvantumkontrakt – programmering av enskilda resor*, in Marius no. 144, Oslo 1987 p. 9 ff.

Do the provisions of the contract set out a right or put an obligation on the shipowner to perform with a particular vessel or could another vessel be nominated, and if so when? Would it make a difference if the vessel used for the voyage is lost? Does it put on the charterer a duty to accept another vessel or does it give the charterer a right to demand that the voyage will be performed by a substitute vessel. Depending on the phrasing of the “substitute” clause and depending on who has the option there will be different effects.²⁷ Will there be a right/duty of substitution more than once? When will the right/duty cease? If the owner offers a substitute vessel which the charterer does not like could he refuse to accept it? It is thus important that the parties make clear to themselves what they intended and meant. Will the owner be entitled to freight even if the vessel is lost? Will the charterer have a duty to provide more cargo? There is obviously also a relation between the “substitution”, the “option” and the “freight payment” clauses. Some of the related questions emanate from the individual voyage and others from the general frame.

What happens if the vessel nominated does not arrive timely at the port of loading due to breakdown of machinery? Could the charterer then request another substitute vessel to perform the voyage? If cargo has been loaded on board the vessel nominated will the shipowner nevertheless have a duty to perform a substitute voyage with another vessel? If so is there a corresponding duty on the cargo owner to supply a substitute cargo in case the shipowner would demand that? Will in stead the voyage be regarded as terminated? What will happen to the freight for the cargo lost and for the new cargo respectively? Of course such problems are not unique in connection with COA's, but similar problems may arise under the charter arrangements as well. It is, however, particularly in connection with COA's that related problems will arise and the parties therefore have to address them in the frame agreement and/or in the CP for the individual voyage.²⁸ From a practical business point of view these problems mainly arise in an upgoing or downgoing freight market.

If we go back to the rules in the SMC there are provisions in 14:42.2 setting out the generic nature of the COA, i.e. basically before an individual ship has been nominated. A distinction is made in relation to consecutive voyages, and in 13:3.2 a distinction is also drawn between COA and general cargo transport.

The question comes up in a double perspective both as a duty on the the shipowner and on the charterer/cargo owner. Then is there a similar right/duty on the part of the charterer to supply alternative cargoes? Again that largely depends on the contract. It could open up for such solution, but failing an express provision, there will hardly be a right/duty on the charterer to supply another cargo than the one agreed for the particular voyage. There could be in the contract a provision that the type and cargo should be nominated by the charterer at a certain point but my understanding is that the volume contract allows alternate cargoes under particular circumstances. Normally the charterers

²⁷ See i.a. Falkanger, *Kvantumskontrakten* i lys av p. 10 f. and 24 f. and id. *Kvantumskontrakter: Kvantum, mislighold og force majeure* p. 31 f. and also Prop. 1993/94:195 p. 305.

²⁸ See *Fyffes Group Ltd. and Caribbean Gold Ltd. v. Reefer Express Lines Pty. Ltd and Reefer Shipping Inc. (The Kriti Rex)* /1996/2 Lloyd's Rep. 171 the related question of breach under a COA, failure to tender a vessel for loading, unseaworthiness etc. is discussed.

will supply a particular kind of goods, say grain, coal, iron ore. The quantity to be carried is normally set out, frequently on an “about-basis”. There could be different quantities for different shipments, also opening up for various solutions in various situations. This also means that the solutions may be based on the particularities in the individual case.²⁹

7 Some of the Parameters of the CoA

7.1 *The Ships Involved Under the Volume Contract*

As already mentioned the ships could either be stipulated by name or within a certain group of vessels or with a provision “or substitute”.

It merits to be mentioned that shipowners often run mixed fleets of vessels with both tonnage owned within the owner group and tonnage that has been chartered. Certain vessel operators do not own any vessel at all but they are operating chartered tonnage only.

A charterer may have certain requirements in this respect, and the charterer may specifically require that the owner will use only ships owned within the owner’s group. If this is the case the charterer should call for a provision in the contract to such effect. The reason for this may be that the charterer has a particular confidence in the owner’s ships and the owner’s manning and maintenance of his vessels, the vessel’s flag etc.

If there is no such requirement but only a requirement for tonnage of similar type and size, the owner will only have to furnish ships within the requirements of this wording and in the particular wording of the individual charter.

7.2 *Time Elements in Connection with COA’s*

As mentioned already the volume contract is based on two different time parameters, one being the length of the contract and the other being the spread between the voyages. This means that there is a relation between the length of the contract and the number of voyages intended. This forms an important basis for the owner’s income/profit.

