

Navigating stormy waters

- How large discretion is the master allowed concerning navigational matters?

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1 Introduction

1.1 The research problem and why it is interesting

“The best preventive measure any vessel can take against heavy weather damage is to slow down and to alter to a more favourable course”¹. That is probably a sentence that most professional master mariners would agree to. At the same time, few would doubt that in commercial shipping, time is money.

Under a time charter party the master will be in a very special situation. He or she is the ship owner’s representative, but also personally shouldering a responsibility for the safety of the vessel, her cargo and crew. At the same time it is instrumental for the charterer to be able to order the master to perform the voyages or services that constitutes the very core of the commercial rationales that instigated the charterer to enter the contract in the first place.

Traditionally, the master is within a time charter party considered to be supreme when it comes to nautical or navigational decisions, whereas the charterer is entitled to give orders regarding commercial matters; the employment of the vessel. Nowadays, modern communication and navigation systems enable the charterers to dictate the master much more in detail compared to what was possible when many of the charter parties still in use were written and the general access of information, for instance weather reports, has rapidly increased.

At the same time, the law on the matter has traditionally been rather obscure, in general terms describing the master’s area of authority as matters concerning “seamanship” and has in borderline cases traditionally focused on the “reasonableness” of the master’s decisions.

¹ Swedish Club (2014) at 20.

This thesis will be concerned with where the line between navigation and employment is to be drawn. The perspective will however, at least as a starting point, be the master's situation, faced with a nautical reality and clinched between the various interests of the contractual parties.

To put it more precisely, the research question to be addressed is: What amount of discretion is the master allowed under a time charter party when it comes to nautical decisions, and how is that discretion affected by recent time charter party clauses?

In order to answer that I will have to take a rather broad view on the concept of navigation versus employment, and analyse also contractual obligations not traditionally addressed in discussions about where to draw the line between navigation and employment.

Such a perspective on the contract law naturally also opens up to reflections regarding the effects of the regulation. Hence I will also discuss different hardships that the master might face as a consequence of how the charter party is written, and the effects that certain charter party clauses might have outside the domains of the contract.

1.2 The methodology, structure and scope

The Norwegian maritime code regulates time charter parties in chapter 14, part IV. Concerning the interpretation of the Norwegian maritime code, the main tool has in accordance with Scandinavian legal tradition been the travaux préparatoires. Since the Scandinavian maritime codes are developed by cooperation between the Scandinavian countries, both Swedish and Norwegian travaux préparatoires has been used.

The rules in the maritime code are non-mandatory². Thus the charter parties are of pivotal importance. This thesis will analyse a selection of time charter parties with the aim to try to

² See 3.1. below.

identify development in time and in correlation with the changing reality that faces the master. Thus, bulk charter parties which have been used for a long time, and that later has been amended, or published in new versions, are of great interest. Most notably in this category is the NYPE form, which came in a new version 2015. Oil tanker charter parties are of interest given the importance of the business in Scandinavian shipping and the fact that they are traditionally drafted by the oil companies alone. As a contrast, charter parties from the highly risk affected off-shore business has been analysed.

All charter parties referred in this thesis are standard documents, often agreed documents. In Scandinavian law, standard documents are construed using the traditions for construing the statutory law as a role model³. Thus, a starting point when analysing a specific clause has been published⁴ “explanatory notes” and alike.

To understand how the provisions interact with the shipping reality, both Scandinavian and English case law has been considered.

Time charter parties are international in their nature. All charter parties that have been considered in this thesis are written in English, and English law is often stated as default background law⁵. It is for this reason alone suitable to consider English case law when analysing time charter parties.

English case law may be a relevant source of law also when the charter party has been amended to refer to Norwegian or other Scandinavian jurisdictions.⁶ A contract that is writ-

³ Falkanger (1997) at 300.

⁴ The accessibility of commentaries, travaux préparatoires etc to standard documents is of great importance in order to give them legal effect. Therefore only official explanatory notes easily accessible on the BIMCO website has been used. See Falkanger (1997) at 291.

⁵ See for instance BALTIME 1939 clause 22, SHELLTIME 4 clause 41, SUPPLYTIME 89 clause 31.

⁶ See *Arica* (1983) at. 309

ten in English and designed to work under English law, but that is made subject to Scandinavian law, is as a starting point to be construed in accordance with Scandinavian contract law traditions.⁷ The Scandinavian tradition of complementing the contract with provisions from the background law will therefore possibly affect the interpretation of a contract notwithstanding that it might be written with an English tradition, which does not offer the same possibilities, in mind.⁸ However, a significant feature in Scandinavian contract law tradition is that considerable weight is put at parties' expectations when the contract was concluded. The fact that the parties has used a contract originally written for English law may have the effect that it must be concluded that parties expected the clauses to have the same effect as they would have had under English law, and thus resulting in giving the particular clause the "English" meaning also under Scandinavian law.⁹

The last reason for considering English judgements is of a more practical nature. The fact that many charter parties stipulate English law as the default choice has resulted in a great number of easy accessible and relevant English judgements. This alone makes it interesting to consider English case law. This thesis is however limited to English and Scandinavian case law, and will not consider American or other common law cases.

2 Time charters

2.1 Main features in time charter parties

A time charter party¹⁰ is a contract in which the ship owner makes a certain ship available to the charterer for a certain period of time. Revenue to the ship owner is earned on the basis of the period of time that the ship has been available to the charterer. The time charter

⁷ Selvig (1986) at 3.

⁸ Selvig (1986) at 10

⁹ See the *Arica*, NJA 1954 s 573 (ND -1954 – 749) and Selvig (1986) at 6.

¹⁰ Swedish/Norwegian *tidscerteparti*, German *zeitcharter*, French *affrètement à temps*

party thus contrasts to voyage charter parties, which focuses on the cargo and under which the revenue is earned on basis of the specified amount of cargo carried on a specific voyage.¹¹

Consequently, the main contractual obligations of the ship owner under a voyage charter party is to make the ship available to the charterer, and the main contractual obligation of the charterer is to pay freight accordingly, i.e. based on the number of days that the ship has been available to him or her.¹²

The history of the time charter party dates back a long time ago, but the popularity of this contract form increased in the beginning of the twentieth century, possibly as a result of the increased predictability of voyages at sea that was brought about by the steam ships.¹³ Not surprisingly, two of the contracts we still see a lot of today, the *Baltimre* and the *New York produce exchange (NYPE)* date back to 1909 and 1913, respectively.¹⁴

The very essence of a time charter-party is, of course, that a manned, equipped and in all aspects “trade ready” ship is, for a certain period of time, made available by the ship owner to the charterer, for the charterer to make use of the ship in whatever way that may seem advantageous to him.¹⁵ There is however certain limitations in the charterers right to the ship under a time charter. A time charter is not a lease and the charterer does not acquire any property rights in the ship. Rather, the charterer is given, subject to contractual limitations¹⁶, a right to make use of the commercial possibilities that the ship offers.¹⁷ In the *Hill*

¹¹ Coghlin et. al. (2014) at 2.

¹² Woll (2012) at 20.

¹³ Michelet (1997) at 2.

¹⁴ Unctad (1990) at 8.

¹⁵ Coghlin et. al. (2014) at 1, Falkanger (2011) at 417 and Østergaard (2009) at 213.

¹⁶ E.g geographical limitations, or limitations with regard to the type of cargo allowed.

¹⁷ Coghlin et.al. (2014) at 2.

Harmony, Lord Hobhouse explained that under a time charter, the owner, in return for the payment of hire “...transfers the right to exploit the earning capacity to the time charterer”.

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2.1.1 Division of duties and allocation of costs under a time charter party

As indicated above¹⁹ the charterer and the ship owner will to a certain extent divide the duties connected to the running of a ship between them. Generally, the charterer will have to bear the voyage specific costs whereas it is the ship owner who will have to carry fixed costs.²⁰

In the maritime code²¹ this division of responsibilities is expressed in i.a. §§ 372, 380, 384, 387, and 392.

In practical terms the ship owner will, as a starting point, be responsible for, and pay for costs relating to maintenance of the ship²², crew wages²³, insurances, and capital costs and alike²⁴. The ship owner must in other words make sure that the ship is in all aspects seaworthy.²⁵ It is not enough that the ship is seaworthy from a strictly nautical perspective, but it must also be “legally fit for service”. The ship owner must therefore make sure that all necessary certificates etc. are in place.²⁶

¹⁸ *The Hill Harmony* (2001) at 156.

¹⁹ 2.1

²⁰ Falkanger (2010) at 433.

²¹ The Norwegian Maritime Code, nor. Sjøloven

²² The Norwegian Maritime Code § 384

²³ The Norwegian Maritime Code § 372

²⁴ Falkanger (2010) at 432.

²⁵ The Norwegian Maritime Code § 372.

²⁶ Coghlin et. al. (2014) at 240

The charterers general responsibilities are in the Maritime Code described as “shall meet all the expenses for the performing of voyages that shall not, according to the provisions of this chapter, be met by the time carrier”.²⁷ In practical terms the time charterer will be responsible for and bear the costs of for instance bunkers²⁸, pilotage, harbour and fairway fees and tugs.

2.2 Nautical/ commercial control

As pointed out above²⁹, the essence of a time charter party is that the earning capacity of the ship is made available to the time charterer. For the charterer to be able to make such use of the vessel, the charterer must have a right of disposal of the vessel. In the Maritime Code such a right is expressed in § 378, which stipulates that the “carrier shall perform voyages ordered by the time charterer in accordance with the chartering agreement.” In time charter parties, the corresponding clauses would normally stipulate that the time charterer is to give orders regarding the *employment* of the vessel.³⁰

However, as pointed out above³¹, the time charterer’s right to the vessel is not absolute, but will be limited to matters of employment and the commercial side of the maritime endeavour. Indeed, the responsibility for tasks related to the nautical management and operation remain with the ship owner.³² To some extent that limitation is evident already from the wording, with the word “employment” indicating that the charterer’s authority is somewhat limited to commercial matters. Although “employment” may be interpreted as to include a wide range of decisions all needed for the ship to be able to perform commercially and thus appearing to include both navigational and commercial authority, the wording must be in-

²⁷ The Norwegian maritime Code § 387.

²⁸ The Norwegian Maritime Code § 380

²⁹ 2.1

³⁰ See e.g. Baltimex 1939 clause 9, NYPE 1946 clause 8 and NYPE 1993 clause 8

³¹ Under 2.1

³² See 2.1.1 above.

terpreted restrictively³³. There seem to be no ambiguity in the neither Scandinavian nor English legal literature that the charterer's authority in principle does not include nautical decisions.³⁴

Therefore, as Justice Staughton said in *Erechthion*³⁵ "It is well settled that the orders which a charterer is entitled to give, and an owner bound to obey, are orders as to the employment of the vessel. They do not include orders as to navigation, which remains in the control of the owner through his master – at any rate in the absence of special and unusual terms."

Also Scandinavian case law affirms the master's navigational control. The Norwegian arbitration award *Hakefford* from 1951 concerned an overly cautious master who refused to sail, blaming adverse weather conditions, despite the fact that the weather was rather moderate. The arbitrator, Sjur Brækhus, writes that "In a time charter relationship the master must, within certain limits, be supreme regarding decisions of a nautical nature. If he finds that the ship should lay idle and wait for better weather, that must be decisive, even if it would be possible to sail, and even if most masters would have sailed under similar circumstances."³⁶

With the charterer having the commercial authority over the vessel and the owner having the navigational authority over the vessel, naturally the commercial risks will reside with charter and the navigational risk will reside with the owner.³⁷ It is the charterer who will have to carry the loss of e.g. decreasing spot market rates during the charter period, whereas it is the owner who will have to take up relevant marine insurances covering e.g risks

³³ Falkanger (2010) at 431.

³⁴ See e.g. *Ibid*, Coghlin 2014 at 335, Woll (2012) at 22, and Wilson (2008) at 107.

³⁵ *The Erechthion* at 185, also referred by Lord Bingham in *Hill Harmony* at 152.

³⁶ *Hakefford* (1952) at 448. My translation.

³⁷ Michelet (1997) at 144. See also Lord Hobhouse in *Hill Harmony* at 156.

such as the ship running aground due to heavy weather, a technical failure or a mistake on behalf of the officer on watch.

It is therefore appropriate to conclude that it is the charterer who has the *Commercial control* of the vessel, whereas the owner has the *nautical/ navigational control*.

If it is clear that the owner has the nautical control, and charterer the commercial control, the real question is how to define the two.

An unlimited right for the master to make any decision, any time, as long as he or she motivates the decision with some sort navigational concern would without doubt endanger the charterer's commercial rationale for entering into the contract. It is, after all, the fact that the vessel proceeds, from A to B, with the cargo and according to orders that is the core of the charterer's interest. Thus, there must be some sort of limit to the master's discretionary right. In the *Hakefford*, Brækhus concludes that the ship owner, when invoking the weather conditions as a defence for delaying departure, must have a somewhat reasonable ground for doing so.³⁸ Brækhus bases his conclusion on the assumption that the charterer must have some sort of protection against complete discretion or excessive apprehension on behalf of the master.³⁹

2.3 The position of the master

It is the master who has the highest authority on board⁴⁰ and it is him or her who gives the orders and makes the decisions with regard to the daily operation of the ship⁴¹. Thus, for

³⁸ *Hakefford* at 448.

