C.M.I.

COMITE MARITIME INTERNATIONAL

SEMINAR ON
BAREBOAT CHARTERPARTIES

REPORT

KNOKKE-ZOUTE

APRIL 1989

SEMINAR ON BAREBOAT CHARTERPARTIES

INDEX

SPEAKERS

Professor F. BERLINGIERI (President, C.M.I.)

Mr. W. BIRCH REYNARDSON (Rapporteur)

Mr. J. ALCANTARA

Mrs. V. POLIC CURCIC

Dr. P. EHLERMANN

Professor T. FALKANGER

Mr. R. HEWARD

Mr. J. KIMBALL

Dr. B. KROGER

Professor J. RAMBERG

Professor W. TETLEY

Mr. M. WILFORD

SECRETARIAT

Mr. G.E. BOUTON

Miss J. CHALLENOR (Seminar Secretary)

Mrs. P. LAWRENCE

Mrs. A. PHILIPPART

Miss H. SCHRYNEMAKERS

C.M.I. SEMINAR KNOKKE 5/6 APRIL 1989

LIST OF ATTENDANCES AND ADDRESSES

ALLEN M.L.
c/o William A. Crump & Son
42 Dolben Street,
London SE1
United Kingdom

ALLESTAM Mats
Brax Shipping AB
Skeppsbron 5
S-411 21 Gothenburg
Sweden

BEARE Stuart
c/o Richards Butler
61 St. Mary Axe
London EC3A 8AA
United Kingdom

BERLINGIERI Giorgio
10 Via Roma
I-16121 Genova
Italy

BIRCH REYNARDSON T.H.
c/o Holman Fenwick & Willan
Marlow House
Lloyd's Avenue
London EC3
United Kingdom

BOMAN Lars
c/o Morssing & Nycander
PO Box 3299
S-103 66 Stockholm
Sweden

BOWTLE Graeme
c/o Richards Butler
5 Clifton Street
London EC2A 4DQ
United Kingdom

BUREAU Xavier
c/o Rembauville-Nicolle et Bureau
161 Bd Haussmann
Paris 8e
France

CALMON FILHO Pedro
c/o Calmon Filho & Associados
Av Franklin Roosevelt 194/801
Rio de Janeiro R.J. CEP 20021
Brazil

CHIRCO Mauro
Via D. Chiossone 7/20
Genoa
Italy

COVA ARRIA Luis
Edificio Karam-Piso - Oficina 713
Av. Urdaneta Ibarras A Pelota
Apartado 1200
Caracas 1010
Venezuela

DANIELS Thomas
c/o Peter Dohle Schiffahrts-KG (GmbH & Co.)
Palmaille 33
2000 Hamburg 50
D.B.R.

DELWAIDE Leo
Markgravestraat 9
2000 Antwerpen
Belgium

DE BRUYNE Hans
c/o Henrijean NV
Rue de la Science, 43
1040 Bruxelles
Belgium

DE LA RUE Collin
c/o Ince & Co.
Knollys House
11 Byward Street
London EC3R 5EN

Mrs DROBNIG Isa
c/o Hasche-Albrecht-Fisher
Valentinskamp 88
2000 Hamburg 36
B.D.R.

DUFFY R.M.L.
International Chamber of Shipping
30 St. Mary Axe
London EC3 8ET
United Kingdom

FLETCHER G.J.
c/o Langlois & Co.
Frankrijklei 115
2000 Antwerp
Belgium

FOGH Peter
c/o Gorrissen & Partners
37, Amaliegade
DK-1256 Copenhagen K.
Denmark

Mrs FU HUEIZHONG
c/o China Maritime Law Association
1, Fuxingmen Wai Street
Beijing
China

GAO ZHUNLAI
c/o China Maritime Law Association
1, Fuxingmen Wai Street
Beijing
China

GODIN Philippe
3, avenue Elisee Reclus
75007 Paris
France

GOMBRII Karl J.
P.O.B. 3033 El. 0207
Oslo 2
Norway

GREGERSEN Stig
c/o Assuranceforeningen SKULD
Frederiksborggade 15,
1360 Copenhaghen K
Denmark

GRELLET Luc
SCP Courtois Bouloy Lebel
5, rue de Chaillot
75116 Paris
France

GUNN I.A.
General Council of British Shipping
30/32 St. Mary Axe
London EC3A 8ET

HEALY N.J.
Healy & Baillie
29 Broadway
New York N.Y. 10006,
USA

HOJER Jorgen
BIMCO
Kristianagade 19,
2100 Copenhagen
Denmark

HOLLENFELTZ DU TREUX Peter
c/o Outshoorn & Landau
Meir 28-30
2000 Antwerp
Belgium

JANSSENS Victor
c/o C.M.B. NV
Meir 1
2000 Antwerp
Belgium

KALPIN
Soviet Maritime Law Association
6.B Koptievsky Pr.
125319 Moscow
USSR

KIRST Wulfert
c/o Peter Dohle Schiffahrts-KG (GmbH & Co)
Palmaille 33
Hamburg 50
D.B.R.

KOBAYASHI Tomotsugu
6-27-12 Maehara Higashi
Funabashi
Chiba
Japan

KOLODKIN A.L.
President Soviet Maritime Law Association
6,B Koptievsky Pr.
125319 Moscow
USSR

LANGE Herman
Schermersstraat 30
2000 Antwerp
Belgium

Mrs LEI MIN
China Maritime Law Association
1 Fuxingmen Wai Street
Beijing
China

McGOVERN J. Niall
Oakdene
166 Merrion Road
Dublin 4
Ireland

MARGAOUI Mohamed
President Association Marocaine de Droit Maritime
30, Bd. Mohammed V
Casablanca 01
Morocco

Mrs MATTEI-DAWANCE Genevieve
51 Av. Georges Mandel
75016 Paris
France

Mrs MEYER ZINNER
Ministerie van Verkeer en Waterstaat
Bordewijkstraat 4,
2288 2B Rijswijk
Netherlands

MICKLETHWAITE Neil P.
c/o Gouldens
22 Tudor Street
London EC4Y 0JJ
United Kingdom

NIELSEN Bent
Reumert & Partners
Bredgade 26
Copenhagen K
Denmark

Mrs PAGEARD Geraldine
12 bis, Avenue Bosquet
75007 Paris
France

PALME Claes
Hamngatan 11,
S-11147 Stockholm
Sweden

PALMER Richard W.
956 Public Ledger Building
Philadelphia PA 19106
USA

PUTZEYS Jacques
Rue St. Bernard 98
1060 Bruxelles
Belgium

RAPOSO Mario
Rua Rodrigo da Fonseca 149-3oDt.
1000 Lisboa
Portugal

RAY J.D.
Edye Roche de la Vega & Ray
25 de Mayo 489 -5th Floor
(1339) Buenos Aires
Argentina

REYNOLDS F.M.B.
Worcester College
Oxford OX1 2HB
United Kingdom

Prof. Dr. RICHTER R.
President Association for Maritime Law of
the German Democratic Republic
Lagerstrasse 26
DDR (2500) Rostock

SAMUELSON Nils
OK Petroleum AB
Warfvinges Vag 25
112 91 Stockholm
Sweden

SASEGBON Fola
6, Ijora Causeway
Box 245
Lagos
Nigeria

SCHANDY Erling Rolf
President
Asociacion Uruguaya de Derecho Maritimo
Circunvalacion Durango 1455 (Plaza Zabala)
Montevideo
Uruguay

SCHULTSZ Jan C.
42 Pieter De Hoochstraat
1071 EG Amsterdam
Netherlands

SICCARDI Francesco
Via Serra 2/8
16122 Genoa
Italy

SLATER A.G.
Clifford Chance
Blackfriars House
19 New Bridge Street
London EC4V 6BY
United Kingdom

TANIKAWA Hisashi
4-15-33-308, Shimorenjaku, Mitaka City,
Tokyo
Japan

TISI Francesco
Eni-Dialeg/Asleg C (1o Pal.Uff.-8o Piano)
20097 S.Do Mi.I.se (MI)
Milano
Italy

TURCI Sergio
Via Ceccardi 4/30
16121 Genoa
Italy

VAN DE VELDE Jan
Ministerie van Verkeer - Bestuur Zeewezen
Aarlenstraat 104
1040 Brussels
Belgium

VAN DEN HEUVEL Jozef
Schermersstraat 30
2000 Antwerp
Belgium

VINCENZINI Enrico
Scali d'Azeglio 52
Livorno
Italy

VOLK Kenneth H.
Burlingham Underwood & Lord
One Battery Park Plaza - 25th fl.
New York, N.Y. 10004
USA

WAROT Jean
12 bis, Avenue Bosquet
75007 Paris
France

Dr. F.L. WISWALL, Jr
10935 Lawyers Road
Reston, Virginia 22091-4908
USA

VON ZIEGLER Alexander
Lowenstrasse 19
CH 8032 Zurich
Switzerland

OPENING ADDRESS BY MR WILLIAM BIRCH REYNARDSON, GENERAL RAPPORTEUR

Mr. President, Ladies and Gentlemen. May I first start by thanking those who have made this Seminar possible; the twelve speakers who have prepared such excellent papers, the C.M.I. Administration office in Antwerp led by Henri Voet which has been responsible for the registration of participants and for the authorities at this hotel who have made the arrangements for the Seminar itself.

Second, may I stress that this is a Seminar not a Colloquium, in other words we are here to learn and not to talk, though this does not mean that there should be no discussion - indeed quite the contrary; we have made specific provision in the programme for discussion time at the end of the delivery of each paper and for the Working Session tomorrow afternoon to be reserved for discussion.

Because the papers have been circulated in advance and will have been read by all of you, I have suggested to the speakers that they should not feel bound in their presentations to keep to the precise texts of their papers. When twelve people write papers on this fairly restricted subject there is bound to be some overlap and I hope that, by adopting this somewhat flexible approach, too much repetition will be avoided.

This Seminar is the fifth in the series of international meetings which have been organised by the C.M.I. in addition to its Conferences. The first was the Seminar at Aix en Provence, in September 1976, when the subject was Apportionment of risk in Maritime Law. This was followed by the Colloquium in Vienna, in January 1979, when we discussed the Hamburg Rules. In May 1983, we were in Venice discussing Bills of Lading. Then, in November 1987, the Colloquium on Protection against Insolvency in Maritime Law took place in New Orleans with the Maritime Law Association of the United States and the Maritime Law Center of the Tulane Law School as co-hosts. These meetings have, I think, proved useful as fora for both learning and discussion.

I have little doubt that this Seminar will prove an equally useful and, I hope, enjoyable occasion.

Thank you very much.

BAREBOAT CHARTERPARTIES

PURPOSE FOR WHICH THE BAREBOAT CHARTERPARTY IS USED

BY
FRANCESCO BERLINGIERI

In the 15th edition of Scrutton's Charterparties and Bills of Lading it is stated (1) that charterparties fall into three main categories, viz. charters by demise, time charters and voyage charters. In respect of charters by demise in a footnote, it is further stated as follows:

> Charters by demise have in modern times largely fallen out of use, with the important exception of the war of 1939-1945, when they were extensively used by the British Government.

It is significant that the first general standard forms of bareboat charterparty for dry cargo vessels (2) are relatively recent, having been issued only fifteen years ago, in 1974, by BIMCO.

It is also significant that these forms, "Barecon A" and "Barecon B", differ in various respects from bareboat charterparties previously in use, in that they substantially increase the area of risk and the power of control of the charterer over the ship and correspondingly reduce those of the owner (3).

In fact, whilst in the past the owner normally provided the insurance and had the obligation of carrying out repairs, except for those required for the ordinary maintenance of the vessel, in "Barecon A" it is the charterer who must carry out all repairs, whether covered by insurance or not. The obligation of the charterers to repair the vessel is provided both in clause 11, whereby the insurance of the vessel is effected by the charterer at its expense, and in clause 12, whereby the insurance is, instead, effected by the owner (4).

In the commentary prepared by BIMCO at the time the two forms were issued (5), which is of great assistance in the correct understanding of their provisions, the following statement is made in the paragraph entitled "Insurance and Repairs":

> Obviously, in the context of bareboat chartering, the responsibility for arranging and paying insurances and effecting repairs rests solely with the charterers and it also follows that there is no question of the vessel coming off-hire, for instance, for time used for repairs. Consequently, the time on hire runs unabated in such events.

It is worth noting that the basic provision is that of clause 11, whilst clause 12 is optional, and is stated to apply only if expressly agreed.

The reasons why optional clause 12 has been inserted clearly indicate the mens legis of the drafting group. They are the following:

> It has been felt that in regard to chartering of commissioned

BAREBOAT CHARTERPARTIES

PURPOSE FOR WHICH THE BAREBOAT CHARTERPARTY IS USED

BY
FRANCESCO BERLINGIERI

In the 15th edition of Scrutton's Charterparties and Bills of Lading it is stated (1) that charterparties fall into three main categories, viz. charters by demise, time charters and voyage charters. In respect of charters by demise in a footnote, it is further stated as follows:

> Charters by demise have in modern times largely fallen out of use, with the important exception of the war of 1939-1945, when they were extensively used by the British Government.

It is significant that the first general standard forms of bareboat charterparty for dry cargo vessels (2) are relatively recent, having been issued only fifteen years ago, in 1974, by BIMCO.

It is also significant that these forms, "Barecon A" and "Barecon B", differ in various respects from bareboat charterparties previously in use, in that they substantially increase the area of risk and the power of control of the charterer over the ship and correspondingly reduce those of the owner (3).

In fact, whilst in the past the owner normally provided the insurance and had the obligation of carrying out repairs, except for those required for the ordinary maintenance of the vessel, in "Barecon A" it is the charterer who must carry out all repairs, whether covered by insurance or not. The obligation of the charterers to repair the vessel is provided both in clause 11, whereby the insurance of the vessel is effected by the charterer at its expense, and in clause 12, whereby the insurance is, instead, effected by the owner (4).

In the commentary prepared by BIMCO at the time the two forms were issued (5), which is of great assistance in the correct understanding of their provisions, the following statement is made in the paragraph entitled "Insurance and Repairs":

> Obviously, in the context of bareboat chartering, the responsibility for arranging and paying insurances and effecting repairs rests solely with the charterers and it also follows that there is no question of the vessel coming off-hire, for instance, for time used for repairs. Consequently, the time on hire runs unabated in such events.

It is worth noting that the basic provision is that of clause 11, whilst clause 12 is optional, and is stated to apply only if expressly agreed.

The reasons why optional clause 12 has been inserted clearly indicate the mens legis of the drafting group. They are the following:

> It has been felt that in regard to chartering of commissioned

> vessels under "Barecon 'A'" it may be useful to also cover the possibility which it is believed may arise from time to time, that a vessel be bareboat-chartered for a short period, say, 4 to 6 months. This may sometimes happen, for instance, with passenger vessels bareboat-chartered for a short cruise or for ferries hired just for a short summer season. It is believed that in such cases it is normal practice that the owners carry on with the insurances for their own account.

Furthermore, all time used for repairs, including any deviation, counts as time on hire. Nor is hire suspended in the case of requisition for hire: clause 22(a), in fact, provides that in such case the charterer continues to pay the hire and is entitled to any requisition hire or other compensation payable by the requisitioning authority. Consequently, in "Barecon A" there is no off-hire clause.

All risks and costs connected with the operation of the vessel are, therefore, borne by the charterer, whilst the owner only bears the risk of the loss of the vessel. A further indication of the change in the nature of the bareboat charterparty is that the risks connected with the vessel becoming a wreck or obstruction to navigation are also borne by the charterer: clause 17 in fact, provides that the charterer must indemnify the owner against any sums which the owner may become liable to pay as a consequence of the vessel becoming a wreck or obstruction to navigation.

The owner's interest is, consequently, merely of a financial nature. He does not need to have an organisation to take care of his ship.

The owner's interest is even more of a financial nature under the terms of "Barecon 'B'", designed for use with newbuildings when the vessels are mortgaged. What is relevant is not so much the set of provisions intended to protect the interest of the mortgagee, but the provisions regarding the power of control of the charterers over the construction of the vessel and the exclusion of any liability of the owners in respect of defects in the vessel, nor for any delay in delivery by the builder (clauses 1 and 2). The following explanations are given in BIMCO's Commentary under the paragraph entitled "Latent Defects":

> In a typical financial bareboat charter such as the "Barecon 'B'" charter, it has been felt that owners should not become implicated in latent defects which may only manifest themselves a long time after delivery from the yard and the repairs of which are thus not recoverable under the building contract.

Subsequently, in the paragraph entitled "Time for Delivery/Cancelling", it is stated:

> Clauses 2 and 3 of the "Barecon 'A'" contain the usual provisions in regard to earliest date of delivery and the right to cancel if the vessel is not delivered latest by the cancelling date agreed. It has not been considered appropriate to incorporate similar provisions in the "Barecon 'B'". The point is that normally owners have no possibility under the Building Contract to reject the vessel on account of delay in delivery from the Yard...

All these provisions mark a substantial change in the approach of owners and charterers. Owners in fact traditionally were not very keen on leasing their ships because they thereby lost any control over their maintenance and bad maintenance, either due to an incompetent crew or to the failure by the charterers to carry out repairs in a timely and proper manner, could have disastrous effects on the subsequent life of the ship. Charterers in their turn were not very attracted by contractual terms which allocated to them practically all costs and risks connected with the ownership and operation of a ship.

It is, therefore, interesting to find out what the reasons are for this change.

The reasons are several, and include the following.

a. Financial leasing

Financing of new buildings may be ensured through the lender acquiring title in the ship which is leased to the company who intends to operate and ultimately own the ship.

This may be attractive for the lender who may consider that by acquiring title in the ship better remedies are available to him in case of default of the borrower than those available to a mortgagee (6). It may be attractive for the borrower who may obtain tax benefits and may avoid the need of an investment which, though reduced to about 20% of the cost of the ship, in respect of a highly sophisticated and consequently very expensive ship, would still be quite considerable (7).

b. Purchase option

Although a purchase option is conceivable also in a time charterparty, it is more frequent and more likely to be granted by the owner in a bareboat charterparty, because the owner has already divested himself of several attributes of an owner - he has given up the possession and control of his ship - and may not be so interested in recovering the full use of the ship at the end of the charter period. A purchase option may be of a considerable interest for a charterer who, if in the course of the charter the option price is lower than the market price of the ship, may purchase the ship at a bargain price. Of course, the possibility of obtaining a purchase option may not be the sole reason for a charterer to choose this type of contract, but may certainly influence his decision.

c. Operation of ships without capital investment

The reasons why a ship operator may choose to use a chartered ship as opposed to ships owned by him may be various. He may not find the necessary financing for the purchase of the ship; he may not wish to purchase a ship because the cost of chartering is less than the amortization of the capital investment, or because the expected period of employment is not long enough to justify a capital investment, or its length is uncertain.

In these cases, however, the owner normally is not a lender by profession but a shipowner himself and, therefore, he may not need the protection granted to the owner by the terms of "Barecon A". Of course, the greater the risks borne by the charterer, the lower the hire and, therefore, the allocation of risks is the cause or the effect of the level of the hire agreed.

d. Enjoyment of national privileges

A foreign shipowner may, in order to enjoy national privileges granted to vessels under the flag of a State, such as participation in the coastwise trade of such State, bareboat charter any such vessel. In that case, however, the characteristics of a bareboat charter, as opposed to those of a time charter, are not essential for the achievement of that aim. The choice between the two types of contracts would, in fact, depend on whether or not the owner wishes to remain involved in the management of the ship and on whether or not the charterer wishes to have full control over the ship and her crew.

The situation may differ when a national shipowner wants to employ in a restricted trade area foreign flag vessels. In fact, he may be allowed to do so under the prevailing national regulations only if the foreign flag vessel is bareboat chartered by him and not if she is time chartered. This may be an additional reason why a bareboat charter may be preferred to a time charter. This type of incentive towards the bareboat charterparty will soon disappear within the EEC. In fact, Article 2 of the EEC Regulation No. 4055/86 provides for the phasing out of all trade restrictions in a four-year period, from 1st January 1989 to 1st January 1993 (8).

e. Enjoyment of State subsidies

When State subsidies to new buildings are conditional on the vessels remaining under the national flag, foreign owners who may be interested in investing in new buildings in that State but at the same time wish to operate the vessels directly, may reach an agreement with a company entitled to own vessels under the flag of that State to the effect that they finance the construction of the vessels and then bareboat charter them in until the construction cost is amortized. In such a case, particularly when an option to purchase the vessels at the end of the charter period is agreed, it is normal that all costs and risks are borne by the charterer.

f. Change of nationality of the vessel

The charterer may have an interest that the vessel acquires, for the period of the charter, his own nationality. The reasons may be various, e.g. the charterer wishes to employ the vessel in national coastwise trade reserved for national vessels or participate in the share of cargo reserved for national vessels; he may wish to employ a national crew or in any event a crew of a nationality other than that of the owner and this would not be permitted under the owner's flag.

The owner himself may have an interest in employing a crew of a nationality other than his own, but at the same time he may wish to avoid the deregistration of the vessel from his national register, for example, because there are registered charges or because the registration is a condition for the continued enjoyment of State subsidies.

The possibility of avoiding the employment of a national crew is, nowadays, in certain countries where the cost of a national crew is extremely high, the only manner to withstand international competition by reducing the operating costs of the vessels. As it will be discussed during this Seminar, the laws of an increasing number of States in different regions of the world (9) allow either suspension of registration or temporary deregistration of national vessels bareboat chartered by a foreign charterer and conversely allow temporary registration, be it a full registration or a special registration for the purpose of granting the right of flying the national flag to vessels bareboat chartered-in by national companies.

NOTES

1. Scrutton's Charterparties and Bills of Lading, 15th Ed. p. 4.

2. Another form presently in existence is "Shell Demise".

3. The same solutions adopted in "Barecon 'A'" and "Barecon 'B'" had previously been adopted in "Shell Demise".

4. Provisions similar to those of clause 11 may be found also in clauses 8(a) and 14(a) of "Shell Demise".

5. I am indebted to Mr. J. Hojer, Deputy Secretary General of BIMCO and author of the Commentary of the two BIMCO "Barecon" Charters, for a copy of such Commentary and the permission to quote it.

6. R.B. Barnett, Protection of Lessors, CMI Colloquium on Protection against Insolvency in Maritime Law, Tulane Law School - Maritime Law Center, 9-12th November 1987, p.70.

7. Normally long-term ship financing is granted for about 20% of the construction price.

8. See, for a commentary of Regulation No. 4055/86, J. Aussant, Freedom to Provide Services in Shipping in the European Communities, Antwerp International Congress on EEC Maritime Regulation, 25-26 November 1988, European Transport Law, Vol. 5-1988, p. 556.

9. See, for a summary of the national legislations, the Note by the Secretariats of IMO and UNCTAD entitled "Consideration of Maritime Liens and Mortgages and Related Subjects", in accordance with the terms of reference of the Joint Intergovernmental Group of Experts - IMO Doc. LEG/MLM/12 of 26th February 1988 and UNCTAD Doc. TD/P/C.4/AC.8/12.

BAREBOAT CHARTERPARTIES

RIGHTS AND OBLIGATIONS

BY
BERND KROGER

Introduction

The matter under discussion concerns legal relationships in the type of hire contract between charterer and owner in a bareboat charter, so that the rights and obligations of the parties concerned are governed by the general principles of law relating to contracts of hire, insofar that the charter contract does not include separate arrangements.

The decisive characteristic of a bareboat charter is the complete transference of sole possession of the ship and control over the ship to the charterer - see the judgment in the case of Baumoll -v- Gilchrest & Co. of 1892 - which means that the charterer takes on the captain and the crew.

In a time or voyage charter the owner remains in possession of the ship and is committed to transporting merchandise for the charterer on his instructions. This is a transportation contract.

The exclusive possession of the ship by the charterer and the requirement to operate in his own name and for his own account distinguishes the bareboat charter from just ship management in which the manager may fulfil similar functions but acts as legal representative of the owner.

The charterer's exclusive possession and control over the bareboat chartered ship justifies imposing on the bareboat charterer all rights and obligations covered by maritime law for the use of the vessel (bills of lading, general average, collision, salvage etc). On the other hand the owner retains all rights and obligations vested in ownership, particularly the right to sell and to take out mortgages with the ship as collateral.

The treatment of the bareboat charterer as an owner and the consequences of this for the owner are also articles in the rules governing international agreements, particularly the Arrest Convention and the CLC.

In my opinion there are three requirements for the use of the bareboat charter as a legal instrument.

1. The boareboat charter, which mainly meets time-limited transportation requirements of the charterer, when the time or voyage charter does not provide the desired unlimited power of control over the ship;

2. The bareboat charter as a means of financing a ship required for one's own purposes, similar to a leasing arrangement, and finally,

3. The bareboat charter as a means of changing flags without having to change the registration. Recently this arrangement has gained considerably in importance to reduce ship's operating costs.

A change of flag on the basis of a bareboat charter registration has been especially used by German owners, and over the past 15 years it has been developed into a flexible instrument. Of the number of German-owned ships under foreign flag, at present about 64%, come under this category. That is a very high figure which, in 1987 alone, increased by about 100 vessels.

The legal basis for this special form of out-flagging are not bilateral agreements or accords in international law, but solely the national law of the two flag states involved in a bareboat charter registration.

The laws of these two states must emanate from the principle that the right to fly the flag and entry in the register can be separated, at least insofar as it concerns the civil law implications of a ships' register.

German law, for instance, contains two complementary regulations. They regulate "bareboating in" and bareboating out". These German law regulations make it possible for a German vessel, for a two-year period, to fly a foreign flag on the basis of a bareboat charter contract, and at the same time to remain listed in the owners' and mortgage register of the former German flag state. Furthermore German law allows a foreign ship to fly the German flag on a bareboat charter arrangement, without the ship having to be deleted from the owners' and mortgage register of the foreign state. The first alternative, bareboating out, is currently the only system of any economic significance.

The requirements for this are:

a) A bareboat charter contract must be concluded with the Third Party who is not German, or with a company which is not domiciled in the Federal Republic.

b) On the basis of the bareboat charter contract the ship must be operated by the Third Party in his own name for at least one, but at the most two years.

c) The agreement of the German authorities responsible must be obtained.

d). The law of the new flag state must not stand in the way of the flag change.

At this point, it must be made clear that the system is based on two interlocking legal systems. The law of state A must permit out-flagging on the bareboat basis. The law of state B must allow flagging-in on the same basis. Only when the legislation of both states interlocks can the system function perfectly.

This is, for example, the case between German flag law and Panama's flag law or that of Cyprus, just to quote two examples. In the meantime, more states have made it possible in their national legislation to approve the right to fly the flag on a bareboat charter registration.

According to German company law, the charterer does not have to be independent from the shipowner. The German owner can establish a subsidiary abroad, commercially linked to him, which can operate as charterer. This company can operate the vessel itself or it can transfer the operation of the chartered vessel to another company, or transfer the management of the ship back to the shipowner. The shipowner can, for instance, conclude a re-charter contract as a time-charter contract. He can then operate the ship himself as "time-chartered owner". But it is also possible that there is only a trust relationship between the charterer and the owner. The management of the ship then remains with the German owner.

The arrangement possibilities are varied and flexible. The requirements of every individual case can be taken into consideration. The principle of freedom of contract prevails in the relationships between shipowner and charterer. As a consequence, on this basis, joint ventures and possible. Insofar that this is permitted by the limits of the internal civil law of the two states involved the contracting parties can freely agree on the law applicable in the charter contract.

a) <u>Delivery of ship in class and seaworthy condition</u>

The basic obligation of the owner in a bareboat charter, as with a time charter, is to hand over to the charterer a ship, seaworthy in every respect, at a predetermined location and time.

Seaworthy means that the ship is generally in a technical condition in which it can sail in usual ocean voyages. This can be assumed if the safety regulations of the state under whose flag the vessel is operated are adhered to. It follows from the character of the bareboat charter that the concept of seaworthiness does not include manning, victualling, bunkering and outfitting the ship to meet the charterer's special purposes.

The most common standard charter agreements, "Barecon," take this into consideration and provide for the operating supplies to be taken over by the charterer from the owner and vice versa, supplies such as bunkers, lubricants, water, provisions and other consumables in which separate ownership could exist. These are paid for at market prices prevailing at the time appointed for the transfer or return of the vessel.

The question of where the ship is to be handed over can produce problems similar to those in the case of a time charter. Usually, when a long-term bareboat charter is involved, the vessel is handed over in dock, where the ship's condition can be inspected by both contracting parties. New buildings are generally handed over in the building yard.

The charterer can take over the ship before the agreed time, but he does not have to do so. Usually the owner commits himself to give at least 30 days' notice of the transfer of the ship.

The existing class is indicated merely in the contract - I go into the obligations of maintaining this later. Naturally the ship must be provided with all necessary papers required by the law of the flag state.

It goes without saying that, in practice, conflicts can occur in fulfilling these obligations. The standard form "Barecon" A lays down time guidelines to regulate this. This agreement has proven itself to be invaluable.

According to No.1 "Barecon" A with the acceptance of the ship by the charterer all the owner's obligations in the charter agreement are regarded as being fulfilled. Otherwise - this has to be read in conjunction with No.3 "Barecon" A - the charterer must protest and decline to accept the vessel until the owner's obligations have been fulfilled.

There is a specific time limit for this. If the ship is not ready in every respect by this deadline the charterer can cancel his contract.

If it is expected that the time limit will be exceeeded, the owner can point this out to the charterer, and can get him to state within a specific period of time - according to No.3 "Barecon" A within a period of 168 hours - whether he will exercise his option of cancelling.

If the charterer wishes to abide by the contract, the owner has seven days to get the ship ready. After this period, the charterer once again has the option of cancelling the contract.

The owner is only responsible to the charterer for latent defects for a specific period of time after the takeover of the vessel. This period can vary according to contract. "Barecon" A stipulates 18 months.

As far as is known there have been no causes to test out these basic contractual obligations before the courts.

The matter is different if the bareboat charter concerns a new building, financed by a mortgage. There are then three parties involved, the charterer, the owner and the shipyard. The rights and obligations of the charter contract are influenced by the building contract.

The charterer's long-term involvement usually influences the matter. The contract is given to the shipyard by the owner according to the wishes of the charterer. Contractual arrangements exist only between charterer and owner and between owner and shipyard, not between the charterer and the shipyard. The owner's interests are concerned with preventing contradicitons arising between his obligations to the charterer regarding delivery of the vessel and his rights vis-a-vis the shipyard.

The charterer's interest do not extend as far as if he had ordered the new building as owner. The owner must, however, so assert his rights with the shipyard that the charterer's interest in the transfer of the ship as per agreement are safeguarded.

"Barecon" B suggests the following procedure. The charterer can only expect the owner to provide the ship in such a condition he, the owner, can demand for it from the shipyard. In No.1 "Barecon" B the charterer has the right to inspect the vessel during construction. Individual

charter contracts give the charterer the right to supervise building and to give instructions to the building yard. In this sense the charterer can influence the building programme of the vessel.

The charterer has the right to take over the ship, when it is actually ready. This can be before or after the date mentioned in the building contract.

The charterer has an obligation to take over the vessel when the ship has been classified and provided with documentation, and is ready for registration under the flag she is to fly.

After having taken over the ship, the charterer has no claims against the owner with regard to seaworthiness, delay in delivery or other reasons, so long as the owner himself has no warranty claims against the shipyard. "Barecon" B lays down a guarantee period of only 12 months from the date of the takeover of the vessel. This period of notice can also be adjusted to the guarantee period of the building contract.

If the shipyard is not in a position to deliver the vessel to the owner, and the owner is not indebted to the yard, then the charter contract is null and void. Under these circumstances, no charterer's claims can be made against the owner.

If the owner, on the other hand, declines to take over the ship he has to consult firstly with the charterer. The charterer then has seven days to state that he declines to take over the ship under an altered contract, or he can request the owner to negotiate with the shipyard for conditions which make it possible to take over the ship.

The possibilities are here varied and are particularly related to the degree of inter-dependence between the charter and building contracts.

b) Maintenance of the ship in class and seaworthiness during the contract

The vessel under a bareboat charter is wholly in the possession of the charterer and the owner's control is withdrawn to a large extent. It seems justified that, contrary to the general rule in charterparties, the hirer has the obligation to maintain the ship in good condition.

According to No.8 "Barecon" A and No.9 "Barecon" B the charterer is obliged to maintain the ship in good operational order and to ensure the continuance of the classification. This obligation corresponds to the charterer's obligation in No.11 "Barecon" A and No.12 "Barecon" B to insure the vessel against hull, war and P. & I. risks.

In addition No.6 "Barecon" A and No.7 "Barecon" B concede to the owner the right to inspect the vessel at any time and make it possible for him to control that the charterer is keeping his obligations and that the owner's interests in the maintenance of his property are properly taken into consideration.

In short-term charter contracts, the owner has an interest in ensuring the maintenance of the class himself. No.12 1 "Barecon" A covers this.

In medium-term charter contracts, the charterer could have an interest in claiming a year of grace to defer a necessary classification falling within the charter period to a specific date after the termination of the charter contract.

Since in this case the costs of the classification are for the owner's account, it is essential to make this point crystal clear. For this reason No.8 "Barecon" A stipulates that the charterer may not claim the year of grace.

No.9 "Barecon" B stipulates usually in a bareboat leasing charter that the charter has to ensure that the vessel is regularly classified. Since the bareboat leasing charter is usually negotiated in the long-term, and the possibilities just mentioned do not apply, the right has so far been conceded to charterers to claim the year of grace.

It goes without saying that the charterer is responsible for ensuring that all essential repairs are done at the appropriate time. If, when the vessel comes up for classification, requests are made for changes, conversions or additions to the equipment No.8 "Barecon" A and No.9 "Barecon" B provide for a balancing of interests between charterer and owner.

If the costs are below 5% of the insured value of the ship, they are for the charterer's account. If they exceed this level they are subject to arbitration, for example an appropriate distribution of these costs by an adjustment of the charter rate. Consideration is here given to the fact that high outgoings on the ship increase its value.

c) Use of the ship

A characteristic of the bareboat charter is that the charterer is expected to ensure that the vessel in his possession is, and is maintained, in operational order. The charterer is also responsible for crewing the vessel, provisioning it, ensuring it is fuelled and providing for repairs.

His disposition rights in the ship allow him to transfer totally or partly the management of the vessel to a third party. In this case, the charterer remains fully obligated to the owner, of course.

Mainly in cases of out-flagged bareboat charters crew management is transferred to crewing agencies, which take over the crewing of the vessel for a lump sum.

Other forms of management may relate to insurance, bunkering, technical management, freight management, chartering, accounting etc.

Bimco has produced a standard form entitled "shipmen" which regulates all aspects of total or partial management.

As the owner usually hands over to the charterer a vessel well fitted out from a technical point of view, the charterer must replace items of equipment with a short working life. The charterer is expected to ensure that the value of the ship is maintained, taking into consideration, of course, fair wear and tear.

No.8 f "Barecon" A and No.9 f "Barecon" B puts the charterer under the obligation of cleaning and painting the underwater parts of the ship when this is necessary. This must be done at least once every 18 calendar months after the vessel is handed over.

Without agreement beforehand, either in the charter contract or by a later arrangement, the charterer, even as the possessor of the vessel, may not make any changes to it of any kind.

The bareboat charter is interpreted as allowing the charterer the greatest latitude in using the vessel for his purposes. Apart from the reservations mentioned later, the charterer can deploy the vessel to earn income by transporting goods of any kind on a voyage or time charter to a third party, or even by passing the ship over to the owner.

The use of the ship may not jeopardise it as an asset. This owner's interest is set out in the clauses dealing with the maintenance of class, keeping the ship up to the standards it was in when handed over, the return of the ship with only fair wear and tear and the owner's inspection rights.