If the contract allows voyages of different lengths there is need of a mechanism with a balancing factor and a freight factor. What will happen if the individual voyage is delayed, if a vessel has a breakdown of machinery, if a vessel is delayed due to congestion in a port or due to strikes, if certain ports will not be used due to war or warlike circumstances? The frame agreement and/or

²⁹ The question of specific performance does not have a definite solution in Scandinavian law. In English law there seems to be some room for applying specific performance in charter relations and in Scandinavian law different views have been expressed: Grönfors, *Tidsfaktorn vid transportavtal*, Göteborg 1974 p. 65 is of the opinion that specific performance cannot be applied in connection with transport contracts, but Selvig in his *Om dom på naturalopplyselse, særlig i befraktningsforhold*, in *Arkiv for Sjørett* vol. 5 p. 570 and 579 ff. comes to the conclusion that specific performance may be used although probably with some more restriction than in other legal areas.

the individual charter will therefore have to identify various risks and have to consider the distribution of such risks between the parties.

There also has to be a coordination of the particular risks under the individual charter parties and the overriding frame agreement. A delay in a port will be decisive for the individual voyage, but it may also have an impact on the possibility to carry out the total number of voyages contemplated under the contract.

7.3 Cargo and Cargo Quantity and Planning of Voyages

As mentioned already there is need for close cooperation between the owner and the charterer in order that the performance of the various obligations under the volume contract will be carried out successfully. This means that the parties will have to keep close contact and inform each other about what steps are needed and when they are needed.

The type and quantity of cargo will have to be taken into consideration. Does the contract only deal with one type of cargo or are various cargoes covered in the contract? Is the charterer allowed to supply alternate cargo if the primarily contemplated cargo is not available? Will this affect the choice of vessel and the ports involved? Different types of cargoes may also require different loading and discharging methods. Certain cargo combinations should be avoided etc.

Normally in a voyage charter the charterer has a duty to supply a certain quantity of an agreed type of cargo. In time charter the situation is different. The distribution of risks where the time charterer takes on the commercial risk will normally allow the charterer the use of the vessel for the carriage of a range of cargoes.³⁰

COA's having features from both may be drafted in various ways depending on the individual needs of the parties. If the charterer is a producer of grain, of iron ore or of another homogenous product which is sold in large quantities he has hardly any interest in a right to supply other cargo. The charterer's interest is then to have an owner who has the capacity in suitable intervals to meet his demand for tonnage. The charterer is content to let the shipowner use the vessel efficiently between the voyages for which he supplies cargo. Should there be an economic change that would probably not make him better suited to arrange for the supply of alternative cargoes.

On the other hand it could be that a charterer is in in stead in a business of supplying different cargo types, and he may then be interested in a right to supply an alternative cargo in order to meet his obligation under the COA. So again the individual circumstances may be decisive for the drafting of the contractual terms and conditions.

³⁰ At the same time it is important to recognize that there is a responsibility on the ship's captain to see to it that the vessel will be loaded and stowed in such a way that the carriage will be safe. A corresponding duty will lie with the liner operator but the carrier will always have to rely on information from the shipper with respect to the cargo (e.g. with respect to dangerous cargo etc.).

8 Breach and Consequences of Breach

8.1 Generally, Best Efforts and Cooperation

As we have seen the duties under CoA's may be of more general type or of more specific type. The duties and breaches may be related to the frame contract or to the individual contract, sometimes to both.

In some respects the duties of the parties are set on a best efforts basis.³¹ Since some of the more relevant questions in this connection have already been discussed in 7 I shall here just very briefly touch upon some items.

8.2 Consequences of the Owners's Breach

The breach by the owner may take many forms. The owner may fail to nominate a vessel (SMC 14:49, Volcoa 15), he may not meet the cancellation date of a particular voyage, the vessel used is not one covered by the contract, the vessel may have engine troubles and there will be one voyage falling out, the ship may be dirty and needs cleaning, which may cause delay, cargo is being unreasonably damaged (Intercoa 80 D, Volcoa 15, Volcoa 10, Volcoa 19. SMC 14:47. 2 cf 14:49 1.) Many of these problems are tied to the individual voyages, but sometimes breach may reach the level of the whole contract also involving questions related to anticipatory breach.

8.3 Consequences of the Charterer's Breach

Similarly the charterer may be in breach in a number of ways. The charterer has a duty to supply the agreed quantity of goods in relation to the "fairly, evenly spread" provision, the charterer has a duty to present shipment plans, and also to notify in good time the owner of the plans, and of the individual shipments (Volcoa 14, Intercoa 80 M, SMC 14:48) and he has the duty to pay freight, demurrage and other charges duly (SMC 14:50, Volcoa 11-box 18, and 19 and Intercoa 80 G)).