³⁹ *Hakefford* at 448

⁴⁰ Falkanger (2010) at 252. Falkanger writes that the masters status has gradually diminished, partly in connection with modern communication abilities.

⁴¹ The masters role has a long standing tradition, see Jensen (1924) at 367.

the time charter to be able to make the commercial use of the vessel that is the very point of the charter party the charterer will be dependent on the master. Therefore, subject to the limitations to matters of employment, the charterer is entitled to order the captain to perform the required voyages.⁴² In the time charter parties the charterers right to give orders is normally expressly stated.⁴³

It is obvious that it will be essential for the time charterer that the cooperation with the master works efficiently. An obstructing master may very well jeopardize the economic rationales of the charter party. It is thus not surprising that most time charter parties has some sort of mechanism for dealing with the situation that the time charterer is dissatisfied with the master. In most cases the time charterer's right in those situations is limited to a right to request a change of master, with a corresponding obligation for the ship owner to investigate the matter and act if it is deemed necessary.⁴⁴

2.3.1 The master's nautical responsibility

The master is in a rather special position when his/her vessel is time chartered. As stipulated in the Maritime Code, the master has to ensure that the ship is seaworthy before a voyage commences, and he is to "do everything in his or her power to keep the ship in a seaworthy condition"⁴⁵. But the most significant of the master's responsibilities in the context of time charters is probably the overriding authority and responsibility to ensure the safety of the vessel⁴⁶, and to always ensure that the navigation and management of the ship is per-

⁴² Michelet (1997) at 66

⁴³ See e.g. *Baltimexchar 1939*, lines 121-123, which states that "the master shall be under the orders of the Charterers as regards employment, agency or other arrangements"

⁴⁴ See e.g. *Baltimexchar 1939* clause 9, line 131 to 136. The correspondent clause in *Shelltime 4* is clause 14, lines 156-159. The two clauses are similar, but *Shelltime* seems to take a slightly more charter friendly approach.

⁴⁵ The Norwegian Maritime Code § 131

⁴⁶ See e.g. the ISM Code article 5.2

formed in accordance with good seamanship.⁴⁷ Failure to do so may have penal consequences for the master personally⁴⁸.

2.3.2 On whose behalf does the master act?

As seen above⁴⁹ the master is employed by the ship owner, and it is the ship owner who pays the master's salary. The master also has a personal responsibility for the safe operation and navigation of the ship. On the other hand, when it comes to the employment of the ship, the master is under the Charterers orders. This raises the question who the master of a time chartered vessel represents.

From practical point of view it must be assumed that the charterer and ship owner normally would have coinciding interests. Both would wish for the ship and cargo to safely arrive at the intended destination. Despite this, the standpoints might differ. For instance, as pointed out by Lord Hobhouse in the *Hill Harmony*, the owner of a time chartered vessel does not normally have any interest in saving time⁵⁰. As a starting point the master's primary responsibilities vis-à-vis the ship owner are his nautical duties, whereas his duties vis-à-vis the charterer are to adhere the instructions regarding the employment. In practice the master therefore serve a double role and might find herself in a difficult situation, clinched between colliding interests.⁵¹

⁴⁷ Cf. The Norwegian maritime code § 132

⁴⁸ In Norway the penal sanctions for a breach of the masters nautical responsibilities are stipulated in the Ship Safety and Security act (Lov 2007-02-16-9) § 60, cf §§ 19, 14, with reference to the Norwegian Maritime Code § 132. Such sanctions were until the 1 october 2015 the general Civil Penal Code §418 (Lov 1902-05-22-10). However, Norway has now enacted a new Penal Code (Lov 2005-05-20-28) which does not deal with the masters responsibilities. In Sweden similar rules are stipulated in the Swedish Maritime Code chapter 20 §§ 1-2.

⁴⁹ See 2.1.1

⁵⁰ *Hill Harmony* at 156.

⁵¹ Ihre (2010) at 108.

From a legal point of view there has historically been a debate both under Scandinavian law⁵² and under English law about whom the master actually represents.

Michelet concludes that today the situation under Norwegian law is clear; the master represents the ship owner.⁵³ Further, he explains the previous discussions as a misperception or confusion of representation and the charterer's right to give orders and instruct.⁵⁴

Regarding English law, Michelet concludes that there is a difference between the terms *servant* and *agent*. The master will always be the ship owner's *servant*, but might act as the time charterer's agent. This would be the case when the master performs tasks that according to the time charter party rests upon the charterer.⁵⁵ For the purposes of this thesis, analysing the effects of the master's decisions when faced with nautical perils, it is however clear that the master will be the owner's representative under both Scandinavian and English law.

3 Rules placing the line

3.1 Norwegian maritime code

§ 378 in the maritime does not only stipulate that the charterer has a right of disposal⁵⁶, but does also lay down certain limitations in the charterer's right. The first paragraph defines

⁵² See eg. ND 1913.393 at 398, where Morgenstjerne expressed the view that the master represents the ship owner with regard to everything that relates to the ship itself, hereunder its seaworthiness, but represents the charterer regarding everything that has to do with the cargo handling etc.

⁵³ Michelet (1997) at 70.

⁵⁴ However, under scandinavian law the master might represent the charterer regarding bills of lading, see the norwegian maritime code §295 in conjunction with §251.

⁵⁵ Michelet (1997) at 70.

⁵⁶ See 2.2 above.

the area in which the charterer has control as to ordering “voyages”. This right is however made subject to possible limitations in the chartering agreement. Further, it is stated that § 372 apply correspondingly. This implies that the owner will be responsible for the maintenance and the nautical operation also during the duration of the chartering agreement.⁵⁷

The second paragraph stipulates that the ship owner⁵⁸ is not obliged to follow the charterer’s orders if the orders would expose the ship or the persons on board or the cargo to danger in consequence of war, warlike conditions or ice, or other danger or inconvenience that could not reasonably have been foreseen at the time when the contract was concluded.

In the travaux préparatoires to the Norwegian maritime code boycotts from certain countries or other trade related hindrances are given as examples on such inconveniences,⁵⁹ whereas the “other dangers” are not particularly elaborated on. The travaux préparatoires to the Swedish maritime code⁶⁰ are slightly more elaborated, and exemplifies “significant inconvenience”⁶¹ as a risk that the ship, without facing any immediate risk of physical damage, may be trapped by ice, become subject to an embargo, or that some sort of political circumstances might cause the ship future boycotts etc. in other countries.⁶²

The Swedish travaux préparatoires do not elaborate on the possible meaning of “other danger” either. It does however in the general description of the second paragraph state that what the second paragraph does is that it constitutes an exception from the ship owner’s responsibilities, and that the exception applies if the ship is threatened by war, dangerous

⁵⁷ NOU 1993:36 at 86

⁵⁸ The Norwegian maritime code uses the word ”Carrier” to describe the one who has been letting the ship, normally ”The owner” or ”disponent owner” in english terminology.

⁵⁹ NOU 1993:36 at 86.

⁶⁰ Sw. ”sjölagen”. § 14:58 in the Swedish code is materially identical to § 378 in the Norwegian maritime Code.

⁶¹ Sw. «väsentlig olägenhet»

⁶² Prop. 1993/94:195 at 313.

ice conditions etc. or significant inconvenience. Refusal to follow orders due to more regular navigational hazards, for instance deviation or reduced speed due to heavy weather or congested or narrow channels thus seems to be outside the obvious scope of the paragraph. Danger caused by ice is mentioned both in the first part of § 378 second paragraph and in the Swedish travaux préparatoires in connection to the second paragraphs and “significant inconvenience”. There is to my knowledge however no support in Scandinavian legal history, case law or legal literature for applying §378 second paragraph ex analogia to all other types of navigational safety concerns, despite ice being a rather regular navigational hazard in Scandinavian waters.

It is evident from the wording of § 378 second paragraph that only dangers or significant inconveniences that could not reasonably have been expected can exempt the ship owner from his/her contractual obligations. The requirement of unforeseeability is confirmed in the Swedish travaux préparatoires, according to which not even a war that could reasonably have been expected when the contract was entered into falls under the exemption⁶³.

Many typical navigational risks are inherent in all types of maritime endeavours. It is for instance not very convincing to claim that no adverse weather was expected. Thus, the requirement of unforeseeability would most likely render the exemption in §378 second paragraph inapplicable to ordinary maritime risks such as heavy weather, navigational hazards etc.

It does not appear possible to determine any distinctive definition of the limits of neither the ship owners navigational control, nor the charterer’s commercial control on the basis of § 378. Of perhaps greater practical interest in the context of drawing the line between navigation and employment is therefore the fact that §378 is non-mandatory. Freedom of con-

⁶³ Prop. 1993/94:195 at 313

tract presides over this area of law⁶⁴. Further, as mentioned above, the section explicitly defines the ship owners obligation as to “ .. perform the voyages ordered by the time charterer *in accordance with the chartering agreement*”.

The reason for this quite wide-ranging definition of the charterer’s right of disposal is in both Swedish and Norwegian travaux préparatoires explained to be a consequence of the fact that the chartering agreement always will stipulate certain limits to the charterer’s right of disposal. Geographical limits and limits with regard to the type of cargo are mentioned as common examples⁶⁵. However, the limitations can be of the most shifting character and may be concerned with purely commercial reasons or special navigational risks, such as heavy weather.⁶⁶ It is further pointed out in both the Swedish and Norwegian travaux préparatoires that it would not be effective or suitable to more specifically codify the extent of the charterer’s right of disposal.⁶⁷

It is in other words the chartering agreement that to a very large extent determine the scope of the charterer’s right of disposal. Consequently, also the owner’s navigational control, and thereby the scope of the master’s authority, at least within the context of the charter party, will to a large extent be determined by the charter party.

⁶⁴ See the Norwegian maritime code § 322. Only with regard to a holder of a bill of lading will mandatory rules affect a time charter party.

⁶⁵ Prop. 1993/94:195 at 313 and NOU 1993:36 at 86

⁶⁶ Prop. 1993/94:195 at 313

⁶⁷ In Prop. 1993/94:195 at 313 the wide ranging wording and unsuitability of further codification is even explicitly explained by the existence such shifting contractual regulations.

3.2 Navigational exception

The importance of the division between navigation and employment is further enhanced by the fact that the owners are generally not liable for losses that are consequences of navigational decisions, even if the master has been somehow at fault.

This navigational faults exception has a long history. In the 19th century the ship owners had managed to exempt themselves from liability for a plethora of different kinds of negligence. As a result of negotiations between ship owners and cargo owners a compromise was struck in the form of the 1924 Bills of Lading convention, the “Hague rules”, which were later amended with the Visby rules.⁶⁸ In short, liability under bills of lading was to be based on negligence, but the ship owner was not to be liable if the master or crew had been negligent in navigating or managing the ship.⁶⁹

The Bills of lading convention, i.e. the Hague-Visby rules does unsurprisingly only apply to responsibility under a Bill of Lading.⁷⁰ In the Scandinavian maritime codes the navigational exception is made effective also regarding cargo damage and delay under a time charter party.⁷¹ However, like the rules regarding the charterers’ right of disposal⁷², the rules regarding cargo damage and delay in time charter parties are non-mandatory.⁷³

It is on the other hand common to include an exception for navigational fault in the charter parties, either directly or by reference to the Hague-Visby rules or to national legislation that is based on the Hauge-Visby rules, for instance the U.S. COGSA^{74 75}. By NYPE 46

⁶⁸ Falkanger (2010) at 278.

⁶⁹ Falkanger (2010) at 278 and The Hague-Visby Rules article IV 2. (a)

⁷⁰ The Hague-Visby Rules article I (b)

⁷¹ Norwegian maritime code § 383, in combination with § 276.

⁷² See 3.1 above

⁷³ See the Norwegian maritime code § 322.

⁷⁴ United states Carriage of Goods Act, which is incorporated in the NYPE 46 by clause 24.

clause 46 the exception rule in the U.S. COGSA is made applicable to all contractual activities performed by the owner under the charter, i.e. not only in regard to bills of lading and not even exclusively regarding handling, carriage, loading, stowing etc. of the goods.⁷⁶ Regarding the nature of the loss the exception is thus not limited to physical loss of, or damage to, the cargo. At least not if the reference is made to the U.S. COGSA.⁷⁷

The navigational exception clauses appear in different variations in different charter parties. However, some common features are noteworthy. Firstly, for the owner to be protected by the exception there must be an error in some aspect of seamanship, as opposed to a general failure to comply with contractual duties.⁷⁸ Secondly, since we are talking about an exception clause it shall generally be construed restrictively. Thus, unless the clause explicitly mentions negligence, there is no protection against negligent navigation by the master or crew.⁷⁹ The exception clause in NYPE 46⁸⁰ does not mention negligence, and is thus not considered to protect against negligence⁸¹ whereas the exception clause in for instance Baltime explicitly includes negligence.⁸²

Notwithstanding the difference in scope of the exception clauses in different charter parties, the existence of the exception highlights the importance of the division between navigation and employment in that the ship owner generally will not be liable for losses due to an error made in the navigation.