In No.4 "Barecon" A and No.5 "Barecon" B the charterer may only deploy the vessel within trades specified. This is a vital matter for the vessels third party insurance cover could be lost if the charterer disregarded this obligation.

No.5 "Barecon" B emphasises the charterer's general responsibility to deploy the ship only in trades approved by the insurance cover in consideration of the special interests of the mortgage creditors. Should the vessel be subject to physical or legal loss, the mortgage extends to insurance claims.

The charterer must deploy the ship only in lawful trades and carry lawful cargoes to protect the owner from losses or from having his ship destroyed, seized or confiscated. As possessor of the vessel, the charterer is also responsible for all charges and special expenses associated with the operation of the vessel, such as port charges, fees for ship's papers and so on.

The charterer is also responsible for any tax liabilities which may accrue from the operation of the ship. As the taxpayer, the charterer is also responsible for all taxes applied to freights. This does not include, of course, the owner's tax liability on his earnings from the chartering of the vessel.

Maritime liens can arise from the operation of the ship because the charterer incurs debts with ship suppliers or bunker suppliers. Since maritime liens of the mortgage can take precedence, there is the constant danger of an encumbrance of the property, unknown to the owner, impairing the mortgage.

How significant this is depends in practice on national law, which in the United States for example can provide extensively for maritime liens, or on the application of the International Convention on Maritime Liens and Mortgages of 1967.

To meet these situations the charterer is obliged for example, according to No.14 "Barecon" A and "Barecon" B, to prevent maritime liens coming into being through the use of a non-lien clause against third parties, or to indemnify the owner against demands from resulting maritime liens.

Bareboat charter contracts also include regulations about the use of the ship's name. The longer the charter lasts, particularly in a leasing charter agreement, the charterer is allowed to give the ship a name of his choosing and paint the vessel in his colours and display his insignia.

It is particularly important to decide which flag the vessel will fly during its deployment under the bareboat charter. As I said at the beginning, the bareboat charter arrangement is used considerably to place the ship under a specific flag to be able to use the regulations of the flag state concerned regarding manning and ship's safety standards.

Independent of that consideration, it is of particular significance for the mortgage creditors that the contract should stipulate under which flag the ship is going to operate during the period of the bareboat charter. The change of flag for a bareboat charter does not represent a change in ownership. The ship remains registered in the state of the owner's nationality. The registration in the new flag state represents only a change of jurisdiction within the implications of international law. This does not introduce any change at all as regards the mortgage.

In various states, however, the mortgage is also registered or recorded under a bareboat charter. This can give rise to the problem that more legal regulations could be applied, to the disadvantage of the mortgage creditors involved in the mortgage.

The banks try to avoid this by introducing clauses in the credit agreement to the effect that the flag can only be changed with the prior consent of the mortgage creditors. In modern legal systems this problem is avoided because the mortgage remains recorded solely in the owner's state. The "Recommendations on Bareboat Charter Registration" from the ICC takes the same line as does the IMO/UNCTAD convention, still only at the discussion stage, on maritime liens and mortgages.

The flag under which the ship operates on a bareboat charter is of considerable importance for crewing. Fundamentally the law of the flag state is definitive here. No.8 b "Barecon" A and No.9 b "Barecon" B are unclear about this point. On the one hand the regulations of the "country of the vessel's registry" apply, on the other hand, however, those "of their own country".

"State of the vessel's registry" must rightly be understood as the flag state, because only this state has jurisdiction over the ship. The "Barecon" explanations indicate that this is what is meant. For greater clarity "flag state" instead of "state of the vessel's registry" should be used. Obviously "Barecon" assumes that the bareboat charterer must not be domiciled in the flag state - the Panamanian regulations are an example for this.

I do not know of any states, which apply regulations concerning crewing to their nationals who charter a foreign-flag vessel, which is not under their jurisdiction. The clause says no more than that the crewing regulations of the flag state must be applied.

The expression "of their own country" could still mean that the regulations of the home state concerning crew training must be applied; the "Barecon" explanation is not clear on this point as well.

It is oviously in the best interests of the owner that the charterer only takes on qualified personnel to man his ship. This point, however, concerns a training question and not a matter of crewing.

d) Payment of hire

Here only general principles of contract law are applied.

The charterer has to pay a charter rate to the owner for the use of the ship, at rates calculated on a daily or monthly basis, and which are usually due monthly in advance or arrears. In a bareboat charter linked to a purchase option, the rate can be so calculated that by the termination of the charter agreement, the purchase price has been paid.

The risks of operating the vessel are entirely for the account of the charterer. If he goes through an off-hire spell, he is still obligated to pay in full the charter fees.

If the ship is lost or goes missing, the charterer can no longer deploy the vessel according to contract. His quid pro quo obligations then come to an end, particularly his obligations to pay for the charter of the vessel.

If the charterer falls into arrears, the owner can charge interest on the arrears due. No.9 "Barecon" A and No.10 "Barecon" B take this into consideration and allow for an interest of 10% on sume due. In practice this is probably revised upwards or downwards. Usually bank rates are agreed. According to No.9 c "Barecon" A and No.10 c "Barecon" B, when the charterer is more than 7 days in arrears the owner is entitled to terminate the charter contract without notice and to demand the return of the vessel.

To ensure that the owner gets paid for the charter a lien clause is usually included in the charter contract. This gives the owner a lien on the goods transported by the charterer and on freight charges. This clause can only come into effect when it is included by the charterer in the freight contract or the Bill of Lading, and so long as the merchandise is in the charterer's possession.

e) Re-delivery of the ship

Two points must be borne in mind when the bareboat chartered vessel is returned to its owner:-

- when is the ship returned?
- under what condition is it returned?

Either the ship is returned to its owner within a specific period of time, determined in months or years, or on a specific date. It can also be agreed that the charterer may return the ship earlier or later than a certain date. In this way imponderables of time can be taken into account, allowing the charterer to fulfil commitments with the ship he has entered into with a third party.

It is in the interests of the owner, particularly after a long-term charter, to make preparations for the return of the ship, for example to make arrangements for docking and inspections and so on.

Here also "Barecon" takes appropriate consideration of the practical requirements of both parties to the charter agreement.

No.13 "Barecon" A as well as No.13 "Barecon" B stipulate that the charterer has the obligation to give the owner 30 days' preliminary and at least 14 days definite notice of the re-delivery. The charterer must promptly inform the owner of any changes to the re-delivery timetable.

The provisions regulate what happens when the charterer overruns the charter contract, because he has to complete a voyage with the ship. The conditions permit the charterer to exceed the original contracted termination date, if this was not taken into consideration in a special clause of the charter agreement, and if before the commencement of the voyage the charterer can reasonably work out that the ship can be re-delivered at a specific time.

The charterer must return the vessel to the owner in the same condition in which he took it over, taking into consideration, of course, fair wear and tear, so long as this does not affect the class. To establish the condition of the ship when re-delivered a clause can be included in the bareboat charter agreement to the effect that, on re-delivery, the ship will go into dock for inspection.

In accordance with No.7 "Barecon" A and No.8 "Barecon" B an inventory should be more of equipment, outfitting, appliances and consumable stores as well as bunkers. As when the charterer took over the vessel, the owner must pay for the stores taken over when the ship is re-delivered.

The ship must have gone through the normal surveys and the classification certificate at least for the agreed period of the bareboat charter contract.

f). Breach of contract

Breach of contract can be contractually controlled or be left to the application of the usual legal regulations.

As mentioned earlier on, there are contractual regulations on the consequences of delay in performance, if the owner does not make the ship available to the charterer at the proper time or if the charterer does not pay the charter fee to the owner when he should.

In the first instance, the charterer's right to cancel the contract comes into effect, in the second the owner's right to interest on arrears and addiotionally, should the situation arise, a right to give notice.

Furthermore, as also mentioned earlier on, the contract controls the consequences of the charterer's disregard of his obligations to avoid maritime liens. If the vessel is arrested by the enforcement of maritime liens, the charterer must indemnify the owner.

Finally there are contractual regulations covering non- or under-insurance of the vessel by the charterer. As this is a basic obligation, the owner has a right to terminate the contract. According to No.11 "Barecon" A and No.12 "Barecon" B, this can only be applied by the owner if the charterer has not obtained insurance within seven days.

Claims can be made for breach of contract on the following grounds:-

1. The charterer uses the vessel in ways contrary to the intentions of the contract.

2. The charterer does not maintain the vessel properly.

3. The owner has withdrawn the ship because of inadequate insurance cover.

4. The charterer returns the vessel too late.

5. The charterer returns the vessel in a damaged condition.

In the first two instances cited, the owner's rights to terminate the contract come into consideration if the employment of the ship or the lack of maintenance by the charterer, contrary to contract, fundamentally endangers the property.

In the other three instances quoted, claims for damages come into consideration. These depend on the faults of the contracting parties and can be excluded if the contract is frustrated. The extent of the damages is calculated basically on how the owner would be placed if the charterer had fulfilled the contract.

The calculation must be fair and reasonable, and take into consideration what the parties had had reasonably to expect as a possible result of breach of contract at the time the contract was concluded. (Verdicts: Paula Lee Ltd. -v- Robert Zehli & Co. Ltd. 1983; Czarnikow -v- Koufos of 1969; quoted in Scrutton, page 399 amd page 393).

If the owner should withdraw the vessel on the grounds of under-insurance, the charterer has to indemnify the owner for expected profits in the event the contract is continued. The owner, however, must take into account what he could otherwise have gained in view of his responsibility to keep damage to a minimum.

If the charterer returns the vessel late, the owner could lose another charter contract already concluded. Here once more, the charterer has

the obligation to indemnify the owner for any loss, which the owner would have had after the deduction of other profits which could have accrued from other sources of income.

The legal consequences in breaches of contract are determined in detail as provided by the law applicable to the charter party. The special papers go into this in detail.

After weighing up the differing economic requirements of the parties to a bareboat charter agreement, I would like to say in summing up that the standard form available, especially "Barecon" A and B, produced by BIMCO, present an appropriate balance of interests in the majority of cases. The fact that there have been few cases brought before the courts is a proof of this.

BAREBOAT CHARTERPARTIES

RIGHTS AND OBLIGATIONS

BY
WILLIAM BIRCH REYNARDSON

Introduction

Bareboat charters or charters by demise are becoming increasingly common especially, as we have seen, in the context of the financing of new buildings. It is for this reason that this seminar is being held. However, despite their increasing popularity, bareboat charters have received spartan comment from most of today's academic and professional writers. Indeed, in England, this is a subject which has, to a large extent, been ignored or dismissed. Thus we find Lord Justice MacKinnon stating in re: An Arbitration between Sea and Land Securities Limited -v- William Dickinson & Co. Ltd., "The Alresford" (1) that "a demise charterparty has long been obsolete".

a) Delivery of ship in class and in seaworthy condition

A discussion about the rights and obligations of the parties to a bareboat charter must start from the basis that a charter by demise is, in effect, a contract for the hire of a chattel and is governed in general by the principles of common law relating to contracts of hire. Mr. Justice Lewis in Read -v- Dean (2) stated (3) ". . . . . there is authority for saying that a ship on hire is in the same position as any other chattel on hire." This must be compared with a voyage or time charter where the owner is essentially contracting with the charterer to provide the services of his master and crew on board his vessel. The case Read -v- Dean established that in a contract of hire for a specific chattel there was an implied undertaking by the owners that the vessel would be as fit for the purpose for which she was hired as reasonable care and skill could make her. This case involved a motor launch hired for the purpose of a holiday on the River Thames. The launch caught fire for an unexplained reason and it was held that there was a presumption that she was not fit for the purpose for which she was hired. The owner's failure to provide adequate fire fighting equipment was further held to be a breach of the implied warranty of fitness. An owner, therefore, when he lets a vessel for hire is under an obligation to make sure that the vessel is reasonably fit and suitable for the purpose for which she is expressly chartered or for which, from the nature of the charter, the owner must be aware she is intended to be used. An owner's delivery of the vessel to the hirer amounts to an implied warranty that the vessel is in fact as fit and suitable for the purpose as reasonable care and skill can make her although the extent of the obligations will depend very much upon the particular circumstances. It is suggested, however, that, at a minimum, a vessel being delivered under such a warranty would have to be in a seaworthy condition and in class.

The implied warranty would not extend to a case where the immediate cause of an accident or breakdown is a hidden defect which no reasonable amount of care on the owner's part would have discovered. However, the onus of proving that the accident or breakdown was due to a hidden defect is on the owner (4).

These common law obligations were given statutory effect by the Supply of Goods and Services Act 1982 ("The Act"). The Act applies (5) to a "Contract for the hire of goods". "Goods" is defined in s.18(1) in the same terms as in the Sale of Goods Act (S.O.G.A.) 1979 and it has been held that a ship comes within this definition (6).

By virtue of s.9 of the Act there is implied in the contract of hire the condition that the goods supplied under the contract are of merchantable quality. This is analogous to the provisions in the (S.O.G.A.) (7) relating to contracts of sale as opposed to hire. "Merchantable quality" is defined in the Act by s.9(9) which provides "Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly supplied as it is reasonable to expect having regard to any description applied to them, the consideration for the bailment (if relevant) and all the other circumstances."

The Act further implies in the demise charter the condition that when the charterer has made known the purpose for which he is chartering the vessel, the vessel will be reasonably fit for that purpose.

The old case of Jones -v- Page (8) established that the mere fact that the hirer had made a preliminary inspection of the thing hired did not relieve the owner of the implied warranty of fitness. The same principle could be extended to bareboat charters, so that at common law an inspection or survey by the charterers on delivery of the vessel would not relieve the owners of their obligation to deliver her in a seaworthy condition and in class. However, this common law principle must now be read in the light of the Supply of Goods and Services Act, discussed previously, which provides that the implied condition as to merchantable quality will not apply with regard to defects specifically drawn to the charterers' attention before the conclusion of the contract or, where the charterer has examined the vessel prior to the contract being made, to defects which that examination ought to have revealed. It would seem that generally the implied condition of merchantable quality will only be excluded in respect of defects which ought to have been revealed by the examination which was actually made. The accuracy of the charterer's inspection would therefore arise if a survey takes place which does not reveal a defect which become apparent shortly after the commencement of the charter.

Overlying the common law position are the contractural obligations contained in the charterparty entered into by the parties. Clause 1 of the Barecon A form provides the "owners shall before and at the time of delivery exercise due diligence to make the vessel seaworthy and in every respect ready in hull and machinery and equipment for service hereunder." This is essentially stating, as an express obligation, the obligation implied at common law and under statute. Lord Justice Wilmer in Riverstone Meat Co. Property Limited -v- Lancashire Shipping Co. Limited (9) stated that "an obligation to exercise due diligence is to my mind indistinguishable from an obligation to exercise reasonable care."

The question of the obligation to deliver the vessel in class and in a seaworthy condition will often arise in the context of a new building.

With a new building there may be some remedy to be obtained from the shipbuilders, and normally the charterers will have had the opportunity to approve the building contracts and watch over the construction. The Barecon "B" form used for new buildings provides at Part II Clause I that the charterers having accepted the vessel from owners take her as having been completed and constructed in accordance with the building contract. It goes on to provide that "the charterers undertake that after having so accepted the vessel they will not thereafter raise any claims against the owners in respect of vessel's performance or specification or defects if any except that, in respect of any repair or replacement of any defects which appear within the first 12 months from delivery, owners shall use their best endeavours to recover any expenditure incurred in remedying such defects from the builders, but shall only be liable to charterers to the extent owners have a valid claim against the builders under the guarantee clause of the building contract . . . ." Under the Barecon A Form, standard bareboat charter, it is provided that "The delivery to the charterers of the vessel and the taking over of the vessel by the charterers shall constitute a full performance by the owners of all the owners' obligation hereunder and thereafter the charterer shall not be entitled to make or assert any claim against the owners on account of any representations or warranties expressed or implied with respect to the vessel, but the owners shall be responsible for repairs or renewals occasioned by latent defects in the vessel's machinery or appurtenances, existing at the time of delivery under the charter, provided such defects have manifested themselves within 18 months after delivery unless otherwise provided . . . . ." Hidden defects must mean defects which were not known and could not have been known. A detailed examination of this clause is beyond the scope of this paper and is dealt with in a later paper.

b) <u>Maintenance of the ship in class and in seaworthy condition during contract</u>

In reflecting the Common Law principles governing a contract for the hire of a chattel, the charterer as a general rule (but see below) is merely under an obligation to take reasonable care of the vessel. He will not be liable for her loss or injury, unless caused by his negligence or that of his servants. Apart from special terms in the contract, the charterer is not responsible for fair wear and tear; nor would he be under any obligation to do any repairs or incur any expenses except those which are actually incidental to the performance of his obligation to take reasonable care. However, if he should execute repairs for which he is not responsible, it is doubtful whether he would have any claim for reimbursement by the owners.

In the context of a long-term charter, these Common Law obligations are inadequate to protect the owner's interest in the vessel, especially in the situation where the charter is merely a means of financing the purchase of the vessel.

A contract between owners and charterers will, however, seek to modify the Common Law position which is, as suggested, inappropriate for long-term charters especially when the owner is a bank. Under the Barecon A form, charterers contract to maintain the vessel in a good

state of repair. Clause 8 provides "The charters shall maintain the vessel, her machinery, boilers, appurtenances and spare parts in good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and . . . . with unexpired classification of the class indicated . . . .". They are also obliged to repair in good time if the owner's right to withdraw the vessel from the service of the charterers is not to arise. The Barecon A form imposes and contractual obligation on the charterer "to take immediate steps to have the necessary repairs done within a reasonable time."

Sometimes heavy additional financial obligations are imposed on the demise charterer by reason of the need for essential improvements, structural changes or new equipment if the vessel is to continue to operate. Such additional expenses may arise as a result of new class requirements or legislation and could be both unfair to the charterer and an onerous financial burden for him. Barecon forms seek to redress the balance in such circumstances. It provides that, unless otherwise agreed, where essential improvements or structural changes or equipment costing more than 5% of the vessel's marine insurance value become necessary, then arbitrators may renegotiate the contract and decide the ratio in which the costs of the improvements etc. shall be shared between the parties. Such negotiations would be of particular benefit to the charterer when he has been required to carry out expensive improvements or alterations shortly before the vessel is due to be redelivered from which the owner will benefit more than he.

The charterer is liable for all damage to the vessel and her loss during the term of the charter subject only to limited exceptions such as acts of God and Queen's enemies. This is, of course, consisten with the charterer's full possession of the vessel.

c) Use of the ship

A bareboat charterer in all respects and for all purposes, except for registration, is the temporary "owner" of the ship. He has obtained full, temporary possession of the vessel which is under his control and at his disposal. The Master and crew are for all practical purposes, his servants and through them the possession of the ship is in him. (10) The owners have therefore relinquished the right to interfere in the management of the ship or in the manner in which she is used, except in so far as rights have been reserved to the owners in the charterparty.

Prima facie the charterer has free use of the vessel although trading limits and restrictions on the cargoes carried may be imposed. For a long-term charter, as will usually be the case when the owner is merely the financier of a new building, the use of the vessel may be restricted only to the extent of the obligation of the charterers to employ her in conformity with the terms of insurance and with the law of any country into whose territorial waters she may sail regarding the trade or business in which she may be engaged.

d) Payment of hire

At a very basic level, an owner, when he demise charters his vessel, loses all rights except the right to receive hire and the right to

receive hire and the right to redelivery of the vessel at the end of the charterparty. The corollary of that is that the charterer must pay the hire, or, as it is sometimes referred to, the charter freight, for the use of the vessel. The owner's right to receive hire exists for the duration of the charter. If the owner assigns his interest in the vessel to a third party, the charterer, upon notice in writing of the assignment, becomes liable to pay future instalments of hire to the third party unless it can be inferred that the charterer contracted by reference to the owner's personal qualifications in which case the contract cannot be enforced against the charterer after the owner has assigned his interest in the vessel.

The redelivery of the vessel before the end of the charterparty does not discharge the charterer from his obligation to pay hire. Such an obligation is only discharged if the owner accepts the vessel back and thereby treats the charter as at an end.

Since the possession of the ship is in the charterer and not in the owner, at Common Law, the owner does not have a lien on freight due under the charter (11).

e) Redelivery of the ship

This is one of the two rights which an owner retains when he has chartered his vessel by demise. The case of R M & R Log Limited -v- Texada Towing Co. Limited, Minnette and Johnson, The Coast Prince (12) established that there was an implied undertaking to redeliver the chartered vessel in as good a condition as when she was received. There was also an express term to this effect in the charter involved in this case.

In the case of Attica Sea Carriers Corporation -v- Forrostaal Poseidon Bulk Reederei GMBH (The Puerto Buitrago) (13) there was a similar clause stating that the vessel was to be redelivered in the same good order and condition as on delivery. The vessel had been chartered by owners for a period of 17 months. After six months use the vessel developed engine trouble and had to be towed from Rio de Janeiro to Gdynia so that her cargo of soya bean meal could be discharged. She was then towed to Kiel for repairs which were estimated at $2 million. The value of the vessel when repaired would only be approximately $1 million, her scrap value being about $0.5 million.

The charterers admitted liability for $400,000 of the repairs and redelivered the vessel terminating the charter hire. The owners refused to accept redelivery contending that, under the charterparty, the charterers were bound to repair the vessel whatever the cost and, in addition, pay the charter hire until the vessel was repaired. At first instance, it was held that the charterers were bound to repair the vessel before redelivery and that the owners were entitled to hire until the charterers repaired the vessel. On appeal to the Court of Appeal, that decision was reversed. It was held that charterers' clear obligation to repair and to redeliver the vessel in good repair was not a condition precendent to his right to redeliver the vessel but merely a stipulation, which if broken gave rise to a remedy in damages. Breach of the stipulation did not prevent them from redelivering the vessel to owners.

In reaching this decision and deciding upon this particular construction of the clause, Lord Denning had regard to the reasonableness of the result of the particular construction as he commented "the fact that a particular construction leads to an unreasonable result must be a relevant consideration". Clearly, in this case, to allow owners the right to have the vessel repaired and receive hire until those repairs were completed would have been an unreasonable burden upon charterers and would have amounted to a requirement of specific performance when damages were an adequate remedy for charterers' breach.

Hidden defects cause the same problems on delivery as they do on delivery of the ship, especially when they appear shortly after redelivery.

Problems will arise if a serious defect is found shortly before redelivery. Charterers have to repair all defects and the owners are entitled (on Barecon form, line 425) to redelivery "in the same or as good structure state and condition . . . . . fair wear and tear not affecting class excepted." Fair wear and tear will depend on the age of the vessel and her trade. The question arises however, whether, for example, it is reasonable for an old ship to be redelivered with a brand new engine. A major breakdown could represent wear and tear, bad luck or lack of good maintenance practice on behalf of the charterers. As we have seen, in the case of expensive alterations or improvements, the Barecon form provides, subject to the agreement of the parties, for renegotiation of the charter. There is not a similar provision in respect of expensive repairs. It is questionable whether the charterers would be able to claim a sum from owners in respect of betterment.

f) <u>Consequences of the breach of a contractual obligation</u>

Both at Common Law and under the standard form charters, non-payment of hire is treated as a repudiatory breach of the charter entitling the owners to withdraw the vessel from charterers' service. Under the Barecon forms the failure to carry out repairs "within a reasonable time" also gives the owners the right to withdraw the vessel from charters' service. Withdrawing a vessel from a bareboat charter is in some respects less complicated than withdrawing a vessel from a time-charter since, in the former case, the contract of carriage for cargoes loaded is with the charterer and not the owner and therefore the owner runs less risk of being sued by cargo interests for failing to deliver cargo. The owner would, however, after withdrawing the vessel from charterers' possession, become bailees of the cargo and would therefore owe a duty of care to cargo owners. This duty could perhaps be fulfilled by discharging the cargo at the nearest safe port. In practical terms, owners would probably negotiate with cargo owners in respect of the completion of the voyage.

As we have seen, charterers' failure to redeliver the vessel in good condition gives rise to a claim by owners in damages. Owners cannot insist on charterers carrying out the repairs prior to redelivery.

Mention should be made of the right of the charterer to refuse to take delivery of the vessel under the charter when she is in an unseaworthy condition or fails to comply with description. Owners delivery of an

unseaworthy vessel would be a breach of their Common Law, statutory and contractual obligations in that regard. However, whether such a breach entitles the charterer to refuse to take delivery of the vessel and thereby treat the contract as having been repudiated by owners will largely depend upon the seriousness of the breach. Following the decision in the "Hong Kong Fir" (14) the test must be whether the breach goes to the "root of the contract" and consequently a minor and easily remedied breach would be unlikely to give charterers the right to treat the contract as at an end.

Where the right to treat the contract as at an end is not open to charterers their remedy will, of course, lie in damages against the owners.

Finally, the possibility of specific performance of the contract must be briefly mentioned. The specific performance of a contract under English law is an equitable remedy exercised at the discretion of the courts and subject to many restrictions. Obviously a lengthy discussion on this topic is beyond the scope of this paper but it is a remedy which could be considered in the case of a breach of a demise charter.

Traditionally the view is that specific performance will not be ordered where damages are an adequate remedy. For example, in the case of commodities, damages is seen as an adequate remedy because the injured party can return to the available market place and obtain the satisfactory equivalent of what he contracted to buy. Obviously where the goods are "unique" this is not possible and the courts have now gone some way to recognising the concept of "commercial uniqueness".

Specific performance has been ordered for the supply of a vessel under a Bareboat Charter (The "STENA NAUTICA" No.2 (15) in circumstances where a substitute vessel could not be obtained easily elsewhere and specific performance of the contract was considered an appropriate remedy in the circumstances. In that particular case, Swedish owners had demise chartered the "STENA NAUTICA" to Canadian charterers for use on their ferry service in the Gulf of St. Lawrence. The charter was for the summer season only for a period of five years and at the end of each season, the vessel would revert to the owners for the remaining period of the year. During the winter period of 1981-1982, the owners entered into negotiations with Belgian charterers as a result of which a charter was executed whereby the vessel would be at the Belgian charterers' disposal during the summer period of 1982 for use on their ferry service between Belgium and the United Kingdom. Owners were clearly seriously in breach of the charter to the Canadians by this subsequent charter. The Belgians in fact took possession of her in good faith and without notice that she had been demise, chartered to the Canadians for the summer season. The Belgians carried out extensive alterations to the vessel at their expense. The question to be decided was obviously between the two innocent parties. In the circumstances of the case, which included the fact that there was a serious doubt that the vessel would be able to be in service in the Gulf of Lawrence in time for the Canadians contemplated business for her, the specific performance of the Belgian contract was ordered, it being decided that, in the circumstances, damages would be an adequate remedy for the Canadians.

References

(1) [1942] 2KB 65 at 69, [1942] 1 All ER 503 at 504.

(2) Reed -v- Dean [1949] 1 KB 188.

(3) p. 193

(4) Hyman -v- Nye (1881) 6 QBD 685.

(5) s.6(1)

(6) Behnke -v- Bede Shipping Co. [1927] 1 KB 649.

7) s.14 Sale of Goods Act 1979.

(8) (1867) 15 L.T. 619.

(9) [1960] 1 All ER 193.

(10) Sandermann -v- Scurr (1866) LR 2QB.

(11) Hutton -v- Bragg (1816) 7 Taunt 14. Dean -v- Hogg (1834) 10 Bing 345 at 350.

(12) [1967] 2 Lloyd's Rep. 290

(13) [1976] 1 Lloyd's Rep. 250.

(14) [1961] 2 Lloyd's Rep. 478

(15) [1982] 2 Lloyd's Rep. 336

unseaworthy vessel would be a breach of their Common Law, statutory and contractual obligations in that regard. However, whether such a breach entitles the charterer to refuse to take delivery of the vessel and thereby treat the contract as having been repudiated by owners will largely depend upon the seriousness of the breach. Following the decision in the "Hong Kong Fir" (14) the test must be whether the breach goes to the "root of the contract" and consequently a minor and easily remedied breach would be unlikely to give charterers the right to treat the contract as at an end.

Where the right to treat the contract as at an end is not open to charterers their remedy will, of course, lie in damages against the owners.

Finally, the possibility of specific performance of the contract must be briefly mentioned. The specific performance of a contract under English law is an equitable remedy exercised at the discretion of the courts and subject to many restrictions. Obviously a lengthy discussion on this topic is beyond the scope of this paper but it is a remedy which could be considered in the case of a breach of a demise charter.

Traditionally the view is that specific performance will not be ordered where damages are an adequate remedy. For example, in the case of commodities, damages is seen as an adequate remedy because the injured party can return to the available market place and obtain the satisfactory equivalent of what he contracted to buy. Obviously where the goods are "unique" this is not possible and the courts have now gone some way to recognising the concept of "commercial uniqueness".

Specific performance has been ordered for the supply of a vessel under a Bareboat Charter (The "STENA NAUTICA" No.2 (15) in circumstances where a substitute vessel could not be obtained easily elsewhere and specific performance of the contract was considered an appropriate remedy in the circumstances. In that particular case, Swedish owners had demise chartered the "STENA NAUTICA" to Canadian charterers for use on their ferry service in the Gulf of St. Lawrence. The charter was for the summer season only for a period of five years and at the end of each season, the vessel would revert to the owners for the remaining period of the year. During the winter period of 1981-1982, the owners entered into negotiations with Belgian charterers as a result of which a charter was executed whereby the vessel would be at the Belgian charterers' disposal during the summer period of 1982 for use on their ferry service between Belgium and the United Kingdom. Owners were clearly seriously in breach of the charter to the Canadians by this subsequent charter. The Belgians in fact took possession of her in good faith and without notice that she had been demise, chartered to the Canadians for the summer season. The Belgians carried out extensive alterations to the vessel at their expense. The question to be decided was obviously between the two innocent parties. In the circumstances of the case, which included the fact that there was a serious doubt that the vessel would be able to be in service in the Gulf of Lawrence in time for the Canadians contemplated business for her, the specific performance of the Belgian contract was ordered, it being decided that, in the circumstances, damages would be an adequate remedy for the Canadians.

References

(1) [1942] 2KB 65 at 69, [1942] 1 All ER 503 at 504.

(2) Reed -v- Dean [1949] 1 KB 188.

(3) p. 193

(4) Hyman -v- Nye (1881) 6 QBD 685.

(5) s.6(1)

(6) Behnke -v- Bede Shipping Co. [1927] 1 KB 649.

7) s.14 Sale of Goods Act 1979.

(8) (1867) 15 L.T. 619.

(9) [1960] 1 All ER 193.

(10) Sandermann -v- Scurr (1866) LR 2QB.

(11) Hutton -v- Bragg (1816) 7 Taunt 14. Dean -v- Hogg (1834) 10 Bing 345 at 350.

(12) [1967] 2 Lloyd's Rep. 290

(13) [1976] 1 Lloyd's Rep. 250.

(14) [1961] 2 Lloyd's Rep. 478

(15) [1982] 2 Lloyd's Rep. 336

BAREBOAT CHARTERPARTIES

ALLOCATION OF COSTS AND RISKS

BY
JAN RAMBERG

Introduction

It would, indeed, be most imprudent to enter into a bareboat charterparty without providing for the rights and obligations of the parties by specific contract clauses. Such clauses will vary according to the commercial purpose and legal structure of the contract. Since bareboat charter arrangements may well serve many different purposes it would perhaps be unwise to assemble samples of such contracts, since the picture would then be rather incoherent. Instead, I will first deal with the bareboat charterparty in the absence of contract provisions (I) and then with the well-known standard form BARECON A (II). The legal solutions under the different legal systems are not identical but, nevertheless, they are sufficiently uniform to permit some general observations. In order to keep this presentation within reasonable limits I have purposely refrained from pointing out such details which would be disclosed by a comparative law research. Without any preference for any particular legal system I have tried to pinpoint what I consider to be the common denominators.

I. The bareboat charterparty in the absence of contract terms

1. The legal classification of the bareboat charterparty

There is a clear distinction between the bareboat charterparty on the one hand and other charterparties and contracts of affreightment on the other hand following from the fact that the bareboat charterers in in possession of the ship, while the owner retains possession in the other types of charter and maritime contracts. Indeed, it is misleading to use the term "charterparty" for contracts which are so different in nature. Even under the time charterparty, which would come closest to the bareboat charterparty, the owner undertakes not only to make the ship available to the charterer but also to fulfil services as required under the charterparty terms. The fact that the bareboat charterer obtains possession of the ship will, in a sense, make him the temporary owner of the ship or, as it is often called, an owner pro hac vice or pro tempore. This, of course, will have a strong bearing on the allocation of costs and risks.

Since the bareboat charter concerns a ship and the operation takes place in a maritime environment, some particular aspects have to be considered. Otherwise, the bareboat charterparty would not be different from the hire of any chattel and would indeed represent no more than an ordinary lease of a physical object (cf. the German Mietvertrag and the French louage or location ou affretement coque nue). True, under common law as well as civil law it may be difficult to determine with certainty the allocation of costs and risks under the ordinary leasing contract, particularly with respect to the obligation to maintain the object in good condition during the contract period. One common aspect, however, is evidenced by the fact that the lessor, unless otherwise agreed, will bear the risk for the physical destruction of the object (periculum est locatoris).

2. The essence of the bareboat charterparty

Subject to specific contract terms it is possible to indicate the main obligations of the parties under a bareboat charterparty with respect to the allocation of costs and risks:

The shipowner undertakes to

- deliver the ship as specified in the contract;
- assume the risk of fortuitous loss of or damage to the ship during the period of the contract;
- arrange and pay for repairs of such loss or damage.

The charterer undertakes to

- pay the hire as agreed;
- use the ship as stipulated in the contract;
- pay the costs required for such purpose;
- assume such risks of loss of or damage to the ship as are stipulated in the contract (usually at least loss or damage caused by negligent acts or omissions on the part of himself or his servants).

It is not possible to determine precisely which one of the parties would have the obligation to maintain the ship in a seaworthy and good condition during service, since this obligation is often divided between the parties. Since the owner bears the risk for physical destruction of the ship it seems logical that he should at least bear the primary obligation to maintain the ship in good condition during service. Nevertheless, it may well be difficult to decide if a loss or damage would engage the charterer's liability owing to negligent acts or omissions on the part of himself or his servants or the operation of the ship. Also, it is frequently stipulated that the charterer has the obligation to redeliver the ship in the same good order and condition as when it was delivered to him only excepting "ordinary wear and tear". Literally, such a stipulation means that the charterer is strictly liable for any loss or damage to the ship during service and that the owner's obligation to maintain the ship is minimal if any at all. Such charters are in American terminology sometimes called "net" charters, as distinguished from "gross" charters, since the bareboat charterparty hire is net to the owner who would not have to pay any costs for maintenance or operation at all. However, the fact that the charterer has to redeliver the ship in a certain condition does not necessarily mean that the risk for loss of or damage to the ship is transferred to him. In my view, a more specific agreement is required for such purpose.

3. The relationship between different types of charterparties

While bareboat charterparties focus on the subject matter - the ship - the other types of charterparties involve the shipowner's service throughout the period of the contract. Therefore, these types of contract seem to fall mainly within the category of contracts for work (locatio operis) although the time-charter is sometimes considered a special contract type (locatio conductio navis et operarum magistri et nauticorum) owing to the fact that the commercial operation during the charter period is the charterer's business, whilst the

shipowner mainly provides a seaworthy vessel and engages the master and the crew. But, as has been said, where the shipowner has parted with the possession of the vessel and let it to the charterer on bareboat terms it is for the bareboat charterer to employ master and crew and be fully responsible for the operation of the vessel under the terms of the charter. The contract type becomes one of lease (locatio conductio rei).

Indeed, the fact that the shipowner surrenders possession of the ship to the charterer is required in order clearly to distinguish the bareboat charterparty from the other types of contract where the owner would retain the possession of the ship be employing the master and the crew. The fact that, under so-called employment clauses in time charterparties, the master would have to take instructions from the charterer does not change this basic distinction.