9 Some Comparisons with Distributorship Agreements in English Law

It might, of course, be questioned whether cases related to distributorship (or for that matter agency agreements) have any relevance in respect of COA's. One could argue that the contractual settings are quite different, and that the solutions chosen for one contract type is not applicable in a different contractual context. I would not argue against the generalities of such thought, but this does not mean that problems arising in one contractual situation and the solutions there chosen

³¹ See i.a. Gorton, *Best efforts*, in *Journal of business law* 2002 p. 143 ff.

should not have any impact in a contractual situation which is reasonably similar. The outcome of a dispute concerning the construction and the understanding of a contract always leaves much room for different solutions. I think, however, that in an effort to find a solution to certain types of COA disputes some guidance could probably be obtained from the following cases. If there would be an undertaking on a “best effort” basis, the solution chosen by an arbitrator/court is often hard to foresee, and such disputes should normally be better suitable for settlement agreement.³²

Before looking at some relevant COA cases I would therefore here like to refer to some cases from the area of distributorship agreements. The contractual structure of these two contract types is similar insofar as there is a need of coordinating over time the parties’ respective obligations. Looking at the COA cases which will be dealt with further the question will have to be asked which are the charterers’ obligations in respect of the supply of cargo. They are two-fold: namely to supply a minimum quantity but also to supply the cargo on an “evenly spread” basis. The contractual expressions may differ. Sometimes the charterer has to supply a minimum quantity, in other instances the owner has a duty to carry a required minimum quantity, and in other cases again the charterer has a right to require certain quantities to be carried without a duty to provide a minimum quantity. The situations may therefore vary largely, but generally there is some kind of interplay between the contracting parties’ respective obligations.

For illustration purposes I therefore wish to refer to a dispute that arose under a distribution agreement. A background for the case was *Lavarack v. Woods of Colchester Ltd.*³³ where Lord Diplock had stated:

“The law is concerned with legal obligations only, and the law of contract only with legal obligations created by mutual agreement between contractors – not with the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.”

This rule, as it had been explained by Lord Diplock became the object of consideration in the case of *Paula Lee Ltd. v. Robert Zehil Ltd.*³⁴ The latter case concerned the determination of damages in case of repudiation. The Paula Lee case concerned a contract whereby the plaintiffs, who were dress manufacturers, appointed the defendants to act as their sole distributors for the sale of their dresses in certain Middle East territories. Under clause 4 of the contract the defendants undertook to purchase from the plaintiffs not less than 16.000 garments each season and by clause 7 gave the defendants the sole discretion with respect to the marketing and selling policy in the territory. Clause 7 also stated, that provided the defendants ordered not less than 16.000 garments then

³² For a view on the question of settlement see the discussion in Macauley, *The real and the paper deal*. In *Implicit dimensions of contract*, p. 51 ff.

³³ /1967/ 2 Q.B. 278.

³⁴ /1983/ All E.R. 390. This being said it is necessary to keep in mind that the outcome of a legal dispute may depend on various parameters. Apart from evidence and other procedural matters the judge may determine the legal principles somewhat differently and also apply various techniques when construing a contract.

the defendants should be able to sell or market the plaintiffs' products to whom they desired within the territory and upon such terms and conditions as the defendants should solely determine.

With two seasons left of the contract the defendants repudiated the agreement, and the plaintiffs sued for breach of contract. Mustill J. (as he then was) held that that the defendants had wrongfully repudiated the agreement, and the question to decide was the quantum of damages.

The problem which faced the Court was that as the contract only stated that the defendants had to purchase not less than 16.000 dresses, without stipulating anything as to the style or size (or price) of the dresses required by the defendants, then on what basis should the plaintiffs' loss be calculated? It was clear that the plaintiffs' profits would be greater on the more expensive styles than on the cheaper ones.

In situations where a defendant has some latitude as to the manner of performance of an agreement, the general rule could perhaps be based on a statement of Scrutton L.J. in *Abrahams v. Herbert Reiach Ltd.*,³⁵ in which it was said, that "a defendant is not liable in damages for not doing that which he is not bound to do." In accordance with this notion the courts have, when faced with a breach of contract which allowed for various methods of performance, chosen as the basis for assessment of damages, that method of performance which would be least unfavourable to the defendant. The defendants thus claimed that they were only liable for damages based upon the notional loss of profit on the purchase of 16.000 garments from the cheapest products.

Mustill J. thought that the principles relating to assessment of damages in relation to alternative obligations did not easily apply to the "novel situation" which had arisen in the Paula Lee case. Here the obligation as to quantity was not a case of alternative obligations, but one of a single obligation which was indefinite as to its content (i.e. as to the proportion of garments from the expensive or less expensive garments which were to be ordered by the defendants). In deciding what the content of the obligation was to be there were two possibilities. The contract could be interpreted as it stood, so that the defendants' obligation would be to buy not less than 16.000 garments per season. In this case damages would be calculated on the basis of the costs of the cheapest dresses in the range provided by the plaintiff. Another solution could be that the contract was subject to an implied warranty that the choice of dresses would be made in a manner which would be reasonable in all the circumstances (i.e. covering the full range).