⁷⁵ Coghlin et. al. (2014) at 509.

⁷⁶ Coghlin et. al. (2014) at 510.

⁷⁷ *Anglo-Saxon Petroleum Co., Ltd.* (1958) at 97.

⁷⁸ Coghlin et. al. (2014) at 513 and *Hill Harmony* at 160.

⁷⁹ Coghlin et. al. (2014) at 513 and *The Satya Kailash* (1982) at 590

⁸⁰ Clause 16

⁸¹ Michelet at 444. The protection in NYPE is however often extended by the reference to COGSA.

⁸² Clause 12

4 Regulations in the charter parties

When analysing charter parties in order to determine how the contracts regulates the balance between navigation and employment, between commercial and nautical control, the natural starting point will be the “master” or “employment” clauses, for instance BAL-TIME 1939 clause 9.

However, concentrating only on the “master clause” will rarely be enough in order to gain a correct picture of the scope of the owners nautical control, and thereby the masters contractual authority. As discussed in relation to the maritime code § 378 there will often be specific limitations with regard to trading areas and certain cargoes. But also other clauses, which less explicitly concern the charterers’ right of disposal, may in practice limit the scope of the owners’ navigational control.

In the *Hill Harmony* the charterer had ordered the vessel to use the great circle route⁸³ between Vancouver and Shioyama in Japan. The captain, however, insisted on following the rhumb line⁸⁴. Following the rhumb line would result in the vessel remaining further south and thus less exposed to harsh weather conditions. The charter was on an amended New York Produce Exchange form and included the regular stipulation that the master shall be under the orders and directions of the charterer as regards employment and agency, that

⁸³ A “great circle” is the closest route between two places. North of the equator using great circle navigation result in following a northward arc, as opposed to following a constant compass course, which constitutes a “rhumb line”. See *Chefen för marinen* (1986) at 24.

⁸⁴ *Hill Harmony* at 147

errors of navigation shall be mutually excepted⁸⁵, and further stipulated the trading area to be world-wide subject to Institute Warranty Limits.⁸⁶

The case concerned whether such decision was within the master's navigational authority or whether the master's decision to follow the southern route encroached in the charterers' authority as regards employment. In general terms, the owner argued that decisions as to which course to follow between the port of departure and the destination will always be a decision as of navigation. Especially so when the master's decision was based on some degree of safety concerns. Interesting with regard to an analysis of the charter party law on the matter is that it becomes apparent that the ship owner very well may accept a certain risk on beforehand.

Lord Hobhouse explains that "Another difficulty for the owners' argument is the fact that the owners have already agreed in the charter party what are to be the limits within which the charterers can order the vessel to sail, for present purposes the institute Warranty Limits, and have undertaken that, barring unforeseen matters, the vessel will be fit to sail in those waters. It is not open to the owners to say that the vessel is not fit to sail from Vancouver to Japan by the shortest route within IWL".⁸⁷

Hobhouse returns to the same kind of reasoning in his conclusions, where he says that "If an order is given compliance with which exposes the vessel to a risk which the owners have *not agreed to bear*, the master is entitled to refuse to obey it: indeed, ... , in extreme situations the master is under an obligation not to obey the order."

⁸⁵ *Hill Harmony* at 147

⁸⁶ *Hill Harmony* at 153. The "Institute warranty limits", drawn up by the Institute of Chartered Underwriters in London, are geographical limits within which ships can operate without incurring additional insurance premiums. See The Standard Club (2016)

⁸⁷ *Hill Harmony* at 157.

The argument that the master's possibilities to make decisions may be curtailed by general risk acceptance in the charter party was subsequently made by the charterers in a 2005 London arbitration⁸⁸ award concerning a situation quite similar to the *Hill harmony*, with the main difference that in the arbitration award the vessel actually encountered quite rough weather. The arbitration was decided in the charterers favour, although mainly after a discussion about the reasonableness of the master's decision.⁸⁹

Considering the above arguments on contractual risk acceptance in conjunction with the emphasis on contractual regulations of the charterers' right of disposal that we find in the Scandinavian maritime codes and Scandinavian travaux préparatoires it becomes clear that one, in order to analyse the contractual regulation of the scope of the navigational control and how the individual charter parties affect the possibilities the master has to exercise discretion in the interest of the safety at sea, must adopt a broad view. All clauses through which the owners can be said to accept a certain risk are relevant. Therefore not only the obviously relevant "master clause"⁹⁰ or similar rules laying down the charterers' right of disposal, but also for instance regulations regarding the performance of the vessel under certain weather conditions are of interest.

The rules on Off- Hire may in some cases be interesting in order to define the contractual obligations. Off-hire clauses does however mainly concern the effects of a breach of con-

⁸⁸ London Arbitration 15/05 (20 July 05).

⁸⁹ Time charter party clauses which establishes that the owner has agreed to bear certain risks has also been discussed in several cases not directly concerned with the master's safety motivated decisions, see e.g. concerning the risk of bottom fouling *The Kitsa* (2005) at 439 and, concerning a highly dubious and corrupt «iraqi system» for cargo claims, *The Island Archon* (1974) at 236.

⁹⁰ There will usually be a clause with either the heading "Master", "Employment" or "Performance of voyages" stipulating the charterers' right of disposal. I will in the following use the headings that are used in the relevant charter party, and if no such heading is given, or when discussing generally, I will use the term "Master clause".

tract, which is outside the main focus of this thesis, but still important for illustrational purposes.

The navigational exception clauses are important since without it the charterers would still have a chance to hold the owner liable if it could be held that the master had been somehow at fault in the navigational decisions, thus limiting the significance of the division between navigation and employment.

To get a picture of how prone the master in practice will be to autonomously act in the interest of safety, not only possible economic consequences for the owner are of interest. Naturally, it will also be interesting to consider what rights the charterer has to act against a master whose decisions they are dissatisfied with.

Although rules regarding trading area and allowed or forbidden cargo certainly are of interest for defining the contractual obligations⁹¹ such rules are often to be specified in the individual contracts⁹² and are often very straight forward, why they are not further analysed below.

In the analysis below, the starting point is naturally the “master clause”. However, since the performance clauses lays down contractual obligations that in practical terms concerns decisions and choices when faced with different weather situations and thus strikes in the very centre of what would traditionally be regarded as “seamanship”, performance clauses are put in focus. In order to get a more complete picture of the contractual reality in which the master operates, the consequences of the master’s decisions must be considered. Thus, some links to the off hire clauses are made, in addition to navigational exception clauses, and clauses giving the charterer a right to demand a replacement of the master are present-

⁹¹ See the *Hill Harmony* at 157, as presented above.

⁹²For instance . inserted in Box 17 in the BALTIME form. Another example is NYPE 93 clause 5.

ed. Those from the outset disparate clauses together provide the big picture of what discretion the master is allowed with regard to nautical decisions.

In order to obtain a better picture of how the charter parties interact with the nautical reality at large, a selection of widely used charter parties representing different branches of the shipping industry and different times are examined.

4.1 The charter parties

Baltimex is the classic dry bulk charter party developed by BIMCO⁹³ and the NYPE forms are, according to ASBA⁹⁴, the most widely used time charter party in the dry cargo segment. Those charter parties will therefore serve as a starting point. In order to get a more complete picture, NYPE and BALTIME will be compared and contrasted to charter parties from different sectors of the shipping industry and different times, with SHELLTIME 4 serving as the main representative for the important oil tanker segment.

4.1.1 BALTIME 1939 (as revised 2001)

The basic rule stipulating the charterers' right of disposal is found in clause 9, which reads as follows:

“The master shall prosecute all voyages with the utmost despatch and shall render customary assistance with the Vessel's crew. The master shall be under the orders of the Charterers as regards employment, agency, or other arrangements. The Charterer shall indemnify the Owners against all consequences or liabilities arising from the Master, Officers or

⁹³ BIMCO – the Baltic and International Maritime Council, based in Copenhagen is the world's largest ship owner organisation, with 2,200 members globally. BIMCO's core objective is to develop standard contracts and clauses. See BIMCO website; about BIMCO.

⁹⁴ Association of Ship Brokers and Agents

Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying goods. The Owners shall not be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise. If the charterers have reason to be dissatisfied with the conduct of the master or any officer, the Owners, on receiving particulars of the complaint, promptly to investigate the matter, and, if necessary and practicable, to make a change in the appointment”

The clause is conspicuously extensive and contains numerous different rules. Of primary interest are of course the first two sentences. However, there it merely stipulates the basic rules of the obligation to prosecute voyages with utmost despatch and the charterers' control with regard to employment of the vessel⁹⁵.

Also the rule giving the charterer a right to complain about the master is found in clause 9. Notably, the owner is only obliged to make a change in the appointments if they on the basis of the charterers' complaints and their own investigation find such changes *necessary and practicable*.

In Baltimore the performance is regulated already in the preamble of the contract⁹⁶. The ship is to be *capable* to perform the indicated speed fully loaded in *good weather and smooth water*.⁹⁷ The description above is far from clear. It does not specify what *capable* refers to, if it is merely a speed that the ship can reach at some sort of special occasions or if it is a speed that the ship actually can keep for a longer period in time.⁹⁸

⁹⁵ Lines 121 to 123 in the original layout.

⁹⁶ Lines 10-12.

⁹⁷ Corresponding wording is used in GENTIME, but box 5 in the “box-layout”, which reads: “speed capability in knots (about)” .

⁹⁸ Michelet (1997) at 31. For a discussion about the effect of “capable of” clauses, see 3.4.2 below.

Off-hire is regulated in clause 11. 11(A), which lists a number of occurrences which leads to off-hire, e.g. deficiency of men and different technical failures. All which are clearly within the owners operational responsibilities. Of greater interest with regard to possible scope for navigational control is 11 (B) which states that in the event of the vessel being driven into port or to anchorage through stress of weather, any detention or expenses resulting from such detention shall be for the Charterers account *even if* the delay or expenses were caused by negligence of the owners servants.⁹⁹

The exception clause¹⁰⁰ in BALTIME is considered to be unusually wide¹⁰¹. It basically places all responsibility for damage to, or delay of, the cargo on the charterer¹⁰². Regarding “delay in delivery of the vessel, delay during the currency of the Charter and for loss or damage to goods onboard...” the owners are only liable if the loss was due to personal acts or omission by the owners.¹⁰³ Regarding damage caused by the neglect of the master and crew, the clause states that the owners shall not be liable “in any other case nor for damage or delay whatsoever and howsoever caused even if caused by neglect and default of their servants”.¹⁰⁴

In English case law there has been some discrepancy as to the scope of clause 12. It has been held that lines 170 to 173 refers back to the previous sentence¹⁰⁵, only covering the types of losses and delays stated there and that for instance general financial losses thus are

⁹⁹ Gentime (clause 9 b) and NYPE (in NYPE 93 clause 17) also excludes deviation caused by stress of weather from the off hire situations, but does not exclude delay or costs caused by the crews negligence. Further, in GENTIME also failure, refusal and inability of the master, officers or crew are specifically mentioned.

¹⁰⁰ Clause 12.

¹⁰¹ Coghlin et. al. (2014) At 515.

¹⁰² Michelet (1997) at 409.

¹⁰³ Clause 12, lines 163 to 170.

¹⁰⁴ Clause 12, lines 170 to 173.

¹⁰⁵ Clause 12 lines 163 to 170.

not covered.¹⁰⁶ However, and perhaps more important for the purpose of analysing the effects of the masters navigational decisions it is clear from the *Appolonius*¹⁰⁷ that the exception for delay is rather wide, including delay under the contract in general, at least delay caused by the engineers intentionally slow steaming due to some apprehension of a technical art.¹⁰⁸

4.1.2 The New York Produce Exchange Forms (NYPE 46, NYPE 93 and NYPE 15)

The NYPE was originally published 1913, and has then been amended 1921, 1931, 1946, 1981, 1993 and, now 2015. The 1946 version is still commonly used.¹⁰⁹

This development over time provides a great opportunity to compare the scope of the navigational control in charter parties from different times. Since the 1946 version is still in use is it useful to have a look at that, along with the two latest editions.

The “master clause” clause in NYPE 46 corresponds in its essential part to that in BALTIME, and reads in its essential parts as follows:¹¹⁰

“That the captain shall prosecute his voyages with the outmost despatch and shall render all customary assistance with the ship’s crew and boats. The captain (although appointed by

¹⁰⁶ Coughlin et. al. at 515 and the *TFL Prosperity*.

¹⁰⁷ The *Appolonius* was on a BALTIME charter party, but the second part of the exception clause was deleted. See the *Appolonius* (1978) at 60.

¹⁰⁸ The *Appolonius* at 65 and 56.