4. The manifold commercial purposes of bareboat charterparties

When determining the commercial purpose of a bareboat charterparty it is necessary to consider the period of the contract. If the period is short, e.g. where the contract is intended for a particular voyage, expedition or trade, then the commercial - as distinguished from legal - meaning of the contract could more nor less equal that of a time or even voyage charterparty. The fact that the owner, and not the charterer, would employ master and drew under the time charterparty and pay their wages may not be all important, since such costs when falling upon the shipowner may be set-off by an increase of the time charterparty hire as compared with the bareboat charterparty hire where the wages of the master and crew would have to be paid by the charterer.

Conversely, a time charterparty for a long period of time - perhaps equalling the "commercial" lifetime of the ship - may commercially serve the same function as a bareboat charterparty, since the fact that the shipowner through the master and crew retains the possession of the ship may not make much difference in practice. In fact, the current employment clauses in time charterparties may give the charterer more or less the same right to instruct the master as he would have had if the master had been directly employed by him. Nevertheless, as a matter of law possession of the ship cannot be recognised unless the master, having been employed by the owner, may be considered his servant and not the servant of the charterer.

Bareboat charterparties, as well as time charterparties, are frequently used for financial purposes, where the bank, leasing company or investor would own the ship only for the purpose of obtaining security for the load extended to the "real" shipowner. This could be achieved at or before the time she is delivered from the shipyard or later when the shipowner wants to "release" the capital invested in the ship by selling her to the financing company, which then would make her available to the former shipowner under a bareboat charterparty or leasing contract ("sale and lease-back"). In the former case, the "tripartite" relationship between shipbuilder and lessor ("formal" shipowner) and lessee ("real" shipowner) is subjected to the 1988 UNIDROIT Convention on International Financial Leasing (not yet in force).

A further commercial purpose of bareboat charterparties might be to enable the shipowner in various respects to benefit from the flag of the country where the charterer is domiciled or, conversely, to enable the bareboat charterer to sail the ship under the flag of his own country although he does not own the ship which may be possible in countries permitting registration of bareboat chartered ships.

5. Division of costs under bareboat charterparties

The manifold commercial purposes of bareboat charterparties mentioned above do not permit a common formula for cost distribution. Also, it may depend upon governmental regulations, availability of convertible currency, tax considerations and many other circumstances whether or not a particular cost should be borne by the shipowner or the charterer. The parties, of course, would normally be able to assess the impact of any chosen cost distribution on the charterparty hire. The more costs which are to be borne by the shipowner, the higher the charterparty hire and vice versa. However, it is usually the better choice to place the costs upon the party who, under the charterparty, is in the best position to control and minimise the costs or to bear the risk of cost increases. Any costs which cannot be determined with a reasonable degree of certainty when the bareboat charterparty hire shall be agreed upon (operational and other variable costs) should be borne by the bareboat charterer, since he is in full control of the use of the ship. If, indeed, such costs which vary with the use of the ship are to be borne by the shipowner, such an allocation of costs may well destroy the very nature of the contract as one of lease or bareboat charterparty.

In order to highlight the "extremes" one would certainly find that shipowners, who only intend to act as financing companies, are not inclined to assume any costs at all for maintenance, repair, insurance, wages, victualling, stores, bunkers and lubricating oil, port and canal expenses, agency costs and other costs for the operation of the ship, while it may well be irrelevant to a shipowner actively engaged in the ship's trade as an operator or a joint venture partner, whether such costs to a greater or lesser degree are to be borne by him and, thus, included in the bareboat charterparty hire. In particular, this would apply to joint venture agreements where the shipowners make their ships available to a bareboat charter company jointly owned by them. In such cases, most costs and risks related to the ship, and the operation of the ship, are borne by the shipowners and the freight earned by the bareboat charterer is repaid to the shipowners as bareboat charterparty hire according to formulae agreed by the shipowners as partners in the joint ventures. The bareboat charterparty then merely serves as a device to assemble the ships in a joint service. The distribution of costs, risks and revenues does not then really rest upon the bareboat charterparty as such but, instead, upon the terms of a joint venture agreement. The same result may, of course, be achieved by making the ships available to the joint venture under time charterparties. This is frequently done where the shipowners may wish to use bareboat charterparties as a facility to raise finance. In these cases, the "formal" shipowner is represented by the financing company, the "real" shipowner by the bareboat charterer and the company operating the joint venture by the time charterer.

As we have seen there is no given cost distribution under bareboat charterparties, it will necessarily vary according to the circumstances. At best, we may ascertain a "neutral" cost distribution basically following the main essence of the bareboat charterparty as described in I.2 above. Since the shipowner would normally assume the risk of loss of or damage to the ship and, to a certain extent, liability to third parties for damage causaed by the ship (e.g. oil pollution, collision damage and proceedings in rem against the ship), he would have to pay for:

- any costs for maintenance expressly or impliedly agreed in the charterparty;

- repair costs resulting from loss or damage to the ship not engaging the charterer's liability;

- costs for salvage of the ship when exposed to the risk of loss on account of fortuitous events;

- hull insurance premiums to cover the risk of loss of or damage to the ship as well as a portion of collision damages;

- P & I insurance premiums to cover the risk of damage to third parties and personal injuries;

- costs incurred to compensate third parties to the extent that these costs are not absorbed by insurance.

Since the bareboat charterer operates the ship with his own master and crew and would have to assume the risk to pay compensation to his own contracting parties and to third parties suffering loss or damage as a result of the operation of the ship and further, according to the terms of the charterparty, to the shipowner for loss of or damage to the ship, he would have to pay for:

- such costs for maintenance as are expressly or impliedly agreed in the charterparty which would, in practice, amount to all maintenance costs when he has undertaken to redeliver the ship in the same condition as delivered except "ordinary wear and tear";

- All operating costs (bunkers, lubricating oil, provision and stores, port and canal expenses, loading and discharging expenses, remuneration of agentc.);

- all costs for manning the ship;

- all costs required to free the ship from liens and encumbrances resulting from the operation of the ship;

- P & I insurance premiums to cover his risk of having to pay compensation to his contracting parties as well as third parties resulting from the operation of the ship;

- charterer's liability insurance premiums to cover his risk of having to pay compensation primarily to the owner for loss of or damage to the ship.

6. Division of risks under bareboat charterparties

6.1. The risk of loss of or damage to the ship

Although liability issues may be determined differently under different legal systems it is at least possible to pinpoint some general principles. Under all legal systems, it will always be the charterer's risk if loss or damage occurs as a result of using the ship contrary to the terms of the contract (outside the trading limits, entering into prohibited or dangerous ports or zones or carrying cargo not permitted by the charterparty). But in other cases it may well be difficult to determine, in practice, who of the owner and charterer would have to bear the risk. Generally, the charterer will always have to bear the risk for negligent acts or omissions on the part of himself and his

servants. Either with the application of procedural principles (res ipsa loquitur) or liability principles the burxen of proving that no such acts or omissions have taken place will normally fall upon the chartere. Thus, the charterer will normally carry the liability for presumed fault and neglect and, indeed, this presumption may well be difficult to rebut in practice. In some cases, e.g. rental of lighters, it is the custom of the trade that the charterer is strictly liable. The principles now mentioned are reflected in a number of cases in England and the United States and are also adopted in stutory provisions (e.g. BGB 548 and Code Civil 1722, 1723).

6.2. The risk of damage inflicted upon third parties (collision damage, cargo or other property damage, death or personal injury claims, environmental damage)

Under the theory that the bareboat charterer is really the temporary owner of the ship (owner pro hac vice or pro tempore it has been deemed logical to let him bear rthe risk not only for loss or damage inflicted on his own contracting parties but also to third parties. This is the principle under English as well as United States law and is expressly stipulated in the German HGB 510 (where the bareboat charterer is named "Ausruster"). But, as has already been said, this does not mean that the owner is relieved from such risk. His liability may be engaged under the 1969 Civil Liability for Oil Pollution Convention and the ship might be subjected to maritime liens and in rem proceedings. In this context it may be interesting to note art.8 of the 1988 UNIDROIT Convention on International Financial Leasing. Here, it is stipulated that "the lessor shall not, in its capacity of lessor, be liable to third parties for death, personal injury or damage to property caused by the equipment". Possibly as a result of an observation made by the CMI the words "in its capacity of lessor" were added, since one would otherwise risk a conflict of conventions whenever the lessor, in his capacity as "formal" owner, could not avoid liability falling upon him in that capacity (e.g. the 1969 Civil Liability for Oil Pollution Convention). This is now made absolutely clear by the additional text in art. 8 (c): "The above provisions shall not govern any liability of the lessor in any other capacity, for example as owner". However, in most cases, the protection intended by art. 8 must be regarded as a cold comfort to the lessor, since his position as "formal" owner would normally be sufficient to engage his liability to third parties, although the bareboat charterer may be liable as well because of his operation and full control of the ship. Thus, in many cases, the liability would be joint and several. In particular, the fact that the bareboat chareterer would man the ship would make him liable for the wrongful acts committed by the master and the crew in their capacity as his servants and agents (this is with respect to English law made clear in the leading case of Baumvoll & Gilchrest (1892) 7 Asp. M.C. 263 which is still a leading precedent; see also with respect to German law HGB 510 and Scandinavian law T. Falkanger, Leie av skib, Oslo 1969 p 528 et seq and the cases cited there). The law of the United States is similar to English law following the leading case of The Barnstable (1901) 181 U.S. 464. However, French law traditionally at least differs from the law of the other legal systems because of the former art. 7 of Code de Commerce. Under that article the owner of the vessel had to assume the liability to third parties generally and it was thought that this provision applied to bareboat charters as well (see G. Ripert, Droit Maritime I p. 674 et seq. and R. Rodiere, Traite generale de droit maritime I p. 309 et seq.). In any event, should the owner be liable to third parties, the French law 10th June 1966 provides in art. 11 that he should be kept indemnified by the bareboat charterer. This provision is, of course, also applicable whenever actions are taken against the ship in rem or when third party claims subject the vessel to maritime liens.

If the owner has failed properly to perform his obligation to deliver the vessel to the bareboat charterer in a seaworthy condition and as agreed in the charterparty and the substandard condition of the vessel causes damage or injury to third parties, he will, of course, have to bear such liability without a right of recourse against the bareboat charterer.

6.3. The risk of having to pay compensation to contracting parties (cargo or other property damage, death and personal injury claims)

While, as we have seen, it may be difficult sometimes to decide if the owner or the bareboat charterer or both of them have to bear liability to third parties it goes withouty saying that each one of them will have to assume such liability as their own contracts may entail. Thus, the bareboat charterer would have to assume liability to cargo owners and bill of lading holders under the respective contracts of carriage. A bill of lading issued by or for the master would under common principles of law be considered as the bareboat charterer's bill of lading and not that of the owner. Here, it is of vital importance to distinguish between time charterparties and bareboat charterparties, since bills of lading issued under time charterparties would normally engage the owner's liability to the bill of lading holders but with a right of recourse against the time charterer under the usual employment clauses which call upon the master to issue bills of lading as instructed by the time charterer. The Hamburg Rules, in art. 14.2, provide that "a bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier" but the definition of "carrier" in art. 1.2 is in my view not sufficient to include the shipowner when the ship has been let under a bareboat charter upon such terms that the shipowner is not at all involved with the operation of the ship. In such cases it cannot be said that the "performance of the carriage of the goods" has been "entrusted" to the owner, since he has not undertaken to perform the carriage but only to make his ship available for the bareboat charterer's operations. Nevertheless, in some jurisdictions, in rem proceedings against the ship may be available to persons having entered into various contracts with the bareboat charterer and the ship may also be subjected to maritime liens under the national law or the applicable international conventions. Most bareboat charterparties contain so-called non-lien clauses to the effect that the charterer should not permit the ship to be subjected to liens or encumbrances and that, for this purpose, he should place a conspicuous notice on the ship purporting to inform those it may concern that the vessel is under a bareboat charterparty operated by someone other than the owner and that, therefore, the master has no "right, power or authority to create, incur or permit to be imposed on the Vessel any lien whatsoever" (BARECON A clause 14). As frequently pointed out, such a provision has no effect with respect to liens arising by operation of law and most probably the effect of such a provision is limited to such liens which may arise for repairs and supplies, e.g. under the law of the United States (see G. Gilmore and C. Black, The law of admiralty, New York 1975 p. 243).

6.4. The risk of loss of time and use of the ship

The main part of the risk for an unsuccessful exploitation of the ship will, of course, fall upon the bareboat charterer. However, the owner may have to assume such risks which occur as a result of a breach of his obligations under the charterparty. If, for instance, he has failed to deliver the ship in a seaworthy condition or as agreed in the charterparty, and this is only discovered subsequently, he may have to compensate the bareboat charterer for

any loss of time resulting from repairs. Also, he may have to compensate the bareboat charterer in the case where the vessel cannot be used as agreed owing to restrictions which prevent the use of the ship. Such situations may well occur because of "black-listing" of the ship or sanctions against the ship for previous activities (see further T. Falkanger, op. cit. p. 335 et seq.). It should be observed that the obligations of the parties are quite different under a bareboat charterparty than under a time charterparty and that, therefore, the "off-hire" regulation under time charterparties is not suitable for bareboat charterparties. Since the owner's main obligation is limited to delivering the ship as agreed to the bareboat charterer, who is in full control of the ship and should assume the full risk for an unsuccessful commercial exploitation of the ship during the period of the charterparty, I can see no reason why the risk of loss of time or of restricted use of the ship should fall upon the owner, except where he has failed in any of his obligations. Thus, the risk of fortuitous and unforeseen events (such as war, disturbances, labour disputes, government directions, blocking of canals and similar force majeure occurrences) will fall upon the bareboat charterer unless otherwise specifically agreed between the parties. In the particular case of a requisition of the vessel during a part of the period of the bareboat charterparty, it may be disputed if the vessel should come "off-hire" and any requisition remuneration should be paid to the owner or if, conversely, the ship should remain on hire and any remuneration compensation should be paid to the bareboat charterer. This problem will be dealt with further in 6.5.

6.5. The risk of frustration of the venture

While, as has been said in 6.4, the bareboat charterer should assume the risk of fortuitous events preventing the contemplated use of the ship during the period of the charterparty, this does not necessarily mean that he will have to pay the chaerterparty hire during the remaining period of the charter if the ship as such is struck by an event which makes her totally unavailable to the bareboat charterer for the remaining part of the charterparty. As has been said, under the general principles of contract law for the contract of hire the owner bears the risk of the thing hired perishing (periculum est locatoris) and if such a risk occurs one has to draw the conclusion that the bareboat charrterparty has come to an end. The question then arises if the same conclusion should be drawn when the ship has not perished but when it may be assumed beyond reasonable doubt that the ship will be unavailable during the remainder of the charterparty because of some unfortuitous event (e.g. the requisition or seizure of the ship or the immobilisation of the ship in a port or a blocked canal). It is not possible within the limited scope of this paper to deal with this problem, which constitutes one of the most difficult questions in contract law, and I therefore permit myself to refer to my dissertation on the matter (see J. Ramberg, Cancellation of Contracts of Affreightment, Gothenburg 1969, in particular pp. 221 et seq.). However, particularly when a bareboat charterparty is intended to cover the full "commercial" lifetime of the vessel it would, in my opinion, be inappropriate to release the bareboat charterer from the contract, even if it could be reasonably assumed that the unavailability of the vessel would last for the full time of the bareboat charterparty. In such a case it could hardly be said, as it was in the famous case of Bank Line v. Capel & Co. [1919] A.C. 435, that the expected delay "destroyed the identity of the chartered service" without having decided beforehand that the risk for such contingencies should fall upon the owner and not upon the bareboat charterer. But it may well be aergued that, since the shipowner should carry the risk of the thing hired perishing, an extension of that principle to cases where it must be assumed

that the ship will be unavailable for the rest of its "commercial" lifetime is is perfectly logical. But, even if this is logical, it does not mean that it is practicable. Indeed, it could seem somewhat arbitrary to decide that the risk for one and the same type of event is split so that one of the parties must bear the risk for a temporary effect, while the other must bear the risk for a final effect. And, one must ask, is it really possible in practice rto decide the vital "turning-point" where the risk shifts from one party to the other? I am therefore inclined to suggest that the risk should remain with the bareboat charterer until the vessel has really become totally unavailable during the full period of the charter although, I am sure, this will remain a matter for much disagreement in the future.

It should also be pointed out that, in cases of requisition, it may work to the advantage of the bareboat charterer if the charterparty does not come to an end because of frustration. It may well be, that because of the event leading to requisition freight rates and also requisition, compensation will exceed what the bareboat charterer had reason to expect when he entered into the charterparty. One may well ask why the owner should benefit from the dissolution of the contract because of frustration in such a case. And, conversely, why should the owner suffer if in a similar situation no compensation or compensation less than the expected income from the charter is paid? True, the very function of the doctrine of frustration is to modify and alleviate the burden of the parties affected by the frustrating event. But, it may well be disputed whether the doctrine should be inapplicable when full compensation is paid for the requisition (cf. Metropolitan Water Board v. Dick, Kerr & Co. [1918] A.C. 119), while the doctrine is applicable to the detriment of the owner if insufficient or no compensation is paid. Would this not mean a bargain to the effect "heads you win, tails I lose" (see J. Ramberg, op. cit. p. 309)? In my view, the doctrine of frustration should not be more restrictively applied if it is considered that "no one is hurt by the event" (Metropolitan Water Board v. Dick, Kerr & Co. [1918 A.C. 119 at p. 129), nor more generously applied for the purpose of avoiding "the confusing, if not impossible, task of adjusting the equities between the owner and the charterer" (The Isle of Mull (1921) 278 Fed 131) or in order to alleviate an economic loss for one of the parties to the detriment of the other (see . Ramberg, op. cit. p. 310). In principle, therefore, it seems to be a natural solution to impose upon the bareboat charterer the whole risk of delay resulting when the vessel is used to carry out his commercial activities, except for delay caused by the shipowner's failure in fulfilling his obligations under the charter.

II. The contractual regulation

1. Introduction

As already mentioned, bareboat charterparties may be used for many different purposes. I must confess that time has not permitted research concerning standard forms covering fishing expeditions, chartering of pleasure craft, joint venture chartering or contracts for other particular purposes. Instead, the standard form BARECON A will be used only as one example to show how costs and risks may be distributed in the typical case where a ship will be used mainly for carriage of goods during a rather long period of time. It should be stressed that the terms of BARECON A may be wholly inappropriate in cases where the bareboat charterparty is only intended for a short period of time and for a particular purpose other than carriage of goods.

2. Allocation of risks

The following main principles appear from BARECON A.

- Most risks are covered by insurance (except "commercial risks" of lack of employment and various "frustration risks");

- the cost of insurance could be borne either fully by the charterer (clause 11) or partly by the charterer (P & I, clause 12 b) and partly by the owner (Marine and War Risks, clause 12 a);

- the insurer's rights of recovery or subrogation against the charterer on account of loss of or damage to the vessel is cut off.;

- the insurance, regardless of alternative chosen, is taken out in the joint names of owners and charterers as their interests may appear (clause 11 a and 12 a);

- the risk of costs additional to those covered by insurance is to be borne by the charterer (clause 11 a and 12 d and e);

- the vessel remains on hire during periods of repair and the risk of loss of time is thus fully on the charterer (clause 11 a in fine and clause 12 f);

- if the vessel becomes an actual total loss or a constructive total loss the charter is to be terminated and the insurance money, after having been paid to the owner, will be distributed between the parties according to their respective interests;

- the "commercial" risk of unavailability is fully to be borne by the charterer including the main part of the "frustration risk", e.g. even if a requisition for hire or other contingency - except total loss (see clause 12 i) or "Compulsory Acquisition" (clause 22 b) of the vessel - could be expected to last during the remainder of the charter period and the hire would then continue to be payable to the owner and, as a consequence thereof, any requisition compensation would be payable to the charterer;

- the risk of war preventing or restricting the contemplated use of the vessel and any resulting cost increases as well as the risk of cancellation on account of the outbreak of war between major powers, or engaging the nation under whose flag the vessel sails, is to be borne by the charterer (clause 23 a-c).

3. Allocation of costs

BARECON A represents a so-called "net" charter meaning that the charterer has to pay all costs for maintenance as well as for the operation of the vessel. The charterer's obligation is further strengthened by an obligation always to keep the vessel "in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and, of course, to ensure that the vessel keeps her class (clause 8). Further the vessel, according to clause 13, "shall be redelivered to the Owners in the same or as good structure, state, condition and class as that in which she was delivered, fair wear and tear not affecting class excepted".

****

Summing-up

It would appear from the short survey of the distribution of costs (I 5) and risks (I 6), in the absence of contractual regulation, that the distribution of maintenance costs represents a "grey area" and that liability issues as well as the impact of unforeseen events may present difficult legal problems. These difficulties are further aggravated by differenty approaches and solutions under the different legal systems. Even if the distribution of costs and risks under BARECON A is said to generally represent a maximum burden for the charterer, the system is at least clear and foreseeable. Undoubtedly, the charterparty hire will be determined accordingly. In any event, BARECON A could be used as a "starting-point" in contract negotiations. If the charterer has a good bargaining position he would no doubt be able to negotiate better terms for himself. But, in my view, he may be well advised to accept the rather unfavourable terms of BARECON A and to require a corresponding reduction of the hire instead. In any event, a bareboat charterer, who is in fact the "real owner" using the bareboat charter merely as a financing device, can certainly not expect a financing institution to wish to become involved with the risks following from the maintenance and operation of the vessel. And this is well reflected by the 1988 UNIDROIT Convention on International Financial Leasing which with respect to ships represents no more than some sort of a bareboat charterparty regulation.

BAREBOAT CHARTERPARTIES

ALLOCATION OF RISKS AND COSTS

BY
JOHN D. KIMBALL

Introduction

The essential condition of a bareboat charter is the transfer of exclusive possession, control and navigation of the vessel from the registered owner to the charterer. As a general rule, it is the expectation of owner and charterer that, with the transfer of control, the risks and costs of ownership will also pass to the charterer. While a properly drawn bareboat charter will accomplish these objectives in most respects, there are risks and costs of which owner will not be relieved.

The parties may wish to have certain obligations remain with owner. Care must be exercised, however, to ensure that the retention of any risks and costs by owner does not have the effect of unwittingly converting the intended demise into a time or voyage charter.

As a basic bareboat charter form for reference purposes, I shall refer throughout to the Barecon "A" form (issued September 1974).1

I RISKS

A. Loss of Ship

A demise charter does not divest owner of its property interest in the vessel. Generally, owner's main rights under a demise are to be paid the agreed hire and to have the vessel redelivered at the end of the charter period. When the vessel is lost before the end of the charter, who bears that risk?

The primary obligation of owner under a demise charter is to deliver a seaworthy vessel at the commencement of the charter. Most charters are explicit in imposing this duty on owner, but in the absence of an express undertaking or an unambiguous disclaimer of the warranty, the duty will be implied by operation of law.2 As a general rule, once the vessel has been delivered to charterer, it is the latter's responsibility to maintain the vessel in a seaworthy condition. Unless the loss of the vessel results from an unseaworthy condition which existed at the time of delivery, or, if the charter so provides, owner's failure to exercise due diligence to make the vessel seaworthy, responsibility for the loss will rest with charterer.

The Barecon "A" form contemplates that proper hull insurance arrangements will have been made by charterer for an agreed value, such that should the vessel become an actual or constructive total loss, insurance payments shall be paid to owner, who will distribute the funds between itself and charterer "according to their respective interests". (Part II, Clause 11(c) and (d) or 12(h), (i) and (j). The charter will be deemed to have terminated as of the time the vessel was lost and hire ceases as of that time. (Clause 9(d).

Disputes may arise between owner and charterer as to responsibility for the loss of the vessel. Harrison Overseas Corp. v. American Tug Titan,

516 F.2d. 89, 1975 AMC 2257 (5th Cir. 1975), for example, involved the capsizing of a barge while it was being towed from Florida to Cuba. The Court allocated 50 percent of the blame to an unseaworthy condition which predated the bareboat charter. The remaining 50 percent of blame was attributed to improper stowage of the cargo. Accordingly, in owner's action against charterer for damages, the Court held that owner was entitled to recover only 50 percent of the value of the lost barge from charterer.

The transfer of control under a demise charter has also given rise to disputes under hull policies issued to cover the loss of the vessel. In Allen N. Spooner & Son, Inc. v. Conn. Fire Ins. Co., 314 F.2d 753 (2d Cir. 1963), a barge was chartered for use in a salvage operation. The charterer personally acted as master for the operation. Due to negligence on the part of the master and heavy swells from a passing vessel, a crane on the barge collapsed and was lost over the side. The barge was so severely damaged that it was a constructive total loss. Owner claimed under the marine hull policy, but the insurer disclaimed coverage in reliance on the Inchmaree Clause,3 arguing that the bareboat charterer's negligence constituted a "want of due diligence by the owners of the ship, or any of them, or by the manager". The Court rejected this argument and concluded that the intent of the Inchmaree Clause was not to deprive owner of coverage because the master was also the owner pro hac vice under the demise charter. According to the Court, the Inchmaree Clause was designed to exclude from coverage damage due to the shoreside failure of owner to make the vessel ready for the voyage.

Where the loss of the vessel is caused by a third-party, charterer will have standing as owner pro hac vice to recover damages from the offending party. In Tracy Towing Line v. City of Jersey City, 105 F. Supp. 910 (D.N.J. 1952), although charterer was partially to blame for the loss of a tug, it was held to be entitled to recover two-thirds of the value of the sunken tug from a wharfinger whose negligence was held to have contributed to the casualty.

B. Damage to Ship

As a general rule, responsibility for damage to the ship during the period of the charter will rest with charterer. This rule follows from the basic premise of a demise that the exclusive possession, control and navigation of the vessel has been transferred from owner to charterer. The exception to this rule is that damage resulting from an unseaworthy condition of the vessel which existed at the time of delivery may be owner's responsibility, depending upon the language of the charter.

The most difficult problems in this area concern latent defects which exist at the time of delivery. If the owner's warranty of seaworthiness is absolute, it appears that owner would remain responsible for damages caused by latent defects. If the warranty is limited to the duty to exercise due diligence, owner will be relieved of responsibility unless there was a failure to exercise that level of care to discover and rectify the condition.

Alcoa Steamship Co. v. United States, 94 F. Supp. 406, 1951 AMC 104 (S.D.N.Y. 1950) concerned a suit for damages alleged to have been

sustained as a result of the delivery of the vessel under a demise charter with latest defects existing in the propeller shaft. The claim was brought by charterer against owner, the former contending that the loss of the propeller resulted from an unseaworthy condition for which owner was responsible. Charterer claimed damages consisting of the cost of making necessary repairs and loss of use of the vessel. The charter provided that the vessel, on her delivery, was warranted seaworthy "so far as due diligence can make her so". The Court held that "this was a limited, not an absolute, warranty of seaworthiness, and it relieved [owner] from liability for latent defects unless there was a failure to use due diligence." (94 F. Supp. at 407).

Under the Barecon "A" charter, while Owner's warranty of seaworthiness is limited by a "due diligence" provision, responsibility for latent defects is expressly provided for in Part II, Clause 1. The clause brings clarity to what otherwise can be an exceedingly murky problem of determining when the condition arose. It provides that Owner remains responsible for repairs or renewals resulting from latent defects existing at the time of delivery, but only if such defects have manifested themselves within 18 months of delivery or such other period as the parties may agree.

C. Inability to Perform

The concept of "off-hire" has no place in a demise charter. As a general rule, unless the vessel is lost or requisitioned, operation of the vessel is the charterer's responsibility whether or not she is able to perform and charterer is obliged to pay the agreed hire.

In United States v. Shea, 152 U.S. 405 (1894), the chartered vessel was in a collision and had to be repaired. Owner claimed hire for the period of the repairs. The government defended the claim on the grounds that the charter was not a demise. The Court held, however, that the vessel was wholly under the management and control of the government, that the charter was a demise, and that the government was liable for hire for the period when the ship was undergoing repairs.

Hills v. Leeds, 149 F. 878 (D. Me. 1907), was similar. Charterer claimed that it was entitled to a return of hire for time lost following a collision. Charterer contended that the collision resulted from a defect in the vessel, but the Court found that the evidence did not support charterer's position. The Court ruled, therefore, that charterer was obligated to pay hire for the period of about 31 days during which the vessel was unable to perform.

A further example of these principles can be found in the arbitration award issued in The Jay Robertson, SMA No. 2052 (Arb. at N.Y. 1985). The chartered vessel was a jack-up drilling barge which broke her tow in a violent storm. As a result, the vessel had to enter a port of refuge to undergo repairs and the intended voyage and drilling program was never performed. The Panel denied charterer' contention that the barge was unseaworthy when delivered and awarded owner the full amount of hire, plus interest and certain expenses (including a portion of its legal fees) due under the charter.

D. Requisition

In the absence of a clause allocating the risk of government requisition of the vessel, such action generally would be deemed an event which frustrates performance of the charter and brings it to an end. The The Permanente, 1945 AMC 1447 (N.D. Cal. 1945), two vessels were demise chartered for a period of about two years, with delivery being made in March and April 1941, respectively. In July 1942, the Government took possession of the vessels for use on a demise charter basis. In so doing, the Government disregarded the existing bareboat charters entirely and owner, without protest, permitted charterer to cease performance of all its obligations under the bareboat charters. The Court held that the Government's action in requisitioning the vessels frustrated the charters and thereby terminated the parties' rights and obligations thereunder.

Part II, Clause 22 of the Barecon "A" form expressly allocates the risk of requisition in a different way by distinguishing between a requisition for hire by a government and "compulsory acquisition" of the vessel by a government. In the former case, the risk remains with charterer, who remains obligated to pay hire to owner but is entitled to the benefit of any hire paid by the Government. Clause 22 expressly provides that a requisition for hire shall not be deemed an event which frustrates the charter.

In the case of compulsory acquisition, the approach taken in the charter is quite different. The charter will be deemed terminated and the obligation to pay hire ceases as of the date of the government acquisition.

E. War

A major concern which arises during time of war is requisition, a subject discussed above. A further major concern is whether the vessel is permitted to trade in a war zone. The Barecon "A" form addresses the issue of trading restrictions very directly in Part II, Clause 23. The clause requires owner's consent to the use of the vessel in any place which is dangerous because of actual or threatened war or warlike activities. In addition, the clause gives the vessel liberty to comply with any orders of the flag government, any other government, or the war risk insurers. Charterer is given an option to cancel the charter in the event of the outbreak of war between any two or more of named world powers.

In Schnell v. United States, 166 F. 2d 479, 1948 AMC 769 (2d Cir. 1948), the charter contained a clause which required that the vessel comply with regulations which the United States might impose as a war measure upon any ship engaged in trade. It was argued unsuccessfully that this clause prevented the charter from being a demise. The clause stated that the charterer shall be subject:

> to all regulations of general application in the trade issued by the United States with respect to cargoes, priority of cargoes, contracts of affreightment, rates of freight and other charges, and as to all matters connected with the operations of vessels in the trade.

The Court read this clause as referring to regulations which the United States might impose in its sovereign capacity in time of war. The Court held that this limitation upon charterer's use of the vessel did not undermine the transfer of complete command, possession and control over the vessel required for a demise.

F. Lack of Employment

Owner has no responsibility for the employment of the vessel during the charter period. Bareboat charters generally do not contain off-hire clauses and the employment of the ship in accordance with the charter rests entirely with charterer.

G. Responsibility in Connection with Employment

As a general rule, as between owner and charterer, the latter will have responsibility to third-parties for any debts or liabilities arising during the course of employment of the vessel under the charter. By the very nature of a demise charter, because owner is no longer in control or command of the vessel, it should have no responsibility for any debts or liabilities incurred during the charter period. Nonetheless, there are liabilities which may arise from the employment of the ship from which owner will not be insulated by virtue of the demise.

1. Personal Injury and Death Claims

A bareboat charter will not entirely insulate owner from liability for personal injury and death claims. The traditional rule followed by most courts in the United States is that delivery of the vessel to a bareboat charterer relieves owner of any liability for conditions arising thereafter which cause injury or death.4 Owner remains liable for injuries caused by conditions in the vessel which existed prior to delivery to the charterer. Thus, although owner is insulated from liability for illness or injury arising during the operation of the vessel by charterer, there is a residual obligation on owner's part with respect to unseaworthy conditions which existed at the time the bareboat charter commenced.

The Second Circuit Court of Appeals summarized the position as follows:

> an owner-demisor is generally only liable where the injury results from unseaworthiness or negligence which existed prior to delivery of the vessel to the demise charterer.

In re Marine Sulphur Queen, 460 F. 2d 89, 100 (2d Cir. 1972).

The rationale for this rule was explained in the Court's earlier decision in Cannella v. Lykes Bros. S.S. Co., 174 F. 2d 794, 796 (2d Cir. 1949). While recognizing that owner's warranty of seaworthiness runs by contract only to the demisee, the Court observed that if the latter were to become liable to a third-party for an injury occasioned by a condition existing at the commencement of the charter, the charter would provide it with either an implied or express right of indemnity against owner. Thus, ultimate responsibility should rest with owner. In case charterer were to become insolvent or otherwise judgment proof, the third party would be

entitled to either join owner in the action or otherwise become subrogated to the rights of charterer as against owner. To avoid circuity of actions, the Court found that permitting owner to be sued directly in the first instance would impose no greater hardship on it that it would have in any event under the charter.

Charterer, of course, will be liable to seamen or longshoremen for injury or death as if it were the owner. Moreover, the vessel is liable in rem to the same extent as if there were no demise.5

In recent years, some United States courts have gone beyond the traditional rules to allow seamen to sue owner, charterer or both for injury and death regardless of when the unseaworthiness arose.

In Baker v. Raymond Int'l, Inc., 656 F.2d 173, 1982 AMC 2752 (5th Cir. 1981), cert. denied, 456 U.S. 983 (1982), the Court held that, as a matter of policy, it was no longer necessary to hold to the old rules. The Court stated:

> As a matter of policy, we treat seamen protectively, as "wards of admiralty." In Spinks v. Chevron Oil Co., 507 F.2d 216, 1979 A.M.C. 1165, (Sy.) (5 Cir. 1975), we followed this policy and held it no longer necessary "that an injured seaman ..... speculate at his peril" on the identity of his Jones Act employer. Id. at 225. Similarly an injured seaman, of presumably limited resources, should not have to speculate on when the unseaworthy condition of a vessel arose or whether a valid bareboat charter existed. No continuing purpose is accomplished by requiring him to seek out and attach the vessel. If injured by its unseaworthiness, he should be able to sue its owner. The allocation of ultimate liability should be the responsibility of the owner and charterer, who "can sort out which between them will bear the final cost of recovery." Id.
>
> We make explicit what was implicit in The Barnstable: a seaman may have recourse in personam against the owner of an unseaworthy vessel, without regard to whether owner or bareboat charterer is responsible for the vessel's condition.

It is not yet clear from the case law whether Baker will be followed in other circuits in the United States. Baker should not apply with respect to claims brought by longshoremen and harbor workers whose rights are governed by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901-950. Under LHWCA, a vessel owner or bareboat charterer whose negligence causes injury may be held liable to a covered worker. 33 U.S.C. 902(21) AND 905(b). See generally Reed v. s.s. Yaka, 373 U.S. 410 (1963), reh. denied, 375 U.S. 872 (1963) and Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983). Actions based on grounds of unseaworthiness are not permitted, however, by virtue of amendments enacted in 1973.6

2. Cargo Loss

Generally, owner will be fully insulated from liability for cargo loss or damages when the vessel is operating under a demise charter. The important exception to this general rule is that owner will remain liable for any unseaworthy conditions which existed at the time the vessel was delivered to charterer.