If the latter course was adopted, then following *Abrahams v. Herbert Reiach*, the method of performance which should be selected would be the least unfavourable method of performance consistent with a reasonable performance of the contract. That is, it would be assumed that of the several reasonable methods of payment the defendant would be taken to have notionally chosen the least expensive to himself. The Court rejected the notion that it was incumbent upon the court to forecast precisely which of the reasonable courses of performance the defendant would have actually chosen.

³⁵ /1922/ 1 K.B. 477.

Musthill J. decided that the agreement in the instant case should be construed as subject to an *implied term* that the garments would be selected in a reasonable manner. The reason for this was to make commercial sense of the agreement. Although clause 7 gave a wide discretion to the defendant, it was, said the judge, difficult to conceive that when the contract was formed the parties would have had in their mind that the defendants could order 16.000 garments of the same size, colour and style (the cheap products), for this would have alienated the defendants' wholesalers, deprived the plaintiffs of a presence in the territory and killed any present and future markets. Hence, the obligation under the contract was not just to purchase at least 16.000 garments, but to choose a range of garments which was reasonable and which would not harm the purpose of the contract (i.e. to sell the garments in the territory).

As the choice of garments was a matter of discretion, the judge concluded that there were several reasonable possible choices, each yielding a total price of different amounts. The amounts to be chosen for the purposes of the calculation of damages was of course the reasonable choice which yielded the lowest price (and hence lowest damages).

This case and the solution chosen raises a number of questions:

It is apparently not an easy task for a court to decide which approach to be taken in order to assess the damages. For example, what should be the range of garments for the purposes of selection under the contract; which of these garments will form a reasonable selection; what other reasonable selections could be made? Which were the quantities purchased during the previous years? Could this serve as some guidance taking into consideration that markets could change substantially in a short time.

Some points could be noted in this connection:

First, the judge, in implying a term, seems to have looked at the performance rather than at the breach. Adopting such approach requires an answer to the question, would the contract have been properly performed if 16.000 of the cheapest dresses had been purchased? Or could the seller also in such a case have demanded a "reasonable selection" of dresses? My immediate reaction to this question would be that the buyer would have performed his contractual obligations by ordering 16.000 of the cheapest ones, but this would of course lead to inconsistency between the two solutions chosen. If it is accepted that the purpose of the contract was to serve the whole range of products of the territory the same type of reasoning should apply in the two cases.

Secondly, it may be of interest to consider the problem from another viewpoint by reversing the position of plaintiffs and defendants and speculate on the possible outcome in such a situation. If the defendants had wished to buy 16.000 of the plaintiff's cheapest dresses, would the plaintiffs have been in breach of contract by refusing to sell only the cheapest dresses? Would the court in such situation have been willing to imply a term requiring that the plaintiffs had to meet orders which constituted a selection from the whole range of dresses?

Thirdly, it is well settled that it is not the function of the court to make a bargain for the parties to the contract. Could it have been argued that the contract in this particular situation might have been meaningfully interpreted without the implication of a term? If so, then it may be that the Court has sought to imply a

reasonable term in a manner inconsistent with the House of Lords judgment in *Liverpool City Council v. Irwin*,³⁶ where Lord Wilberforce indicated that to imply a contractual term on the basis of reasonableness alone would be “to extend a long, and undesirable, way beyond sound authority”. So we could put against each other the interests of business efficacy and the principle that it is for the parties to a contract to make their own bargain. Interference with this latter principle may be seen as encouraging those who would wish to benefit from hindsight.

There is then a question whether the Paula Lee case breaks with previous case law or whether it is just a case where the construction of the contract for various reasons lead to a deviation from the main rule but still within the scope of that rule.

10 Some COA Cases Involving “Evenly spread” -provisions and Related Questions

10.1 “Evenly spread”

A dispute that arose some time ago illustrates well some problems that might occur in connection with COA’s.³⁷ The situation was the following:

In a one year COA where it was i.a. provided for shipment of “minimum 400.000/maximum 800.000 mt – shipments to be fairly evenly spread over the contract period”.

During the first six months of the contract year about 360.000 mt were shipped spread over 10 voyages. The charterers then chose one more shipment in July which meant that slightly more than the yearly minimum quantity had been shipped during the first 6-7 months. They then declared that they had performed their contractual obligations, and that there would be no further shipments.

The owner did not accept this in view of the words “evenly spread”. The dispute thus concerned how the words “evenly spread” were to be understood. The dispute was finally settled amicably, but it raises some interesting questions with respect to the construction of and the consequences of a breach of contract in connection with COA’s.