¹⁰⁹ NYPE 2015 Explanatory notes (2015) at 3.

¹¹⁰ Clause 8.

the owners), shall be under orders and directions of the Charterers as regards to employment and agency ...”

Notably, save some modernisation to the language, the corresponding clauses in NYPE 93 and NYPE 2015 are more or less identical to NYPE 46.¹¹¹ The only difference is that NYPE 2015 provides an opportunity for slow steaming.¹¹²

The performance of the vessel is regulated in the preamble of NYPE 46, which, like BALTIME, states *capable of and good weather*. In the preamble of NYPE 93 the wording is similar, but with the difference that specific wind force is to be filled in. NYPE 15 differs in that it, in clause 12 (a) stipulates that the vessel shall be capable of the indicated speed *on all sea passages with wind up to and including 4 Beufort and sea state of 3 on the Douglas scale*. Periods with decreased speed due to safety concerns *or* while navigating in narrow waters or assisting in distress situations are excluded from the performance situations.

Clause 12 in NYPE 15 also stipulates in paragraph (b) that the master shall be obliged to follow weather routing services provided by the charterer. The obligation ceases if the safety of the vessel would be compromised by following the weather routing.¹¹³

The three versions includes materially identical rules regarding the possible replacement of the master¹¹⁴, which is also very similar to BALTIME, but with the difference that it is enough if removal is *necessary* for the owner to be obliged to replace the master. The exception in BALTIME for when replacement is not *practicable* is not to be found in

¹¹¹ Perhaps no coincidence, the ”master clause” in NYPE 93 and NYPE 15 are also numbered 8.

¹¹² NYPE 2015 Explanatory notes (2015) at 8.

¹¹³ As to weather routing, see also GENTIME clause 15 (k), which is different in that it states that the master has no obligation to follow weather routing information provided by the charterer.

¹¹⁴ NYPE 46 clause 9 NYPE 93 8b and NYPE 2015 clause 8 b.

NYPE.¹¹⁵

The exception clause exempts the owners from responsibility for error in navigation, and is materially identical in the three versions.¹¹⁶

4.1.3 GENTIME

GENTIME was initially intended to replace BALTIME and NYPE¹¹⁷. GENTIME is intended to be a truly balanced contract, which is why BIMCO advises against any changes in the standard clauses of the contract, since that would risk to change the contractual balance.¹¹⁸

The “master clause”¹¹⁹ is very similar to the ones in the NYPE forms, with the difference that it emphasises that the master has a right to disregard the charterers’ orders if the orders compromise either the safety of the vessel or the protection of the environment.¹²⁰ GENTIME is therefore slightly more explicit regarding the master’s right to refuse to follow orders which concern navigational or nautical aspects.

Clause 19 is the general exception clause in GENTIME, dealing with all other claims but cargo claims.¹²¹ It is quite straight forward and exempts the owners from all responsibility

¹¹⁵ Similar provisions are found in GENTIME clause 15 (e)

¹¹⁶ NYPE 46 clause 16, NYPE 93 clause 21, NYPE 2015 clause 21. For a further discussion about the scope of the NYPE exception clause and the relationship to the clause paramount, see 3.2 above.

¹¹⁷ Michelet (1997) at. 3

¹¹⁸ BIMCO, Explanatory notes to GENTIME, at general observations.

¹¹⁹ Clause 12.

¹²⁰ BIMCO, Explanatory notes to GENTIME, at clause 12. In the clause this is done by reference to an IMO resolution (A443 [XI]).

¹²¹ BIMCO, Explanatory notes to GENTIME, at clause 19.

for neglect or fault by the master or other servants in the navigation or management of the ship.¹²² It thus corresponds to the Hague-Visby rules.¹²³

4.1.4 SHELLTIME 4

SHELLTIME 4 is not an agreed document but developed by the oil company Shell. Most major oil companies have developed their own charter parties. There are many reasons for this, but most relevant for the understanding of the contract is the circumstance that Shell, and other major oil companies, are powerful to negotiate contracts that suits their interests.¹²⁴ SHELLTIME is despite this considered to be unusually balanced for a time charter party developed by an oil company.¹²⁵

The “masters clause” in SHELLTIME is more or less identical to GENTIME and NYPE, lines 142 to 143 in SHELLTIME stipulating that “The master (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment of the vessel, agency and other arrangements.” Regarding the more specific description of the master’s obligations SHELLTIME 4 has a different layout compared to the dry bulk charter parties presented above and we find the obligation to carry out the voyages with outmost despatch in clause 2.¹²⁶ The regulation does however appear to materially the same.

One main difference compared to the dry bulk charter parties is to be found in the performance clause¹²⁷. In contrast to the *capable of* stipulations in BALTIME, GENTIME and NYPE forms does SHELLTIME operate with a guaranteed *average speed*. The speed is to be calculated on all voyages and from pilot station to pilot station. Apart from periods

¹²² Clause 19 lines 649 to 652.

¹²³ BIMCO, Explanatory notes to GENTIME, at clause 19

¹²⁴ Michelet (1997) at 3.

¹²⁵ Michelet (1997) at 3.

¹²⁶ INTERTANKTIME has a similar layout, see e.g. INTERTANKTIME clause 13.

¹²⁷ Clause 24

when the vessel is off-hire there are only two exceptions, i) when reduced speed is necessary for safety in congested waters or poor visibility and ii) any days when the wind force has exceeded 8 Beaufort for more than 12 hours. If the vessel fails to maintain the average speed there will be a reduction of hire, either calculated at a yearly average¹²⁸ or, if due to for instance breach of orders or neglect on behalf of the master, via the off hire clause.¹²⁹ SHELLTIME 4 operates with specified speeds for when the ship is in ballast and when it is fully laden¹³⁰ and includes detailed rules about how the speed is to be calculated. The performance clause is generally very technical and does not leave much room for adaption to specific situation, but seems to attempt to cover all cases of speed deficit.

The off-hire clause is generally considered to be relatively charter friendly¹³¹. In addition to traditional off hire situations is *breach of orders or neglect of duty* explicitly stated as to give rise to an off hire situation¹³².

The exception clause except the owner from liability for negligence in navigation or management of the vessel¹³³ and incorporates the Hague -Visby rules in regards to cargo damage¹³⁴. The scope of the exception clause is however limited by the off-hire clause.¹³⁵

Regarding complaints about the master, SHELLTIME seems to have a slightly more charter friendly regulation compared to for instance BALTIME and NYPE. It is according to

¹²⁸ Clause 24(b)

¹²⁹ Clause 21 (b)

¹³⁰ Lines 310-311

¹³¹ Michelet (1997) at 336.

¹³² Clause 21. See corresponding clause in INTERTANKTIME clause 5.

¹³³ Clause 27 (a)

¹³⁴ Clause 27 (c) (iii).

¹³⁵ Clause 27 (d)

SHELLTIME clause 14 enough if the complaints are “well founded” for the owner to be obliged to make a change in the appointments.¹³⁶

4.1.5 INTERTANKTIME 80

INTERTANKTIME is a tanker time charter developed by the tanker owner association Intertanko¹³⁷.

It resembles the SHELLTIME 4 to a great extent, most notably it contains an “average speed” performance clause similarly to SHELLTIME, with the difference that the wind force limit in INTERTANKTIME is set to 7 Beaufort for 6 hours, and that all voyages less than 12 hours are excluded.¹³⁸

4.1.6 BP TIME 3

BP TIME 3 is BP Shipping’s¹³⁹ Time charter party, but it is developed in association with BIMCO. BP TIME 3 is relatively new, first published in 2001, and it was intended to be innovative and bring something different from the charter parties traditionally used in the tanker segment¹⁴⁰. It is further intended to be a truly balanced charter party, and it has, as explained in the explanatory notes “been negotiated and developed between two main players in the shipping industry, one being the world’s second largest oil company and the other being the world’s largest shipowner’s association”. Given this approach of innova-

¹³⁶ See corresponding clauses in SUPPLYTIME 89 clause 6c, WINDTIME clause 9b, INTERTANKTIME clause 12 and BP TIME 3 clause 10.4.

¹³⁷ International Association of Independent Tanker Owners

¹³⁸ Clause 23. There is another exception for the situation when the vessel has lain in port for more than 30 days during a 60 day period, but that has to do with the need for cleaning and re painting due to fouling of the bottom and will hardly affect any navigational decisions.

¹³⁹ BP Shipping is a subsidiary to British Petroleum. As of end 2015 BP Shipping had 109 tankers on time charter. See BP Shipping, *Our fleet*.

¹⁴⁰ BIMCO, Explanatory notes to BP TIME 3, in the introduction.

tion it is without doubt interesting to investigate how BP TIME 3 addresses the demarcation between navigation and employment.

The “Master clause” in BP TIME 3 is in its essential part materially identical to what we find in the charter parties described above.¹⁴¹ However, BP TIME emphasises the master’s obligation to operate the vessel according to good seamanship, and makes a reference to the safety rules laid down in ISGOTT¹⁴². Further, it contains a contractual obligation to adhere to regulations and recommendations as to traffic separation and routing issued by the flag state, state where the management is exercised or, issued by “responsible organisations or regulatory authorities”.

The performance clause in BP TIME 3 operates with an obligation to perform all voyages with the indicated service speed¹⁴³, together with a warranty that the vessel will be capable of said speed throughout the charter period¹⁴⁴. The warranty applies up to and including a wind force of 5 Beaufort. A failure to maintain the indicated speed does of course lead to a deduction of hire; however, in contrast to the tanker charter parties discussed above the charterers’ compensation is based on loss of capability, and not on the vessels average performance over time.¹⁴⁵

In general BP TIME 3 clause 18 is far less detailed and technical compared to the tanker time charter parties previously discussed. To write the performance clause in a less detailed manner and focus rather on the underlying principles is apparently a result of a conscious

¹⁴¹ Clause 10.1

¹⁴² International Safety Guide for Oil Tankers and Terminals

¹⁴³ Clause 18.1

¹⁴⁴ Clause 18.4

¹⁴⁵ Clause 18.2 last sentence and BIMCO, Explanatory notes to BP TIME 3 clause 18

decision, based on the conclusion that the more detailed and exhaustive approach in for instance SHELL TIME 4 does not lead to fewer disputes.¹⁴⁶

4.1.7 SUPPLYTIME 2005 and SUPPLYTIME 89

The SUPPLYTIME is BIMCO's standard time charter for offshore service vessels. The right of disposal, or "master clause" is found in clause 7 (d) in the 2005 version, which is identical to clause 6 (d) in the 89 version. SUPPLYTIME's master clause does however contrast starkly to all described above, in that it puts a much larger emphasis on the master's operational/navigational responsibility:

"The entire operation, navigation, and management of the Vessel shall be in the exclusive control and command of the Owners, their Master, Officers and Crew. The Vessel will be operated and the services hereunder will be rendered as requested by the Charterers, subject always to the exclusive right of the Owners or the Master of the Vessel to determine whether operation of the Vessel may be safely undertaken. In the performance of the Charter Party, the Owners are deemed to be an independent contractor, the Charterers being concerned only with the results of the services performed"¹⁴⁷

It should be especially noted that the master and owner are given an *exclusive* right to determine whether an ordered operation can be safely undertaken, and that the charterers shall be concerned only with the result of the provided services. Thus, under SUPPLYTIME, the charterers will have no right to order the master how to perform the voyages or other tasks.

Performance and speed is regulated in clause 3 by reference to ANNEX "A". There is a stated service and maximum speed, however subject to "good weather". SUPPLYTIME

¹⁴⁶BIMCO, Explanatory notes to BP TIME 3 clause 18

¹⁴⁷ See corresponding clause in WINDTIME clause 8 (d)

does not use any” average speed” warranties or similar, but simply states a maximum and service speed and corresponding bunker consumptions.¹⁴⁸

4.1.8 WINDTIME

WINDTIME was developed by BIMCO with a start in 2010. The aim was to cater for the off shore wind industry, who until then had relied upon amended standard forms written for the oil and gas sector. The scope of WINDTIME is limited to covering vessels used for transports to and from offshore wind farm installations.¹⁴⁹ WINDTIME is to a large extent based on SUPPLYTIME¹⁵⁰, and also shows great similarity, even with regard to the “master clause” which is identical to that in SUPPLYTIME.

The one difference regarding the masters authority is that in WINDTIME the master is also given a right to refuse to carry any person places on board by the charterer, if he/she is dissatisfied with their conduct¹⁵¹. The master’s right in this aspect is motivated by safety reasons, since inappropriate behaviour could very easily compromise the safety of the vessel.¹⁵²

5 Development in time

5.1 The “Master clause”

In some of the charter parties discussed above it has been possible to study revisions and amendments over time, i.e. the NYPE forms and the SUPPLYTIME and, to some extent,

¹⁴⁸ A corresponding solution is used in WINDTIME, ANNEX ”A” 2 and clause 4.

¹⁴⁹ BIMCO explanatory notes to WINDTIME, at 1

¹⁵⁰ BIMCO, explanatory notes to WINDTIME, at 2

¹⁵¹ Clause 9 (a)

¹⁵² BIMCO, explanatory notes to WINDTIME, at 7.