These principles are illustrated by Dant and Russell Inc. v. Dillingham Tug and Barge Corp., 1986 AMC 954 (D. Ore. 1985). The case involved a claim for cargo damage. The barge was demise chartered by Pacific to Hvide, which, in turn, voyage chartered the barge to Terminal. The cargo damage was caused by an unseaworthy condition of the barge which predated the demise charter. The Court found that the demise charterer was liable for the cargo damage. The Court followed the well settled rule that the owner of a vessel under demise charter remains liable for unseaworthiness that preexists the charter. It is also well settled that the owner's liability runs to the cargo owner even when there is no privity between them. The Court rejected owner's argument that it was entitled to rely upon the provisions in the bills of lading. According to the Court, only those parties in a direct contractual relationship with the carrier may take advantage of the bill of lading provisions, and then only if the intent to extend them to those parties is clearly expressed. See Tokio Marine and Fire Insurance Co. Ltd. v. NYK Lines, 466 F. Supp. 212, 213, 1979 AMC 2577, 2578 (W.D. Wash. 1979). The Court found that those conditions were not met and that owner was not entitled to rely upon the bills of lading. According to the Court, the owner's liability for unseaworthiness predated and, therefore, was unaffected by the bills of lading.

A similar result was reached in National Marine Service, Inc. v. Petroleum Service Corp. 1983 AMC 2658 (E.D. La. 1982). There, the registered owner was held 40% at fault for the sinking of a barge and the loss of its cargo. Owner's liability flowed from its failure to give charterer and the shipper sufficient warning of the barge's characteristics which rendered it unfit to carry the particular cargo.

3. Collision

A bareboat charterer can be held liable to third parties for collision damages to the same extent that the vessel's owner would be. See, Van Nood v. Federal Barge Lines, Inc., 282 F. Supp. 890 (E.D. La. 1968). Owner would be relieved of liability in personam (save in cases where a pre-existing unseaworthy condition contributed to the collision), although the vessel would be liable in rem. Federal Barge Lines, Inc. v. SCNO Barge Lines, Inc., 711 F.2d 110 (8th Cir. 1983); United States v. Barge CBC 603, 233 F. Supp. 85 (E.D. La. 1964 .

4. Suppliers

Charterer bears sole responsibility for supplies or necessaries ordered during the period of the charter. Two recent cases illustrate this rule.

In Avin International Bunker Supply, S.A. v. Wellrun Management, 607 F. Supp. 738, 1985 AMC 2513 (S.D.N.Y. 1985), a supplier of fuel contended that the vessel owner was liable. There were somewhat peculiar facts, in that owing to charterer's financial difficulties, arrangements were made by owner and a third party whereby the latter paid for supplies by advancing necessary sums to the charterer, in return for which the third party collected freights owing to charterer. The Court held that owner had no direct liability to the fuel supplier. The Court recited well established principles concerning bareboat charters:
"It has long been the maritime law that the owners of a vessel are not

personally liable for goods or services furnished to the vessel on order of a bareboat charterer of the vessel."

Similarly, in Pierside Terminal Operators Inc. v. M/V Floridian, 374 F. Supp. 27, 1974 AMC 1954 (E.D. Va. 1974), the bunker supplier argued that the contracts entered into after charterer encountered financial difficulties modified the bareboat arrangement to an "owner/operator" relationship rather than a registered owner/bareboat charterer relationship. The Court found that questions of fact were raised which required a trial concerning the issue of control. The Court noted that the burden of proof rested with owner since it was the party attempting to show that it was relieved of its legal obligations as to the supplier of fuel. It is clear from the Court's decision, however, that so long as owner could carry its burden of proof on this issue, it would prevail in the suit brought by the supplier.

It bears emphasis that a demise charter does not insulate the vessel from in rem liability to suppliers of necessaries or repairs under the Federal Maritime Lien Act.7 A bareboat charterer is presumed to have authority to bind the vessel when it orders repairs, supplies, towage, use of dry-dock or other necessaries.8

To protect owner against the consequences of maritime liens for necessaries, the Barecon "A" form expressly allocates responsibility for repairs and other necessaries to charterer, and contains a prohibition of liens clause, which provides as follows:

> Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Vessel.
>
> The Charterers further agree to fasten to the Vessel in a conspicuous place and to keep so fastened during the Charter period a notice reading as follows:
>
> > "This Vessel is the property of (name of Owners). It is under charter to (name of Charterers) and by the terms of the Charter Party neither the Charterers nor the Master have any right, power or authority to create, incur or permit to be imposed on the Vessel any lien whatsoever."
>
> Charterers shall indemnify and hold Owners harmless against any lien of whatsoever nature arising upon the Vessel during the Charter period while she is under the control of Charterers, and against any claims against Owners arising out of the operation of the Vessel by Charterers or out of any neglect of Charterers in relation to the Vessel or the operation thereof. Should the Vessel be arrested by reason of claims or liens arising out of her operation hereunder by Charterers, Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released and at their own expense put up bail to secure release of the Vessel.

A thorough discussion of the effect of such a clause is beyond the scope of this paper, but a few comments may be in order. The clause is valid and, if actually known to third parties before any goods or supplies are provided would defeat a maritime lien against the vessel.9

5. Trading Limits

Owner may impose trading limits in the charter without defeating the requirements of a demise. Such limits may be geographical in nature or restrict the type of cargoes charterer is permitted to carry. There is case authority which holds that charterer becomes liable as an insurer of the vessel for any consequences of its violation of geographic trading limits even in the absence of negligence on its part. The James G. Shaw, 1928 AMC 1253 (E.D.N.Y. 1928).

Part II, Clause 4 of the Barecon "A" form imposes geographic trading limits and excludes certain types of dangerous cargoes. Clause 6 gives owner the right to require that the charterer keep it apprised of the intended employment of the ship.

6. Restrictions in Bills of Lading

In Schnell v. United States, 166 F.2d 479, 1948 AMC 769, 770-771 (2d Cir. 1948), an issue arose as to whether the charter was a demise because it contained a clause requiring that certain specified clauses should be incorporated in the charterer's bills of lading. The Court held that this condition did not indicate that control of the vessel was retained by owner.

II COSTS

A. Crew

It is not vital to the formation of a demise charter that the charterer pay the crew its wages and related expenses. The Supreme Court observed in United States v. Shea, 152 U.S. 178 (1894) that a clause requiring owner to furnish a crew and supply fuel did not prevent the charter from being a demise since they were matters affecting the freight rate and did not interfere with charterer's exclusive control. The Court made a similar statement more recently in Guzman v. Pichirilo, 369 U.S. 698, 1962 AMC 1142 (1962), noting that the Master could be employed by owner so long as he was subject to the orders of charterer during the period of the demise. See also Hills v. Leeds, 149 F. 878 (D. Me. 1907).

The usual practice, however, is for charterer to supply the officers and crew. Indeed, if the situation is otherwise, the burden of proving that the charter is a demise may be a heavy one. In Fitzgerald v. A.L. Burbank & Co., Ltd., 451 F.2d 670, 1972 AMC 207 (2d Cir. 1971), for example, the Court observed that if the owner supplies the Master and crew, "it is extremely unlikely that there has been a demise to the charterer." (1972 AMC at 213)

Similarly, in In re the M/V Peacock, 1983 AMC 1200 (N.D. Cal. 1982), although the charter had many of the common features of a demise, owner retained primary responsiubility to "man the vessel and pay all costs in connection therewith". Because of this and certain other related clauses, the Court found that the charter did not allocate complete control of the vessel to the charterer and was not a demise.

Charterer may be held liable in an action by a seaman for wages and maintenance. Aird v. Weyerhaeuser S.S. Co., 169 F.2d 606 (3d Cir. 1948).

B. Ordinary Maintenance

In the absence of a clause in the charter providing otherwise, the charterer's obligation is to redeliver the vessel in as good condition, ordinary wear and tear excepted, as she was in when delivered. Kenny v. City of New York, 108 F.2d 958 (2d Cir. 1940; Howard v. Dobbins-Trinity Coal Co., 111 F.2d 571 (2d Cir. 1940), cert. denied, 311 U.S. 691; Lopez v. Atlanta-Schiffahrts-G.m.b.H., 259 F. Supp. 949 (D.P.R. 1966).

The Barecon "A" form requires in Part II, Clause 8 that charterer shall keep "the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice." Owner is given a right of inspection to assure itself that the vessel is being properly maintained. Part II, Clause 6.

Owner's right to have the vessel properly maintained is considered so important in Barecon "A" that it is entitled to withdraw the vessel is "necessary repairs" are not done by charterer "within a reasonable time". Part II, Clause 8.

C. Extraordinary Maintenance

What is the charterer's duty when extraordinary maintenance is required, such that instead of just keeping the vessel in a good state of repair, improvements are made? Can charterer make structural improvements or install new equipment without owner's permission? Who bears the costs of complying with government regulations which come into force during the period of the charter and require structural or equipment improvements?

The Barecon "A" form deals with these difficult issues in Part II, Clause 8 by allowing the parties the option of either agreeing what to do or submitting the matter to arbitration:

> Unless otherwise agreed, in the event of any improvement, structural changes or expensive new equipment becoming necessary for the continued operation of the Vessel by reason of new class requirements or by compulsory legislation costing more than 5 per cent. of the Vessel's marine insurance value as stated in Box 28, then the arbitrators under Clause 25 shall have power to re-negotiate this Contract in a reasonable way having regard, inter alia, to the length of the period remaining under the Charter and may decide the ratio in which the cost of compliance shall be shared between the parties concerned.

D. Fuel and Lubricating Oil

Typically, the charter will provide that charterer will take over all fuel and lubricating oil on board at the time of delivery and owner will do the same at the time of redelivery at the then current market price at the place of delivery or redelivery. Part II, Clause 7 of Barecon "A" is explicit in this regard.

E. Port and Canal Expenses

Port and canal expenses arising out of the operation of the charter are solely for charterer's account.

F. Agency

Agents appointed by charterer cannot bind owner and act strictly for the account of charterer. It has been held that owner is not liable for torts committed by agents of charterer. Schnell v. United States, 166 F.2d 479, 1948 AMC 769 (2d Cir. 1948).

G. Insurance

The usual arrangement under a demise charter is that charterer arranges for hull, war risk and P & I cover to the extent required by owner. Owner usually does not purchase additional hull insurance since its interest should be fully protected by the cover provided by charterer. It appears that, in the past, it was common for owner to directly insure the hull for its own account. See, e.g. Kerr-McGee Corp. v. Law, 479 F.2d 61, 1973 AMC 1667 (4th Cir. 1973).

Unless owner is named as a co-assured under the P & I cover obtained by charterer, in view of the risks described above of liability to third parties notwithstanding the demise charter, it should have its own separate cover.

Part II, Clause 11 of Barecon "A" is typical and requires that charterer acquire such insurance at its expense, but in such form as owner approves. Further, all insurances are to be in the joint names of owner and charterer.

FOOTNOTES

1. Two works which deserve special mention as resource materials for the study of bareboat charters are Gebb, The Demise Charter: A Conceptual and Practical Analysis, 49 Tul. L. Rev. 764 (1975) and Harper, Demise Charters: Responsibilities of Owner or Charterer for Loss or Damage, 49 Tul. L. Rev. 786 (1975).

2. See, e.g., Work v. Leathers, 97 U.S. 379 (1878); Cullen Fuel Co. v. W.E. Hedger, Inc., 290 U.S. 82 (1933); Thomas Jordan, Inc. v. Mayronne Drilling Mud, 214 F.2d 410 (5th Cir. 1954). It is open to the parties to enter into a bareboat charter wherein owner disclaims any warranty of seaworthiness. See, e.g. Zidell, Inc. v. Barge ZPC 404, 661 F. Supp. 1696, 1987 AMC 2494 (W.D. Wash. 1987), where the Court held that there was no warranty of seaworthiness in view of charterer's acceptance of the vessel "as is", along with the responsibility for all repairs.

3. The Inchmaree Clause provided:

> This insurance also specially to cover (subject to the average and all other conditions of this policy not conflicting herewith) loss of or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through bursting or explosion of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, but free from any claim for the part in which latent defect existed.

4. See Reed v. The Yaka, 373 U.S. 410, 1963 AMC 1373 (1963), reh. denied, 375 U.S. 872 (1963). Anibal v. Litton Industries Leasing Corp. 1977 AMC 1353 (D.P.R. 1977).

5. See, e.g., Grillea v. United States and Nat. Shipping Assoc., 1956 AMC 1009 (2d Cir,. 1956), holding that a ship is liable in rem for the personal injury of longshoremen even if owner has no direct personal liability.

6. 33 U.S.C. 905(b).

7. 46 U.S.C. 971, et seq.

8. 46 U.S.C. 973.

9. See, e.g., Marine Fuel Supply & Towing, Inc. v. The M/V Ken Lucky, 859 F.2d 1405 (9th Cir. 1988) and cases discussed therein.

BAREBOAT CHARTERPARTIES

BAREBOAT CHARTERS FOR NEW BUILDING

BY
JOSE M. ALCANTARA

A) Inspection during construction

It is normally agreed that, having regard to the charterer's interest to see the vessel built in accordance with the specifications and plans he has approved, the charterer may send his representative, or an appointed surveyor, to the yard to inspect the vessel during the course of her construction (Barecon B, Part II, 1-c).

However, the charterer's inspectors shall be sent to and maintained at the shipyard at charterer's entire cost and expense. The charterer's representatives do not form a separate inspection team vis-a-vis the builder but shall always deal with the owners' inspectors or supervisors at the yard direct and are expected not to interfere with the construction works of the builder's performance in general.

The charterer's inspector is entitled, during construction of the vessel, to attend all tests and inspections of the vessel including those tests conducted by the Classification Society, other regulators agencies and the builder. These inspectors will also have unrestricted access to all work in progress and material utilised in connection with the construction of the vessel, no matter where such work is being done or where such material is stored, provided that their attendance is required for the purpose of determining that the vessel is being constructed in accordance with the specifications and plans and also that such examination does not cause obstruction to the orderly procedure of the construction by the builder.

The charterer's inspectors do not take over the authority of the owners' supervisors at any time but they act in conjunction with the latter and with no legal capacity in respect of the builder. Thence, all the discoveries, demands, complaints and questions shall be notified to the builder through the owners supervisors. In practice, the charterer's inspectors are to play a major role of supervision because the vessel is truly and factually constructed for the charterer's needs in accordance with his own design (the bareboat charterer is an ad hoc owner.

B) Changes and extras

The charterparty for "Barecon B" (at Part III, 1-b) provides that no change shall be made in the Building Contract or in the specifications or plans of the vessel as approved by the charterers without the charterer's consent. The rule is simple and easy to understand: the vessel is constructed for the charterer to suit his employment purposes and, therefore, no changes should be made without his consent and by no one but him (albeit through the owners).

It will be presumed that the owner, who is purely a "go-between" between the builder and the charterer and very often no more than a builder's subsidiary company, will not be likely to order alterations and/or extras in the vessel since he does not purport to trade her for a long period of time or, where a purchase option is agreed, at all. Thus, modification requests are likely to come from the charterer though they must be made by the owner. These changes to the plans and specifications should normally be agreed in writing with the builder and may involve a considerable amount of detailed work and negotiation.

The charterer will see that the builder is amenable to, or rather persuaded, to accommodate his requests within the shortest period of time and at a reasonable cost. The charterer cannot, however, dismiss the possibility that the builder may well decline certain modifications and changes that can be proved to be of a nature that would seriously delay the builder's work schedule then in hand at the yard.

The charterer, once a particular change has been agreed (inevitably involving discussions as to the increase or decrease in the price), will make sure that the owner exchanges with the builder duly authenticated letters, or telexes confirmed by letters, evidencing such agreement because the said letters and telexes will amount to an amendment to the specifications and plans under which the vessel is being built and which were approved by the charterer at the inception of the building contract.

It is most important that changes relating to Class requirements such as may be requested by the Classification Society or other regulatory bodies in the course of the construction are advised to the charterer by the owner.

Another aspect in which the attendance and special care of the charterer's inspectors may be required is in the event of substitution of materials, whenever any of the materials referred to by the specifications cannot be supplied or procured in time for delivery to take place. Where new materials of like quality are agreed upon, the owner must seek and obtain, for the charterer, the approval of the Classification Society.

C) Discharge of terms of the contract and acceptance of delivery

Under a Bareboat Charter for newbuilding, the doctrine of "compliance with description" is very strictly followed. The golden rule is that, in order for the owners to tender delivery to the charterer, the vessel must have completed her acceptance trials under the building contract (including trials of cargo equipment) to the full satisfaction of the charterer (Barecon B, Part II, 2-a).

On general principles the ship's specifications are the "description" and where the vessel does not conform to the specifications the tender for delivery is defective. Thence, the owner cannot properly effect delivery under the charter where the vessel did not complete her trials to the charterer's satisfaction. The charterer has the last word and it will be more than appropriate for the owner to secure that he is sufficiently protected under the building contract so as to meet the charterer's terms for taking delivery under the charter. In particular, the owner should be careful over the agreed method of acceptance of the vessel, e.g., he should have the charterer's representative attending with him at the sea trials and all further tests, give him the official results of the trials promptly and obtain the charterer's consent to acceptance before confirming to the builder, in writing, his acceptance of the vessel.

The application to the shipbuilding contract of the doctrine of strict compliance with specifications may lead to dramatic consequences for the yard. From the owner's (as a buyer) point of view, perhaps the most important consideration for him is to receive from the shipyard a profit earning chattel having certain important commercial characteristics, such as those regarding deadweight, speed, consumption, cargo handling, overall measurements and complying with the requirements of the chosen Classification Society. These are of course matters which are specifically and prominently dealt with in the

contract. Apart from the question of classification, it is noteworthy that so far as matters of deadweight, speed and consumption are concerned, even here a degree of tolerance is permitted before the owner would be entitled to reject the vessel for non-compliance. And yet, on the other hand, some relatively minor matter, because expressly dealt with in the specification, and therefore treated as a condition, will give rise to the right to reject the vessel. The vessel must have been tendered for acceptance complying with the building contract and the specifications; if she does, then the tender is good and meets charterer's satisfaction; if she does not, then the owner is entitled to reject the vessel.

Necessarily leaving aside in this paper the matter of the tolerance permissible under the various types of delivery/acceptance clauses in building contracts, we shall focus our attention to one substantial issue; where does the charterer stand regarding delivery and acceptance of the vessel from the shipyard? Can he do more or less than the owner is entitled to do?

i) Where the owner is entitled to reject the vessel under the building contract.

   The owner must first consult the charterer and thereupon if the latter does not wish to take delivery of the vessel he shall inform the owner within seven days in writing and upon receipt by the owner of such notice the charterparty shall cease to have effect. This period of notice should be adjusted with the time for rejection under the building contract.

ii) Where the owner is entitled to reject the vessel but the charterer is nevertheless willing to receive her.

   Then, the charterer may within seven days require by notice to the owners to negotiate with the yard as to the terms on which delivery should be taken, i.e. the alteration or corrections to be made so as to remedy the cause of rejection in accordance with the charterer's directions. Having received such notice, the owner shall refrain from exercising his right of rejection and shall commence the negotiations with the builder for the purpose of delivering the vessel to the charterer.

The charterer cannot, on the other hand, reject the vessel where the owner has no reason under the building contract to do so (Barecon B, Part II, 2-c-iii).

In summary, the Charterer cannot exceed the powers given to the owner (buyer) under the building contract, but it is the charterer who makes the decision to accept or reject the vessel.

It is relevant to note that, once the vessel is accepted, the charterer cannot be compelled to take delivery for the purpose of the charter until the vessel is:

i) Afloat and ready for delivery after completion of trials
ii) At the shipyard or at the place agreed with the builder
iii) Classed and documented
iv) Free for transfer to the flag she is to fly.

Therefore, delivery of the vessel under the charter is a factual term and not a matter of estimate or calculation in the contract. She must be <u>effectively</u> ready to be employed under the Charter. Thus, it is possible that the dates of

delivery under the building contract and under the charter may differ. Nowadays, most of delivery terms under the building contracts are drafted in a very precise fashion to satisfy owners as to when the obligation of delivery is discharged by the builders and, accordingly, it is often agreed that acceptance of the vessel by the owners is to be conditional upon receipt by him of all documents and certificates required by the contract and the specifications (usually, protocol of stores of consumable nature, drawings and plans, builder's certificate, protocol of deadweight determination and inclining experiments, declaration of warranty of the builder as to free of liens and encumbrances, commercial invoice, bill of sale and all other documents and certificates specifically agreed to be furnished) together with the Protocol of Delivery and Acceptance. Under these circumstances, the documents and certificates having been provided to the vessel, she will be free for flag arrangements and the charter period should be deemed to have commenced to run as the construction is finalised. The charterer shall not be entitled to refuse acceptance upon delivery being effected to him as aforesaid.

The owner, despite his low-profile role in the Bareboat Charter for newbuilding, is not relieved of his obligation to provide a ship in the event of builder's cancellation due to a default by the owners under the building contract (e.g., failure to pay one of the price instalments), and the charter would only follow the course of the building contract where the cancellation by the builder is caused by force majeure.

D) Seaworthiness at delivery

Under the Barecon A form of Bareboat Charterparty the owner has to exercise due diligence to provide a seaworthy ship (Clause 1). The vessel's seaworthiness at the time of delivery is a warranty but not an absolute obligation on the part of the shiowner. In the event of a newbuilding, delivery under the charter is conditional upon the vessel complying with the description (pursuant to the building contract and the specifications) to the full satisfaction of the charterer. Therefore, it is submitted that the owner will not be able to tender an unseaworthy ship because she would not be "ready for delivery by the builder after completion of trials". Subject to hidden defects, the owner must not accept from the builder a vessel that is not seaworthy. However, where the owner fulfils his obligations as to delivery of a ship in full readiness, classed, documented and safely afloat at the place agreed, then the charterer shall not be entitled to make any claim against the owner in respect of any warranty, whether expressed or implied, as to seaworthiness of the vessel (Barecon B, Part II, 2-a, at lines 56 and 57).

E) Maintenance after delivery

The vessel is, during the charter period, in the full possession, at the absolute disposal and under the complete control of the charterer in every respect (Barecon B, Part II, Clause 9). Therefore and consequent upon the above rule, the charterer shall:

- fully maintain the vessel in efficient operating condition ("in accordance with good commercial practice", Barecon B)
- in class
- undergo periodic class surveys

- carry out repairs promptly ("take immediate steps", Barecon B)
- arrange and keep the vessel insured (hull and P & I risks)
- establish and maintain financial security or responsibility in respect of oil or other pollution damage as may be required by any government or authority.

The charterer's duty as to maintenance of the vessel after delivery derives from the fact that he is in possession of the vessel and appoints the master and crew. The shipowner parts with the control of the ship to every extent in bareboat chartering, and the more so in the case of newbuildings where the charterer is an owner ad hoc and uses the Bareboat Charter to finance the purchase of the vessel.

While under the Barecon A form the time limit for claims against the owner in respect of latent defects, not discoverable upon delivery, is of 18 months, this period is reduced to 12 months for newbuildings in order to give charterers the protection of the guarantee clause in the building contract. The owner, as a result, assigns the benefit of the builder's guarantee (12 months) to the charterer who agrees to claim against ownere only to the extent that the owner can effectively recover under such guarantee.

BAREBOAT CHARTERPARTIES

BAREBOAT CHARTERS FOR NEW BUILDING

BY
WILLIAM TETLEY

I. Introduction

1) Definition of a Bareboat Charter

A bareboat charter is a lease of a ship to a charterer who becomes the owner ad hoc or beneficial owner. The charterer controls the master and crew and appoints them. "Bareboat" and "demise" charterparties are practically synonymous. Nevertheless because the law of some flags requires that the master and some of the officers be nationals of that country, they may be appointed by the owners, but under the control and direction of the charterer.

> Scrutton on Charterparties states:
> "A charter by demise of a ship without master or crew is sometimes called a 'bareboat' or 'net' charter". 1
>
> The U.S. Supreme Court defined a demise charter as follows: 2
> "(F)ull possession and control of the vessel are delivered up to the charterer for a period of time. The ship is then directed by its Master and manned by his crew; it makes his voyages and carries the cargo he chooses. Services performed on board the ship are primarily for his benefit. It has long been recognised in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner, generally called owner pro hac vice".

2) Purposes of Bareboat Charters

a) To hire a ship long term without master and crew.
b) To finance the purchase of a ship.
c) To finance the building of a ship.
d) To finance the purchase and conversion of a ship.

3) Specific Purposes of Bareboat Charters

a) For the charterer

To obtain the possession and service of a ship on a long term basis without having to finance the price of her purchase or the cost of her building if a new ship. In consequence, the charterer is not obliged to show in its financial statements a liability such as a loan, which would be the case if the ship were financed by the charterer as owner. In the present case, the hire payable usually monthly or bi-monthly being a current liability. At the end of the charter, the charterer has the option to purchase the ship, and part of the hire payments are considered to be on account of the purchase price. If the ship is registered in the name of a single ship company, the charterer is given the option to buy the shares of the owning company.

b) For the owner

To make a remunerative investment, e.g. in the case of an insurance or trust company or other "angel" having the required funds to invest but without being obliged to operate the ship, an operation for which it would not have the organization, competence or desire.

c) For the mortgagee

To make a remunerative investment, the loan in capital and interest and charges being repaid by way of the hire payments during the c/p period and guaranteed by a first mortgage on the ship. As protection against the case of a loss of the ship, the insurance proceeds are assigned to the mortgagee.

The charterer in these cases will usually be a wholly-owned subsidiary of a large corporation like U.S. Steel or an oil company, the credit of which is high class.

4) Forms of Bareboat Charter

a) Barecon "A" - "Standard Bareboat Charter", Benedict on Admiralty, Vol. 2B at pp. 4-9.
b) Barecon "B" - "For New Building Vessels Financed by Mortgage (see Appendix attached Ibid at pp. 4-23.
c) Shell Demise (New Building Vessels) Ibid at pp. 4-47.

(For the purposes of this paper, Barecon "B" is attached as Appendix "One". There are many other possible forms of Bareboat building charter.)

II The Cause of Problems Arising from New Buildings and Bareboat Charters

Problems in respect to bareboat charters and new buildings arise because the normal role of the purchaser is divided between two persons, the bareboat charterer and the shipowner who in effect attempt to deal as one party with the shipbuilder. In consequence there are now three parties, not two. In fact, there are four parties when on certain occasions a naval architect is employed by the owner (or bareboat charterer) and the plans and architect of the builder are not used. In that case there is an owner, a bareboat charterer, a shipbuilder and a naval architect (or designer).

There may also be a fifth party, a mortgagee lender as well or the owner may attempt to hold the first mortgage under a loan from a subsidiary corporation. This latter procedure is very suspect and has been questioned in the United States. 3

The roles, rights and responsibilities of these five parties in a bareboat new building must be very carefully defined and not left to the mere application of the law. The implied warranties of a normal shipbuilding contract, for example, are for whose benefit - the owner or the charterer? Who is responsible for cost overruns, or plan changes imposed by the government or classification societies - the owner or the charterer?

In other words, the normal demise charterparty between owner and charterer for the hire and operation of a ship must also take into account different contractual relationships as well - the design and building of the ship and its financing.

III The Normal Building Contract

Before considering the contractual arrangements involving the five parties - the builder, the designer, the shipowner, the bareboat charterter and the mortgagee - it is fitting to look at the straight or "pure" tripartite arrangement involving the shipowner, the designer and the builder.

Nota bene It is also possible that there will only be two parties - the owner and the builder. This happens when the builder provides its own plans (and designer) and guarantees the design and the ship to be built.

IV A Straight Ship Building Arrangement

The order of events in a straight owner, designer and shipbuilder arrangement is usually as follows:

1) The owner has a long term contract of carriage or use for a new vessel. For example, the owner has a long term contract to transport so many million barrels of crude from the North Sea or the Persian Gulf to the U.S.A. or to Japan each year for ten years or the owner has a long term contract to provide passenger and cargo services to a government in a particular area.

2) It is assumed that the owner has its own financing or can get its own financing without need of a bareboat charter.

3) The owner selects a ship designer (naval architect).

4) The owner enters into a design contract with the designer at a fixed price (or cost plus) to do contract plans and specifications.

5) The owner gives the designer the broad parameters of the required ship - the size, capacity, speed, fuel consumption, type, date to be delivered, cost, etc. (not more than 30 such requirements).

6) The designer prepares contract design plans (drawings) and specifications.

7) A classification society is selected by the owner.

8) The owner approves and initials every page of the plans and specifications which are also submitted to the selected classification society and to governmental authorities for approval if possible. (In the U.S. the Coast Guard has delegated its governmental duties to the American Bureau of Shipping (A.B.S.)).

9) The designer goes out to tender on behalf of the owner to shipyards (approved by the owner) with the approved package. The owner's name may or may not be divulged by the designer.

10) Firm offers from shipyards are received based on the approved package.

11) The owner selects the shipyard and a contract is signed to supply the ship at an agreed price or perhaps some other method.

12) The shipyard prepares working drawings to the approval of the owner, the designer, the classification society and the governmental authorities, if possible. (The shipyard guarantees that its design will comply with the present requirements of the government and of the classification society).

N.B. (On occasion the owner goes directly to the yard which provides the design, plans and specifications of the proposed ship, (usually of a type of ship previously built). Thus the builder guarantees the design and the construction.)

13) Supervision of each step of the building is done by:

a) the designer on behalf of the owner,
b) on occasion the owner employs an additional supervisor as well. (See Employers Ins. v. Avondale (The Oxy Producer) 1986 AMC 2770 (E.D. La. 1986)
c) the classification society,
d) governmental authorities,
for passenger carriage
for environment sewage & pollution
for crew health and safety
for the general stability of the ship and safety,
e) the builder.

14) The builder tenders for delivery with governmental and classification certificates.

15) Three tests are made. (On occasion only two tests). The tests are usually: Dock Trials, Builder's Trials and Sea Trial).

16. The vessel is accepted by the owner.

17. Normal conditions of a bareboat charter ensue.

V Bareboat Charterer, Owner, Designer, Builder

In a four party builder/designer/owner/bareboat charterer arrangement, one must carefully stipulate how the responsibilities of the owner in a normal contract are divided between the owner and the bareboat charterer.

1) The bareboat charterer has a long-time use for a new vessel, but needs financing.

2) The bareboat charterer convinces the owner to provide financing. A general agreement to finance under an eventual bareboat charter is agreed upon.

3) The bareboat charterer selects the designer who is approved by the owner or vice versa.

4) The bareboat charterer enters into a design contract, approved by the owner.

5) In each successive step of the four party contract, the owner and bareboat charterer share the normal role of owner in the three party contract. The bareboat charterer assumes the principal role and the owner who is usually a lending institution seeks warranties and protections. For this reason the owner will also have inspectors checking on its behalf at every stage of the ship building just as the charterer has a system of inspection and verification.

6) Mortgagee The owner may try to obtain additional security through a subsidiary holding a first mortgage. This has been questioned in the U.S., because it is doing indirectly what cannot be done directly.4 The mortgagee must be independent.

In the U.S., the builder's mortgage must be in accord with State law because a ship does not come into existence until launched and "capable of being used as a means of transportation"5 and only at that moment is it subject to U.S. law.6

In Canada, a builder's mortgage can be registered from the very beginning of construction of a recorded ship.7

In the U.K. a builder's mortgage is not possible and only an equitable mortgage is possible. (The equitable mortgage is not registered and ranks as an ordinary claim.)8

7) The bareboat charterer usually contains an option to purchase in favour of the charter. (See Barecon "B" attached.)

8) The overall contract can, therefore, be a bareboat charter which, besides referring to the delivery operation and redelivery of the ship (in the normal fashion), also refers to and incorporates a) the building contract, b) the design contract, c) the mortgage and d) the option to purchase.

VI Problems from Bareboat Building

Because the owner's responsibilities under a bareboat building contract are shared between the owner (the financing institution) and the bareboat charterer (owner ad hoc), all possible problems which could arise must be anticipated and then the responsibility carefully fixed in advance in the building contract as well as in the mortgage and in the charter itself. (See Barecon B Part II, para. 1 "Specifications and Building Contract").

The mortgagee must also have powers of intervention, inspection and notice and benefits of warranties, insurance, subrogation, etc. (See Barecon B Part II para. 11, "Mortgage").

To be taken into consideration are the following problem areas:

1) Responsibility for plan changes required:

   a) by the classification society,
   b) by governmental authority,
   c) by the owner,
   d) by the bareboat charterer.

2) Responsibility for increase in cost due to:

a) inflation,
b) devaluation of a currency,
c) cost overruns,
d) delays,
e) force majeure.

3) Responsibility for damages due to:

a) delays,
b) force majeure,
c) governmental intervention or delays in inspection and approval,
d) classification society intervention or delay in society's inspection and approval,
e) delays of the shipbuilder,
f) delays in the inspection and approval by the charterer at any stage,
g) delays in the inspection and approval by the owner at any stage,
h) delays in the inspection and approval by the designer at any stage.

4) Responsibility for defective work of the builder or of the designer must be fixed in advance between the charterer and the owner. In almost every case it will be the charterer who accepts that responsibility as the owner is only a financier who has no real knowledge or interest in ship construction or operation.

5) Responsibility for personal injury during building and operation caused by defect in design and methods of building, must be anticipated.

6) When does ownership pass? At delivery or at the moment of payments? 9 When does risk pass?

7) Are there two deliveries? The builder to the owner and the owner to the bareboat charterer or are they simultaneous?

8) Protection against bankruptcy of any of the parties.

VII Examples

There are so many possible permutations and combinations of arrangements, warranties, undertakings, terms and conditions amongst and between the parties that it is fitting to give reported decisions of what may happen and the solution arrived at by the courts. Herewith are examples.

Example No. 1

Alcoa Steamship Co. v. Charles Ferran 1967 AMC 2578, 383 F. 2d 46 (5 Cir.1967)

Implied non responsibility clause:

Evidence disclosing that "Red Letter" clause limiting ship repair contractor's liability to £300,000 was usual practice in industry and that ship repair contractor had oral understanding with vessel owner to do owner's repair work and after repair work was done had sent invoices to owner containing such clause was sufficient to show that vessel owner had notice that clause was implied in every repair contact. (Headnote at pp. 47.)

Direct action vs. shipbuilder's underwriter:

Ship repair contractor's underwriters, sued under Louisiana direct action statute along with contractor for damages because of contractor's negligence, were entitled to defence of ship contractor under red letter clause of repair contract limiting liability to £300,000.
LSA-C.C. 1rt. 2098. (Headnote at pp. 47.)

Example No. 2

in re Marine Sulphur Queen 460 F. 2d 89, 1972 AMC 1122 (2 Cir. 1972).

The Marine Sulphur Queen., a converted tank carrier, sank without warning or a trace in the Atlantic.

Where sinking of demise chartered vessel is presumed to have been caused by a series of defects, some occurring before and others after her delivery under the charter, the fact that the shipowner was a wholly-owned subsidiary of the demise charterer justifies imposing unlimited liability on the shipowner, because its stock would be available to satisfy seamen's death claims if the charterer's other assets were insufficient. (Headnote 1972 AMC at pp. 1123.)

Where demise charterer of vessel which disappeared was in privity to all the elements of proven unseaworthiness because, through its highest officers, it was involved in and knowledgeable concerning reconstruction of the ship, knew type of cargo that was being carried, and through its master or agent, knew, or should have known, the condition of the vessel and how she was loaded prior to commencement of her last voyage, demise charterer's liability would not be limited. 46 U.S.C.A. 183 (a, e). (Headnote 460 F. 2d at pp. 91.)

Even if shipbuilder was at fault, either under negligence theory or under doctrine of a manufacturer's duty of strict liability, it could not be made liable to death claimants unless its wrongful conduct was cause of the loss of the vessel; the burden of proving causation was on the claimants. (Headnote 460 F. 2d at pp. 91.)