Apparently the charterers had at this point, when further shipments were interrupted, already fulfilled one of their obligations, namely to ship the minimum quantity, since they had not agreed to ship more than 400.000 mt. On the other hand they had also undertaken to perform the shipments evenly spread over the year, and this undertaking had clearly not been performed. So, which was then the meaning that should be given to the wording “minimum quantity” read together with the “evenly spread” provision. Should any of these undertakings be seen as the overriding principle? In case the charterers had an obligation to ship cargoes during the later half of the year with the same frequency as during the first half, that would mean the charterers’ obligations

³⁶ /1977/ QAC 239.

³⁷ Reported in Nordisk Skibsrederforenings Medlemsblad nr 553 p. 5675.

with respect to cargo quantity would be considerably greater than the minimum quantity.

Now, would in stead the charterers be regarded to have performed their contractual obligations as the situation stood? If not, could there be an obligation of specific performance related to the shipment of further cargoes, or would there be an obligation on the charterers to pay damages for unshipped cargo, and if so for what quantity.

If in stead the charterers had supplied little cargo during the first six months in spite of repeated demands from the owner for the supply of more cargo what would then happen with respect to the latter part of the contract period? What would be the legal position of the parties if there was during this later part an increase or a decrease in the freight market?

Let us now revert to similar questions mentioned with a COA calling for shipments of “minimum 600.000 mt/maximum 900.000 mt – shipment to be fairly evenly spread over the contract period”. Let us assume also that the contract period is one year. There is no mention of the number of voyages contemplated. During the first 6 months 550.000 mt are shipped in 12 shipments and in the beginning of the second half year another voyage is called for where another 60.000 mt are lifted, taking us above the minimum quantity. The charterers then declare that there will be no more shipments. Taking into consideration the “fairly, evenly spread” provision the question could be raised whether the charterers are correct or whether the owner could request further shipment, and if so how many?

The charterers have again performed their minimum undertaking namely to ship minimum 600.000 mt. The shipments have been fairly evenly spread during the first 6 months. On the other hand the shipments were certainly not fairly, evenly spread over the whole contracting period. Both provisions in the contract should have some meaning, and if the “fairly, evenly spread” provision should be given equal weight then the charterer could be required to ship well above the minimum quantity undertaken. Could it be argued that the owner, unless he has requested the charterer to observe the “fairly, evenly spread” by accepting the quantity shipped during the earlier part has accepted a change in the shipment programme? In my view such inference could be made only under particular circumstances.

The SMC 14: 44 states i.a.:

“The charterers shall arrange that the quantity covered by the contract shall be reasonably divided over the contract period. He shall then take into consideration the size of the vessels to be used.”

The preparatory works state in this respect:

“A significant increase or decrease of the frequency of shipments towards the end of the period would not be compatible with a reasonable distribution. If the charterer has prepared schedules of shipments with a view to utilizing the maximum quantity under the contract, his right to change his mind and in stead opt for the the minimum quantity may thus have been lost, and vice versa”.³⁸

In the particular case there was no express requirement for shipment schedules to be prepared but the charterers were to give notice well in advance

³⁸ The above are free translations made by Nordisk Skibsrederforening.

of each shipment. If Swedish law would be applied in such situation it is likely that the charterers would be regarded to have an obligation to perform some more shipments following the evenly spread provision, but it is hard to foresee whether such duty would mean the maximum quantity or something in between. Having said this the subsequent question will, of course, be how to measure damages – if any – in such a case. There are different undertakings in the contract and both have to be performed, at least that should be a basic assumption. In Swedish law procedural law allows a court to determine damages at its reasonable discretion, and I tend to believe that under Swedish law a court or arbitrators in a similar case would determine damages on a “between basis”.

Whether English law would see the matter differently is hard to foresee. Again if we apply the principle set out by Scrutton, J that one could not be held liable for what one is not bound to do, this principle does not help us here since there are two undertakings, and there is therefore a twofold duty and maybe in such a situation a Musthill principle may be chosen. The charterers would certainly be seen to have fulfilled their basic obligation of shipping a minimum quantity, why there would be a breach of the “fairly, evenly provision”. Some support for damages in such a case may also be found in the cases referred to below, but there is also caselaw which might support the opposite view.

Another case illustrating “fairly evenly spread” under a COA is also discussed in another *Nordisk Skibsrederforenings Medlemsblad*.³⁹ In this case the situation was different, and the issue was here not the “spread over the year” as such but rather the allowable minimum interval between charterers’ nominated shipments.

The COA covered a quantity during the year of between 600.000 mt and 1,2 million mt in charterers’ option. The charterers also had the option with respect to the quantity of each shipment within “lots” provided for in the contract of 20.000, 25.000, 30.000, 35.000 and 40.000 mt which were “to be determined by /charterers/ from lifting to lifting. The contract was subject to Norwegian law, thus substantially the same as Swedish law in this respect.

The nomination clause concerning the individual shipments stated: “/Charterers/ to give /owners/ about three weeks’ approximate and minimum two weeks’ definite notice prior to commencement of first layday. Laydays to be stipulated with 5 days’ spread.” The COA also provided for the annual cargo “to be shipped fairly evenly spread over the year.”