GENTIME.¹⁵³ Notably, it seems clear that the contractual regulation of the general division between navigation and employment seems to have remained unchanged during a very long time in the discussed charter parties. The “master clause” is basically identical in the three different NYPE charter parties, with the only significant difference being that the latest version opens up for slow steaming, something that, firstly, is made subject to the charterers orders and secondly, presumably is driven more by environmental and economic concerns than by for instance the changed situation that increased communication ability has brought about. Regarding SUPPLYTIME the picture is the same, with the “master clause” being identical in the 2005 and 89 versions.¹⁵⁴

5.2 Routing

The obligation to follow routing recommendations from a weather routing service chosen by the charterer¹⁵⁵ is a notable new feature to NYPE 15, which does not appear in previous versions of NYPE.¹⁵⁶ Planning the more specific execution of a voyage taking the present weather conditions into account is doubtlessly within the very core of traditional navigational competence. Subject to for instance the obligation to prosecute the voyages with outmost despatch weather routing would therefore appear to be a matter of navigation. An obligation to adhere to certain weather routing would thus, notwithstanding the masters explicit possibility to refuse to follow the recommended route for reasons of safety of the vessel or its cargo, decrease the array of choices which would otherwise logically be considered to be matters of navigation and thus within the masters authority.

The clause does however appear to be consistent with the decision in *Hill Harmony*. In the *Hill Harmony* Lord Hobhouse says that one cannot conclude that all matters of routing are

¹⁵³ See 4.1.3 above

¹⁵⁴ SUPPLYTIME 2005 clause 7 (d) and SUPPLYTIME 89 Clause 6 (d)

¹⁵⁵ See 4.1.2 above and NYPE 2015 clause 12 (b).

¹⁵⁶ Routing is mentioned in GENTIME, see 4.1.3 above.

matters of navigation but that the master remains responsible for safety of the vessel, her cargo and crew.¹⁵⁷ The charterer is in other words entitled to give routing orders to the master, subject to superseding safety considerations and possible express terms of the charter party.¹⁵⁸

Indeed, also explanatory notes to NYPE 15 makes a reference to the *Hill Harmony*, stating the consistency to be that the master has the right to deviate from the recommended route for reasons of safety, while otherwise being under an obligation to follow the suggested routing.¹⁵⁹

However, in the *Hill Harmony* the case was decided after a thorough analysis of the factual circumstances and it was emphasised that the master did not have any rational justification for what he did.¹⁶⁰ Further, the northern route was the shortest and quickest, and there was no evidence that it was not the usual route. Therefore, it was found that the charterers by ordering the vessel to take the northern route required only what in any event would have been the contractual obligation of the owners.¹⁶¹

Since the decision in *Hill Harmony* was based on the lack of rational justification, and since the judges points out that the result would have been the same notwithstanding the charterers explicit order, it can probably not be concluded from the case that the master, save when excepted for safety reasons, *always* would be under the obligation to follow a routing prescribed by the charterers. The conclusion that not all decisions about routing are matters of navigation is certainly not synonymous to that of all orders with regard to weather routing being outside the scope of navigation, or being matters of employment.

¹⁵⁷ *Hill Harmony* at 160.

¹⁵⁸ Lacey, *The Hill Harmony Case* at 1. See also Scrutton et. al. (2008) at 326.

¹⁵⁹ ASBA, Explanatory notes to NYPE 15 at 14.

¹⁶⁰ *Hill Harmony* at 157.

¹⁶¹ *Hill Harmony* at 158.

It is easy to envisage a situation far from as clear cut as the *Hill Harmony* case, even without discussing safety concerns. The most obvious situation is of course that the specific weather routing service might be wrong, and that another route for that reason could prove to be the quickest and most economical. But also the specific characteristics of the vessel may complicate matters, a heavy laden vessel with strong machinery and a large propeller may for instance not be as hampered by headwinds as the average vessel, and vice versa, and the master might have specific local knowledge about sea state and currents which are not taken into consideration by the weather routers.

Since the master according to clause 12 (b) NYPE 15 always has to follow the prescribed weather routing, subject to safety concerns but notwithstanding other possible navigational considerations, NYPE 15 lays down a more rigid regulation compared to previous versions of NYPE. Although the result, in the light of *Hill Harmony* often would be similar also without clause 12 (b), NYPE 15 leaves the master less leeway to independently judge the nautical practicalities that the vessel encounters.¹⁶²

6 Differences between different areas of shipping

6.1 “master clause”

As shown above, there are only minor variations in the master clause in the dry bulk and tank charter parties. GENTIME and BP TIME 3 are perhaps slightly more specific compared to the others, but neither the explicit right to disregard orders for different safety and environmental reasons in GENTIME, nor the emphasis on good seamanship in BP TIME obviously shifts the balance between navigation and employment.

¹⁶² See further discussion under 5 below.

A key difference can however be observed between the supply charter parties and the others.. As shown above¹⁶³, in SUPPLYTIME and WINDTIME the obligation to adhere to the charterers' orders is made subject to an *exclusive* right of the Owners or the master of the vessel to determine whether the operation can be safely undertaken. Such an exclusive right to determine whether a requested operation can be safely undertaken clearly contrasts with the discussions and conclusions in both *Hakefjord*¹⁶⁴ and *Hill Harmony*. In both cases the owner tried to argue that the decision to follow another route, or to remain in port, was based on safety considerations, but the courts decided that the situation was indeed safe, notwithstanding the master's opposite claim. Since the owners lost the above cases, one must conclude that under NYPE or BALTIME the master does not have an exclusive right to determine whether an operation can be safely undertaken. The master normally has an absolute and more or less exclusive right to refuse to follow orders when the situation is *not* safe, but that is not equivalent to an exclusive right to determine whether the situation is safe or not.

This stronger emphasis on the master's nautical judgement is interesting in connection to the risk environment in which supply vessels operate. They normally operate in connection to oil-platforms or offshore windmill installations, the operations are advanced and great risks are involved. In connection to especially oil platforms, accidents could have disastrous consequences, far greater than what could emanate from the vessel itself. Conceivably those greater risks has created an economic reality around the contract that necessitates a contract that favours safety before performance.

¹⁶³ 4.1.7 and 4.1.8

¹⁶⁴ *Hakefjord* at eg. 452 and 453

6.2 The Performance clause

As shown above¹⁶⁵ the ship owner may accept a certain risk when entering into the chartering agreement. In the *Hill Harmony* that accepted risk concerned the trading area, which was agreed to be world-wide, within Institute Warranty Limits. As Lord Hobhouse explained, it was not open to the owners to say that the ship was not fit to use the shortest route between Vancouver and Japan, since it was within the Institute Warranty Limits.

An undertaking from the owner that the vessel shall maintain a certain speed in certain conditions could have a similar legal effect. The owner must then be said to have accepted the risk connected with keeping the indicated speed in the indicated conditions. If the contract stipulates that the vessel shall keep an average speed of 15 knots in all conditions less than 40 knots of wind¹⁶⁶ then it must be concluded that the owner has accepted the risk connected with proceeding with 15 knots in 39 knots of wind and that it would not be open to the owners, or master, to say that the ship is only fit to proceed with for instance 10 knots in such conditions.

Performance clauses therefore inevitably relates to the question of navigational control in that they, depending on how they are formulated, may limit the array of possible choices which the master would otherwise have for coping with the conditions the vessel encounters.

As we have seen above there are quite a few differences regarding the description of performance. To start with the big picture, we must have a look the difference between the “average speed clauses” and the “capable of” clauses.

¹⁶⁵ See 4. above.

¹⁶⁶ 8 Beauforts equals approximately 40–45 knots of wind speed

6.2.1 The difference between “Capable of” and “Average speed” - clauses

All dry bulk charter parties above, i.e. BALTIME, the different NYPE- forms and GEN-TIME describes the owners obligation in regard to performance in terms of the vessel being “capable of”, in some variations. The wet bulk, or oil tanker charter parties, i.e. SHELLTIME 4, BPTIME 3 and INTERTANKTIME on the other hand predominantly uses some sort of “average speed” construction. The odd one out is BP time which stipulates an average speed, but in which the compensation to the charterer is based on speed capability, and not on actual performance¹⁶⁷. In the supply charter parties service and maximum speeds are simply stated, with corresponding bunker consumptions. Given the lack of explicit average speed obligations or similar the performance regulation in the supply charter parties, they must be deemed to have same effect as the “capable of” clauses in the dry bulk charter parties.

“Average speed” clauses are concerned with the actual achieved speed during each voyage, i.e. not only a capability¹⁶⁸. The obligation to keep the indicated average speed is rather strict; it applies “come hell or high water” as Michelet expresses it.¹⁶⁹ For instance, the average speed clause in SHELLTIME 4¹⁷⁰ is, as we have seen, quite detailed. It stipulates that all voyages during a yearly period are to be taken into account, and that the speed shall be calculated on the basis of the observed distance from pilot station to pilot station. There is in other words no doubt that an average speed clause such as SHELLTIME 4 clause 24 applies to the ships activities and masters decision’s during the duration of the contract. Thus, the reasoning above, that a performance clause may very well affect the scope of the navigational control, applies to average speed clauses such as the one found in SHELLTIME 4 and similar.

¹⁶⁷ BIMCO, Explanatory notes to BP TIME 3, clause 18.

¹⁶⁸ Ihre (2010) at 91.

¹⁶⁹ Michelet (1997) at 40.

¹⁷⁰ SHELLTIME 4 clause 24.

From the outset it appears as if the “capability” applies only when the contract is entered into, or at the start of the charter period, but not during the duration of the contract¹⁷¹. If so, all “capability clauses” would lack relevance for deciding the scope of the navigational control since such control obviously must be executed during the contract time. Thus, only average speed clauses would be relevant for deciding the scope of the navigational control. A brief examination of the case law on the matter does however complicate the picture.

In Scandinavian case law, records of actual performance during the charter period has been taken into account when deciding whether a vessel chartered under a charter party with a “capable of” clause was contractual or not.¹⁷² Michelet seems to explain the relevance of the performance after the point in time when the contract was entered into as mainly a matter of evidence.¹⁷³

Under English law there have been extensive discussions on whether a “capable of” warranty applies only at the date of the charter party, i.e. the date when the contract was entered into, or whether it applies at the date of delivery of the vessel. This was an important question in the *Appolonius*¹⁷⁴. Justice Mocatta held that “It seems to be clear that the whole purpose of the description of the vessel containing a speed warranty is that when the vessel enters on her service, she will be capable of the speed in question,…” He further based his conclusion on commercial considerations, concluding that such considerations require the description to be applicable to the date of delivery.¹⁷⁵ It therefore may seem as if under English law it is the date of delivery that is the latest possible point in time when the rec-

¹⁷¹ Østergaard (2009) at 216. See also Michelet (1997) at 33.

¹⁷² See for instance ND 1949. 312 *Braila* and ND 1952. 299 *Lynæs*

¹⁷³ Michelet at 34.

¹⁷⁴ The *Appolonius* at 61

¹⁷⁵ The *Appolonius* at 64.

orded speed would be of any relevance¹⁷⁶. However, also in the *Appoloniuss* recorded speed during the chartering period, and even after the relevant charter period, was taken as evidence.¹⁷⁷ It seems obvious that one must agree with Justice Mocatta in that it would make no sense if the speed warranty did not apply on the date of delivery¹⁷⁸. It can however also be concluded that under both English and Scandinavian law speed records during the duration of the charter serves, in the absence of some overriding factor, as evidence for what performance the vessel was capable of at the delivery.

While records of the performance under the charter period certainly is of relevance for deeming the appliance to a “capable of” clause under both English and Scandinavian law it is must still clearly be a difference between how “capable of” clauses affect the scope of the nautical control compared to the “average speed” clauses. Whether performance during the contract period is of material significance or merely a matter of evidence would perhaps appear to be of hypothetical interest from the perspective of navigational control. Important for the master when making his decisions would then mainly be whether the recorded speed during the charter period will risk to have contractual consequences or not. But even if performance during the charter period is of interest in order to determine if the vessel corresponds to the performance warranty on the date if delivery, it is just that, proof on the vessels potential capability at that date. Thus, it can, at least in theory, not be of relevance if the speed has been reduced during the charter period purely because the master for one reason or another chooses to reduce the speed.

In practice the difference is mitigated by the general obligation to perform the voyages with utmost despatch. An obligation to perform the voyages with utmost despatch would nor-

¹⁷⁶ Wilson (2008) at 87 writes that the shipowner has not guaranteed the specifications throughout the charter..

¹⁷⁷ The *Appoloniuss* at 58.