Example No. 3

The Amoco Cadiz, Lim. Procs. 1984 AMC 2123 (N.D. 111 1984 Frank D. McGarr D.J.)

The Amoco Cadiz grounded off France grounded off France when the steering

system failed and claims were made for the resulting oil pollution. Chicago based Standard Oil Company through various subsidiaries had had the tanker designed and built by shipbuilder Astilleros in Spain and the ship was operated by various subsidiaries of Standard through various agreements and bareboat charters.

The cause of the loss was the lack of a back-up steering system in the ship's design and construction.

It was held

1) that Standard had been involved in the tanker's improper design, construction, operation and management and treated the vessel as its own. Standard was, therefore, liable both for its own negligence and for the tortious acts of its wholly-owned subsidiaries which owned and operated the vessel and were responsible for her day-to-day operations. (Headnote)

2) Astilleros' negligence in the design and construction of tanker's steering gear system entitles the tanker's owner and operator to recover on claims for indemnity and contribution to the extent that their liability to third parties was contributed to by the shipyard's fault. (Headnote)

Example No. 4
Amoco Cadiz 1986 AMC 1945 (N.D. 111 1986).

Although broad exculpatory clause in classification society's certificates may not be legally enforceable, it does indicate that the society did not intend to assume liability for all damages resulting from defects in tanker's design or construction. Hence, tanker owner's claim against the society for complete indemnity will be dismissed. (Headnote)

Since failure to detect already existing defects does not increase the risk, a shipowner having knowledge of dangerous conditions on its vessel cannot escape liability for failing to correct them on the ground that classification society's surveyor failed to bring them to its attention (denying society's motion to dismiss shipowner's claim for contribution, since there were factual issues as to the exact scope of the society's undertakings and shipowner's reliance on them). (Headnote at pp. 1945)

Example No. 5
East River S.S. Corp. v Transamerica Delaval Inc. 476 U.S. 858, 1986 AMC 2027 (1986).

Four tankers were constructed for owner Seatrain by a wholly owned subsidiary who had contracted with Defendant Delaval to design, manufacture and install turbines in the ships. When completed, ownership in each ship was transferred to a trust company as owner trustee who in turn bareboated each ship to subsidiaries of Seatrain.

The turbines were defective and it was held by the U.S. Supreme Court:

1) "Whether a tort committed on the high seas, as opposed to U.S. navigable waters, must be significantly related to traditional maritime activity, to be within admiralty jurisdiction, not decided". (Headnote 1986 AMC at pp. 2027.)

2) "Although the products liability doctrine has been incorporated into general maritime law, a buyer has no cause of action in tort on either a negligence or products liability theory to recover from the manufacturer for purely economic loss resulting from defects in a product, purchased in a commercial transaction, which malfunctions and injures only the product itself; the sole remedy lies in a non-admiralty contract action for breach of warranty. Held: aff'g (3 Cir.): Turbine manufacturer is not liable in tort to vessel's bareboat charterers for cost of repairing vessels' propulsion systems and for lost income while vessels were out of service due to design and manufacturing defects." (Headnote 1986 AMC at pp. 2027). (Emphasis added)

(This strange result or refinement of a combination of American economic loss and products liability judge made law is an example of the common law unsuccessfully trying to grapple with new and quickly changing commercial problems. The various Circuit Courts (Appeal Courts) of the United States are struggling with the meaning of this U.S. Supreme Court decision (and others) and arriving at different conclusions. See The Oxy Producer below.)

See also an excellent article on "Maritime Products Liability in the U.S." by Prof. Robert Force (1986) II The Maritime Lawyer 1 to 48.

Example No. 6

Employers Ins. v Avondale Shipyard (The Oxy Producer) 1986 AMC 2770 (E.D. La. 1986). Upheld for the most part in appeal: (5 Cir., Feb. 13, 1989 not yet reported).

The tug (the Oxy Producer) of an integrated tug-barge, sank when units in its mating mechanism broke in a heavy but typical storm off the Azores on her maiden voyage. The barge was damaged but did not sink. The owner, bareboat charterer, time charterer and insurers of the Oxy Producer took suit against the naval architect, the shipyard, its guarantor, the manufacturer of the mating parts and the supervisor of the design and construction of the vessel.

Held in appeal: The vessel was improperly mated and unseaworthy on delivery and this was the sole cause of the damage to the vessel and the loss of the tug. The economic loss rule adopted in the East River case precludes recovery in maritime tort for purely economic loss stemming from the negligent performance of a contract for professional services where those services are rendered as part of the construction of a vessel. The plaintiffs were therefore limited to their contractual remedies against the contract supervisor and the maritime tort claims were dismissed.

The contract supervisor's acceptance of the vessel in its improperly mated condition was not binding on the purchaser, and the shipbuilder was therefore fully liable to the owner for breach of contract. The Construction contract,

however, effectively limited the shipbuilder's liability to the cost of repairing or replacing deficiencies in the contract work. Although shipbuilding is not maritime, actions for defects in design and construction which result in a sinking of a ship at sea are maritime.

The naval architect and the manufacturer were not held responsible at trial because it was the mating work by the shipyard which was defective and this finding was returned by the Appeal Court to the Trial Court for rehearing.

Example No. 7

Shipco 2295, Inc v Avondale Shipyards 825 F. 2d 925, 1988 AMC 2035 (5 Cir. 1987)

Standard Oil entered into a contract of construction for a tanker with Avondale Shipyards. Standard Oil assigned its rights in the contract to a Trustee who entered into a bareboat charter for the vessel with Shipco. Under the bareboat charter the Trustee assigned its rights under the construction contract to Shipco. Shipco entered into a longterm time policy with S.P.C.

Standard Oil accepted delivery and after the expiration of the builders warranty settled with Avondale for defects by an agreement which read "Full and final settlement of all Avondale obligations under the contract ..... and final settlement of the construction contracts."

More defects then came to light and Shipco (the bareboat charterer) and S.P.C. (the time charterer) sued the shipyard (Avondale) and the designer (A.E.G.) in contract and tort.

Held there was no claim in contract because of the settlement. Nor was there a claim in tort because the physical damage was to the ship itself and not to "other property" relying on East River v Delaval 476 U.S. 858, 1986 AMC 2027 (2986) and thus no recovery of economic loss was possible in tort.

Example No. 8

Kruger Inc. v Baltic Shipping Co. (1988) 1 F.C. 262 (Fed. Ct. of Canada)

A Russian ship carrying newsprint from Canada sank during a very severe but not unexpected storm in the North Atlantic in 1982 which storm had sunk the Ocean Ranger (a giant oil rig) the previous day.

In the claim for lost cargo, the carrier's defence was peril of the sea (the Hague Rules at 4(2)(c) rather than latent defects (at 4(2)(p)). It was held there was no peril and that due diligence had not been exercised to make the ship seaworthy (a ventilator through which the sea probably entered was badly designed). The ship had been built in Finland for a Soviet state-owned corporation (Sudoimport) and the vessel had been assigned by the Soviet Ministry of Merchant Marine to the Defendant carrier Baltic Shipping Co. The ship had passed her four year inspection in 1980 and her annual inspection in 1981, but it was held that complying with the USSR Register of Shipping requirements was not sufficient.

at p.292 ".... because of the way in which the Soviet Ministry of Merchant Marine, Sudoimport and Baltic were all involved in the purchase of the

ship (from the Finnish Builder), it was incumbent upon Baltic to show what, if anything, was done by the relevant parties, and to show what due diligence was exercised by them."

"There is no evidence that Baltic exercised any diligence in relation to the construction and design of the ventilators except, apparently to assume that any deficiencies would be detected by the Register".

It is not known if the Defendant had a recourse in contract against the builder or designer.

The decision was unanimously upheld in appeal by a decision dated March 31, 1989.

Example No 9

North Ocean Shipping v Hyundai (1979) 1 Lloyd's Rep. 79

On April 10, 1972 a shipbuilding contract was entered into with a Korean shipyard for a 259,000 ton tanker for $30,950,000 U.S.

On February 12, 1973 the U.S. dollar was devalued by 10 percent and Korean currency followed suit.

On April 23, 1973 the shipbuilder claimed a 10% increase for all subsequent payments. (One payment had already been made.)

Payment was made by the shipowners under strong objection reserving all their rights. The shipowners also asked that the letter of credit provided by the shipbuilder be increased by 10%, which request was immediately complied with.

On May 22, 1973 the owners entered into a three year time charter with Shall.

The vessel was delivered November 27, 1974. A claim for recovery of the 10% was made on July 31, 1975.

Held: The increase in the letter of credit was the consideration for the increase in price.

Because the final payments were made without qualification and the claim delayed one year, the voidable contract had been confirmed.

Example No. 10
Hyundai Heavy Industries Co. v Papadopoulos (1980) 2 Lloyd's Rep. 1 (H.L.)

Guarantors guaranteed the payments by the buyer to the shipbuilder for the construction of a ship.

The buyers defaulted on their payments, the shipbuilders rescinded the contract and then claimed on the guarantors for the defaulted payments.

The guarantors claimed that once the contract was rescinded, there was no further claim possible on them as guarantors of the contract'

Held by the House of Lords that the guarantee and recission was not cancelled:

> "I find it difficult to believe that commercial men can have intended that guarantors were to be released from their liability for payments already due and default because the builder used his remedy of cancelling the shipbuilding contract for the future." (At pp. 16)

Example No. 11

The Mineral Transporter [1985] 2 Lloyd's Rep. 303 (Privy Council)

A ship the Ibaraki Maru was damaged by the fault of the Mineral Transporter.

Under the charterparty the bareboat charterer was responsible for repairs caused by the collision.

It was held that the bareboat charterer could recover the cost of repairs as well as its economic loss from the Mineral Transporter. The time charterer, however, who suffered no physical damage, although owner, had no proprietary or possessory right because of the bareboat charter. Therefore the time charterer could not recover economic loss.

The Mineral Transporter had been demise chartered and the demise charterer had time chartered the ship back to the owner.

Example No. 12

Deep-Sea Tankers Ltd. v The Tricape [1958] S.C.R. 585.

By a long term time charter, Deep Sea Tankers chartered the "Paloma Hills" to its parent company Shell Oil Company.

The "Paloma Hills" collided with the "Tricape" which latter was solely to blame.

Even though Deep Sea Tankers Ltd. had been paid hire during detention for repairs, Deep Sea was entitled to recover the amount paid because of a clause in the c/p obliging it to pay back recovered hire to Shell Oil Co.

Example No. 13

Goodwin Johnson Limited v The Ship (Scow) AT&B No. 28 et al. [1954] S.C.R. 513

In a collision between the ship under bareboat charter with an innocent vessel, the latter has a maritime lien against the wrong-doing ship even though the collision was due to the fault of the bareboat charterer and not that of the owner.

Example No. 14

Continental Ins. Co. v Daewoo Shipbuilding 1988 AMC 2526 (S.D. N.Y. 1988

A classification society's duty in respect of a newly-constructed vessel is measured by its contractual obligations to the shipbuilder. In action for water damage to cargo on vessel's maiden voyage, based on defendant society's failure to report leaky deep tank cover which had been unsealed after initial approval, held: The society's motion for summary judgment dismissing the complaint will be granted; it had no duty to supervise operational details of the vessel's management.

VIII. Conclusions - Bareboat Charters for New Building

The foregoing presentation has been three fold:

(i) a description of the normal shipowner/shipbuilder contract
(ii) a description of the tripartite shipowner/shipbuilder/bareboat charterer contract; and finally
(iii) the pitfalls expressed in fourteen reported decisions.

It is appropriate to now draw conclusions which can be summarized under six headings.

1) The tripartite contract

The shipowner/shipbuilder/bareboat charterer contract is a tripartite contract where the responsibilities of three parties one to another must be very carefully defined.

2) The designer or ship architect

The designer or ship architect is often another (fourth) party to the contract and his rights and responsibilities must also be carefully defined. In particular, it must be made clear to whom he is responsible - the owner or the bareboat charterer.

3) The mortgagee

The mortgagee is often another (fifth) party to the agreement. It is noteworthy that there may be difficulties if the mortgagee is merely a subsidiary of the owner or vice versa.

4) Classification societies, surveyors, supervisors and inspectors

The roles of classification societies, of surveyors, of supervisors and of inspectors must be clearly defined as well.

5) Delivery

Delivery of the ship is important and is usually to both the shipowner and the charterer simultaneously. Proper trials should be made, guarantees given and releases provided.

6) Third parties

Despite all the above described precautions, warranties, releases, red letter clauses, etc., third parties in the past have been able to claim against the shipowner or the bareboat charterer or the shipyard or the supervisors. They have also been permitted to pierce the corporate veil. Usually, the claim of third parties is in delict or in tort, but there may be implied contracts based on the principles of product liability or of even the common and civil law.

In very large claims, the parties (owner, charterer, builder, supervisors) will very likely be the subject of suits by third parties. It is of course very difficult for the contracting parties to avoid responsibility to third parties. They may, however, contract that one or more of their number indemnify them for claims of third parties.

Notes

1. 19 Ed., 1984 at pp. 47 note 3.

2. Reed v The Yaka 373 U.S. 410 at pp. 412, 1963 AMC 1373 at pp. 1375 (1963); see also Charles L. Trowbridge, "The History, Development and Character of the Charter Concept" (1975) 49 Tul. L. Rev. and Sheldon A. Gebb, "The Demise Charter: A Conceptual and Practical Analysis" (1975) 49 Tul. L. Rev. 764.

3. Custom Fuel Services v Lombas Industries 805 F. 2d 361, 1987 AMC 1321 (5 Cir. 1986). "Since the equitable doctrine of subordination applies in admiralty, an otherwise valid preferred ship mortgage may be subordinated to later-arising maritime supply liens even without any finding of fraud or illegality." This was a case of a preferred mortgage issued to mortgagee bank by its wholly owned and undercapitalised shipowning subsidiary.

4. Ibid

5. 1 U.S. Code 3 "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used as a means of transportation on water." (Emphasis added.) See also Trinidad Corp. v American S.S. Owners 229 F.2d 57 (2 Cir. 2956), cert. denied 351 U.S. 966.

6. People's Ferry Co. v Beers 20 How 393, 15 L. Ed. 961 (1857); Thames Towboat Co. v The Francis McDonald 24 U.S. 242 (1920).

7. Canada Shipping Act R.S.C. 1985 c. S-9 at sect. 45 and 46; see also Tetley, Maritime Liens & Claims 1985, at pp. 214 & 215.

8. Merchant Shipping Act 1894 sect. 2; see Tetley ibid at pp. 208.

9. See in general Rene Rodiere, Traite General, Le Navire at pp. 83-112. See also Anne Chemel DMF 1981, 707; Alain Besse, DMF 1981, 323; R. Achard, DMF 1981, 288.

(The author appreciates the criticisms and suggestions provided by attorneys Robert B. Acomb jr., John J. Broders and James B. Kemp jr. of New Orleans, Jean Brisset Q.C. of Montreal and naval architects, David J. Doust of Montreal and Kenneth E. Wood of Halifax, N.S., during the preparation of this paper.)

BAREBOAT CHARTERPARTIES

BAREBOAT CHARTERS FOR TRADING SHIPS

BY
THOR FALKANGER

1. Introductory remarks

My task concerns some questions in respect of bareboat charters for trading ships, i.e. charters for vessels which may have been trading for quite a period of time before the owner decides to fix the vessel on a bareboat charter. This means that the owner in the typical case has reasonable knowledge of the vessel - its performance and requirements, in short: its good and bad characteristics. The motives behind a bareboat charter may vary. The contract may be an ordinary commercial transaction between two independent parties, often with predominant financial and/or taxational features. Sometimes a bareboat charter comes after a long time charter, the charterer then having a fairly good knowledge of the vessel before concluding the bareboat charter. Not infrequently a bareboat charter is a contractual link within a group, e.g. between a Panamanian owning company and a company in a traditional maritime country, which has the actual say in the Panamanian company. In such cases the charterer will, of course, have wide knowledge of the vessel at the time of chartering, but more important, the questions of rights and obligations tend to be mere formalities.

What is said in the following is aimed primarily at commercial contracts between independents, which means that modifications of the suggested principles and rules may be necessary when the relationship between the parties is of another nature.

My topic falls into two distinct parts. The first one covers the rights and obligations of owner and charterer in respect of maintenance of the vessel, and the other one the charterer's right of legally utilising the vessel. Both parts have an important common factor: They concern aspects of a contractual relationship where freedom of contract is dominant; however, with certain limitations in as much as public law requires a minimum level of safety, in particular in respect of life. But in this paper the possible impact hereof upon the contractual relationship shall not be developed; thus the presentation is based upon the assumption that freedom of contract prevails in the matter at hand.

Thus, the task would appear to be a survey of the types of clauses most commonly used, combined with views on the construction of these, at least in some respects. But contracts are not always dealing with all possibilities, and as just indicated, clauses which are found in the contracts need interpretation. For these reasons it is necessary to investigate the general law in this field; whether before or after attacking the actual clauses, is a matter of opinion. In any case, I intend to give priority to the general law, thus encroaching as little as possible upon the tasks supposedly to be dealt with in the paper covering item I.6.

2. Obligations at the time of delivery.

2.1. Class and seaworthiness in a wide perspective The professionally drafted bareboat charter will give a detailed description of the characteristics of the chartered vessel at the time of signing the contract and/or the time of delivery of the vessel thereunder to the charterer.

The description has the legal effect of defining the obligations of the owner and the rights of the charterer, e.g. in respect of the vessel's type, dimensions, cargo capacity, speed and consumption, etc. This paper is restricted to two important features, viz. class and seaworthiness. These features are clearly related: To a large extent, the class requirements may be seen as specific, concrete applications of the seaworthiness obligation. However, class and seaworthiness will be discussed separately here.

2.2. The class requirements.

While an obligation of seaworthiness is implied (see 2.3 below), there is no class requirement unless spelled out in the contract. However, the contracts will ordinarily state the class of the vessel; usually this is a statement as to class at the time of signing the contract (Scrutton, Charterparties and Bills of Lading 18th ed. 1984 p. 76). From the charterer's point of view, the important thing is the status at the time of delivery; connecting the obligations to that event, may also make sense for the owner who will have the time up thereto to do necessary repairs etc. in order to comply with class requirements. These considerations may have an impact upon the construction of a clause which is not quite clear as to the decisive moment.

In order to obltain and retain a given class, there are a number of requirements which should be complied with. The owner's promise is not an assurance that the vessel materially is entitled to the class in question. His promise is much more restricted, viz. to the fact that the vessel's class papers are in order. Or in other words: The promise relates to formal criteria; the promise is fulfilled when the vessel's class papers are in order. But it is, I submit, unlikely that the courts will protect the owner who has reasonably certain knowledge that the vessel does not justify clean certificates, due to serious material faults in the vessel which at that time are not known to the class society.

If it appears that the class statement in the charter is untrue, it seems that English law will give the charterer the possibility of withdrawing from the contract (Scrutton p. 74). In my own country I believe the courts will examine the merits of the case: How seriously is the charterer affected by the non-compliance, and what steps, if any, have the owner taken to rectify the situation - preferably prior to delivery? The final test would be: Are there sufficiently strong reasons justifying a withdrawal, having the relief which other remedies may give?

Summing up regarding class, one may say that in practical life the delivery is the crucial point: At this stage the vessel should have clean certificates, satisfying the requirements of the charter. If the requirements are not met, the practical attitude is to demand immediate action to have the deficiencies rectified. When this cannot be done, or can be done only with a delay beyond the cancelling time, the owner is at the mercy of the charterer - provided that the deficiency is more than a triviality.

2.3. Seaworthiness

2.31 Fit for the purpose - seaworthiness. In ordinary voyage and time chartering there is implied a term of seaworthiness at the commencement of the charter period. Words with prima facie the same meaning are commonly used for bareboat charters; see e.g. Reed v. Dean [1949] 1 K.B. 188 stating that - in this instance a hired motor launch - must be "reasonably fit for the purpose". A further analysis will show, I submit - that the objective contents of this requirement is, in principle, the same as that of seaworthiness in time chartering.

More concrete: The charterer cannot expect perfection. The implied standard is related to reasonableness. which has to be determined with a view to the purpose of the contract, primarily, as it appears from the contract itself. In other words: The intended trade (cargo allowed, geographic trading limits) and the charter period are essential factors. In some respects there are important differences from time chartering: The owner under a time charter has to present a fully manned and equipped vessel, and his obligation of seaworthiness covers these duties as well. Thus, the obligations under a bareboat charter are more limited, concerning primarily the physical properties of the vessel itself (including her appurtenances).

Sometimes the owner delivers the vessel to the bareboat charterer fully or, more frequently, partially crewed. Here it is sufficient to mention the situation where an engineer, originally employed by the owner, shall remain onboard during the bareboat charter period, in most cases to protect the owner's interest in proper handling of the engines. If there are no words to the contrary, it is my view that the owner has a clear responsibility for this person, probably along the same lines as in time chartering - or expressed in other words: The seaworthiness obligation requires that the engineer is competent and qualified for his job.

The implied obligation of seaworthiness refers to the time of delivery, which is fully in accordance with the usual contractual stipulations.

2.32. Breach of obligation. Guarantee or due diligence? If it is found that the vessel is not in fact seaworthy at the time of delivery, we have the similar problem as briefly mentioned in connection with the class requirement: Should the owner be entitled - and obliged - to rectify the deficiencies? Generally, the answer would appear to be yes; but if the problem is ascertained after delivery, the charterer will have to repair the vessel, thereafter presenting the bill to the owner (see below on damages). Unseaworthiness may also entitle the charterer to get away from the contract, but a minor breach of a seaworthiness requirement cannot give the charterer the right to cancel (Hong Kong Fir [1961] 2 Lloyd's Rep. 478, Work v. Leathers (1878) U.S. 379); but prolonged repair works may entitle the charterer to declare himself freed from the contract due to delay.

The unseaworthiness - whether trivial or important - may lead to economic loss for the charterer. Is it sufficient ground for damages that the vessel was unseaworthy? The contract may give a clear answer, but here the question is whether the implied term is in the nature of a guarantee (a warranty). The answer varies from jurisdiction to jurisdiction. In my country the law is that there is a duty to exercise due diligence, and apparently this is the situation in England as well (Scrutton p. 50, while U.S. law operates with a warranty (Work v. Leathers) and French law with "une obligation de resultats".

2.33 The effects of charterer's prior knowledge of the vessel - primarily from inspection of the vessel. In many instances the charterer has some knowledge of the vessel before concluding the charter, e.g. he may have had the vessel on time charter, or he may have inspected the vessel in connection with the negotiation of the contract.

Regardless of how the charterer has obtained information, it appears to be a general principle that he cannot rely upon a statement of the owner or an implied term, knowing (actually or technically) that the vessel is unseaworthy (e.g. Jones v. Page (1867) 15 L. T. 619, Sanford Brooks v. Columbia Dredging (1910) 177 Fed. 878). The application of this principle - analogous to caveat emptor - is not without difficulties. In particular, questions may be posed as to what the charterer would have discovered if his inspection had been more professional. A number of U.S. cases show that a superficial inspection, which thoroughly carried out would have revealed faults, may relieve the owner of a contractual responsibility which he otherwise would have had (e.g. Portsmouth Fisheries v. John L. Roper Lumber (1920) 269 Fed. 586). Another matter to be mentioned in this respect is that the inspection, if any, may take place a long time before anticipated delivery. What the charterer then observes and classifies as deficiencies, he may very well expect to be remedied thereafter, so that the vessel will have its contractual standard at the time of delivery. Examples may be poor painting (coating) necessary for protection of the cargo, or an auxiliary enqine broken down, observed at the time of inspection; here the charterer may rightfully expect that adequate repairs are executed before delivery. In other instances it is not obvious that remedying will take place, e.g. when the owner appears to be ignorant of the defect, or when remedying is unlikely due to the work (and expense) involved and/or length of time to delivery (e.g. the engine is worn and poorly maintained). In these last mentioned cases there are good reasons for holding that the charterer is deprived of pleading the statements in the charterparty. The proper attitude is to notify the owner of the deficiencies, demanding that corrective measures are taken.

I add that ordinarily, there is no obligation on the charterer to inspect the vessel in connection with concluding the charter; i.e., the owner cannot escape liability by arguing that the charterer would have discovered the defect if he had inspected the vessel. Inspection is either a voluntary matter, or it is made a duty in the contract. Clearly a voluntary inspection will not so easily defeat the charterer's claim based upon unseaworthiness as when the inspection is a duty, because in the latter case the scope of imputed knowledge may be much wider. Regardless of basis, if the inspection has been very thorough, it may successfully be argued on the part of the owner that there is no implied term at all (e.g. Angeles Gravel v. Crown Zellerbach 1947 AMC 1750).

2.34. Waiver on delivery? On delivery the charterer takes possession of the vessel, and now he has the possibility of making himself fully acquainted with the vessel. Is he deprived of pleading unseaworthiness unless he does so immediately after delivery? This question of notification and waiver is accentuated by the formal procedure ordinarily prescribed in the contract:

At the time of delivery an on-charter survey is to be held, whereafter a formal document is drawn up and signed by both parties. The contract may provide that a "clean" document constitutes waiver of all claims "against the Owner on account of any representations or warranties expressed or implied" (Form 149 clause 1). In the absence of such words the courts in my country would tend to use the general principles of sales, declaring a waiver in respect of deficiencies discovered during the on-survey and not notified to the owner, as well as those which would have been ascertained if the survey had been carried out in conformity with prudent shipping practice.

3. Maintenance after delivery.

During the charter period the vessel will be subjected to ordinary wear and tear, and it may also suffer damages because of bad weather, strandings, collisions, careless loading/discharging, poor maintenance (e.g. causing engine break downs) etc. It may be necessary to repair the vessel so that it can continue its trading. This may be essential for the charterer, but also for the owner where off hire follows from general law or from a specific contractual stipulation in the contract. The owner has also an interest in preserving the value of the vessel irrespective of its capability to perform the services immediately required. Is it the job of the owner or the charterer to keep the vessel in good shape and pay the expenses involved? (Damage arising from deficiencies existing at the time of delivery is not dealt with here.)

The starting point is that the charterer is not liable for damages caused by Act of God (e.g. Scrutton p. 50, Sun Printing & Publishing v. Moore (1902) 183 U.S. 642, BGB 548) - admittedly with some exceptions, cf. in particular the "safe port" rules. He is, however, liable for damages caused by his own faults or errors, or those of his servants (or in some instances; independent contractors engaged by him). As for the typical unavoidable wear and tear, I believe much can be said in favour of the statement in the Sun case that the charterer is not liable when the vessel is "deteriorated by natural decay".

Further inquiries into the principles of general law may be academically rewarding, but is of less interest from a practical point of view. This is because, invariably, the contract will contain stipulations and reveal presuppositions giving a safer basis for defining the obligations of the parties. The contractual clauses will be dealt with in paper No. 6, and consequently I restrict my observations to the following:

Damage to the vessel is usually an insurance matter, and the cost of repairs should finally be absorved by the insurance company. The questions between owner and charter being: Who shall provide for adequate insurance, pay the insurance premium and execute the repairs when a damage occurs?

Barecon A reflects this basic attitude. Clause 11 imposes the obligation on the charterer to keep the vessel properly insured at his own cost. The charter has an alternative solution in clause 12, making insurance a matter for the owner. When there is adequate insurance coverage, money will be available for repairs, but fair wear and tear as well as a number of incidents are not covered in this way. Clause 8 provides that the charterer is responsible for the maintenance of the vessel even if the costs are not recoverable (cf. clauses 8(a), 11(a), 12(e) and clause 13).

4. Right of charterer to disposition of vessel

4.1. The problem A bareboat charter will have the full use of the vessel, ordinarly within wide limits in respect of cargo to be carried and trading areas - provided that the vessel is seaworthy, i.e. is fit and adequately equipped and manned for the undertaking decided by the charterer. In most instances the vessel will not be used for carriage of goods belonging to the

charterer. He will (in a wide sense) sell his rights under the bareboat charter, and the question to be dealt with now is: To what extent is the charterer entitled to do so when the contract contains no provisions in this respect?

4.2. Sale or re-let The charterer may wish to transfer all his rights to a third party, on the condition that this third party assumes all his responsibilities. Thus, two questions arise in relation to the owner of the vessel: Is the charterer entitled to let a third party exercise the rights which the charterer has? And can the charterer be released from his liabilities by providing a third party as a new debtor?

The latter question is easy to answer; The charterer cannot avoid his contractual liabilities solely by an agreement with a third party. The owner has to participate in some way, either by a positive declaration or by a behaviour which can be construed as a waiver of his rights as towards the original charterer.

Accordingly, the charterer cannot transfer the contract in toto without some kind of consent from the owner. The remaining question is whether the charterer is entitled to transfer his rights; i.e., can he sub-let the vessel on a bareboat charter?

Generally, the test regarding assignment is whether the contract involved "personal skill or confidence". In our case: Is it important for the owner whether the charterer A or a subcharterer B is in possession of the vessel? Clearly, B who has derived his rights from A, cannot exceed the limits set in the first charterparty. But it is obvious that the risks, seen from the owner's point of view, may be increased and/or be different where B takes over the vessel with functions as manning, trading and maintenance. Is this material?

In the Scandinavian countries, the general law of hire appears to be that subletting is subject to the owner's approval. As far as I understand, the rule is the same in Germany (BGB 549), but the opposite in U.S. and France (Gilmore & Black The Law of Admiralty (2nd ed. 1975) p. 194, loi d'affretement art. 12).

The general formula of "personal skill or confidence" may be applied to ordinary time or voyage charters as well. But now the answer is beyond doubt: The bareboat charterer is entitled to fix the vessel, e.g. on a time charrter, without asking the owner's permission. It may be said that the bareboat charterer transfers parts of the rights obtained over the vessel to the time charterer. The essential feature is, however, that the bareboat charterer remains in possession of the vessel, and also in relation to the time charterer he will be the one who actually operates and maintains the vessel. In short, when an ordinary time charterer has the right to re-charter the vessel, there are no reasons for denying the bareboat charterer to fix the vessel to a third person on a time charter basis, because the increase or change in risks is not different in the two situations.

References: The paper is prepared on the basis of my doctor's thesis: Leie av skib (On bareboat charterparties), Oslo 1969, in particular 19-34, discussing Scandinavian, English-American law as well as French and German law.

BAREBOAT CHARTERPARTIES

BAREBOAT CHARTER FOR TRADING VESSELS

BY
ROGER HEWARD

I have been asked to deal with matters arising in relation to vessels which have been trading for some time before being bareboat-chartered. The nature of charter clauses which the parties are likely to agree upon will depend to a large extent upon the commercial motives behind the transaction. At an earlier point in this seminar these motives were analysed in detail. Broadly speaking they fall into two categories:-

a. Operational, and

b. Finance-related.

In cases where the bareboat charter structure is associated with a financing transaction, the normal market principles as expressed, for example, in the "Barecon A" form of charterparty are likely to be substantially amended so as to relieve the financier, so far as possible, of all the risks and burdens of operating and maintaining the vessel. Bareboat charters entered into for finance-related reasons are frequently described as "finance leases". Upon analysis, it can be seen that these documents seek to place the financier in much the same position as if he were a mortgagee of the vessel. That is perfectly reasonable, bearing in mind that the bareboat charter structure may have been adopted for some incidental reason such as tax advantages, and that the shipowner's role is effectively limited to providing finance.

Class requirements and seaworthiness

The Barecon A form of charterparty requires the shipowner to specify the vessel's class and the date of her last special survey. The accepted view is that the shipowner, in effect, warrants the accuracy of this information, in the sense that a material breach of the warranty would entitle the charterer to avoid the contract.

The risk that the classification requirements might change and become more onerous during the charter period is one that is shared between owner and charterer. If the new classification requirements involve expenditure equivalent to more than 5% of the vessel's insured value, arbitrators may decide the ratio in which the cost of compliance shall be shared.

So far as uninsured damage (e.g. wear and tear) to the vessel is concerned, it is the charterer's duty to maintain the vessel's condition and classification. The Barecon A form in clauses 11 and 12, then provides alternative methods as to how insurance arrangements and the repair of insured damage shall be dealt with. The first alternative is for the charterer to bear the burden of maintaining the vessel's condition and classification in all circumstances. On this basis, insurance is effected by the charterer for all marine war and P & I risks such insurance being for the benefit of the charterer, the shipowner and any mortgagee.

The alternative method is for the vessel to be kept insured by the shipowner against marine and war risks (with rights of recovery or subrogation against the charterer being waived) and for the shipowner to have the burden of repairing insured damage and ensuring that the vessel's classification is not endangered thereby.

The shipowner is obliged to exercise due diligence before and at the time of delivery to make the vessel seaworthy.

A typical finance-related bareboat charter (e.g, a sale and leaseback) would deal with these matters differently. In particular:-

a. The charterer would warrant the vessel's classification to the shipowner; alternatively, production of evidence by the charterer as to the vessel's classification might be specified as a condition precedent to the validity of the charterparty.

b. Throughout the duration of the charter period the vessel would be at the sole risk of the charterer and the charterer would effect and pay for marine, war and P & I risk insurance in the names of the charterer and the owner. Claims other than total loss claims would in normal circumstances be payable to the charterer who would be under a duty to apply the proceeds towards maintaining the vessel's condition and class.

c. As we saw, under the Barecon A form the charterer is obliged before and at the time of delivery to exercise due diligence to make the vessel seaworthy and in every respect ready (as regards hull, machinery and equipment) for service thereunder. Under a finance-related charterparty the opposite would apply. One might expect to find a clause to the following effect:-

> "The owner makes no representation or warranty, express or implied, as to title, seaworthiness condition or fitness for purpose of the vessel or any other representation or warranty whatsoever with respect to the vessel. Delivery of the vessel to the charterer under this charterparty shall be conclusive evidence, as between owner and charterer, that the vessel at that time accords with the provisions of the charterparty, is in good working order and repair and without defect or inherent vice in condition, design and operation and is free and clear of all liens, charges, encumbrances and debts of whatsoever nature."

Furthermore a typical finance-related charterparty would go on to provide that the charterer waived any claims which it might have against the owner arising out of the operation or performance of the vessel and indemnifying the owner in respect of any claims which might be made against the owner by third parties, whether for death, personal injury or otherwise.

The right of the charterer to disposition of the vessel

In his paper, Professor Falkanger has dealt with the English-law principles governing the right of a bareboat charterer to assign his rights or sub-charter the vessel in cases where the head charter does not specifically deal with this issue. So far as the disposition of the chartered vessel is concerned I shall therefore confine myself to two points, namely:

1. A comparison of the manner in which one would expect the right to assign or sub-charter to be dealt with in "operational" bareboat charters as opposed to finance-related bareboat charters.