Throughout the first half year the size of the “lots” shipped was usually 30.000 mt and 35.000 mt. Based on such “lots”, one could calculate the distribution of shipments of shipments to be about every ninth day.

Apart from two “close” shipments in April (to which owners raised no objection), the various shipments had been nominated with with approximately such a spread up until July. At this point, charterers nominated three “close” shipments. Following one shipment of 25.000 mt with laydays 5-10 July, they nominated three shipments of 35.000 mt each, with laydays 24-28, 26-30 and 27-31 July.

Owners disputed charterers’ right to do this under the “fairly evenly spread” provision in the contract. For the owners the problem was basically that such

³⁹ Nr. 556 p. 5772.

close nominations made it impossible for them to utilise their COA-dedicated tonnage for at least one of the shipments. This meant that they would have to charter in tonnage from the market at a market rate which was significantly higher than the freight rates of the COA.⁴⁰

Charterers on the other hand maintained that the nominations were in accordance with the COA, since the quantity as a whole for July corresponded to the average quantity for the preceding months during the six months, and thus the quantity as such had been “fairly evenly spread”. Also if the requirements were to be applied to the various shipments, then the charterers argued that the wording “fairly evenly spread over the year” inferred that there was no basis for applying the clause to such narrow intervals as each respective week within a month, as long as the total of shipments within a month accorded with the number of shipments to be “spread” over each month. As a further argument, charterers pointed to the wide geographical options of loading and discharging ranges given to them in the contract. This, in their view, had the effect of reducing owners’ ability to “program” their dedicated COA fleet and thus reduced the degree of foreseeability which the “fairly evenly spread” provision might otherwise entail.

The dispute was finally settled amicably between the parties but an opinion was given by professor Thor Falkanger at the Scandinavian Maritime institute in Oslo. The essential parts of this opinion was translated by Nordisk Skibsrederforening and could be found on p. 5773 f. in the particular issue.

10.2 Mitigation of Damages

Another question of interest in this connection is the duty of mitigation. This is a principle of general obligatory law, and basically an off-print of a good faith principle.⁴¹ In Swedish law it is explicitly set out in e.g. the Purchase Act but it also forms part of the general law of obligations, but with certain limitations. The duty to mitigate losses is related to the duty to act in good faith (duty of loyalty). In borderline cases it is not easy to apply the principle. In the situation here discussed the question could arise concerning whether an owner would have to try to find alternative employment for the vessel in case the charterer would fail to provide cargo, or what duty the charterer may have if the owner would fail to nominate another vessel. The basic understanding is that the owner could not just lean back doing nothing just expecting to be compensated by the counter part. Thus if the owner could find alternative “reasonably suitable” employment for the vessel he has a duty to do so, since then the total costs could be decreased. The duty to mitigate damages could thus be seen as a way of using capital more efficiently. There are, however, limits to this duty, and every case will turn around its own particular facts, and all facts will have to be taken into consideration.

⁴⁰ The financial situation is obvious, although, of course not decisive from a legal point of view.

⁴¹ In *Fyffes Group Ltd. and Caribbean Gold Ltd. V. Reefer Express Lines Pty. and Reefkrit Shipping (The Kriti Rex)* 2 /1996/ Lloyd’s Rep. 171 the question of remoteness and mitigation in connection with COA’s are partly discussed.

When determining damages in connection with COA's one difficulty is that several vessels may be involved. These vessels may be employed alternately, and the calculation of damages may thus become very complicated.

One case illustrating this question is also reported in *Nordisk Skibsrederforening's Medlemsblad*.⁴² Here the charterer under a COA had agreed to ship 8 cargoes of bauxite in bulk spread over two years. The charterers had in their turn made a subcharter to another company basically on back to back basis. The cargo quantity of each shipment had been agreed at 47.000 mt 5% less or 10% more in owner's option. There was a detailed nomination clause providing that the charterers would nominate a laycan within a set time limit and then for the owner to nominate a performing vessel likewise within a set time for each shipment. The charterers were entitled to reject the vessel nominated by the owners if the vessel did not meet certain listed criteria, or if it was rejected by subcharterers. In such case the charterers were required to send to the owners a notice of rejection stating their reasons for rejection which were not to be unreasonable. Unless the rejection would be unacceptable owners had to arrange promptly a substitute vessel for the intended cargo.