¹⁷⁸ That conclusion is accepted in english legal literature,see Scrutton et. al. (2008) at 327 and Wilson (2008) at 87.

mally imply that the vessel shall proceed with the indicated maximum speed¹⁷⁹. The “utmost despatch” obligation is however not a specified, absolute obligation with regard to the indicated speed, but rather an obligation to keep a as high speed as possible, subject to the masters responsibility for the safety of the vessel, crew, cargo etc.¹⁸⁰ Indeed, in the *Pearl C*, Judge Popplewell based the conclusion that the vessel had not proceed with the utmost despatch on the fact that the engines had been run on a lower rpm than maximum¹⁸¹ without the owners being able to explain this slow steaming by any “concerns for the safety of the vessel or for meteorological/oceanographic reasons”.¹⁸² Thus, despite actual performance during the charter period is of relevance also concerning a “capable of” clause, a “capable of” clause undoubtedly leaves some leeway with regards to the master’s discretion concerning safety considerations and other nautical concerns.

It is thus possible to conclude that there is a difference between on one side the tank charter parties, with SHELLTIME 4 as the most obvious example, and on the other side the rest of the charter parties discussed above. The average speed clauses of the tank charter parties does, by placing a strict obligation to keep a certain speed, risk to narrow the scope of the navigational control.

6.2.2 The importance of the wind force limits

SHELLTIME 4 and INTERTANKTIME do, as we have seen, operate with significantly higher wind force limits for when the indicated speed is to be achieved. While the dry bulk charter parties and supply charter parties all stipulates that the vessel shall be capable of the

¹⁷⁹ See *the Pearl C* (2012) at 542

¹⁸⁰ Coghlin et.al. (2014) at 328

¹⁸¹ Apparently 78- 82 rpm instead of the maximum 92 rpm, see the *Pearl C*, at 542

¹⁸² The *Pearl C* at 542

indicated speed in “good weather”, “fair weather” or below 4 Beauforts of wind force, and BP TIME 3 stipulates that the speed shall be kept in wind forces not exceeding 5 Bufofts, SHELLTIME 4 and INTERTANKTIME operates with an obligation the keep the average speed if the wind force does not exceed force 8 or force 7, respectively. In addition, as we have seen the wind must exceed the indicated wind force for a certain period of time¹⁸³ for that period to be excluded from the average speed calculations.

Force 4 and 5 on the Beufort scale only constitutes moderate to fresh breezes. While moderate breezes very seldom would imply any nautical hazards, the picture changes dramatically when we look at wind forces of 7-8 on the Beufort scale. Beufort force 7 means wind speeds of approximately 14-17 m/s, and force 8 means wind speeds of approximately 17-21 m/s¹⁸⁴. Force 8 does in other words constitute a severe gale, something that dependant on other factors¹⁸⁵ very well might put the master in a situation where he/she will have to adapt the original plans to the present conditions in order to preserve safety, for instance reduce speed. The passenger ship *Estonia* which sunk in the Baltic Sea the 28th of September 1994 may serve as an illustration. The wind speed on the time of the accident was 18-20 m/s,¹⁸⁶ and the Swedish, Finnish and Estonian Joint Accident Investigation Commission that investigated the accident concluded that the ferry did not reduce speed when the first signs of weakness in the bows were observable, but that a decisive reduction of speed would have significantly increased the chances of survival.¹⁸⁷

¹⁸³ 12 hours in SHELLTIME 4 and 6 hours in INTERTANKTIME

¹⁸⁴ Met office, *Beufort scale*.

¹⁸⁵ For instance sea state, which is affected not only by wind force but also by geography, depth and sea bed topography, previous wind shifts, current, etc. See *Chefen för marinen* (1986) at 316ff. and *Jensen* (1924) at 329f.

¹⁸⁶ Den gemensamma haverikommissionen (1998), *Slutrapport*, at 223.

¹⁸⁷ Den gemensamma haverikommissionen (1998), *Slutrapport*, at 225.

6.2.3 Conclusion

The combination of a rather strict regulation on average speed and a wind force limit which is set high enough to include weather which under certain circumstances clearly would demand the master to disregard the average speed obligations in the charter party in order to observe his/her general nautical responsibility, clearly curtails the scope of the navigational control. This is done by the owner contractually accepting¹⁸⁸ the risk of not being able to proceed with the indicated speed in wind forces of, for instance, 8 beauforts, thus leaving no room for arguments that it for nautical reasons in a specific situation in fact was not safe to proceed without slowing down¹⁸⁹. Since beaufort force 8 very well may, as seen in the *Estonia* example above, lead to dangerous conditions, a conceivable result of strict performance clauses is that the master has no option but to disregard the obligations laid down in the charter party, while the ship owner has to carry the economic consequences of the master's decision.

A regulation that places the economic risk of the master's safety motivated navigational decisions on the ship owner appears rather charterer friendly. That such a regulation is found in SHELLTIME 4, which is developed unanimously by a charterer with presumably very high bargaining power, is perhaps not hard to understand¹⁹⁰. Why INTERTANK-TIME, developed by a ship owner association, has chosen a similar, although to the ship owner slightly more lenient, approach is less obvious. Perhaps the explanation simply is that the tanker industry generally appears to be harsher on the ship owner, and that INTERTANKO's contract must relate to industry standards at large.

¹⁸⁸ See 4 above.

¹⁸⁹ See 6.2 above.

¹⁹⁰ See 4.1.4 above.

6.3 General

With their strict performance clauses and slightly stricter regulations regarding replacement of the master, off hire and exceptions the tanker charter parties seems to generally put most constraints on the master's navigational authority. Notably, some recent development, exemplified with BP TIME 3 provides a different picture. The other side of the spectrum is interestingly also found in the oil industry, within the high risk environment of the supply vessels. Possibly, an increased general focus on environmental hazards and thus, in a broad sense, increased economic risk in the tanker business will lead to less strict performance clauses, like the one seen in BP TIME 3, generally in the tanker segment.

7 A matter of construction of contract?

As mentioned above, the owner is generally not liable for losses that result from error in the navigation or management of the ship.¹⁹¹

Consequently, the owners have for a long time, and in numerous cases argued that the decisions of the master were indeed matters of navigation and that the owners therefore were not liable, notwithstanding whether the master was in any way at fault or not.

An early example is the *Renée Hyafill* from 1915. The vessel *Renée Hyafill* was en route from the Mediterranean to London with fruit, but the master did not dare to cross the Biscay in typical winter conditions, and remained in A Coruña for 23 days. The owners tried to rely on the navigational fault exemption. Lord Justice Swinfen concluded that the delay “had nothing to do with the navigation or management of the ship as such”¹⁹²

In the *Hill Harmony* the court of appeal concluded that as long as the master acted in good faith it did not matter whether he acted reasonably, as long as the reasons for his decisions

¹⁹¹ 3.2 above.

¹⁹² *The Renée Hyafill* (1915) at 660.

were the safety of the vessel the owners were protected by the navigational fault exception.¹⁹³

In the House of Lords, Lord Hobhouse does not accept the arguments by the court of appeal but says that the breach of contract concerned both the obligation to adhere to the charterers orders regarding employment and the obligation to perform the voyage with the utmost despatch, and that: “as a matter of construction, the exception does not apply to the choice not to perform these obligations.”

Lord Hobhouse made a reference to the old *Knutsford v. Tillmanns* case, from 1908, which concerned interpretation of a bill of lading. The vessel was held up by ice 40 miles from Vladivostok. She tried for three days to get through the ice but after that the master decided to unload in Nagasaki instead. The owners relied on a term in the bill of lading that if a port should be ice blocked or if the master deemed the port unsafe, then the master had the right to discharge the cargo at another port. It was, however, concluded that “unsafe” was not to be construed as to mean unsafe at the moment, but unsafe for a longer period that would involve unusual delay.¹⁹⁴ It was held by the judges in the case that this was simply a matter of the master breaking the contract, and that it would be “fantastic” to extend the idea of navigational fault to a master who forms the wrong legal opinion of a clause in the bill of lading and then acts in accordance with that idea.¹⁹⁵

In the *Pearl C* it was considered proven that the vessel had been slow steaming deliberately. The owners tried to defend themselves firstly by stating that the performance warranty only applied at the time of delivery, and secondly by contending that navigational fault defence anyways would protect the owners from any liability.¹⁹⁶ Regarding the second ar-

¹⁹³ *Hill Harmony* at 154.

¹⁹⁴ Coghlin et.al.(2014) at 200.

¹⁹⁵ See *Hill Harmony* at 160.

¹⁹⁶ *The Pearl C* at 534.

gument Justice Popplewell referred to the above referred analysis conducted by Lord Hobhouse in the *Hill Harmony* and concluded that there is a dichotomy between a deliberate decision not to proceed with the utmost despatch and negligent errors regarding matters of seamanship.¹⁹⁷ He concludes that the navigational fault exception applies to the latter but not to deliberate decisions not to adhere to the contractual duties.¹⁹⁸

It can thus be concluded that the master cannot rely on the navigational fault exception if he or she has, as a matter of fact, misinterpreted the contractual duties. Thus, if the master negligently concludes that a certain order from the charterers is an order as to the navigation of the vessel, but it is later on considered to be an order as to the employment vessel, the navigational fault exception does not apply. The owners will only be able to rely on the navigational fault exception if the master correctly understood the contractual duties, but failed to adhere to them due to lack of seamanship, as opposed to if the master failed to understand what the contractual duty actually was. In other words, this must be understood as that if the master of the *Hill Harmony* had ended up way more south than expected purely due to inaccurate navigation, although he actually tried to follow the great circle, then the exception for navigational fault would be applicable.

The situation when a master is ordered to enter what he or she believes is an ice threatened or generally unsafe port is a situation with many similarities to when the vessel is ordered to take a certain route or to keep a high speed. Also here is the master clinched between the responsibility for the safety of the vessel and the responsibility to perform according to the contract and the orders given. The master will always have the opportunity to refuse to follow the orders, but would then have to himself determine his chances to succeed in a possi-

¹⁹⁷ *The Pearl C* at 544.

¹⁹⁸ In a London Arbitration 30 march 15 (5/15) at 5 it was concluded that the master had done his best to follow the charterers orders and to proceed with despatch but was prevented not by his own decisions but by circumstances beyond his control. Thus no breach of the obligation to follow orders or to proceed with utmost despatch was found.

ble subsequent arbitration on the matter.¹⁹⁹ Decisive regarding whether there is a breach of contract or not is according to Michelet whether the refusal would be deemed justifiable taking into account the risk that the vessel would be exposed to if it proceeded.²⁰⁰

7.1 Rational justification

Since the masters subjective opinion on whether a decision is a decision as to the navigation of the ship does not seem to be enough, but the master has to actively construe the contract in order to determine whether his or her decisions will risk to cause the owner liable for possible losses, it is vital to identify the basis for the master's contractual rights.

As we have seen above the general contractual regulation regarding the division between navigation and employment is often rather scarce, with the "master clause" in all discussed charter parties above except the supply charter parties simply stating that the master has an obligation to adhere to orders as to the employment, or similar, and an obligation to perform voyages with the utmost despatch.²⁰¹ Save for when specific situations are regulated in detail, as the speed in SHELLTIME 4²⁰², it is therefore highly interesting to determine on what basis the contract is to be construed.

As discussed above²⁰³ the basic concept is that matters normally falling within the nautical expertise of a master mariner are matters of navigation. That encompasses matters of what would typically be considered as matters of seamanship.²⁰⁴ There are, of course, cases where the discussion has been more plainly about what seamanship actually is, and on the basis of that determining what constitutes navigation, or what typically constitutes em-

¹⁹⁹ Michelet (1997) at 87.

²⁰⁰ Michelet (1997) at 87.

²⁰¹ See for instance Baltime 1939(as revised 2001) clause 9.

²⁰² SHELLTIME 4, clause 24. See also INTERTANKTIME 80 clause 23.

²⁰³ 2.2

²⁰⁴ Coughlin et. al. (2014) at 343 and *The Hill Harmony* at 159.

ployment.²⁰⁵ That was the case in the *Erechthion*,²⁰⁶ where it was decided that orders to proceed to a specific anchorage were orders as to employment, but exactly where to anchor, and how to manoeuvre in the anchorage, were matters of navigation.²⁰⁷ However, for the sake of thesis the interesting situation is that when the master claims to have acted in the interest of the safety of the vessel, and thereby disobeying an order or contractual duty that devoid of that safety concern would have been considered to be within the scope of employment.

In *Hill Harmony*²⁰⁸ it is emphasised that the master lacked a rational justification for his choice to proceed on the rhumb line. In the 15/05 London arbitration it was decided that the master, when deciding not to follow weather routing advice but to lay the course further south “quite simply ... unreasonably made the wrong choice and thus ignored his responsibility ...”²⁰⁹ In the *Pearl C* it is concluded that in order to decide a claim for proceeding too slowly it is necessary to apply a test of whether there had been an “unjustifiable decision not to proceed as fast as possible”.²¹⁰ That test is said to be determined by whether the vessel proceeded as fast as it was capable on the particular voyage.²¹¹ Given that the arbitrators found that there was no notes in the logbook that indicated that the vessel had to be slowed down due to stress of weather etcetera or any technical issues, a finding that is ref-

²⁰⁵ See e.g. *The Silver constellation* (2008) at 455; orders to complete a certain vetting scheme are orders as to employment, *The Ocean Victory* (2013) para 177 and *The Ramon de Larrinaga* (1945); the decision when to leave a port is a matter of navigation, *The khannur* (2010) at 629; proceed to or remain in a certain port are orders as to employment.