2. Conflicts between charterers and mortgagees as to the disposition of bareboat-chartered vessels.

1. Assignments and Sub-charters

a. Operational charters

Clause 19 of the Barecon A charterparty provides that the charterer shall not assign the charterparty nor sub-demise the vessel except with the prior consent in writing of the owner, which consent shall not be unreasonably withheld and subject to such terms and conditions as the owners shall approve. Clause 20 provides that the charterer shall procure that all bills of lading issued for the carriage of goods under the charter shall contain a paramount clause incorporating any legislation relating to carriers liability for cargo compulsorily applicable in the trade and, if no such legislation exists, the bills of lading shall incorporate the English Carriage of Goods by Sea Act. The charterer agrees to indemnify the owner against all consequences or liabilities arising from the Master signing bills of lading or other documents. These clauses do little more than re-state the common law position. As Professor Falkanger has pointed out, the question of whether the charterer is entitled to assign the benefit of the bareboat charter without the consent of the owner depends upon the test of whether the original bareboat charter involves the "personal skill or confidence" of the parties. There is a strong argument to the effect that a bareboat charter is a contract involving "personal skill or confidence" because of the dire consequences which might befall an owner who bareboat charters his vessel to an unreliable charterer. Clause 19 applies only to assignment and sub-demise and therefore does not restrict those uses of the vessel by the demise charterer which do not involve transfer of possession. There is therefore no restriction upon time or voyage charters or the carriage of goods by sea apart from the requirement that the Hague-Visby rules or other such legislation must be incorporated into bill of lading contracts.

b. Finance-related charters

In finance-related charterparties, the identity of the charterer will be regarded as of great importance by the owner, because the charterer will have been approved by the owner as an acceptable credit risk. Therefore, in a finance-related demise charter one would expect to see a clause preventing the charterer from sub-letting the vessel on demise or bareboat charter for any period without the prior written consent of the owner. Furthermore, financiers are usually anxious to ensure that vessels do not become locked-in to long-term commitments which may become unprofitable in changing conditions. As one-year time charters are fairly common in the market, and usually provide for possible extensions up to thirteen months, it is common practice for mortgages and finance-related charters to specify that the financier's prior written approval must be obtained for any time or consecutive voyage charter which exceeds the period of thirteen months. For the reasons set out above one would also expect a finance-related charter to prohibit any assignment of the charterer's interest without the prior consent of the owner.

2. Conflict between charterers and mortgagees

The rights of a mortgagee in respect of a vessel are, in general, governed by the same general principles of law and equity applicable to all other types of personal chattels, subject to the special statutory provisions as to registration and transfer of ship mortgages contained in the Merchant Shipping Acts. The concurrent rights of the mortgagee and the charterer may conflict where, for example, the owner is in default under the loan agreement and the mortgagee wishes to enforce its mortgage and realise its security by selling the vessel. The mortgagee may wish to exercise its private power of sale and sell the vessel free from charter in order to obtain the most advantageous price. Alternatively, if the sale takes place by way of Admiralty Court proceedings then, under English procedure, the vessel is sold free of charter obligations. The charterer, however, may wish to continue the charter especially if freight rates are increasing. Who should prevail, the mortgagee or the charterer? This conflict has been considered by the courts on a number of occasions and two principal factors have influenced their approach, namely:-

a. Was the charter entered into before or after the mortgage and did the mortgagee have notice of the charter; and

b. Is the charter by way of demise charter or not?

The leading case applicable to circumstances where the mortgage pre-dates the charter is The "MYRTO" [1977] 2 Lloyd's Reports, 243. In this case the vessel had been mortgaged and subsequently chartered on terms which were held to have been speculative. The mortgage debt was not paid and the mortgagee arrested the vessel and applied for her appraisement and sale. The charterer intervened and applied for the vessel to be released from arrest on the grounds that the arrest was an unlawful interference with its rights. It was held that the shipowner had dealt with the vessel in such a way as to impair the mortgagee's security and that therefore the

charterer's application for release would be refused. The principles laid down by the court were as follows:-

a. The owner is entitled, subject to one exception, to deal with the vessel (and that includes employing her under a contract with a third party) in the same way as he would be entitled to if the vessel were not mortgaged.

b. The one exception is that the owner is not entitled to deal with the vessel in such a way as to impair materially the security of the mortgagee.

c. Where the owner makes a contract with a third party for the employment of the vessel, of such a kind and made or performable in such circumstances that the security of the mortgagee is not impaired, and the owner is both willing and able to perform such contract, the mortgagee is not entitled, by exercising his rights under the mortgage, whether by taking possession or selling, or arresting the vessel in a mortgage action in rem, to interfere with the performance of such contract.

d. The mortgagee is, however, entitled to exercise his rights under the mortgage without regard to any such contract made by the owner with a third party for the employment of the vessel in two cases:-

    (i) Where the contract is of such a kind and/or is made or performable in such circumstances that the security of the mortgagee is impaired;

    (ii) Where, whether this is so or not, the owner is unwilling and/or unable to perform the contract.

e. Where the mortgagee, by exercising his rights under the mortgage, interferes with a contract made by the owner with a third party for the employment of the vessel in circumstances where he is not, in accordance with (c) and (d) above, entitled to do so, he commits a tort (or actionable wrong in the nature of a tort) against the third party.

f. The remedies available to the third party against the mortgagee in respect of such a tort or actionable wrong are as follows:-

    (i) Where the mortgagee interferes by taking possession or seeking to sell, an injunction restraining him from doing so;

    (ii) Where the mortgagee interferes by arresting the vessel in a mortgage action in rem, an order for the release of the vessel from arrest in such action;

    (iii) Further, or alternatively, damages.

If the mortgage is taken after the charter has been entered into, and if the mortgagee has actual notice of the charter, the mortgagee will be

restrained from doing any act which will have the effect of preventing the performance of the charter, whether or not such charter impairs the mortgagee's security. This will not however be the case if the owner is already unable to perform the charter: for example, if the owner lacks the means to maintain the vessel in a seaworthy condition - De Mattos -v-Gibson [1858] E.R.108, and Swiss Bank Corporation -v- Lloyd's Bank [1979] 2 A11 E.R.853.

BAREBOAT CHARTERPARTIES

ANALYSIS OF CONTRACT CLAUSES

BY
MICHAEL WILFORD

I have been asked to analyse Bareboat charter clauses from an English law standpoint and to deal with six types of clause in particular. The paper is primarily directed towards the Barecon A form of Bareboat charter, but reference will also be made to the Barecon B form.

Condition of vessel at delivery

Clause 1 of the Barecon A provides that:-

"The owners shall before and at the time of delivery exercise due diligence to make the vessel seaworthy and in every respect ready in hull, machinery and equipment for service hereunder ...

The delivery to the charterers of the vessel and the taking over of the vessel by the charterers shall constitute a full performance by the owners of all the owners' obligations hereunder, and thereafter the charterers shall not be entitled to make or assert any claim against the owners on account of any representations or warranties expressed or implied with respect to the vessel but the owners shall be responsible for repairs or renewals occasioned by latent defects in the vessel, her machinery or appurtenances, existing at the time of delivery under the charter, provided such defects have manifested themselves within 18 months after delivery ..."

Summarising the effect of the 1982 Act, the Act implies into a demise charter, amongst other terms:-

(a) an implied condition that the ship hired corresponds with its description (7);

(b) an implied condition that the ship hired is as fit for the purpose for which ships of that type are commonly hired as it is reasonable to expect having regard to all relevant circumstances (8); and

(c) where the charterers make known to the owners any particular purpose for which the ship is being hired, an implied condition that the ship hired is reasonably fit for that purpose (9).

But there is no condition implied such as is referred to in (b) as regards defects specifically drawn to the charterers' attention before the contract is made or, if the charterers examine the ship before the contract is made, as regards defects which that examination ought to reveal (10).

The 1982 Act further provides that the terms implied by the Act may be negatived or varied by express agreement or by a course of dealing between the parties or by usage, but emphasises that an express condition or warranty in the contract does not negative an implied condition unless inconsistent with it (11).

In the light of the position at common law and by statute, there seems no reason to give the "due diligence" provision in Clause 1 of the Barecon A any different meaning from that which the words have in the context of the Hague Rules - namely that the owners are responsible for the negligent acts or omissions of independent contractors just as much as for those of servants or agents. The express "due diligence" obligation in clause 1 is not inconsistent with the implied conditions as to fitness in the 1982 Act, although the express term and the implied terms may cover somewhat different ground. The difficult question is the extent to which the express and implied terms may be excluded by the remaining part of clause 1 which treats the delivery of the vessel and its acceptance by the charterers as constituting a "full performance by the owners of all the owners' obligations hereunder" and disentitles the charterers from making any claim "on account of any representations or warranties expressed or implied with respect to the vessel" other than in respect of "latent defects".

The word "hereunder" can hardly refer to all the owners' obligations under the charterparty, because obviously the owners' obligations continue after delivery and indeed there are express terms imposing obligations on the owners after delivery in the Barecon A (12). It may be therefore that "hereunder" in this particular phrase means only "under clause 1" and is solely apt to exclude the owners' responsibilities after acceptance and delivery under the express "due diligence" provision. That the implied conditions introduced by the 1982 Act are not excluded, or not wholly excluded, is supported by what follows in clause 1, namely the provision that the charterers shall not be entitled to make any claim on account of any "representations or warranties" with respect to the vessel, whether expressed or implied. For in the respects I have mentioned, the Act introduces implied "conditions" and itself draws the distinction between "conditions" and "warranties" (13). An exclusion of implied warranties is not apt to exclude implied conditions (14). Nor is a condition even of description necessarily also a representation, although it may be so.

It seems therefore that the exceptions in clause 1 of the Barecon A may be ineffective to exclude wholly the implied conditions introduced by the 1982 Act as to compliance with the description and as to fitness for the purpose. If correct, the result may be serious for the owners because breach of the implied conditions would not only lay them open to claims for damages, but would give the charterers the right to "cancel" the charter, in the sense of treating it as discharged, in the absence of waiver or affirmation (15). Further, even in regard to the express due diligence obligation in clause 1, the owners remain liable for repairs or renewals occasioned by latent defects existing at the time of delivery, if they manifest themselves within 19 months.

It is suggested that "latent defect" in this context means no more than a defect which is not obvious on reasonable examination by the charterers. Thus in an old case, underwater damage to the vessel's hull was held to be a "latent defect" in a sale of a vessel afloat (16). It would be a question of fact in each case as to what was a reasonable examination to be carried out by or on behalf of the bareboat charterers on or before delivery.

There is one other respect in which the owners may remain liable after delivery, despite the exceptions in clause 1 and that is in regard to any claim for death or personal injury which may be attributable to the owners' negligence. The Unfair Contract Terms Act 1977 (which in other respects is not applicable to commercial charterparties) prohibits exceptions which restrict liability for death or personal injury resulting from negligence (17).

If the Barecon A takes the form of a contract of hire purchase rather than a straightforward contract of hiring, the 1982 Act is inapplicable since it excludes hire purchase agreements (18). However, similar provisions to those in the 1982 Act are contained in the Supply of Goods (Implied Terms) Act 1973 which does apply specifically to hire purchase agreements (19). The effect of clause 1 of Barecon A would therefore be similar in such cases.

So far as concerns the Barecon B form, the scheme is different since its use is confined to new buildings. The charterers are given rights to inspect the vessel during the course of construction and satisfy themselves that construction is in accordance with the specification and plans they have approved. And if the vessel passes her trials to the charterers' satisfaction and is properly classed and documented, the charterers are bound to accept delivery under the bareboat charter and "... upon and after such acceptance, the charterers shall not be entitled to make any claim against the owners in respect of any warranties (whether expressed or implied), as to the seaworthiness of the vessel or in respect of delay in delivery or otherwise howsoever" (clause 2). This exception might not be effective to exclude the "conditions" implied by the 1982 and 1973 Acts, although of course the charterers' involvement in the acceptance of specifications and plans and in the construction of the vessel itself is in any event likely to restrict the charterers' rights after delivery within very narrow limits.

Maintenance

It is the "Maintenance and Operation" clauses in the Barecon A and Barecon B forms of charter that contain the essence of the charter by demise. This essence, as Lord Esher said in Baumwoll v. Gilchrest (20) "is a parting with the whole possession and control of the ship" and is expressed in the Barecon A in clause 8(a) and in the Barecon B in clause 9(a). Those sub-clauses go on to define the standard to which the vessel must be maintained by the charterers, namely "in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and ... with unexpired classification of the class ... and with other required certificates in force at all times."

Those standards of maintenance call for little comment, save in relation to the next paragraph of the sub-clause which requires the charterers to take immediate steps to have necessary repairs done "within a reasonable time" failing which the owners have the right of withdrawing the vessel without notice. Bearing in mind the uncertainties inherent in such concepts as "efficient operating condition" and "good commercial maintenance practice", coupled with the added uncertainty of what is a "reasonable time" within which to

carry out necessary repairs, the right of the owners to withdraw the vessel without notice can truly be described as Draconian. The consequences of withdrawal are even more onerous if views expressed in the House of Lords in a number of cases in time charters constitute "conditions" of the contract (21). For the exercise of the right to withdraw would then give the owners trhe right to claim damages for the loss of the charter in addition to having their ship back.

However, a withdrawal clause in a bareboat charter is to be distinguished from a withdrawal clause in a time chartrer in an important respect. It was held by the House of Lords in The "SCAPTRADE" (22) that in the case of time charters, the Court had no jurisdiction to apply equitable principles to give relief against forfeiture (the power developed by the English Courts to mitigate the harsh effect of forfeiture clauses in leases of land). But by contrast it was indicated that in the case of charters by demise, where the owners transferred to the charterers the possession of the ship, the Court would have jurisdiction to grant equitable relief. Hence it seems that the English Courts could intervene to prevent (by means of an injunction if necessary) an attempt by owners to withdraw under this and other withdrawal clauses in bareboat charters, if it was considered that, even though strictly justified under the express terms of the clause, it would be inequitable to allow withdrawal in all the circumstances of the case.

Sub-clause (a) of the "Maintenance and Operation" clause in the Barecon charters contains a further interesting provision to the effect that in the event of any improvement, structural change or expensive new equipment becoming necessary for the continued operation of the vessel by reason of new class requirements or by compulsory legislation costing more than 5% of the vessel's insured value "the arbitrators under clause 25 shall have the power to renegotiate the contract in a reasonable way" having regard to the period remaining under the charter and may decide the ratio in which costs should be shared. Is a clause which gives arbitrators the power to "renegotiate" the contract for the parties an effective clause? The answer under English law seems to be that such a clause is enforceable as long as the determination is to be in accordance with an objective standard expressed or implied. In Sudbrook Trading Estate v. Eggelton (23), the House of Lords upheld a clause in a lease giving the lessees an option to purchase the freehold reversion at a price to be "agreed upon by two valuers, one to be nominated by the lessor and the other by the lessee and in default of such agreement by an umpire appointed by the valuers." And in a recent time charter case (The "DIDYMI") (24), the Court of Appeal upheld a performance clause in which owners were to be indemnified by an increase of hire, to be calculated "equitably", for better average performance than the stipulated speed and consumption. Clauses 8(a) and 9(a) of the Barecon A and B also seem to satisfy the text.

The other sub-clauses of clause 8 of Barecon A and clause 9 of Barecon B deal with operational matters.

Insurance

The Barecon A has two alternative insurance clauses (clauses 11 and 12), the first requiring the charterers to keep the vessel insured against marine, war and P and I risks, as approved by owners; the

second requiring the owners to insure against marine and war risks and the charterers to insure against P and I risks. The Barecon B form has no alternative provisions but, as it is used for new buildings financed by mortgage, requires the charterers to insure in accordance with the requirements of the mortgage and the mortgagees. Further, the Barecon B insurance clause (clause 12(b)) provides that in the event of the charterers' failure to effect and keep in force the required insurances, they will indemnify the owners against all resulting losses.

All of the clauses contain a provision that should the charterers fail to keep any of the insurances in force, they shall rectify the position within seven days of receiving notice from the owners, failing which the owners have the right to withdraw the vessel from the charterers' service. Again, however, it seems that the Court would have jurisdiction to give relief from forfeiture if, in the circumstances, it considered that it was equitable to do so.

There are varying provisions in these clauses as to the application of the proceeds of insurance monies in the event of partial and total loss which do not require any particular comment.

Hire

There are similar provisions in the Barecon charters to those found in time charters regarding the payment of hire. In each charter (clause 9(e) and 10(e) respectively) there is provision for withdrawal by the owners "in default of payment beyond a period of seven running days", the right to withdraw being "without noting any protest and without interference by any Courts or any other formality whatsoever". Despite the reference to the right being exercisable without the interference of any Court, an English Court would still, I believe, have the right to give relief from forfeiture on equitable grounds, as previously explained.

There is no provision in the charters for off-hire, it being contemplated that hire will be paid continuously from delivery to redelivery or other termination by, for example, withdrawal or total loss. Indeed, the insurance clauses in the Barecon A contain the provision that: "All time used for repairs under the provisions of ... this clause and for repairs of latent defects according to clause 1 above including any deviation shall count as time on hire ..."

This is not to say, however, that hire paid for time lost may not in certain circumstances be recoverable as damages (25). For example, if the "latent defects" for which the owners remain responsible under clause 1 are attributable to a breach of their obligation to exercise due diligence to make the ship seaworthy, then it seems that hire for the time lost as well as the cost of repairs or renewal would be recoverable from the owners. Likewise, if time were lost as a result of a breach of the implied condition as to compliance with the description or as a result of a breach of the implied condition as to fitness for the purpose, the hire paid in respect of such a period would probably be recoverable as damages.

War

Sub-clause (a) of the War Clause in the Barecon A charter (clause 23) is in identical terms to clause 21(A) of the Baltime charter which was

considered by the Court of Appeal in The "EUGENIA" (26) in connection with the closure of the Suez Canal after war had broken out between Israel and Egypt in 1956. Since the vessel is wholly under the control of the charterers and subject to their orders, even when following a customary route, if the charterers allow the vessel to proceed into a dangerous zone, an implication that they "ordered" the ship to proceed into it will readily be drawn.

Sub-clause (b) of clause 23 is in identical terms to clause 21(D) of the Baltime form. The words "any other government" in that sub-clause have been held in the case of an almost identical provision in the War Risk Clause of the Gencon voyage charter to mean any national government which exercised full executive and legislative power over an established territory, irrespective of the fact that English law was the governing law and the government was not recognised either de facto or de jure by the government of the United Kingdom (27).

Sub-clause (c) of clause 23 of the Barecon A has evidently been adapted from clause 21(E) of the Baltime form, but as drafted might give rise to difficulty if at the time the events specified in the sub-clause occur, the vessel has cargo on board and because of the war etc. cannot reach her destination. Sub-clause (c) requires the vessel to discharge her cargo at a "near open and safe port as directed by the owners", which may not be in accordance with the contractual obligations of the demise charterers under sub-charters or bills of lading. Compliance with the owners' directions under the demise charter might amount to a deviation under a contract of carriage. The demise charterers would then be faced with a dilemma as to which contract to breach, that they would most likely be forced to resolve by breaching the demise charter, since the concept of deviation in English law probably has no application in the case of demise charters.

Requisition

Under the Requisition clause of the Barecon A (clause 22(a)), an attempt is made to put upon the demise charterers the obligation to continue to pay hire to the owners in accordance with the terms of the charter upon requisition of the vessel by any governmental or other competent authority, whatever the circumstances of that requisition and whenever the time it occurs. The sub-clause purports to exclude the operation of the doctrine of frustration so as to terminate the charter in the event of requisition. Under English law, the parties to a contract are able to prevent the operation of the doctrine of frustration by express provision in their contract if it is a complete provision (28), but in any particular case the Court will examine the provision carefully to see whether on a true construction of a charter as a whole, it is in fact sufficiently wide to cover the situation which has occurred (29). It is therefore not possible to say, without reservation, that clause 22(a) would be effective to prevent frustration in all conceivable circumstances.

Transfer of title

Transfer of title is dealt with under the Barecon A and B forms under the optional part III hire/purchase agreement in clause 29. The first part of clause 29 (lines 610 to 622) is very similar to clause 9 of

the Norwegian Saleform 1966 for the sale of secondhand ships. Under these clauses the sellers (in the case of demise charters, the original owners) guarantee that the vessel at the time of delivery is free from all encumbrances and maritime liens or any debts whatsoever and undertake to indemnify the buyers (the demise charterers) against any claims against the vessel incurred prior to delivery. Clause 9 of the Norwegian Saleform was considered by the Admiralty Court and the Court of Appeal in The "BARENBELS" (30). The view was expressed by Mr. Justice Sheen at first instance that "maritime liens" in that clause was not confined to maritime liens as recognised in England, but extended to maritime liens recognised in other jurisdictions, which often cover a much wider range of claim.

As for the words "any debts whatsoever", the Court of Appeal held in The "BARENBELS" case that the words in the Norwegian Saleform "any other debts whatsoever" did not include debts which only related to the vessel in the sense that they were capable of rendering the vessel liable to be arrested in the future. In the case in question, the vessel had been arrested in Qatar, after delivery to buyers under a sale agreement, in respect of debts incurred by the sellers before delivery in connection with other vessels which they owned or operated. However, the sellers were held liable to indemnify the buyers under the indemnity provision in clause 9 of the Norwegian Saleform because the very fact of the arrest of the vessel rendered the claim a claim "against the vessel", even though it was not in respect of the vessel.

The remaining part of clause 29 (lines 623 to 631) which concerns the documents to be handed over on delivery is in similar terms to clause of the Norwegian Saleform 1966 and calls for no particular comment.

Michael Wilford.
February 1989

References

(1) The American Harter Act 1893; Dobell v. Steamship Rossmore Company [1895] 2 Q.B. 408; and see Riverstone Meat Co. v. Lancashire Shipping Co. (The "Muncaster Castle") [1961] 1 Lloyd's Rep. 57 and the cases there cited.

(2) Robertson v. Amazon Tug Co. (1881) 7 Q.B.D. 598; Reed v. Dean [1949] 1 K.B. 188.

(3) Francis v. Cockrell (1870) L.R. 5 Q.B. 501; Hyman v. Nye (1881) 6 Q.B.D. 685; Reed v. Dean [1949] 1 K.B. 188; White v. John Warwick & Co. [1953] 1 W.L.R. 1285; Vendair (London) v. Giro Aviation Co. [1961] 1 Lloyd's Rep. 283, Astley Industrial Trust v. Grimley [1963] 1 W.L.R. 584; and see Law Commission Working Paper (No. 71) and Report (No. 95) on Implied Terms in Contracts for the Supply of Goods.

(4) S. 18(1).

(5) S. 62 of the Sale of Goods Act 1893, now S.61(2) of the Sale of Goods Act 1979.

(6) Behnke v. Bede Shipping Co. [1927] 1 K.B. 649.

(7) S.8.

(8) S.9(2) and (9).

(9) S.9(4) and (5).

(10) S.9(3).

(11) S.11.

(12) For instance, in clauses 11(d) and 12(a).

(13) See Ss. 7, 9 and 11.

(14) Wallis v. Pratt [1911] A.C. 394; Henry Kendall & Sons v. William Lillico & Sons [1969] 2 A.C. 31.

(15) See Chitty on Contracts (25th Edition), para. 750.

(16) Mellish v. Motteux (1792) Peake 156.

(17) S.2.

(18) S.6(2)(a).

(19) Ss. 8 - 10 and 15.

(20) [1892] 1 Q.B. 253 at page 259.

(21) Per Lord Diplock in United Scientific v. Burnley Council (1978) A.C. 904 at page 924 and in The "Afovos" [1983] 1 Lloyd's Rep. 335 at page 341; and per Lord Roskill in Bunge v. Tradax [1981] 2 Lloyd's Rep. 1 at page 12.

(22) [1983] 1 Lloyd's Rep. 335.

(23) [1983] 1 A.C. 444.

(24) [1988] 2 Lloyd's Rep. 108.

(25) See The "Democritos" [1975] 1 Lloyd's Rep. 386.

(26) [1963] 2 Lloyd's Rep. 381.

(27) Luigi Monta v. Cechofracht [1956] 2 Lloyd's Rep. 97.

(28) Bankline v. Capel [1919] A.C. 435.

(29) Fibrosa v. Fairbairn [1943] A.C. 32; Pacific Phosphate v. Empire Transport (1920) 36 T.L.R. 750.

(30) [1984] 2 Lloyd's Rep. 388, [1985] 1 Lloyd's Rep. 528 (C.A.).

BAREBOAT CHARTERPARTIES
BAREBOAT CHARTER REGISTRATION AND MORTGAGE SECURITY

THE GERMAN SYSTEM IN COMPARISON WITH SOME OTHER SYSTEMS

BY
PETER EHLERMANN

Contents:

INTRODUCTION

In this paper I should like to start from the legal system as it exists in the Federal Republic ("FR") and to compare some main systems of bareboat charter registration. I finally will say some words about the ways the various systems try to ensure the mortgage security on a vessel is subject to bareboat charter registration.

I
German Legal System

The system of flagging-in and flagging-out of the Federal Republic has been working for many years. At least as far as Europe is concerned the majority of bareboat charter registered ships is owned by owners with domicile in the Federal Republic.

1. General Concept

The general principle which underlies this system is that a vessel which is owned by a German individual or company must, in principle, fly the German flag. This rule is established by article 1 of the "Gesetz uber das Flaggenrecht der Seeschiffe und die Flaggenfuhrung der Binnenschiffe", dated 8th February, 1951, the so called "Flag Law". The "Schiffsregisterordnung" dated 26th May, 1951, i.e. the Act regulating the registration of vessels, in its article 3 makes reference to that law and states that a seagoing vessel qualified to fly the German flag, must be registered in a German registry of seagoing ships. The rules established by these provisions are much like those in force in most other countries.

2. Flagging-out

The flagging-out option is contained in Article 7 of the Flag Law which provides that the Federal Minister of Transport on application may exempt the owner of a vessel from the obligation to have his vessel fly the German flag. This exemption is granted only if the vessel is operated from another country and that other country (or a third country) permits the vessel to fly its flag during the period when it is operated from abroad.

Such exemption may be granted for a period of at least one year, but not exceeding two years. Extensions are possible. During this period the vessel may not fly the German flag.

So, the concept is simple: a vessel is registered in Germany and whilst the registration is not changed or altered it may be granted permission to fly temporarily the flag of another country if operated from that (or a third) country. The concept is just that registration and flag are matters which normally coincide, but which may be separated from one another.

3. Flagging-in

This concept is likewise applied for flagging-in into Germany. Article 11 of the Flag Law states that a vessel owned and registered in a foreign country may on application from its German operator be permitted to fly the German flag for a period of up to two years despite the fact that the vessel is neither German owned nor registered in Germany provided the laws of the country of foreign registration permits such change of flag.

4. Registration of Flagged-in Vessels

In Germany you will not find the names of any of these flagged-in vessels in the German shipping registry. They are only entered in a special list of ships maintained by the Federal Waterway Administration. This authority should not be confused with the Ships Registry Office held by the lower Courts in the port cities. It is quite a different authority and the listing with that authority has no relevance whatsoever as regards title of the vessel or any mortgages. This list simply does not permit any mentioning of mortgages. It is by no means a ship register.

In other words, a vessel bareboat chartered-in is not subject to any registration or notification in the German registry of ships. Furthermore, in no way are the mortgages or any other encumbrances registered in the country of the main registration subject to registration in Germany. The term "Bareboat flagging-in" is more convenient in this context.

II
Other Systems

There are other countries that have a quite similar approach to that of the Federal Republic. These are some neighbouring countries like East Germany and Austria. (There are a number of West-German vessels bareboat chartered to East Germany or to Austria.) Another country with a quite similar flagging-in system is Turkey.

Some other systems like the French system have been used for quite a time. Other systems emerged in recent years. I would like to give you the following list which, however, may not be complete, of countries permitting new bareboat charter registration:

1. Antigua and Barbuda
2. Australia
3. Austria
4. Burma
5. Cyprus
6. East Germany
7. France
8. Liberia
9. Luxembourg
10. Mexico
11. Panama
12. Philippines
13. Portugal
14. Spain
15. Sri Lanka
16. Turkey
17. Vanatu

Finally, I should also mention the UN Convention of February. 1986.

Although I do not pretend to be a specialist of the law of any of these various countries, I should mention some of these systems which might be useful for a comparison. However, I will not discuss systems like the Mexican system which in my view is not a bareboat charter registration in the sense that there is a flagging-in or a flagging-out but just granting some subsidies to vessels flying foreign flag but bareboat chartered to Mexico and using local crews.

I will start with the Liberian system.

1) The Liberian System

The matter is dealt with in the Liberian Maritime Law, Title 22 of the Liberian Code of Laws of 1956 as amended in Articles 85 to 89 dealing with bareboat charter-in registration in Liberia. Article 85 is dealing with the principle. There is a special book for bareboat charter registration where the following details are entered:

a) the name of the vessel
b) the names of the bareboat charterer, the shipowner and holders of mortgages
c) the time and date of recording of the charterparty,
d) the duration of the charterparty,
e) the foreign state of registry of the vessel.

Section 86 imposes the obligation on the bareboat charterer to execute under oath an undertaking to the effect that while the vessel is granted the right to fly the Liberian flag she will not fly any other flag nor have any home port other than Monrovia and that the bareboat charterer will without delay notify the Liberian registration office if any other foreign state shall accord the vessel the right to fly its flag.

2) The Panamanian System

Law No. 11 of January 25, 1973, supplementing Article 3 of Law 8 of January 12, 1925 is rather short but no less precise than Liberian law as far as it provides that:

"vessels of foreign registry chartered for a period not longer than two years may acquire Panamanian registry, without waiving such foreign registry, provided that the government of the country where they are registered, allows it. In the affirmative, the interested party shall produce a certified copy of the corresponding Charterparty, including the consent of the owner, Enrolment Certificate from the foreign country, and the authorisation of the country where the vessel is registered to the Consular and Shipping Bureau of the Ministry of Treasury which in turn shall perform the corresponding registration."

Here too a special book for bareboat charter registration is maintained with a registration authority, SECNAVES.

3) The Cyprus System

Cyprus law from 1986 (Law amending the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963 to 1982 uses the term "Dual registration" for bareboat charter registration.

"Dual registration" and - I cite the law - "the use of Cyprus flag on a ship registered in a foreign registry is allowed if she is bareboat chartered by a Cypriot or by a corporation which is entitled under Section 5 of the law to own a Cyprus ship" (Article 23 A of the Cyprus Code), provided certain conditions are met. The law says that registration in the foreign country as long the dual registration of the vessel continues, shall be "suspended save as regards the creation, registration or deletion of mortgages or other encumbrances."

So, again here is a registration by the registrar of ship. There are two registrations with one of them being temporarily suspended.

4) The Antigua and Barbuda System

Many ships in recent years have been registered in Antigua and Barbuda. To my knowledge there are more than 200 ships that have been bareboat chartered to Antigua in the last two years. The Antigua and Barbuda registration system is contained in the Antigua and Barbuda Merchant Shipping Act, 1985. Bareboat charter registration is contained in the Antigua and Barbuda Merchant Shipping (Amendment) Act 1986. Vessels are admitted for bareboatcharter registration for a period of two years if bareboat chartered to a company having domicile in Antigua and Barbuda or in a third country. Registration is made by the Registrar of Ships in St. John's, mostly in co-operation with the local consul in the flagging-out country.

5) The French and the Spanish System

Under French law the procedure to obtain the French flag is the "Francisation" which is granted either if the vessel is French owned or also if the vessel is foreign owned, if the vessel is operated by a French operator (Article 219 of the Code de Douane). The vessel is then subject to registration ("Immatriculation"). The French system of bareboat charter registration more exactly speaking is not a special form of registration. The vessel is just entered into the normal registry book of the vessel which is accessible to French vessels, a French vessel being not only a French owned, but also a French bareboat chartered vessel.

I have made no specific research on Spanish law, but my understanding is that Spanish law basically follows the system of the French bareboat registration, in other words, a vessel can become Spanish also if bareboat chartered to Spanish citizens without being owned in Spain.

6) Luxembourg

The new Luxembourg project of law on ship registration specifically permits bareboat flagging-in and-out. The registrar dealing with the matter is the registrar of ships.

7) The Australian System

I should also mention briefly the Australian system. In the Merchant Shipping Act of 1981 Australian law permits vessels to be registered in Australia not only if owned by an Australian national or company but also if bareboat chartered to such person qualified for registration in Australia and if operated out of Australia. This is certainly a form of bareboat charter registration but insofar it is different to the systems discussed here as it requires full deletion of the previous registration. It is just a "full registration" of the vessel.

8) UN Convention

The United Nations Convention of 7th February, 1986 on Conditions for the Registration of Ships deals for the first time with this area of law after having discussed general rules for ship registration. In its Article 11 it first mentions bareboat charter registration and it provides in Article 11 Para 5:

> "in the case of the ship bareboat chartered-in the state should assure itself that right to fly the flag of the former flag state is suspended. Registration shall be effected on production of evidence indicating suspension of previous registration as regards the nationality of the ship under the former flag state and indicating particulars of any registered encumbrances."

In Article 12 of the Convention then is added the following principle:

> "Subject to the provisions of Article 11 and in accordance with its laws and regulations a State may grant registration and the right to fly its flag to a ship bareboat chartered-in by a charterer in that State, for the period of that charter."

and after having said that the rules of this Convention should be respected in so far, it is adding the very particular sentence:

> "To achieve the goal of compliance and for the purpose of applying the requirements of this agreement in the case of a ship so bareboat chartered-in, the charterer will be considered to be the owner. This Convention, however, does not have the effect of providing for any ownership rights in the chartered ship other than those stipulated in the particular bareboat charter contract."

This short summary shows that most legal systems which permit bareboat charter registration consider it apparently as a form of ship registration which just does not require transfer of ownership to the country of registration, but just the use of the vessel by a bareboat charterer.

From the mortgagee's standpoint then the question arises as to how his mortgage is protected when a vessel registered in a certain country is bareboat chartered to another country.

III
Mortgage Protection

Various systems have provided for legal protection against the registration of mortgages during the bareboat charter registration by a party other than the owner of the vessel. However, the tools chosen for protection differ from each other.

Certainly none of the systems permits bareboat charter registration without the consent of the mortgagee. This is certainly the general method of protection. The vessel cannot be subject to bareboat charter registration without the consent of the mortgagee.

But what happens if the vessel is bareboat registered? How, in such a case, can the mortgagee be sure that the legal system of the country concerned will respect and protect the mortgage which existed before this bareboat charter registration?

Again the German system has no problem here. As described above, no mention is made of any mortgage and indeed the special entry in the list of vessels bareboat chartered-in to Germany is considered a pure list of ship names having no relevance with respect to the vessel's title, the validity of the bareboat charter nor any mortgages on the vessel. A German judge would just look to the foreign registry, the German annotation of the vessel having no relevance with respect to any encumbrance.

The other system cited above have different solutions to this problem.

Firstly, some countries permit facultative registration of mortgages, existing and registered in the main registry of the vessel. This applies to Liberia and for Vanuatu.

Secondly, some systems like those of Antigua and Barbuda, Cyprus or Panama provide additional protection to the mortgagee by specifically referring to the main registration. The techniques used for this purpose are different.

Thirdly, some publicity is granted to the foreign mortgages by additionally either requiring or permitting the mentioning or listing of the existing mortgages on the vessel's certificate of registry. This is the Panamanian and the Cyprus system.

In my view, the disadvantage is that the list of mortgages in the vessel's certificate is not complete if new mortgages are registered or old mortgages are deleted. The danger of a discrepancy between the list on the certificate and the true situation of mortgages is obvious. More satisfactory in my view is a general reference on the certificate of registry stating that mortgages - if any - are registered in the main registry and that then the main registry is precisely referred to, mentioning the city where the prime registry is maintained and the registry number under which the vessel is registered.

Even more satisfactory in my view are systems which permit, in the registry book itself, a general reference to the prime country of registry and that mortgages, if any, on the vessel are registered in the main registry, mentioning the city and the registry book number.

Here are some details:

1) The Liberian System

Section 89 of the Liberian Maritime Law deals, in particular, with the mortgage question and provides

> "without prejudice to the continuing foreign legal status of a ship mortgage, hypothecation or similar charge made and registered in accordance with the laws of the foreign state, upon compliance with section 5 and section 6 of this sub-chapter, such foreign mortgage, hypothecation and similar charge may also be recorded in accordance with section 105, and if so recorded shall also constitute a Liberian preferred mortgage under section 106 and shall give right to preferred mortgage lien under section 107."

So the law is clear: Once a foreign mortgage is recorded, it is recognized as a Liberian mortgage. The conclusion to me seems clear, namely that if the foreign mortgage is not recorded in the Liberian registry, Liberia does not recognize this mortgage as a Liberian preferred mortgage.