In the particular case the charterers nominated a cargo and gave a specified lay/can, which was in line with their duties under the sub contract which they had in their turn with the subcharterers. In the particular case the owners were late in nominating a ship under the time table of the COA, but they also nominated a ship that was too small (although not very much) to carry the minimum quantity stated in the COA which was also the same minimum quantity stated in the subcontract. The nomination of the vessel was passed on to the subcharterers, who rejected the vessel as being too small and therefore not in compliance with the contract. The charterers informed the owners that the vessel was rejected and gave the reason for the rejection. They also requested owners to nominate a substitute vessel of the right size. The owners refused to do so claiming that the charterers had to mitigate the loss even if the vessel nominated was too small and did not meet the contractual requirement. The owners underlined that the vessel nominated was suitable for the intended voyage although admittedly somewhat too small. The freight rate in the COA was well below the then prevailing market rates.

The subcharterers, however maintained their refusal and so did the charterers visavis the owner. The owners in their turn refused to nominate another vessel but offered to carry the shortlifted cargo in connection with the subsequent shipment. There was thus a stalemate which ended only by the charters chartering another vessel large enough for the shipment in the open market when they also had to pay a much higher rate due to the time constraint.

The charterers claimed the balance from the owners who refused to pay any compensation, and the matter was brought to arbitration in New York.

The charterers demanded compensation from the owners for the difference between the rate which they had to pay for the vessels chartered specifically for the voyage and the rate payable under the COA. The owners accepting that the vessel they had nominated was too small nevertheless refused to pay any

⁴² No. 557 p. 5825 ff.

compensation alleging that the charterers had in two ways failed to mitigate their losses:

- 1) by rejecting the nominated ship, which despite its small size, was the best and most economical alternative available to the charterers; and
- 2) by fixing a substitute vessel at a price well above the market rate.⁴³

In respect of the first item the owners expressed the view that the charterers by accepting the smaller ship offered by the owners there would have been only a comparatively small amount of shut out cargo. Because the charterers had thus failed to mitigate their loss, they were not entitled to recover the amounts they claimed. The owners relied on the case *The Glidden Company v. Hellenic Lines, Ltd*⁴⁴ and also on an arbitration award, where it had been stated that the duty to mitigate did not “permit the injured party to arbitrarily refuse the best offer merely because it originates from the party who created the breach”.⁴⁵

In respect of the second question the owners contended that in agreeing to a rate above the market rate the charterers did not properly mitigate their loss, but they were also of the opinion that the charterers had not shown that they fixed the vessel at the most economical rate to them. In other words even if the charterers would be held to be allowed to charter a vessel, they also had an obligation to negotiate the freight rate and other terms and conditions so as to obtain a reasonable freight.

Charterers in their turn explained that they had no obligation under the circumstances to accept the owners’ nomination, since the nominated vessel could not carry the minimum quantity. The cases quoted by owners did not say that an innocent party must accept an offer from the breaching party, but only that a refusal to do so could not be unreasonable. In the actual case the owners were well aware of the charterers’ obligation to their subcharterers which had been expressed in the COA by giving the charterers a right to reject the vessels nominated if rejected by the subcharterers. For the subcharterers it was essential that the vessel had a certain size and could carry the full quantity of cargo since the number of liftings out of the loading port was restricted. Thus the charterers could not accept the small vessel. The charterers also claimed that they had negotiated a reasonable freight taking into consideration the time squeeze they had been left in due to the owners’ breach.

The arbitrators held that the owners had breached the charter COA by: 1) failing to timely nominate a ship; 2) failing to nominate a conforming ship; and 3) failing to renominate a conforming substitute ship once the charterers had rightfully rejected the first nomination. The arbitrators also found that the charterers had been left with a difficult situation when a late Friday they had themselves to charter a substitute vessel. The charterers allowed the charterers full compensation and also stated in respect of the duty to mitigate: “While an

⁴³ I am convinced that if a similar situation would have come up in connection with a voyage CP the owner would have had a duty to compensate the charterer.

⁴⁴ 315 F2d. 162 (2 CCA 1963).

⁴⁵ *Golden Breeze No 1237 SMA* (1978).

injured party does indeed have the duty to take reasonable steps to avoid or mitigate its damages, it is against these circumstances created solely by the Owners' breach that we must measure the reasonableness of the Charterers' actions."

In my view the decision under the circumstances is fair and reasonable.⁴⁶

11 Freight, Demurrage and Similar

11.1 General Points

Particular problems may be related to the financial compensation due to the owner.⁴⁷ This depends upon the contract being of a certain length, where the parties may agree that the freight level should reflect a presumed or real development. If the contract allows for different cargoes and different ports various freights will have to be calculated. If there are different freight levels in different years, the number of voyages performed each year will give the owner different compensation. If freight is not paid for one voyage will the owner be allowed a lien in another cargo?

Thus several problems could come up. Similar problems could arise in respect of demurrage and other charges.