²⁰⁶ The important part in the *Erechthion* was a question about causation, but the case serves well as an illustration.

²⁰⁷ *The Erechthion* (1987) at 185.

²⁰⁸ *Hill Harmony* at 148 and 158.

²⁰⁹ London Arbitration 15/05 (20 July 05).

²¹⁰ *The Pearl C* at 543

²¹¹ *The Pearl C* at 543

erenced by Justice Popplewell in connection to his reasoning about the “test”²¹² it seems clear that to determine how fast a vessel was capable of proceeding on a particular voyage one must take typical navigational matters into account.²¹³

In Scandinavian law the argumentation has primarily concerned the reasonableness of the masters concerns. That was clearly the line of reasoning in *Hakeford*, as referred above.²¹⁴ As seen in Michelet’s example above²¹⁵ regarding refusal to enter ice or unsafe ports, determinative in such cases would be whether the master’s decision would be considered reasonable.

It thus seems like if in borderline cases it is some sort of nautical rationality²¹⁶, to some extent based on the degree of danger or risk, that tends to be determinative when deciding whether the master/owners have breached the contract or not. It is therefore interesting to discuss how that rationality is deemed, or what degree of danger it takes for it not to be considered a breach of contract²¹⁷ when the master does not adhere to the charterer’s orders, or decides to slow down.

7.2 What constitutes a rational justification?

7.2.1 Concrete circumstances

Firstly, it can be concluded that the starting point is an objective analysis of the concrete factual circumstances that faced the master when making the decision. In the *Pearl C* the

²¹² *The pearl C* at 542

²¹³ See also *Ease faith Ltd.* (2006) at. 693 where utmost despatch was defined as requiring the vessel to proceed as fast normal navigation permitted qualified with what is reasonable.

²¹⁴ 2.2

²¹⁵ 7.

²¹⁶ As to navigational rationality, see Scrutton et. al. (2008) at 326.

²¹⁷ Or for the possible losses to be covered by the navigational exception clause, see eg. *Hill Harmony* at 154 and 160.

main point is that there appears to be no nautical reason whatsoever. Rather, the arbitrators list what appears to be all different kind of nautical reasons they can think of, and concludes that there was no sign in the logs or elsewhere that any such reasons had appeared²¹⁸²¹⁹. In *The Hill Harmony* it was taken into account that during the relevant period some 360 other ships had used the northern, great circle, route²²⁰, that the northern route was recommended by ocean routes²²¹ and that the evidence of the recommendations of Ocean Routes was uncontradicted.²²² A similar reasoning is provided in the London Arbitration 15/5²²³. The reasoning in the Norwegian case *Hakefjord* is perhaps even clearer. There arbitrators analyse each contested voyage separately, taking weather forecasts and recordings into account. It is further stated that when a ship owner invoke weather concerns they have to provide weather forecasts or recordings that would provide a somewhat reasonable ground for the decision.²²⁴ Thus, in order to justify the master's safety motivated decisions it seems like if the owners must provide some sort of objective evidence backing the masters concerns.

7.2.2 Bonus pater familias?

If the starting point is that there must be some real facts supporting the master's position, the reality which faces the master at sea will often demand that decisions are made based

²¹⁸ *The Pearl C* at 542.

²¹⁹ See also *Suzuki v. Benyon* (1926), where the cause of the slow steaming was concluded to be "general slackness" as opposed to some real navigational concerns.

²²⁰ *Hill Harmony* at 148.

²²¹ A ship routing company.

²²² *Hill Harmony* at 160.

²²³ London Arbitration 15/05 (20 July 05). It was taken into account that two other vessels had used the northern route at the same time without sustaining damage. One vessel that had been only 19 nautical miles away when the master turned south had continued north and thereby saved time. Further, weather reports and forecasts were thoroughly investigated.

²²⁴ *Hakefjord* at 448.

on far from comprehensive information. The question is then how large discretion the master is allowed when refusing to follow the charterer's orders. The *Houda*, concerned a case where the charterer's office had moved from Kuwait to London due to the invasion of Kuwait by Iraq. The owners and the master were apprehensive regarding the legal authority of the charterers new London office and would thus not follow the orders from there immediately. *The Houda* case does without doubt concern a quite specific situation. It does however seem like if Lord Justice Niell attempts to formulate a general rule for when the master may refuse to follow orders when he formulates the test to be: "how would a man of reasonable prudence have acted in these circumstances". That formula could probably serve as good starting point, but needs to be qualified.

First of all, it seems obvious that when discussing typically nautical decisions such as how the vessel will cope with possible adverse weather, the "man of reasonable prudence" must be read to mean a master of reasonable prudence, taking into account all the specialist knowledge that a master must be assumed to have.

Secondly, there are good reasons to allow the master a great level of discretion when making decisions that aims to preserve the safety of the vessel. It is, after all, the master who must be assumed to be best suited to analyse the effect that, for instance, weather conditions would have on the vessel since he or she is on-board when the conditions strikes. At least in Scandinavian law, the masters need for discretion is often emphasised.²²⁵

Another aspect, that has been discussed in a couple of old English cases from the time of the Franco- Prussian wars²²⁶, is that the master must be allowed to act on the, often limited, information that is available to him or her, and that the reasonableness is to be deemed on the basis of that information. The cases were referred in *The Houda*²²⁷, where the point

²²⁵ Michelet (1997) at 87. See also *Hakefjord* at 447.

²²⁶ *The Teutonia* (1872) and *the San Roman* (1873)

²²⁷ *The Houda* (1994) at 547.

was put forth that in the *Teutonia* the master had acted on, if not correct, although *credible* information²²⁸ and that in the light of credible information that the ship will be exposed to peril, the master must be able to take reasonable steps to avoid the danger.

The information may be correct, but of a nature that makes it uncertain whether the risk will materialise or not. That was the situation in the *Triton Lark*. The charterers instructed the vessel to proceed via the Suez and Gulf of Aden. The vessel proceeded via Cape of Good Hope due to risk of piracy. It was chartered on a NYPE form including BIMCO's CONWARTIME clause which stated that the vessel was not to be ordered to any place in which in the reasonable judgement of the master and/or owners the vessel may be, or is likely to be exposed to war risks.²²⁹ Justice Teare concluded that it was material that the likelihood was "real" in the sense that it was based on evidence rather than speculation, but that it was not required that the event was more likely to happen than not.²³⁰

Although the reasoning in the *Triton Lark* predominantly concerned the words "likely to be" in the CONWARTIME clause, the reasoning seems to correspond with the cases referred above, and could serve as an illustration of the considerations that must be taken when considering whether a masters decision was rational.

In summary, it can be concluded that the danger that must be present in order to bring a situation that would otherwise have been deemed to be a matter of employment within the navigational field does not always have to be objectively established. It must however be grave enough for it to be rational and reasonable to act upon it, it must be based on facts as opposed to assumptions but the master must be allowed to act upon the information that is

²²⁸ He had been informed by a pilot in Dunkerque that there was a war between Germany and France. He therefore changed course and proceeded to Dover instead. In fact, war was not declared until 3 days later. See Cooke et. al. (2014) at 12.12

²²⁹ *The Triton Lark* (2012) at 151.

²³⁰ *The Triton Lark* at 158.

available to him or her. Further, the master must be allowed a certain degree of discretion when it comes to assessing the information.

The definition above is far from clear, and it would probably be quite hard for a master to on beforehand decide whether his or her refusal to follow orders would be accepted or not. On the other hand there are some clear requirements. It is clearly not enough that the master claims that the decisions were motivated by concerns for the safety of the vessel²³¹, and the motivation must be backed by objective facts.

8 Summary and conclusion

The discretion that the master is allowed under a time charter party when it comes to nautical decisions clearly varies under different charter parties. In the traditional bulk charter parties the scope of the navigational control appears to still be to a large extent undefined, and must be determined by analysing the reasonableness of the master's decisions in each specific case. Recent case law seems to provide no generally applicable answer as to exactly where the line between employment and navigation is to be drawn.²³² Thus, notwithstanding that, as presented above²³³, some general guidelines can be defined, the master will often find herself in uncertainty with regard to his actions effects within the owner's and charterer's contractual relationship.

Although the "master clause" is materially identical in most charter parties there are, in practice, some quite radical specifications to be found in the specific charter parties. The most obvious example is the average speed clauses, which effectively limits the scope of

²³¹ As illustrated by the judgement in *Hill Harmony* and arbitration award in *Hakefjord*.

²³² See Coghlin et. al (2014) at 343 where its stated that the facts of *Hill Harmony* are to extreme to provide a general answer.

²³³ 7.2.2.

the navigational control²³⁴. The existence of such strict performance clauses leads to the conclusion that the rule about navigational control is merely a theoretical starting point, and that one, in order to get a proper picture of the actual scope of the master's navigational control must adopt a broad view, taking the entire contract into account.

Clauses which might have similar effect are the weather routing clauses. Although the weather routing clause in NYPE 15²³⁵ is made subject to safety considerations it stipulates that as starting point assessments regarding the weather, which is something that would appear to be within the very core of traditional seamanship, are not within the contractual scope of navigation. Thus, even if the master may refuse for reasons of safety, such a weather routing clause appears to firmly place the risk of that weather assessment being wrong on the master and owner²³⁶.

There are, however, also opposite examples. As seen above, in the supply charter parties examined the very assessment of whether an operation may be safely undertaken is made an *exclusive* right of the owner and master to carry out²³⁷. With such a clause a discussion about the rationality of the masters decisions would be as irrelevant as it would be under the average speed clause in SHELLTIME 4, this time, however, to the master's and owner's advantage.

9 Final remarks

As we have seen, the master will often be in a situation when it is far from clear what the contractual effects of his or her actions will be. Rather the decisions will often be judged on a not very well defined scale of reasonableness and the master will have to, in order to

²³⁴ See 6.2 above.

²³⁵ See 4.1.2 and 5.2. above.

²³⁶ See London Arbitration 15/05 (20 July 05), where a weather routing clause was included.

²³⁷ 6.1 above.

fulfil the contractual obligations and not cause economic losses for the owners, try to construe the contract in the light of the nautical conditions that the vessel faces.

Modern charter parties seem to a certain degree clarify the masters position. If the master commands a ship that operates under one of the supply charter parties analysed above the master can feel rather secure that his or her decisions will be unchallenged afterwards. As concluded above, an obligation to follow weather routing advice or an obligation to keep a certain average speed also relieves the master from much of the burden to assess whether his or her decisions will be deemed reasonable or justifiable. The contractual obligation is put rather clear.

Thus, stricter regulation such as the performance clause in SHELLTIME 4 certainly has some advantages with regard to foreseeability and clarity. Questions of navigational concerns about safety at sea, weather conditions etc. becomes a matter of clear contractual risk allocation. Such a regulation does to some degree simplify for the master, who is probably rarely qualified to perform the more advanced legal assessments that are the results of a more traditional charter party. Perhaps this is the explanation for why INTERTANKTIME contains a rather detailed performance clause.

The master will however remain responsible for the safety of the vessel, her crew and cargo, and the responsibilities under the penal law will of course remain unaltered by the contract entered into by the charterer and owner. Further, and perhaps more important, the weather conditions or other surrounding factors effect on the safety of the vessel will of course not be altered by a contractual obligation which places the risk for not being able to maintain a certain average speed in 8 beauforts of wind, or to follow a certain route on the ship owner. Indeed, in Swedish clubs latest report concerning heavy weather damage the top three preventive measures recommended for avoiding damage are weather routing to avoid adverse weather and decreasing speed and adjusting course to ease the vessels mo-

tion when being in adverse weather.²³⁸ It does not appear farfetched to assume that a regulation that allocates the risk for matters that under other areas of legislation without doubt is the master's responsibility on the ship owner puts the master under a certain press. Simply put, a master that frequently makes decisions that makes the ship owner lose money is probably not fostering his or her career in a very effective way. That impression is further enhanced by the owners' obligation to, in slightly various degrees in the different charter parties, replace a master that the charterer is dissatisfied with. Thus, a master that refuses orders that the charterer is entitled to give risks to pay a high personal price for her convictions.

The strict risk allocation in certain charter parties does in other words risk creating a situation where the safety sea to a considerably large extent depends on the integrity of the master.

However, also the development from *Hill Harmony* and onwards seems to be inclined towards a reasoning about contractual risk allocation²³⁹. Even though the situation is not as clear as under the performance clause examples above, the masters will have to carefully consider the legal consequences of implementing their professional judgement on safety, seldom being able to rely on that their judgement will be respected in court.

Thus, also regarding more traditional charter parties the safety at sea will, in the light of recent legal development, depend on the master's integrity.²⁴⁰

²³⁸ Swedish club (2014) at 17.

²³⁹ See 4 above.