2) The Panamanian System

The Panamanian law provides that for such vessels a "special navigation certificate" (Patente Especial de Navegacion) will be issued and that this certificate besides mentioning the owner of the vessel the charterer and the name of the foreign port of registry will also show any lien or liens noted in the foreign registry certificate. It continues:

> "so long as such vessels maintain this special status, their bills of sale may not be recorded in the registry office nor as the consequence any ship mortgage or other liens thereon. With regard to any ship mortgage recorded in the foreign registry, the law of such foreign country shall apply."

The system does not require that the foreign mortgage be recorded in any Panamanian registry. The mortgage mentioned in the main registry certificate will be listed on the bareboat charter certificate. But what if the foreign system does not prescribe that mortgages shall be recorded on the vessel's certificate? And, furthermore, what if a mortgage has been forgotten or has not been correctly mentioned on the Panamanian bareboat charter certificate or what happens if a new mortgage meanwhile has been registered in the foreign registry and subsequently is not listed on the Panamanian bareboat charter certificate?

3) The Cyprus System

Article 23 E (1) of the Cyprus Code provides:

> "(1) Mortgages and other encumbrances which are a charge on the ship at the time of dual registration in the Cyprus Register, continue to exist and to be charged on the ship and to be governed by the law governing the same at the time of their creation, without being affected by the fact of dual registration of the ship in the Cyprus register.
>
> (2) After the dual registration of the ship in the Cyprus register, a mortgage or other encumbrance are created over the ship only by the shipowner and in accordance with the law of the country of foreign register in which register they are recorded.
>
> (3) Registration of a mortgage in the Cyprus register in accordance with the provisions of Part VII of this law is not allowed.
>
> (4) Mortgages and other encumbrances referred to in sub-sections 1 and 2 are recorded in the special book of dual registration of the Cyprus register for information purposes only."

The Cyprus system is definitely not so strict and merely says that mortgages coming into existence are to be considered valid if existing and valid under the law of the main registration and states that mention of the mortgages is 'for information purposes only.'"

4) The Antigua and Barbuda System

The Antigua and Barbuda System provides for a very practical protection of the mortgages. On the one hand it specifies that mortgages as registered in the foreign main registry shall be considered valid mortgages under the law of Antigua, secondly it gives publicity of the foreign mortgage in two ways. Firstly on the back of the certificate of registry the main registration of the vessel is referred to and it is further said in a general form that mortgages, if any, are registered in that main registry. The registry book for bareboat chartered vessels contains the same reference to the main registration with all details and a general reference to the mortgages registered there.

5) The Vanuatu System

The Vanuatu system as far as the registration of the vessels is concerned widely resembles the Liberian system. As far as mortgages on bareboat chartered vessels are concerned, Art. 30 A of the Vanuatu Maritime Law proposes a dual concept: The mortgagee may either register the mortgage or he may not register the mortgage. In both cases the mortgages are considered Vanuatu mortgage.

6) The French System

The French mortgage is a contractual mortgage which comes to existence not by the fact of registration but just by contract or otherwise outside the registry. The purpose of the registration is to protect the holder

of the mortgage against third party creditors by publicising the existence of the mortgage. This publication of a mortgage already existing in the country of main registration is the means of protecting the mortgages.

There is no danger that third parties other than the owner may create a mortgage on the vessel, this right being restricted to the owner.

This system, however, leaves the danger that, if the mortgagee failed to have his mortgage also shown in the French register, in the case of an arrest and auction of the vessel a third party may claim to be in good faith with respect to the absence of mortgages on the vessel because the vessel was flying the French flag and the French registry did not show any registry entry. At least a French creditor could be heard with this argument before a French court. It therefore seems advisable to protect the mortgagee of such a vessel who has his mortgage registered in the country of the main registration, to also have his mortgage registered under French law. The French registrar when accepting such a mortgage for registration, is not acting in contradiction to the laws of the main registration when re-recording such a mortgage which already exists in the main registry, because such notation serves only to publicise the existing mortgage.

This again permits - at least in the interpretation of a number of registrars in France - that the registration office may accept mortgages for registration on the vessel including mortgages already existing on the vessel in the foreign country of registry.

7) Luxembourg

The new Luxembourg project of law says clearly that no registration of mortgages is possible on a bareboat charter registered (flagged-in) vessel. However it is not yet specific on the question whether it permits any publicity of foreign registered mortgages.

IV
Conclusions

1) The concept of bareboat charter registration which is known and practised in a number of countries, is still considered by many experts with distrust. The idea that the vessel may be registered in one country and operated under the flag of another country seems to be rather absurd to many observers and is considered a threat to some principles which guarantee the recognition of foreign mortgages in many countries. On the other hand, bareboat charter registration has in recent years been widely accepted and laws in various countries have been changed to make it possible. Apparently there is a genuine need to have the possibility to temporarily change the flag of a vessel according to operational necessities.

2) The instrument of bareboat charter registration seems to be useful, in particular for some developing countries. Banks, it seems, who would be reluctant to grant a loan to borrowers in certain countries which have rather restricted monetary systems, are ready to accept a borrower and mortgage security of another country and would be willing to

tolerate that the vessel so financed be temporarily operated under a flag which would not normally be acceptable as a borrower country. The controversy - if there is any - emerges when it comes to the protection of mortgage security. Serious observers argue that some countries might not recognize a mortgage on a ship which was not created in accordance with the laws of the country of the flag and/or in particular is not registered in the country of the vessel's flag.

To me it seems it is a question of how the law is written. I think that a satisfactory form of bareboat charter registration law clearly spells out that a bareboat charter registration is something different to registration of ownership and title and that as far as mortgages are concerned the law of the original registration applies and that bareboat charter registration does not permit the registration of mortgages for other purposes than merely as information to third parties of the mortgages registered in the country of the main registration.

In my view it seems to be advisable - at least in legal systems where the distinction between main registry and bareboat charter registry is not so clearly spelt out - that the entry of the vessel in a bareboat charter registry contains a clear and precise mention of the main registration quoting the registration number and place of the main registry stating that, as far as mortgages are concerned, the contents of that other registry are relevant. This in my view assures that a third party will not be heard with the argument that it believed in good faith that a certain vessel at the time at which he gave credit was free of mortgages.

BAREBOAT CHARTERPARTIES
REGISTRATION OF SHIPS UNDER BAREBOAT CHARTER
WITH PARTICULAR REFERENCE TO DUAL REGISTRATION

BY
VESNA POLIC CURCIC

1. In the past, shipowners registered their ships in the registers of their own countries and operated them according to their laws and regulations. Gradually, operating ships in this way became too expensive in most traditional maritime countries because of the high costs of national crews, high maintenance, high taxation, etc. These economic grounds forced many shipowners to look for a way to avoid the application of national legislation to business operations. This object could best be achieved either by providing the ship with the flag of another country, so that the legislation of the new flag State applied, or by registering the ship in a particular register to which only a part of the legislation of the home country applied. (1)

In the past few decades a significant part of world tonnage has been flying the so called flags of convenience. These are ships registered in "open registry countries", whose registers were created to impose minimum conditions for acceptance of foreign ships and whose legislation allowed a relatively cheap and very competitive running of these ships.

In spite of the benefits which shipowners were enjoying when registering their ships in the open registry countries, this system created substantial disadvantages. For example, a ship registered abroad sometimes lacked the legal protection of the "home" country; the home, capital-generating country, usually lost control over repatriation and reinvestment of shipowner's profits etc.

It was on the initiative of some developed maritime countries that in 1978 an ad hoc working group was formed within UNCTAD with the task of studying the problem of open registries. This initiative was later taken over by developing countries that also had an interest in phasing out the open registries. A conference was therefore convened with the task of drafting the conditions, at the international level, that a ship had to fulfil in order to be accepted on a register. Simply speaking, the idea was to make provision for the elements of the genuine link between a ship and her flag State in such a way that the open registry countries could not fulfil them and so force the ships to apply for registration in those countries with which they had a genuine link. The United Nations Convention on Conditions for Registration of Ships was adopted on 7th February 1986.(2) It is not yet in force. The Convention is the

(1) The change of flag sometimes had political motives, for example to evade the Prohibition Act, to show neutrality in a war or to acquire the protection of a State, as in the Gulf War recently. However, these motives appear only occasionally.

(2) UNCTAD doc. TD/RS/CONF/23. For commentary see: Vesna Polic Curcis, Uvjeti za upis brodova - stvarna veza broda i drzave zastave (Conditions for Registration of Ships - Genuine Link Between a Ship and her Flag State), Uporedno pomorsko pravo i pomorska kupoprodaja (Comparative Maritime Law and Commerce), 1986, No. 109-112, p.1; Moira L. McConnell, "Business as usual": An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships, Journal of Maritime Law and Commerce, Vol. 18,No.3, July, 1987, p.435.

result of a political compromise between the interests of those parties who need and defend the open registries and those who felt threatened by them. Its wording is very mild and in some instances imprecise, and it is obvious that it did not manage to achieve its original aim, i.e. to phase out the open registries.

As it became evident that the problem of competition of open registries could not be solved at the international level, some maritime countries were forced to seek solutions through national legislation. Changes in some countries' legislation and practice, in order to make the operation of ships cheaper and more competitive, have been made in two directions. The first is the creation of separate, so-called international registers, usually in a part of a country's territory with historically different status. These registers attempt to attract ships that are flagged-out and even foreign ships. The second is the increasingly frequent bareboat chartering-out of ships into countries under whose flag ships can be operated in an economically acceptable manner. Neither of these two ways of avoiding domestic laws is new, but we agree with the opinion that only recently they really started to flourish.(3)

The main characteristic of international registers is that a ship entered in such a register flies the flag of the country that created it, that country retaining its jurisdiction and control in respect of administrative, technical and social matters over this ship. At the same time these ships are exempted from a part of the national legislation of the country, mostly concerning taxation and social matters. In this way they are not obliged to pay a large amount of taxes, are allowed to employ a certain percentage or even an entirely foreign, less paid crew, etc. These elements form the major difference between regular and international registers of a country and permit the latter to operate with significantly reduced costs.

2. Bareboat chartering

Bareboat chartering ships is a well established way of acquiring and operating ships without having to spend large sums of money in purchasing them. For many countries that provided bareboat chartering-in in their legislation this was a way to enlarge their fleets and to satisfy their need for transportation. We dare say that for a long time this was the predominant motive for entering into bareboat charter arrangements.

Only relatively recently in some countries bareboat chartering-out of ships was developed in order to provide another flag for the ship and to submit the ship to a legislation more convenient than the national one.

Whatever may be the economic motive for bareboat chartering, it does not pose any legal problem when a ship is first deleted from the register of the country that charters-out the ship and is subsequently entered into

(3) For example for the international registers in: Pavillons "bis" ou de "complaisance": une difference de degre, mais pas de nature, Journal de la marine marchande 1988.3256. For bareboating-out it is estimated that this practice has existed for roughly forty years and has flourished in the past two decades - Consideration of Maritime Liens and Mortgages and Related Subjects, in accordance with the Terms of Reference of the Joint Intergovernmental Group, Note by the Secretariats of UNCTAD and IMO - JIGE(III)/WP/4,p.2.

the register of the country to which she is chartered-in, for the duration of the contract of charter. It goes without saying that the deletion must be complete and that all the entries have to be transferred into the new register. In this way ships can be entered among others into Yugoslav,(4) Italian (5) or Australian (6) registers.

The Yugoslav Maritime and Inland Navigation Law provides that a ship registered in a foreign register of ships may not be registered in a Yugoslav register of ships.(7) A ship which is wholly or partially owned by a foreign national, a stateless person or a Yugoslav citizen domiciled abroad, and whose operator is a Yugoslav citizen or organisation, may be entered in the Yugoslav register of ships, provided that the shipowner consents with this registration.(8) If the ship is being transferred from the foreign register to a Yugoslav register of ships, the application for the first registration of the ship shall, inter alia, be accompanied by a certificate of the authority keeping the foreign register of ships that the ship was deregistered from this register.(9)

The U.N. Convention on Conditions for Registration of Ships also provides that a State may grant registration and the right to fly its flag to a ship owned by a foreign legal or physical person and bareboat chartered-in by a charterer in that State, for the period of that charter.(10) A condition for such a registration is the suspension of the right of this ship to fly the flag of the former flag State. Such registration shall be effected on production of evidence indicating the suspension of previous registration as regards the nationality of the ship under the former flag State and indicating particulars of any registered encumbrances.(11) Each State should ensure that a ship bareboat chartered-in and flying its flag will be subject to its full jurisdiction and control.(12) That means that in all relevant aspects a ship shall be governed by respective national laws of the flag State.

3. Dual registration of bareboat chartered ships

It happens in some cases that a shipowner does not want his chartered-out ship to be completely transferred to another country's

---

(4) It results from Part three, Chapter II of the Maritime and Inland Navigation Law, especially from its Articles 174(1). 178 and 306(1)(8).

(5) It results from Chapter five of the First volume of the First part of "Codice della navigazione", especially from Art. 145.

(6) Consideration of Maritime Liens and Mortgages and Related Subjects, in accordance with the Terms of Reference of the Joint Intergovernmental Group - JIGE(IV)/2. p. 15.

(7) Art. 178

(8) Point 1 of paragraph 1 of Art. 175

(9) Point 8 of paragraph 1 of Art. 306

(10)Paragraph 1 of Art.12

(11)Paragraph 5 of Art.11

(12)Paragraph 4 of Art.12

register. He might have several reasons for this. If he wants to enter his ship in another country's register, he has to obtain the consent of his lenders. For a lender, the country where his mortage is registered is of great importance because the priority of the mortgage in respect of any other encumbrance - and, indeed, the security of the mortgage itself - depends upon the law of that country. He may, therefore, condition his consent to change the ship's register or even refuse to give it. In the latter case, the shipowner has first to pay off the mortgage and only then make the change. In addition, some countries protect their industry by granting a shipbuilding subsidy to shipowners when they order ships in domestic shipyards, on condition that ships that are built with such assistance are operated under the flag of that State for a certain period of time.(13) For these and similar reasons a practice developed that a bareboat chartered-out ship is not completely suspended or deleted in the register where it was previously entered, but this registration is combined with the registration in the country of the bareboat charterer.

Such a parallel or dual registration results in the existence of two separate registers of ships.(14) The first is situated in the State of previous registration and is usually called "Real Rights Register". It contains entries concerning the ship, her shipowner, ownership and all possible registrable charges, and performs the private law function of a register. The second is called "Flag Register". It is kept in the State where the ship is bareboat chartered-in and is usually not identical with the regular national register of ships of that State. It deals with public law matters such as the right to fly the flag and the obligations relating to employment of crew, control, etc.(15) The ship has the nationality of the State of the flag register and is subject to its sovereignty. A Real Rights Register may never be suspended and the encumbrances on a ship entered into this register stay in it even while the ship is registered for flag purposes in another State.(16)

The number of countries permitting dual registration is increasing.

---

(13) For example in the Federal Republic of Germany, where the ship has to be operated under the national flag for eight years after delivery. In the case of a temporary change of flag on the basis of a bareboat charter, if the ship remains in the German Register, the government may refrain from claiming repayment of this subsidy - Dr. Bernd Kroger, The Bareboat Charter Registry in Operation; The German Experience, paper held at the ICC Symposium on Bareboat Charter Registration, Paris 5-6 October 1987, p.8.

(14) Report on Third Session of UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects at Geneva from 30 November 1987 to 11 December 1987 - MLM - 101/1-88, P. 5-6

(15) Ibid

(16) Dr. B. Kroger, Ibid, p.9.

Among them are the Philippines,(17) Federal Republic of Germany,(18) Cyprus,(19) Liberia,(20) Panama,(21) Sri Lanka(22) and others. The largest number of parallel registered ships are probably the West German ships bareboat chartered-out to Cyprus.(23)

The Cyprus Merchant Shipping Law, 1986, in its chapter "Parallel Registration of Ships" defines parallel registration as "the registration in the Cyprus Register, for a certain period of time and under special legal prerequisite conditions, of a ship, which continues to be registered in a foreign register".(24) Such a registration can be effected if the law of the country of the foreign registry allows the parallel registration of the ships registered in its registry and if the required documents are submitted with the application, namely, a copy of the charterparty, written consent of the shiponwer, the mortgagees and the appropriate maritime authorities of the country of the foreign registry, including a confirmation as to the ownership of the ship and as to the mortgages or other encumbrances on the ship.(25) During the period in which parallel registration is in force, the ship is furnished with a "Certificate of Parallel Registration". At this time "the registration in the foreign register shall be suspended, save as regards transfers or transmissions and the creation, registration or deletion of mortgages or other encumbrances on the ship".(26) This law does not allow registration of encumbrances in the Parallel Register of Ships, so that all the encumbrances existing at the time of parallel registration of a ship, as well as all the encumbrances created later, are submitted only to the law of the State of the Real Rights Register. In the Cyprus Register these encumbrances are recorded for information purposes only.(27)

---

(17) The law allowing bareboat charter registration was passed in The Philippines in 1975. The country's overseas fleet is made by more than 400 ships. Out of that only 50 are owned or permanently registered in the country, the rest being temporarily registered under the bareboat charter registration system - Lloyd's Ship Manager, July 1987, quoted after JIGE(IV)/2,p.37.

(18) Ibid, p.18

(19) Ibid, p.25

(20) Ibid, p.29

(21) Ibid, p.32

(22) Ibid, p.33

(23) They are about 100. About 80 West German ships are in the same way registered in Panama, about 60 in Antigua, and some of them in Burma, Togo, the Philippines and St. Vincent - Dr. B. Kroger, Ibid, p.2.

(24) Section 23A (1), official English translation - quoted after JIGE(IV)/2, p.25

(25) Section 23B(1) - Ibid, p.26

(26) Section 23A(3) - Ibid, p.27

(27) Ibid.

Parallel existence of two registers into which a ship is entered at a time can create a number of problems. They can arise from the delimitation of the scope of the Public and the Real Rights Register in cases that concern both of them. Problems can also arise in connection with the conflict-of-law rules concerning mortgages, hypotheques and other charges registered in a State different from the State whose flag the ship is flying, because in these cases the conflict-of-law doctrine, as developed in various legal systems, loses its most reliable feature in maritime law, i.e. that the State of registration and the flag State is always one and same. For example, a court of a third State might not recognise a mortgage on a bareboat chartered ship and that can create serious consequences for a mortgagee. In spite of that, parallel registration is developing because it satisfies ambitions of the parties that, we venture to say, in some instances may be of a speculative nature.

Parallel or dual registration is now not permitted in maritime law. In defending such registration it is argued that it specifically reflects the principles of maritime law because, despite the existence of two registers, it does not violate its main principle that ships sail under the flag of one State only. This registration, it is suggested, only divides up the public and private law functions of the ship's register. So, in the sense of public international law, there is no dual registration,(28) and this term is used erroneously.(29) Disregarding the name, because it seems that all the names mentioned describe well the notion, this kind of registration is not provided for nor regulated in the international conventions that concern the registration of ships.

As already mentioned, the U.N. Convention on Conditions for Registration of Ships permits that its States Parties grant registration to chartered-in ships and that these ships fly their respective flags. A condition for registration of a chartered-in ship is the suspension of her former registration. That means that such registration cannot have any effect during the period when the vessel is registered in the charterer's State. Therefore entries in that register are not effective during such period and no new entry may take place.(30) The Convention in fact states that evidence shall be produced "indicating suspension of previous registration as regards the nationality of the ship under the former flag State and indicating particulars of any registered encumbrances".(31) Does that mean that only the public law part of the register should be suspended ("as regards the nationality"), and that particulars on its private law part should be mentioned for information only?

---

(28) Dr. B. Kroger, op. cit. p.10

(29) JIGE(III)/WP/4,p.2

(30) Consideration of Maritime Liens and Mortgages and Related Subjects, in accordance with the Terms of Reference of the Joint Intergovernmental Group, Registration of bareboat chartered ships. Notes prepared by the Chairman of the Joint Group - JIGE(III)/WP/3. p.1

(31) Paragraph 5 of Art. 11

Although the literal reading of this unclear sentence might permit such an interpretation, it would be contrary to the spirit of this Convention and of other conventions on the law of the sea. On the contrary, we agree that this provision should be seen in connection with paragraph 3 of Article 4 of the same Convention (32) (that is taken over from the Geneva Convention on the High Seas, 1958, and this Convention only codified the existing international law), that repeats the principle that ships sail under the flag of one State only. That means that the new flag State, irrespective of whether it registers a purchased or a chartered ship, must check that the previous registration of the ship is deleted or suspended respectively. This provision should also be seen in connection with paragraph 4 of Article 12 of the same Convention, which states that each State should ensure that a ship bareboat chartered-in and flying its flag will be subject to its full jurisdiction and control. That means that all the relations emanating from the registration of a ship in its register, including those concerning the encumbrances, have to be governed by its laws. On the other hand, paragraph 2(i) of Article 11 might also be misleading. It provides that, unless recorded in another public document readily accessible to the Registrar in the flag State, the register shall record the particulars of any mortgages or other similar charges upon the ship as stipulated by national laws and regulations. Could that mean that the flag State register might not record any mortgages or other similar charges if they are recorded in the Real Rights Register of the former State of registration and made readily accessible to the Registrar in the flag State?

In analysing further the text of this Convention, it should be noted that another notion was taken over from the High Seas Convention - that is the "right of a ship to fly a flag". In paragraph 1 of Article 5, the High Seas Convention allows each State to fix the conditions for granting its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. It also states that ships have the nationality of the State whose flag they are entitled to fly. The U.N. Convention on the Law of the Sea, 1982, took over these provisions from the 1958 Convention,(33) enlarged the duties of the flag State in exercising jurisdiction and control in administrative, technical and social matters over ships flying its flag and added a list of the duties of this State concerning its ships.(34) Undoubtedly, the duties of a State towards the ships flying its flag, as well as the right of a ship to fly a flag, emanate from the fact of the registration of a ship in the register of this State. Only a regular, i.e. complete registration is a basis of the rights and duties of a ship to fly the flag of the State in which she is registered and of many other rights and duties of the ship, her owner, operator, authorities of the State of registration and others. Therefore a State granting to a ship the right to fly its flag cannot be different from the State in which the ship is registered.

(32) Intertanko - The U.N. Ship Registration Convention - Twelve Months On, Oslo 1987, p. 21

(33) Art. 92

(34) Art. 94

At the Conference on registration a discussion developed over the issue of whether it is more suitable for the State to which the ship is bareboat chartered-in to be called "flag State" or "State of registration". The representative of Panama argued in favour of the term "flag State" as a unique notion, saying that in case of a ship bareboat chartered-in two States of registration can exist - the State in which the previous registration is suspended and the State where the ship is chartered-in and where it is or shall be registered. The representative of Brazil considered that the notion "State of registration" was more suitable, because registration is one basis of the right to fly a flag. No final opinion seemed to prevail, so that the text refers to both of these terms.(35) However, this ambiguity should not create confusion, because from Articles 4, 11 and 12 of this Convention and from the above mentioned provisions of the Convention on the High Seas it is evident that for the period of a charter the State that chartered-out the ship is the State of suspended or "frozen" register, and the State to which a ship is chartered-in is in that time both the State of registration as well as the flag State.

For these reasons we could not agree with the suggestion(36) that these two terms are mutually exclusive when used in the context of bareboat charter registered ships. Neither can we agree with the analysis of paragraph 5 of Art. 11 of the 1986 Convention dealing with the suspension of the right to fly the flag of the former flag State, according to which the suspension of the right to fly the flag excludes the suspension of the registration of the same ship in the former flag State. We especially cannot agree with the conclusion made later at the same place, that consequently the only proper place to record or register mortages, hypotheques and similar instruments would be the former, "original", registry.

It is evident that logic could not lead to such a conclusion, because what results from the premises is just the opposite. However, the fact that such a conclusion was presented in a paper prepared for an international session should not be ignored. This conclusion arose because of the increasing number of ships bareboat chartered and parallel registered on the basis of national legislation of the States that charter them in and out, or on the basis of bilateral agreements between these States. The 1986 Convention neither provides for nor regulates parallel registration of ships. Concerning bareboat chartered ships it provides for a full suspension of registration in the country that bareboats-out the ship and a full registration in the country of the charterer, for the duration of the contract of charter. It is true that the relevant provisions of this Convention are not complete and precise, but they still do not give ground for a different interpretation.

35) v. Polic Curcic. op. cit. p.19

(36) JIGE(III)/WP/4,p.3

4. Parallel registration of ships and other unificatory instruments

The possible existence of two registers of ships also created problems in preparing the text of the Convention on International Financial Leasing, 1988.(37) After it was finally decided that the Convention should apply to the leasing of ships, it was not easy to reach agreement about the giving of public notice by the lessor to preserve his rights in the vessel against the lessee's trustee in bankruptcy and other creditors. Should such notice be given in the State of registration of the ship or in her flag State? It was first proposed that it should be given in the flag State and governed by its laws, but at the last moment, at the diplomatic conference where the Convention was adopted, it was decided that the public notice should be governed by the law of the State of registration. It was further clarified that the State of registration is the State in whose register a ship is entered in the name of her owner. Where ships that are both leased and bareboat chartered, the State of registration will depend on the national laws of the State of original register and of the State where the ship is bareboat chartered-in. If this law allows parallel registration so that the Real Rights Register remains open in the State of original register, the laws of this State shall apply to public notices and other relations arising from Art. 7 of the Convention. If the ship is chartered-in to a State that does not allow parallel registration and the register in the State of original registration has to be fully suspended, the ship shall be entered in the charterer's State register also in the name of the shipowner. In this case the laws of this State shall govern all the relations mentioned above.(38)

It follows from these provisions that the draftsmen of the Convention were fully aware of the existence of parallel registers in a significant number of maritime countries and that they considered it necessary to adapt the provisions of the Convention to reflect this practice.

The same problems arose in the preparation of the text of the Convention on Maritime Liens and Mortgages and Related Subjects. Among other issues, this convention should also govern the registration of encumbrances on ships and conditions for change of ownership or registration. An earlier draft of this convention (39) stipulated that a State Party should not permit the owner to deregister the vessel unless all mortgages, "hypotheques" or charges were previously deregistered or the written consent of all holders of such mortgages, "hypotheques" or charges was obtained. A vessel which is or has been registered in a State Party shall not be eligible for registration in another State Party unless either a certificate has been issued by the former State to the effect that the vessel has been deregistered, or a certificate has been issued by

(37) Adopted in Ottowa on 28th May 1988, not yet in force. Commentary of its provisions concerning ships in: Ljerka Mintas Hodak, Nova Konvencija o medjunarodnom financijskom leasingu sa stanovista pomorskog prava (New Convention on International Financial Leasing from the point of view of maritime law), Uporedno pomorsko pravo i pomorska kupoprodaja (Comparative Maritime Law and Commerce) 1988, No. 119-120, p. 193-218.

(38) Ljerka Mintas Hodak, op. cit. p.209.

(39) Consideration of maritime liens and mortgages and related subjects in accordance with the terms of reference of the Joint Intergovernmental group of experts - TD/B/C.4/AC.8/17, P.4-5.

the former State to the effect that the vessel will be deregistered with immediate effect at such time as the new registration is effected. This version of the Draft did not provide for the possibility that mortgages, "hypotheques" or other charges remain entered in the original register and that only the public law entries be transferred into another register.

However, this traditional, conservative approach, although legally absolutely correct, was changed in the next version of the Draft. Art.15 of the last Draft (40) explicitly provides for situations where a seagoing vessel registered in one State is permitted to fly temporarily the flag of another State. References to the "State in which the vessel is registered" or to the "State of registration" are deemed to be references to the State in which the vessel was registered immediately prior to the change of flag. The main provision on this matter states that mortgages, "hypotheques" and charges on ships temporarily flying the flag of another State shall be recognised and enforced only if the register of the State of registration specifies the State whose flag the vessel is permitted to fly, and that the vessel's record in the Flag State specifies the State of registration (41). However, no State Party to this Convention shall permit a vessel registered in that State to fly temporarily the flag of another State unless all registered mortgages, "hypotheques" or charges on that vessel have been previously satisfied or the written consent of the holders of all such mortgages, "hypotheques" or charges has been obtained.

5. Concluding remarks

It is obvious that the practice of bareboat chartering of ships and their parallel or dual registration is accepted in a number of countries and that the laws of these countries permit and regulate such registration. On the other hand, there are still a great number of countries which consider this practice legally unjustified and unacceptable. This practice is not, at present, governed by any international convention or other instrument in force. The 1986 Convention on Registration of Ships does not provide for parallel registration, although there are some interpretations of this Convention where an attempt is made to argue to the contrary. The 1988 Convention on Leasing however takes account of the existing practice and contains provisions both for cases when parallel registration is allowed and for those when it is not. So does also the last Draft of the Convention on Maritime Liens and Mortgages.

It is not possible to deny the existing tendency towards a wider acceptance of the concept of dual registration. However, the elements of this concept are still not satisfactorily governed by international law and thus the problems that might arise out of them may have serious consequences. As it usually happens, the commerce did not wait until the lawyers were ready. Therefore, one of the future tasks of the lawyers should be to regulate the practice of dual registration of bareboat chartered ships, so that it does not create problems, but serves to the benefit of the international shipping community.

Vesna Polic Curcic
Institute of Maritime Law
Zagreb.

(40) JIGE(VI)/2,p.10

(41) It should be noted that the list kept in the Flag State is not called a "register" any more, but the "vessel's record", in support of the assertion that there is only one register, i.e. that one in the State of registration.

REPORT ON DISCUSSION SESSION:

APRIL 6TH 1989

Mr. Birch Reynardson reminded the Seminar participants that the session in the afternoon of April 6th had been reserved, in the programme, for discussion. He had enquired of a number of those present how best the discussion session should be organised. In the result a small group, drawn from the Panel of Speakers, had anticipated a number of questions which were considered both relevant and appropriate for discussion. This, he stressed, was not an attempt to stifle questions for discussion; indeed he invited questions in addition to those already prepared. (Note: The questions were circulated in advance and included an additional question by the French delegation.) Mr. Birch Reynardson continued by suggesting that each of the questions should be introduced by a member of the Panel of Speakers, there should then be a short discussion which would be chaired by him. At the end of the discussion of each question (which would be limited to about twenty minutes), the introducing Speaker would be invited to sum up. This programme was approved by the participants.

Question 1: Protection of rights of i) bareboat charterers and ii) mortgagees

The first question was introduced by Mr. Roger Heward. It read "Is it possible, in the case of an unregistered demise charterparty, to protect:-

(i) the bareboat charterer against either actions by the mortgagee or in respect of various breaches of contract by the owner (e.g. the unlawful sale of the vessel to another party or chartering the vessel to another charterer).

(ii) the mortgagee against actions by the bareboat charterer aiming at preventing the mortgagee from exercising his rights under the mortgage agreement (assuming that the mortgage is registered)?"

(i) Mr. Heward suggested that there were two possible answers to the first part of the question. Either the bareboat charterer could rely, under English law, on the rights established in the Myrto case (which was discussed in his paper), or the bareboat charterer could enter into a priorities agreement. Where a vessel is bareboat chartered in circumstances where there is a pre-existing mortgage then the charterer is most unlikely to be able to persuade the mortgagee to execute a priorities or co-ordination agreement subordinating the mortgagee's rights to those of the demise charterer. However, the problem may not be too great since the bareboat charterer would be alerted to any sale by his master or a member of his crew.

A bareboat charterer is always under the risk of sister ship arrest for breaches by an owner and there is no way a bareboat charterer can protect himself in advance against this event.

(ii) With regard to the second part of the question, Mr. Heward suggested that a prohibition of bareboat charters or a priorities agreement is a suitable protection for a mortgagee. In the absence of these, the mortgagee would have to fall back on the Myrto principle.

A discussion then took place when the position under civil law was compared with that under common law and the differences were highlighted. The main distinction appeared to be in regard to the nature of the right in the vessel which the demise charterer obtained. Under common law a demise charterer had a possessory right as opposed to a contractual right. It thus followed, that he could, for example, sue for damages in tort. Equity gives protection to those with possessory rights. Therefore, under common law a demise charterer has a better chance of success than under civil law, where civil law rights are not created in the vessel itself but against the owner of the vessel.

Question 2: Contractual relationships under Shipbuilding Contracts

The second question was introduced by Professor Ramberg. The question asked was: "What is the position of the bareboat charterer when the charter concerns a newbuilding and the shipbuilding contract is concluded between the builder and the owner:

(i) In the case of delay on the part of the builder entitling the owner as his contracting party to collect a substantial amount of damages,

(ii) In case of defects engaging the builder's liability under the shipbuilding contract?

What remedies would be available to the bareboat charterer?

- in contract against the builder

- in tort against the builder?

(It is assumed that the owner is either unwilling or incapable of creating by assignment or otherwise a contractual link between the builder and the bareboat charterer)."

Professor Ramberg pointed out that this illustrated the problems of the tripartite relationship between builder, owner and charterer. Difficulties arise from the fact that the bareboat charterer is excluded from any direct contractual relationship with the builders.

Professor Ramberg suggested that, under "Barecon" 'B', it was assumed that the builder and the bareboat charterter would co-operate, although there was no contractual relationship between them. If, in fact, there was no co-operation, then any action would have to lie in tort.

In a claim in tort, damages for delay which resulted in a pure pecuniary loss would be difficult to recover. It would be particularly difficult under Swedish law because of the statute barring damages for a loss of that nature.

If there was physical damage then this would be much easier for the bareboat charterer and he could recover damages including those for consequential loss.

Delay may cause serious pecuniary loss and reference was made to Article 10 of the Financial Leasing Convention which provides that under a supply agreement a duty was owed to the lessee (the demise charterer) as if he were a party to the contract/agreement. Professor Ramberg suggested that in many legal systems the strict doctrine of privity of contract has been avoided by the grant of special rights to parties outside the contract. In this transitional state of the law there was some uncertainty as to the legal principles purporting to protect the bareboat charterer.

It was also suggested that there might be an implied contract between the charterer and builder. This might, perhaps, be so if the charter was annexed to the building contract and it was clear that the charterer had some authority in respect of the building contract. It was pointed out that, under English law, this would be difficult to argue because of the strict application of the doctrine of privity of contract.

In summary it was concluded that there were problems for a charterer wishing to sue a builder in contract because of the lack of a direct contractual relationship between them. An action in tort was available but the problem appeared to be that damages for delay, resulting in a pecuniary loss, were often either difficult to recover or, sometimes, excluded.

Question 3: Acceptability of "dual registration"

The third question was introduced by Mrs. Curcic who asked:- "Assuming that it is desirable for owners to be entitled to register the ship in one country and to have the bareboat chartered ship entered into a list or "registry" in another country - for the mere purpose of entitling the ship to fly the flag of that country - is this practice acceptable?"

Mrs. Curcic opened the discussion by suggesting that before considering whether or not the practice was acceptable, it was necessary to decide to whom was the practice acceptable. The answer to this question would depend on the interests that could be harmed by the practice. Many delegates spoke on this question and there was some disagreement as to whether or not the practice was acceptable. Some delegates thought that it was acceptable because it provided benefits for the shipowning community in general. Others were of the opinion that it was damaging for mortgagees and seamen and that it was a means of violating national policies on labour law. There was disagreement as to whether or not a mortgagee could be adversely affected. In summary Professor Berlingieri said that the question should really be considered under two headings:

(i) Is the practice acceptable for international law? To which he suggested the answer should be in the affirmative, and

(ii) Is the practice acceptable for national law? To which he suggested that the answer to this should depend on the policy of each government. He submitted that a general conclusion could not be reached on this point. This was agreed.

Question 4: Desirability of international regulation of "dual registration"

Question 4 was introduced by Dr. Ehlermann who asked: "If the answer to question 3 is in the affirmative, is it nevertheless thought that, in order to safeguard the interests of mortgagees and others, the present practice should be regulated by any international agreement?"