11.2 Freight Level

First of all let me refer to the freight level. If the contract is based on homogenous voyages the situation is less complicated than if the length of voyages differ, the cargoes and cargo quantities and the ports differ. Unless all parameters are set out clearly on beforehand. If one freight level is thus determined for the whole contract period, then the situation is reasonably clear. There is only under very particular circumstances reason to call for a recalculation of freight. On the other hand parties are in a long term contract normally well aware of the risk with increased costs (either in relation to bunkers, wages or something else). It is therefore not unusual to find in long term contracts clauses spelling out that a recalculation of the freight should be made depending on the level of certain costs, or the parties could choose a certain index allowing for a standardized freight increase or there may be reference to changes in currency exchange rates.

⁴⁶ A similar point is discussed but also from the angle of "inducement of breach" in the case *The "Kaliningrad"* and *"Nadezhda Krupskaya"* /1997/2 Lloyd's Rep. 35.

⁴⁷ See above all Selvig, *The freight risk*, Oslo 1965-78 . In Arkiv for Sjørett vol. 7 and with respect to certain aspects Gorton, *Liability for freight*, in Festschrift till Jan Ramberg, Stockholm 1996 p. 165 ff.

11.3 Escalation and Hardship Clauses

It is not unusual to find an escalation clause or a hardship clause in COA's particularly those which run over a long period of time. Such clauses could be of general or specific type. One type covers particular items such as labour costs or fuel costs. An escalation clause could be tied to an index chosen by the parties, whereby the cost increase is subject to a general cost increase mirrored in the index. The cost increase could, however, also be subject to the particular labour cost situation of the individual owner. Such solution is to-day less common, one reason being that it removes the cost incentive for the owner. Other types of actual cost increase clauses are those tied to insurance costs or fuel costs, whereby in the latter case the freight should be adjusted depending on the cost of fuel actually supplied to the owner. These type of clauses seem to be more common in times of inflation and considerable swings in the currency exchange rate.

It is, however more frequent that parties insert into the contract some kind of hardship clause. These clauses may be drafted differently, and they may focus on one or the other aspect.⁴⁸ I shall not here delve further into the questions related to hardship clauses but let me quote the hardship clause mentioned in the Unidroit Principles (there is in the European Contract Principles a corresponding solution). Art. 6.2. contain three provisions where hardship matters are focussed.

6.2.1 spells out the basic principle:

“Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.”

6.2.2 observes that there may be particular situations:

“There is a hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of a contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.”

⁴⁸ It merits also in this connection to refer to an article by Gorton, *Escalation and currency clauses in shipping contracts*, in *Journal of World Trade Law*, 1977 p. 319 ff. For a more full account of various aspects related to such questions see Runesson, *Rekonstruktion av ofullständiga avtal*, Stockholm 1996.

6.2.3 finally sets out the principles applicable to hardship situations:

- “(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold the performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
 - (a) terminate the the contract at a date and on terms to be fixed; or
 - (b) adapt the contract with a view to restoring the equilibrium.”⁴⁹

I leave this question which merits a separate discussion due to its practical importance, and I restrict myself to making the comment that hardship questions may be seen as another angle of good faith performance, and that therefore both ends of related questions may have to be considered in this type of contracts.

12 Concluding Remarks

CoA's form an important group of charter arrangements. It is a form of charter having both voyage elements and time elements. For the draftsman of a volume contract it is of particular importance to negotiate and determine the relation between the frame contract and the individual contract. The interdependence between these two has to be considered carefully by the parties when drafting the contract. Solutions chosen with respect to the individual voyages will have an impact on the overriding level and vice versa.

The contract draftsmen may avoid future problems if they negotiate and consider in advance the prospective difficulties well, and also give regard to the question of the documentation to be used. It should be emphasized that with the existence of Volcoa and Intercoa matters to consider when drafting the CoA are covered largely. On top of that there may, of course, be other matters to define and negotiate but unless there are very good reasons to use only a voyage charter party with certain amendments the structure with a frame agreement for the overriding contract and a voyage charter for the individual voyages makes the contract clearer. As shown above it is practically hard to state in precise but at the same time flexible terms the obligations of the parties over a long period of

⁴⁹ This question was discussed at at some length at a Hässelby colloquium on modern chartering some years ago, and it was obvious that the common law lawyers were much less understanding to the principle as such (unless contractually negotiated) than were the lawyers from the continental law systems, from the United States and from Canada. ICC has published an ICC hardship clause where professor *Charles Debattista* has been the main draftsman.

time. Like for instance in connection with distributorship agreements where the parties may have to fall back on “best effort undertakings” which lack the precision often being the aim of a contract draftman there will in COA’s often be a drafting problem in connection with the relation between the cargo quantities, number of voyages and times of voyages. There will then often be a “fairly, evenly spread provision” which calls for individual contractual construction solutions unless the parties themselves find a way out of the problem.

COA’s are practically important tools for cargo owners and vessel operators to find solutions whereby over time the cargo owner will be guaranteed necessary transportation and the vessel operator some guaranteed cargo. COA’s will undoubtedly continue to play an important role in several trades.