²⁴⁰ Captain Philip Anderson did, in *Maritime Risk International* 01 Jun 0,1 say that many masters would interpret the *Hill Harmony* as putting them in an "almost no win situation" and requested the help from the legal profession to "create an environment where masters and seafarers can feel comfortable and confident that they can report safety problems without fear of being sued or sacked"

Regarding the increased communication possibilities, it is impossible not to make a few reflections. The legal aspect of weather routing and the existence of weather routing clauses appears to be, to a large extent, dependent of modern communication equipment. In the days when weather routing was mainly a question about following the trade winds and glancing at the Admiralty sailing directions, it would not have been very meaningful to contractually regulate matters of routing, and even less suitable to allow the charterer any say on the matter. However, nowadays it is possible to both plan the detailed routing more in detail in advance, and, more importantly, from somewhere else than the bridge of the vessel.

Therefore, although the nautical reality that face the master may have become less obscure in the light of modern communication abilities, the complexity of the contract law surroundings appear to be as complex as ever. Thus, albeit the master's status may have diminished²⁴¹, the need for a master of integrity certainly remains.

²⁴¹ See note 40 above.

10 Table of reference

International Conventions and regulations

The Hague- Visby Rules	The 1924 International Convention for the Unification of certain rules of Law relating to Bills of Lading and its 1968 protocol .
The ISM Code	International Maritime Organization. 1997. <i>International safety management code and guidelines on the implementation of the ISM code.</i> London: International Maritime Organization

Scandinavian legislation

The Norwegian Maritime Code	Lov om sjøfarten (Sjøloven) (LOV-1994-06-24-39)
Swedish Maritime Code	Sjölag (SFS 1994:1009)
Norwegian Penal Code	Lov om straff (Straffeloven) (Lov 2005-05-20-28)
Norw. Civil Penal Code	Almindelig borgerlig Straffelov (Lov 1902-05-22-10)
Ship Safety and Security act	Lov om skipssikkerhet (skipssikkerhetsloven) (Lov 2007-02-16-9)

Travaux Préparatoires

NOU 1993:36	Godsbefordring til sjøs. Utredning XV fra utvalget til revisjon av sjøfartslovgivningen (sjølovskomiteen)
-------------	---

Prop. 1993/94:195

Regeringens proposition om ny sjölag

Charter parties

NYPE 46

ASBA 1946. *New York Produce Exchange Form*

NYPE 93

ASBA 1993. *New York Produce Exchange Form*

NYPE 2015

ASBA 2015. *New York Produce Exchange Form*

BALTIME 1939

BIMCO 2001. *Uniform Time-Charter (as revised 2001)*

GENTIME

BIMCO 1999. *General Time Charter Party*

BP TIME 3

BP Shipping Ltd. 2001. *Time Charter Party*

WINDTIME

BIMCO 2013. *Standard Offshore Wind Farm Personnel Transfer and Support Vessel Charter Party*

SUPPLYTIME 89

BIMCO 1989. *Uniform Time Charter Party for Offshore Service Vessels*

SUPPLYTIME 2005

BIMCO 2005. *Time Charter Party for Offshore Service Vessels.*

INTERTANKTIME 80

INTERTANKO 1980 *Tanker Time Charter Party*

SHELLTIME 4

Shell International Trading and Shipping Company Ltd. 1984 *Time Charter Party*

Cases

United Kingdom

<i>The Teutonia</i>	(1872) L.R. 4 P.C. 171
<i>The San Roman</i>	(1873) L.R. 5 P.C. 301
<i>The Renée Hyafill</i>	(1915) 32 T.L.R 83 (Evans, P.)
<i>Suzuki v. Benynon</i>	<i>Suzuki & Co., Ltd. v. T. Benynon & Co., Ltd.</i> [1926] Ll. L Rep. 49 (H.L.)
<i>The Ramon de Larrinaga</i>	<i>Larrinaga Steamship Company Ltd v. The Crown</i> [1944/45]78 Ll. L Rep. 167 (H.L.)
<i>Anglo-Saxon Petroleum</i>	<i>Anglo-Saxon Petroleum Company Ltd. V. Adamastos Shipping Company, Ltd.</i> [1958]1 Ll.L Rep. 73 (H.L.)
<i>The Appolonius</i>	<i>Cosmos Bulk Transport Inc. V. China National Foreign Trade Transportation Corporation</i> [1978]1 Ll.L Rep. 53 (Q.B.)
<i>The Satya Kailash</i>	<i>Seven Seas Transportation Ltd. v. Pacifico Union Marina Corporation</i> [1982]2 Ll. L Rep. 465 (Q.B.)
<i>The TFL Prosperity</i>	<i>Tor Line A.B. (Renamed Investment A.B. Torman) v. Alltrans Group of Canada Ltd.</i> [1984]1 Ll. L Rep. 123 (H.L.)

<i>The Erechthion</i>	<i>New A Line v. Erechthion Shipping Co. S.A.</i> [1987]2 Ll.L Rep. 180 (Q.B.)
<i>The The Island Archon</i>	<i>Triad Shipping Co. v. Stellar Chartering & Brokerage Inc.</i> [1994]2 Ll. L Rep. 227 (C.A.)
<i>The Houda</i>	<i>Kuwait Petroleum Corporation v. I & D Oil Carriers LTD.</i> [1994]2 Ll.L Rep. 541 (C.A.)
<i>The Hill Harmony</i>	<i>Whistler International Ltd. v. Kawasaki Kisen Kaisha Ltd.</i> [2001]1 Ll. L Rep. 147 (H.L.)
<i>The Kitsa</i>	<i>Action Navigation Inc. v. Bottigliere di Navigazione S.p.A</i> [2005] EWHC 117 (Comm), [2005]1 Ll. L Rep. 432 (Q.B.)
<i>Ease faith Ltd.</i>	<i>Ease faith Ltd. V. Leonis marine management Ltd.</i> [2006] EWHC 232 (Comm), [2006]1 Ll. L Rep. 673 (Q.B.)
<i>The Silver Constellation</i>	<i>Seagate Shipping Ltd, v. Glencore International AG</i> [2008] EWHC 1904 (Comm) [2008]2 Ll. L Rep. 440 (Q.B.)
<i>The Khannur</i>	<i>Gas Natural Aprovevisionamientos SDG SA v. Methane Services Ltd.</i> [2009] EWHC 2298 (Comm), [2010]1 Ll. L Rep 610 (Q.B.)
<i>The Triton Lark</i>	<i>Pacific Basin IHX Ltd. v Bulkhandling Handymax AS.</i> [2011] EWHC 2862 (Comm), [2012]1 Ll. L Rep. 151 (Q.B.)

The Pearl C *Bulk Ship Union SA v. Clipper Bulk Shipping Ltd.* [2012] EWHC 2595 (Comm), [2012]2 Ll.L Rep 533 (Q.B.)

The Ocean Victory *Gard Marine & Energy Ltd v. China National Chartering Co Ltd* [2013] EWHC 2199 (Comm) [2014]1 Ll. L Rep. 59 (Q.B.)

Arbitration Awards

London Arbitration 15/05 Lloyds Maritime Law Newsletter 20 July 05

London Arbitration 5/15 Lloyd's maritime Law Newsletter 30 March 15

Scandinavia

ND 1913.398 (NH)

ND 1949 s. 312 *Braila*

ND 1952 s. 299 *Lynæs*

ND 1952 s. 442 *Hakefjord*

ND 1954 s 749 (NJA 1954 s. 573)

ND 1983 s. 309 *Arica*

Books etc.

Legal Literature

Coghlin et. al. (2014) Coghlin, Terence, Andrew W. Baker, Julian Kenny, John D. Kimball, Thomas H. Belknap, Jr. *Time Charters* (7th ed., Informa Law from Routledge, Abingdon, 2014)

Cooke et. al. (2014) Cooke, Julian, Timothy Young QC, John Kimball, LeRoy Lambert, Andrew Taylor, David Martowski, *Voyage Charters* (4th ed., Informa Law from Routledge, Abingdon, 2014)

- Falkanger (2011) Falkanger, Thor, Hans Jacob Bull, and Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Peerspective* (3rd ed., Universitetsforlaget, Oslo, 2011)
- Ihre (2010) Ihre, Rolf, *Handbok I sjörätt och närliggande ämnen* (2nd ed., Ihre AB, Gustavsberg, 2010)
- Michelet (1997) Michelet, Hans Petter *Håndbok I Tidsbefraktning* (Sjørettsfondet, Oslo, 1997)
- Scrutton et. al. (2008) Scrutton, Thomas Edward, Stewart C Boyd CBE QC, Steven Berry, Andrew S Burrows Q.C. Bernard Eder, David Foxton, *Scrutton on Charterparties and Bills of Lading* (21st ed., Sweet & Maxwell, London, 2008)
- Wilson (2008) Wilson, John F, *Carriage of goods by sea*, (6th ed., Pearson Education, Harlow, 2008)
- Østergaard (2009) Østergaard, Kim, *Søretten i et formuerettsligt perspektiv* (1st ed., Jurist- og Økonomforbundets Forlag, Copenhagen, 2009)
- Nautical literature**
- Chefen för marinen (1986) Chefen för marinen, *Navigation I- Terrester navigation* (1st ed., Chefen för marinen in cooperation with Försvarets läromedelscentral, Stockholm, 1986)
- Jensen (1924) Jensen, Jens Kusk, *Haandbog i praktisk sømandskab* (4th ed., Dansk Sejlskibsrederi-forening, Nivaa, 1924)

Articles

- Falkanger (1997) Falkanger, Thor “Tolkning av sjørettslige standardkontrakt-særlig om betydningen av forarbeider” *Ånd og rett- Festskrift til Birger Stuevold Larssen* (1997): 289
- Selvig (1986) Selvig, Erling “Tolkning etter norsk eller annen skandi-navisk rett av certepartier og andre standardvilkår utformet på engelsk” *Tidsskrift for rettsvitenskap 1* (1986): 1-26
- Unctad (1990) The United Nations Conference on Trade and development secretariat “Charter parties- A comparative analysis” 27 June 1990, found at:
http://unctad.org/en/PublicationsLibrary/c4isl55_en.pdf
- Woll (2012) Woll, Linn Beate “Hvordan Sjørøveri påvirker risikofor-delningen i et tidscerteparti” *MarIus 407* (2012)

Newsletters

- Capt. Philip Anderson (2001) “Judges urged to be more supportive of seafarers for im-proved safety”, Speech in London, presented in *Maritime Risk International* 01 Jun 01
- Charlotte Lacey (2001) ”The Hill Harmony Case” *The Swedish Club Letter* 1 -2001

Found at:

<http://www.swedishclub.com/upload/12/Extract%20from%20TSCL%202001-1.pdf>

Explanatory notes and charter party commentaries.

BIMCO, Explanatory
notes to BP TIME 3

BIMCO, *BIMCO Bulletin No. 1, 2002*, Found at:
<https://www.bimco.org/Contracts-and-clauses/BIMCO-Contracts/BPTIME3>

ASBA, Explanatory
notes to NYPE 15

ASBA,
Found at: <https://www.bimco.org/Contracts-and-clauses/BIMCO-Contracts/NYPE-2015>

BIMCO, Explanatory
notes to WINDTIME

BIMCO,
Found at: <https://www.bimco.org/Contracts-and-clauses/BIMCO-Contracts/WINDTIME>

BIMCO, Explanatory
notes to GENTIME

BIMCO *BIMCO BULLETIN No. 5 1999*, Found at:
<https://www.bimco.org/Contracts-and-clauses/BIMCO-Contracts/GENTIME>

Miscellaneous

- Den gemensamma Haverikommissionen, *Slutrapport*, (1998)
- Den för Estland, Finland och Sverige gemensamma Haverikommissionen för M/S Estonia “Slutrapport Ro-ro passagerarfärjan MS Estonias förlisning i östersjön den 28 september 1994, Svensk översättning” Helsingfors, 1998, found at:
http://www.havkom.se/assets/default/Estonia_JAICrapport_Sv.pdf
- Swedish Club (2014) “Heavy weather”, 30 June 2014, found at:
<http://www.swedishclub.com/media/publications/loss-prevention-and-brochures/>
- The Standard Club (2016) “International Navigating Limits”, February 2016, found at:
<http://www.standard-club.com/media/1984187/loss-prevention-international-navigating-limits.pdf>

Web pages

- Met office, *Beaufort scale* Met office “The Beaufort wind force scale”, Found at
<http://www.metoffice.gov.uk/guide/weather/marine/beaufort-scale>, (retrieved on 20-10-2016)
- BIMCO; *about BIMCO*. BIMCO ”About us” , Found at:
<https://www.bimco.org/About-us-and-our-members/About-us>
(retrieved on 1-10-2016)
- BP Shipping, *Our fleet* BP Shipping ”our fleet”, Found at:
<http://www.bp.com/en/global/bp-shipping/our-fleet.html>,
(retrieved on 29-09-2016)

All web site addresses accessed and active on 19-11-2016. N.B: The BIMCO web site is currently being restructured and material may temporarily be unavailable or may have been moved within the structure of the web-site. In order to access some of the material (free) registration is required.