Dr. Ehlermann's own comments were that an international agreement would be useful but that there should be some delay before attempting to reach such agreement in order that the shipowning community might first attempt to find a solution to this problem. Professor Berlingieri pointed out that the latest draft of the Convention on Liens and Mortgages gave full protection to interested parties and, for example, provided for a notice of sale to be given to both registries. Professor Berlingieri suggested, however, that safeguards for crews was something which should be dealt with under national law.

Question 5: The implications of "dual registration" in the event of national or international crises

The fifth question read "Where a ship, registered in the country of the owner, flies the flag of another country, will this create problems in the event of the involvement of one or both of these countries in some form of national or international crisis?". This question was introduced by Dr. Kroger.

Dr. Kroger stated that under German law requisition is limited to ships flying the German flag. The flag was obviously important because the nationality of the vessel was governed by the flag she flies. Only the flag state has sovereignty over the vessel and therefore a state can only requisition a ship if she flies the flag of that state.

If the vessel flies a temporary flag the owner would normally have had to obtain the original state's approval to the flag change before it takes place. Consent to fly the flag of a foreign state can be given by the original state and with conditions and approval can be withdrawn at any time. Therefore the right to fly the flag of a foreign state can be immediately withdrawn if the vessel was required by the owner's state. In practice the decision of the state to allow the vessel to fly the flag of another state is a political decision.

In the United States the situation is different. The government can requisition any U.S. owned vessel irrespective of the flag the vessel is flying. The system in the U.S. does not differentiate between vessels flagged out to bareboat charterers or owner's vessels.

The question of insurance was raised and it was agreed that there would possibly be problems if the vessel was requisitioned by a state other than the flag state. However, it was thought that these problems could be solved.

Question 6: Notification of bareboat charter in ship's register

Professor Tetley introduced question 6 which had been raised by Messrs. Fontaine and Tantin of France. They asked "It seems some of the difficulties caused by the fact that third parties do not know of the existence of a bareboat charter could be avoided (or reduced) if such existence was brought to their knowledge by proper recording on the ship's register of the bareboat charter.

- Potential mortgagees would be aware of the charterers' rights;

- creditors of the exploitation of the vessel would have to contract with or direct their claim against the charterer exclusively.

Would such a notation in the ship's register be considered desirable?"

Professor Tetley thought that the registration of the whole charter (not notice) would be of little use to potential mortgagees and he could not see any real advantage to them while it might be deemed to qualify their rights. Vis-a-vis creditors, he again thought that it was not particularly practicable as foreign creditors such as suppliers in foreign ports could not be expected to check the ship's registry on every occasion of supplying the ship to determine if there was a bareboat charterparty and who had the authority under the charterparty to bind the ship.

Some delegates thought Professor Tetley was, perhaps, somewhat negative; it was pointed out that the system of notice of bareboat charters was already operative in France and the problems of notice in good faith were solved by having such a register.

Professor Berlingieri thought that so far as owners were concerned the registration of the bareboat charter would be helpful since it gave notice that the vessel was operated by the charterer and not by the owners. Creditors could not, therefore, enforce claims against the owners since they would have notice of the charter.

At the conclusion of the session, Mr. Birch Reynardson thanked those who had introduced the questions and those who had participated in the discussion. He apologised for having to bring the session to a close but time was limited. He called on the President, Professor Berlingieri, to sum up.

SUMMING UP

PROFESSOR FRANCESCO BERLINGIERI

PRESIDENT OF THE C.M.I.

The papers presented at the Seminar covered a very wide spectrum indeed, and, notwithstanding that in several papers the same subjects were discussed, there was very little overlapping since the manner in which these subjects were considered was different.

If the subjects discussed are arranged in a systematic order, the following picture is obtained:

1. Purposes for which the bareboat charterparty is used: this subject was considered by Mr. Heward, Dr. Kroger, Prof. Ramberg, Prof. Tetley and me.

2. Time of delivery of the ship: this subject was considered by Dr. Kroger.

3. Condition of the vessel at delivery: this subject was considered separately in respect of:

   a) Ordinary bareboat charterparties: by Mr. Birch Reynardson in respect of the right to carry out inspections and their effect; by Mr. Wilford who made an analysis of the provisions of the "Barecon 'A'" form; by Prof. Falkanger who thoroughly considered the class requirements, discussed the distinction between seaworthiness and fitness for the purpose and the relevance of the charterers' prior knowledge of the vessel's condition.

   b) New building: by Mr. Alcantara, who also considered the rights of the charterer during construction; by Prof. Tetley who discussed the problem of seaworthiness and the question of whether or not the duty to make the vessel seaworthy is delegable. Mention should also be made of the very interesting intervention of M. Fontaine.

   c) The case where at delivery there occurs a change of flag; this subject was discussed by Dr. Kroger, Dr. Ehlermann and Ms. Curcic.

4. Maintenance of the vessel: this subject was discussed by a great many speakers, including Mr. Alcantara, Mr. Birch Reynardson, Prof. Falkanger, Mr. Heward, Mr. Kimball, Dr. Kroger, Prof. Ramberg and Mr. Wilford.

5. Use of the ship: an analysis of this subject was made by Mr. Birch Reynardson and by Prof. Falkanger; Dr. Kroger considered the special situation which occurs when the management of the ship is entrusted to others and Mr. Heward discussed the problems arising in case of assignment of the charter and of sub-charter.

6. Payment of hire: Mr. Birch Reynardson and Dr. Kroger considered this subject generally, whilst Mr. Kimball gave special attention to the question whether the vessel can be put off-hire.

7. Insurance: Mr. Kimball and Mr. Heward gave a clear picture of the ordinary provisions on insurance in bareboat charterparties.

8. Allocation of the risks between owner and charterer: Prof. Ramberg and Mr. Kimball thoroughly analysed this subject, dealing separately with the allocation of the risk of loss or damage to the vessel, of requisition and of the risk of war. The risk of liability towards third parties was discussed by Prof. Tetley, whilst Mr. Bowtle considered liability insurance, pointing out that the only liability that cannot be covered is that arising out of personal misconduct.

9. Allocation of costs: two speakers, Prof. Ramberg and Mr. Kimball, dealt with this subject.

10. Consequences of the breach of contractual obligations: these were considered by Mr. Birch Reynardson and Dr. Kroger.

11. Protection of mortgagees: Mr. Heward presented a comprehensive analysis in this respect.

12. Special situations occurring when the vessel is mortgaged: these were considered by Prof. Tetley.

13. Redelivery: the redelivery of the vessel to the owner was discussed by Mr. Birch Reynardson, who paid special attention to the obligation of effecting repairs and to the question whether hire should be paid during repairs, and by Dr. Kroger.

14. Transfer of title: the purchase option and the transfer of title was discussed by Mr. Heward.

15. Arbitration: various questions arising in respect of the settlement of disputes by arbitration were discussed by the participants, including, Mr. Gao, Mr. Goni, Me. Warot and myself.

A subject which requires a more detailed summary is that of the change of nationality of the vessel in case of bareboat charter. Two papers were presented on this subject: one by Dr. Ehlermann and one by Ms. V. Polic Curcic. Dr. Ehlermann described in his paper the system in force in the Federal Republic of Germany stating that the general principle underlying it is that vessels owned by German individuals or companies must fly the German flag and must be registered in a German register, but that a vessel registered in Germany may be temporarily exempted from the obligation to fly the German flag, whilst remaining registered in Germany when it is operated from another country. Conversely, a vessel registered in a foreign register and operated from Germany may temporarily be permitted to fly the German flag. In the second part of his paper, Dr. Ehlermann gave a summary of the other legal system that allows the temporary change of flag of bareboat chartered vessels. Ms. Curcic, in her paper, explained the reasons behind the temporary change of flag and discussed the problems that may arise as a consequence thereof.

With a view to encouraging an orderly discussion of the most interesting problems dealt with by the speakers in their papers and in their oral presentation several question were formulated and all of them were the subject of a lively debate. The debate on the last three questions, which all dealt with the temporary change of flag, was particularly interesting. These questions were the following:

Question 3: Assuming that it is desirable for shipowners to be entitled to register the ship in one country and to have the bareboat chartered ship entered into a list or "registry" in another country - for the mere purpose of entitling the ship to fly the flag of that country - is this practice acceptable?

Question 4: If the answer to Question 3 is in the affirmative, is it nevertheless thought that, in order to safeguard the interests of mortgagees and others, the present practice should be regulated by an international agreement?

Question 5: Where a ship, registered in the country of the owner, flies the flag of another country, will this create problems in the event of the involvement of one or both of these countries in some form of national or international crisis?

Dr. Wiswall stated that he had made a thorough research of international law on the subject and that five points emerged, viz. the following:

1. A ship may not fly more than one flag.

2. A ship may not be simultaneously accorded the right to fly different flags.

3. The State whose flag the ship is flying is that which must exercise the control over the ship from the standpoint of safety and other public law requirements.

4. A clear distinction must be made between registration and documentation.

5. Dual registration is not prohibited by law, but dual documentation is.

Several other participants expressed doubts about the legality of the system. Dr. Alcantara pointed out that the system lent itself to abuses by unscrupulous shipowners who might thereby dismiss their crews and avoid payment of their salary.

I should like to draw some conclusions from this very interesting debate.

Firstly, the temporary change of flag, when a ship is operated (normally on the basis of a bareboat charterparty) from a country other than that where the vessel is registered, constitutes, in the present world economy, the solution to a number of problems. In these circumstances, it is wise, instead of opposing it, to try to find out how it can be achieved without violating the accepted principles of international maritime law on the nationality of ships and without adversely affecting the interest of other parties.

Secondly, dual registration does not violate accepted principles of international law when its object is different, viz. registration for public purposes (i.e. nationality, control of safety requirements, etc.) and registration for private purposes (i.e. ownership and other rights in the ship, as well as charges).

Thirdly, there are two basic alternatives. First, the mere suspension of the right to fly the flag, the vessel remaining registered in her original register for all private law purposes and being registered in the State of the new flag only for the purpose of being enabled to fly its flag. Second, a complete suspension of registration and of a complete new registration. Of these two alternatives, the first seems definitely preferable.

Fourthly, in view of the vessel temporarily flying another flag, the effects of the change of flag on the choice of the proper law should be carefully considered. The following is an attempt to outline such effects as regards the major maritime law conventions:-

1910 Collision Convention: Art. 12 provides that the Convention applies when all the vessels concerned in any action belong to Contracting States, viz. have the nationality of Contracting States. Therefore, during the time when the vessel is temporarily flying the flag of the State from which it is operated, that is the relevant flag for the purposes of the application of this Convention.

1910 Salvage Convention: Art. 15 provides that the Convention applies when either the salving vessel or the vessel salved belongs to a Contracting State. Therefore, the position is the same as that under the Collision Convention.

1924-1968 Convention on Bills of Lading (Hague-Visby Rules): The Convention applies to all bills of lading issued in Contracting States and to all cases where the carriage is from a port in a Contracting State, whatever may be the nationality of the ship.

1926 and 1967 Conventions on Maritime Liens and Mortgages: Mortgages/hypotheques and maritime liens must be considered separately.

a. Mortgages and hypotheques: The rule under both Conventions is that mortgages and hypotheques are governed by the law of the State of registration. Therefore, if in case of change of flag the vessel remains registered in the original register, the "State to which the vessel belongs" or "the State where the vessel is registered" is that of the original registration.

b. Maritime liens: The change of flag would only create problems in countries where the proper law is the law of the flag. In many countries, however, the proper law is the lex fori or the law of the place where the claim has arisen; where the law of the flag is the proper law, maritime liens which have arisen during the time when the vessel is flying the flag of the bareboat charterer would be governed by that law. This, however, should not give rise to particular problems.

1952 Arrest Convention: Art. 8 provides that the Convention applies to any vessel flying the flag of a Contracting State. Therefore, the applicable law is that of the flag of the vessel at the material time.

1969 Civil Liability Convention: The convention applies to pollution damage caused on the territory of a Contracting State and, therefore, the nationality of the ship is irrelevant.

1976 Convention on Limitation of Liability: The flag of the vessel is irrelevant, since the Convention is applied in the Contracting States to all vessels irrespective of their nationality.

It would appear, therefore, that where the nationality of the ship is relevant, the temporary change of flag should not give rise to particular problems.

In concluding my summary of this very successful Seminar, I should like to express my sincere thanks to all the speakers, who have prepared and presented very interesting papers, to the participants, who have contributed with their qualified interventions to the success of the Seminar and, particularly, to Mr. Birch Reynardson, who has so ably organised and presided over the Seminar.

SPECIAL PAPERS

COMITE MARITIME INTERNATIONAL
SEMINAR ON BAREBOAT CHARTER PARTIES

Questionnaire

General Remarks

DDR

The legal rules and principles governing bareboat charter parties and ship leasing contracts under law of the DDR are set out in a detailed legislation. For the purpose of this paper the following Acts and Statutes are of particular interest:

- Seehamelsschiffahrtsgesetz der Deutschen Demokratischen Republik - SHSG - vom 5.2.1976 (Merchant Shipping Act of the GDR) hereinafter SHSG;

- Verordnung uber die Flaggenfuhrung und Eigentumsrechte an Schiffen und das Schiffsregister vom 27.5.1976 (Registration Act) hereinafter SCHRVO, as far as questions of registration are concerned;

- Gesetz uber Internationale Wirtschaftsvertrage vom 5.2.1976 (International Commercial Contracts Act) hereinafter GIW;

- Gesetz uber die Anwendung des Rechts auf internationale zivil-, familien- und arbeitsrechtliche Beziehungen sowie auf internationale Wirtschaftsvertrage (Conflict of Laws Act), hereinafter RAG, as far as problems of Conflict of Laws are concerned.

a. Law applicable to bareboat charter parties.

Argentina

The law of the flag (Art. 602 of the Navigation Act).

Canada

Canadian maritime law which is derived from English maritime law, as well as the English common law of contract, tort and bailment as amended from time to time by the Parliament of Canada. See THE BUENOS AIRES MARU [1986] S.C.R. 752, 1986 AMC 2580 (Supreme Ct. of Canada).

DDR

Contracting parties are entitled to agree on the national law, determining their contractual relationships, as a general principle under the RAG. Thus the law applicable to bareboat charter parties may be agreed between the charterer and the owner. However, if the parties to a bareboat charter party fail to agree on such a contractual stipulation, a bareboat charter party will be governed by the law of that country, where the owner of the chartered vesse has its permanent place of business (section 12(1) of the RAG).

Denmark

Most bareboat charter parties provide for application of English law. The Danish maritime code does not contain special rules on bareboat charter parties. In case Danish law is applicable, disputes will be solved on the basis of general rules on property law and rules on time charter parties.

France

As a preliminary remark, it must be recalled that under French law, the terms and conditions and the effect of the contracts of affreightment are agreed upon by the parties. There is a complete freedom and it is only in the absence of a clause in the charterparty on a particular point that the law and the decree are applicable.

1. Law June 18, 1966 (in an English translation)
   Chapter IV
   Art. 10
   By a bareboat charterparty an owner hires a non-manned, non equipped or only partly manned and equipped ship to a charterer for a specified time.
   Art. 11
   The charterer warrants the owner for any claims from third persons which may arise from the operation of the ship.

2. Decree, December 31, 1966.
   Chapter IV
   Art. 25
   The owner undertakes to deliver the ship on the date and at the place provided in the charterparty, when and where she shall be in a seaworthy condition and fit for the service for which she is intended.
   Art. 26
   The owner takes care of repairs and replacements required as a consequence of an inherent defect in the ship.
   If the ship is held up for more than twenty four hours owing to an inherent defect, no hire is due for that period.
   Art. 27
   The charterer may use the ship for all purposes for which such a ship is usually employed.
   He may also use the ship's equipment and stores subject to restoring the exact equivalent thereof in quantity and quality upon redelivery.
   Art. 28
   Maintenance of the ship falls on the charterer as do repairs and replacements other than those referred to in Article 26.
   The charterer recruits the crew, whose wages and for whose food he pays, incidental expenses also being for him to pay.
   Art. 29
   The ship and her gear must be redelivered in the same condition as upon delivery, allowance being made for normal wear and tear.
   Art. 30
   In the case of belated redelivery the charterer must pay compensation, at a rate equal to the hire for the first ifteen days, at twice this rate for the following period unless the owner gives proof of greater loss.

Great Britain

There is no statute which specifically covers bareboat charterparties. The law of contract applies in general and, in particular, the law relating to the hire of chattels. Thus, for example, in the case of Reed - v - Dean (1949) 1 KB 188 Mr. Justice Lewis held that "a ship on hire is in the same position as any other chattel on hire".

In relation to the vessel's condition on delivery to the charterer and the description which has been applied to her by the owners, the Supply of Goods and Services Act 1982 is applicable and implies certain conditions into the contract. The Act applies to contracts for the hire of goods and a ship has been held to come within the definition of "goods".

India

Bareboat charter parties are agreements between the owners of ships and charterers who hire the bare ships. It is the charterers who arrange for the ships officers and crew for manning the ships, maintain and repair the ships, provide provisions and stores and operate the ships. It is the provisions of the Indian Contract Act which apply to the agreements (bareboat charter parties) between the shipowners and the charterers. There are no enactments or statutes which specially apply to bareboat charters.

Ireland

There is no special statute applicable to bareboat charter parties. The ordinary law of contract applies, particularly the principles of the common law relating to contracts of hire.

Italy

Bareboat charter parties, as all other charter parties (time and voyage), are governed by the national law of the vessel.

Netherlands

No fixed rule. If no specific choice of law, a closest connection approach to determine parties' supposed will.

Switzerland

See schedule attached.

U.S.A.

In the United States, bareboat charter parties are governed by the general maritime law, i.e., the traditional law governing maritime commerce, as interpreted by the United States courts.

The Limitation of Liability Act, 46 U.S. Code 181-189, provides, in 186, that a charterer who mans, victuals and navigates a vessel "at his own expense, or by his own procurement" [i.e. a bareboat charterer] shall be deemed the owner of the vessel within the meaning of the Act. Such a charterer is therefore entitled to limit his liability for loss or damage not caused with his "privity of knowledge."

b. The main characteristics of bareboat charter parties.

Argentina

It is a contract of hire (Arts. 219 and following of the Navigation Act establishes that the owner grants the use and enjoyment of the vessel to the tenant.

Canada

The ship is leased to the bareboat charterer who becomes the owner ad hoc or beneficial owner. The charterer controls the master and crew and appoints them. "Bareboat" and "demise" charter parties are practically synonymous in Canada. Because the law of some flags requires the master and some of the officers to be nationals of that country, they may be appointed by the owners, but under the control and direction of the charterers.

Note: Scrutton on Charter Parties 19 Ed. 1984 at p. 47 note 3 states: "A charter by demise of a ship without master or crew is sometimes called a 'bareboat' or 'net' charter."

DDR

First of all, it should be mentioned that the SHSG provides for separate regulations governing bareboat charter parties and ship leasing contracts.1.

1. For a detailed analysis of bareboat charter parties and ship lease agreements under the SHSG, see: Richter-Hannes, D., Pape, M., "Nature juridique du contrat de leasing pour les navires", (1973), Le Droit Maritime Francais at pp. 387-394 and 451-458.

(i) Under a ship leasing contract an unmanned vessel is leased by her owner to a lessee (section 87 of the SHSG). The lessee undertakes to pay the hire and bears the risk of occasional loss of or damage to the leased vessel (section 88 of the SHSG). Under the provisions of the Merchant Shipping Act of the GDR, the property in a leased vessel is transferred to a lessee after expiration of the agreed lease period, provided all instalments of hire were paid in time.

(ii) Under a bareboat charter an owner undertakes to hand over an unmanned vessel to a charterer. The vessel and her equipment must fit the contractual purpose. The charterer is obliged to pay the agreed hire and to maintain the vessel. Necessary repairs have to be induced by the charterer (sections 85 to 86 of the SHSG). Unlike under a ship leasing contract, the charterer has to return the vessel after expiration of the charter period and the risk of occasional damage to and loss of the chartered vessel is borne by the owner (off-hire situation).

Denmark

Most bareboat charter parties are based upon the well known standard charter parties "Barecon A", "Barecon B" and "Shell Demise".

France

Owner's obligations

i) the vessel must be delivered to the charterer at the date and place agreed, the vessel being seaworthy and fit for the purposes she is hired.
ii) the owner is responsible for the repairs and replacements which are a consequence of an "inherent vice or defect" of the vessel.

Charterer's obligations

i) to pay the hire; however this payment is suspended after 24 hours if the detention of the vessel is due to an inherent vice or defect.
ii) maintenance of the vessel, repairs and replacements with an exception if the repairs and replacements are a consequence of an inherent vice or defect of the vessel.

iii) to pay the crew's wages and also the corresponding debts:
e.g. the Social Security (in France, payable to ENIM, Etablissement des Invalides de la Marine)
e.g. the fiscal debts (tax etc.)
e.g. port, harbour dues, etc.
iv) insurance of the vessel
v) redelivery of the vessel at the termination of the charterparty in the same good condition and seaworthiness existing at the time of delivery with the exception of normal wear.

Great Britain

Where a ship is completely transferred to a hirer for a period of time, and during that time, the actual owner of the ship loses possession of the ship and has nothing to do with the appointment of officers and crew or with the ship's employment or management, then this is a case of a charter by demise. In Sea and Lunn Securities v Dickinson 1942 72 Lloyd's Law Report, Lord Justice Mackinnon said "There is all the difference between hiring a boat in which to row yourself about, in which case the boat is handed over to you, and contracting with a man on the beach that he shall take you for a row, in which case he merely renders services to you in rowing you about". In that statement lies the difference between on the one hand a demise charter and on the other time or voyage charters.

India

The shipowners make available to charterers only bare ships. The manning, storing and provisioning, maintenance and repairs are the responsibility of the charterers. The employment of ships and their operation is with the charterers. The third party liabilities such as cargo claims, claims of the crew and officers and claims which arise in the course of the operations of the ships are the responsibility and liability of the bareboat charterers. Therefore the Protection and Indemnity risks are insured by the charterers. The hull and machinery insurance i.e. the insurance of the ships themselves is a matter of arrangement between the shipowners and bareboat charterers. The ships are usually insured by the bareboat charterers. However the owners' interests are safeguarded either by assignment of insurance policies in favour of the owners or by incorporating the loss payable clause in the insurance policies which make the total loss claims (claims for actual total loss, constructive total loss or compromised total loss), payable by the insurers to the shipowners.

Ireland

The real owner leases or hires his vessel to the charterer by demise in such a way as to give to the charterer the right to do what he pleases with regard to the master, the crew, the management and the employment of the ship. The charterer by demise becomes the owner pro hac vice of the ship for the duration of the charter, and the master and crew become his servants for all intents and purposes. The real or registered owner has merely the right to receive the charter hire and to take back the ship when the charter expires.

Italy

Bareboat charter parties are contracts for hire (locato rei) as opposed to time and voyage charter parties which are contracts for the performance of a service (locatio operis). The owner lets the ship to the charterer who becomes the operator of the vessel, employs the crew and runs all risks connected with the operation. Pursuant to Art. 379 of the Code of Navigation, the owner must

provide for the maintenance of the vessel during the charter and carry out all repairs. However, it becomes more and more frequent that maintenance and repairs are at the charge of the bareboat charterer, who consequently takes ou the insurance in his own name and in the name of the owner as their respective interests may appear. Whilst in case the owner takes care of the maintenance and repairs, he is liable for the unseaworthiness of the vessel, such liabilit may cease if maintenance and repairs are taken care of by the bareboat charterer.

Netherlands

Period of time; captain and crew in charterer's employment; charterer fully operating ship, commercially and navigationally.

Switzerland

See schedule attached.

U.S.A.

Under U.S. law, a bareboat charterparty is a demise of a vessel; the owner surrenders possession and control to the charterer, who employs the master and crew and becomes the "owner pro hac vice" for the term of the charter.

c. The main purpose for which such charter parties are used.

Argentina

In the bareboat charter, the charterer is the one who managed the vessel and who can obtain benefits from the Cargo Reservation Act, even though the ship is foreign.

Canada

For long term financing or for fiscal purposes in the case of affiliated companies or in the case of unmanned vessels like scows or barges.

DDR

Bareboat charter parties are used in the traditional sense in the DDR. However, sometimes they are employed in ship financing. Where a shipping company doesn't wish to pay the purchase price for a new vessel at delivery, a bareboat charter, following the line of "Barecon B" is sometimes used as an alternative.

Denmark

There are basically two purposes:

- Used as a basis for long term chartering arrangements between two shipowners;
- Used as the basis of a leasing arrangement.

France

The main purposes for which a bareboat charterparty is used depend, of course, on the employment of the vessel decided upon by the charterer. In France, bareboat charterparties are common in the trade of minerals, oil and grain but very seldom for the trade of general cargo.

Great Britain

Bareboat charterparties are largely used in leaseback arrangements to finance the purchase or new building of a vessel. Ownership by a lending institution may have tax advantages. The actual operator of the vessel will enter into a bareboat charter with the lender in his capacity as owner.

Bareboat chartering is also a means of facilitating an expansion of tonnage without a company's capital being tied up in the vessel.

India

Conceptually, the owner of a vessel on bareboat charter abdicates his position in favour of the charterer. The very nature of such charter therefore demands that the period designed is generally of a longer duration than for time charter. Besides, unlike in time charters, where the owner simply undertakes to render services with his vessel and crew in carrying the goods of the charterers, bareboat charter is essentially a contract of lease and in this the owner parts with the possession of the ship and the charterer in turn gets a possessory interest on account of which he is generally known as the "disponent owner".

Bareboat chartering also serves admirably the purpose of enabling persons and financial institutions not experienced in shipping to invest in a ship without having to shoulder the responsibility of organising its day to day operations, and of allowing a knowledgeable entrepreneur to assume the role of owner without having to raise the finance to purchase the vessel.

The line of demarcation between the owner and the bareboat charterer during the period of the charter is very tenuous. Obviously, the charter is generally considered to have the nearest nexus to acquire the vessel after the period of charter is over, provided, however, the owner is inclined to sell and this is explicitly agreed in the charter party.

Bareboat chartering has been used to reduce the manning costs if the ownership is in a developed country where the wage levels are high. By bareboat chartering the ship to persons or parties in a developing country the crew of the developing country will be employed bringing about a reduction in the manning costs. For developing countries which do not have adequate financial and foreign exchange resources to acquire a fleet of ships, bareboat chartering of ships owned by others enable them to possess and operate ships, earn foreign exchange, carry cargoes in their own overseas trades and provide employment to their own seafarers.

It also enables the bareboat charterers to acquire the ships after the period of the charter is over provided however the owner is willing to sell and this is explicitly agreed in the charter party.

Ireland

Bareboat charters are not used very much in Ireland and there are no judicial decisions on them. It is likely that decisions of judges in the superior courts in England would be treated with considerable respect by Irish judges even though those decisions would not be binding. Although not so used, bareboat charters could be used for financing the purchase of ships or for tax avoidance schemes.

Italy

Traditionally, the bareboat charter was used, in place of a time charter, when the owner did not have the organisation required in order to man the vessel and, therefore, did not want to get involved with her operation. As regards the charterer, the choice of this type of charter was made when he wanted to have full control over the crew. Bareboat charter parties were not frequent, for owners feared to lose the control over the maintenance of the vessel which might then be returned to them in poor maintenance condition.

At present, bareboat charter parties are used for different purposes, such as financial leasing or construction of a vessel with the governmental subsidy in cases where the beneficial owner is not entitled to own vessels under the Italian flag. Since the subsidy is only granted in favour of vessels registered in Italy (or in another EEC country), when the beneficial owner cannot register the vessel in Italy or in any other EEC country, he may form an Italian company of which he becomes the owner and then he may bareboat charter-in the vessel throughout the period during which Italian registration is required.

If the bill on bareboat charter registration which is presently pending before the Parliament will be approved, then bareboat charters may become the means of transferring Italian vessels to other flags, thus avoiding the need to employ Italian crews.

Netherlands

Various. Inter alia to serve (financing purposes; towage purposes; commercial operation purposes (e.g. to avoid manning restrictions and/or other cabotage rules).

Switzerland

See schedule attached.

d. Standard forms of bareboat charters and special forms of such charters.

Argentina

The Baltic and International Maritime Conference Standard Bareboat Charter, Code Name "Barecon" (A & B) is used.

Canada

The Baltic and International Maritime Conference, Standard Bareboat Charter, Code Name: "Barecon A". Any other form which the parties will adapt to their particular needs.

DDR

"Barecon A" and "Barecon B" are known in GDR shipping.

Denmark

Standard forms: "Barecon A", "Barecon B" and "Shell Demise".

France

There are no special forms of bareboat charterparties in France. The brokers are proposing to their clients the Standard forms customarily used.

Great Britain

The Baltic International Maritime Conference Standard Bareboat Charter Forms, code named "Barecon A" and "Barecon B" are most often used with necessary alterations to tailor the forms to the individual parties needs. The Shell Demise form is also commonly used for the bareboat chartering of tankers.

India

"BARECON A" and "BARECON B" are the bareboat charter party forms adopted by Baltic and Maritime International Council (BIMCO) and these are widely used with suitable alterations and additions to meet the individual requirements of owners and bareboat charterers.

Italy

There is an Italian standard form of bareboat charter party prepared by the Genoa Chamber of Commerce, the code name of which is "Italscafo". However, it is not frequently used. More often the BIMCO forms "Barecon A" and "Barecon B" are used. If, however, bareboat charter parties are used for special purposes, contracts are prepared on an ad-hoc basis, often using "Barecon A" or "Barecon B" as a reference.

Netherlands

No specific Dutch forms of a general nature.

Switzerland

See schedule attached.

U.S.A.

In the United States, bareboat charters are customarily hand-tailored to fit the particular needs of the parties, but they frequently incorporate many of the provisions of "BARECON A" or "BARECON B". Other forms which may be used as bases for bareboat charters are the SHELL DEMISE forms, one of which is for new buildings and the other for existing vessels.

e. <u>The possibility of ships being bareboat chartered-out to foreign charterers, of such ships flying the flag of the country of the charterer and being registered in such country and the consequences thereof, particularly as respects registered mortgages, hypotheques or other charges.</u>

Argentina

The bareboat charter does not establish the change of flag or of registry, except in the special case of fishing vessels, under law 22.978.

Canada

It is possible, but it would require a complete transfer out of the Canadian Registry, including the radiation, with the consent of the mortgagee, of any registered mortgage on the ship. There is nothing in our law which contemplates double registration although at present the matter is under study by the Canadian Government.

DDR

Section 4(3) of the SCHRVO (Registration Act of the GDR) provides for such a possibility. GDR vessels chartered out to a foreign charterer under a bareboat charter may be temporarily excluded from the right and duty to fly the flag of the GDR and may get the permission to carry the flag of a foreign country during the charter-period up to two years. Such a suspension from the right and duty of a GDR vessel to fly the flag of the GDR may be granted by the competent authority (e.g. the head of the GDR shipping board), following an application of the bareboat charterer. Nevertheless, the vessel remains registered in the shipping register of the GDR with all consequences regarding ownership, and mortgages. The property rights (including mortgages) remain entered in the GDR shipping register.

Denmark

Not possible under Danish law.

France

By a law dated April 29 1975, the French legislator has authorised the Ministry of Merchant Marine to grant the "Francisation" of a foreign vessel (the "Francisation" is the registration of a vessel under the French flag).

"When the vessel has been bareboat chartered by a French owner who has a full 'control' of the vessel, of her manning of her employment, of her nautical management and if the law of the flag of the vessel allows it, in such hypothesis, the abandonment of the foreign flag".

The French Customs Authorities can authorise a foreign mortgagee to register his mortgage on the French registry of vessels at the home port.

Great Britain

Under English law British flag vessels may be chartered to foreign charterers but they cannot be registered in the country of the charterer while still registered in the British registry. The British registry does not allow dual registration and under S.9 of the Merchant Shipping Act 1988 "Where a ship becomes registered at a time when it is already registered under the law of any country outside the United Kingdom, the owner of the ship shall take all reasonable steps to secure the termination of the ship's registration under the law of that country".

India

Indian laws do not permit dual registration that is suspension of registration of ships owned by Indians whilst they are under bareboat charter to foreign charterers who can register the ships in their countries during the period of the charter. Similarly they do not make available Indian registration for the ships bareboat chartered by Indian parties.

In practice it is not normally easy to get Government permission to bareboat charter out Indian ships to foreigners because it is regarded in effect as depletion of Indian tonnage which is not available for carriage of India's cargoes in national and international trades.

Bareboat chartering of foreign flag ships by Indian charterers is considered by the Government on a ship by ship basis and approved if the Government is satisfied about the chartering requirements. The foreign flag ships bareboat chartered by Indian parties are manned by Indian crew. Although there is no legal requirement that manning of bareboat chartered ships should be by Indian crew and officers, it is one of the favourable factors in getting the

If Indian owned ships are allowed to be bareboat chartered to foreigners, under the Merchant Shipping Act provisions, the ships will have to be still manned by the Indian crew and not foreign crew of bareboat charterers' choice. Foreign ships on bareboat charter to Indians do not get the same priority as Indian owned and registered ships in the allotment of Government owned and controlled cargoes. They, however, get preference over foreign ships operated by foreigners in the carriage of Government owned and controlled cargoes.

Ireland

As stated in the reply of the Irish Maritime Law Association (MLM-105) to your questionnaire (MLM-100) a vessel cannot be removed from the Irish register merely because it has been bareboat chartered out.

Italy

At present, Italian law does not regulate the flagging-out of Italian ships in case they are bareboat chartered out to foreign charterers. However, there is a bill pending before Parliament which provides for flagging out of Italian ships and states that in such a case the same rules applying to deregistration shall also apply. As a consequence, the owner must seek the authority of the Ministry of Merchant Marine and notice of the intention to flag out the ship must be given to all registered creditors including, of course, holders of hypotheques. The creditors are entitled to oppose to the flagging-out, and if they do so, the authorisation of the Ministry of Merchant Marine is not granted unless security is provided by the owners.

Netherlands

Bareboat chartering-out of ships to foreign charterers permissible under Dutch law. The possibility of such ships flying the flag of charterer's country is dependent on latter's law; if validly so stipulated, the Dutch certificate of registry to be withdrawn (certificate provides entitlement to use Dutch flag). Owners' ship registration is unaffected and thus mortgages etc. are preserved. In this view it is understood that the seat of the owners' shipping business is in the Netherlands.

Switzerland

See schedule attached.

U.S.A.

Under U.S. law, American flag vessels may not be chartered to foreign charterers without the permission of the Maritime Administration, and as a matter of policy, the Administration does not permit U.S. vessels to be bareboat chartered to foreign charterers.

f. <u>The possibility of foreign flag ships being chartered-in and the consequences thereof</u>.

Argentina

See: letter c).

Canada

There is no legal impediment to a foreign ship being bareboat chartered to a Canadian subject or a Canadian corporation, but the hire payable to the

foreign owner will be taxable at the source, that is in the hands of the bareboat charterer. The ship, unless owned by a British subject within the meaning of the British Nationality Act, or by a body corporate incorporated under the law of a Commonwealth country and having its principal place of business in that country, could not be registered in Canada either by her owner who would not qualify or by the bareboat charterer in his own name as the latter would not qualify to be registered as the owner.

DDR

Section 4(2) of the Registration Act provides that the right to fly the flag of the GDR may be granted to a foreign ship, up to two years, provided:

- the ship is operated by a GDR enterprise on behalf of such enterprise;
- the ship is manned in accordance with the legal provisions of the GDR;
- the owner of the chartered vessel has given his consent to such a change of flag;
- the national legal rules of the country, where the vessel is permanently registered must not exclude such a procedure.

Furthermore, the permanent registry must suspend the right and duty to fly the flag of the country of permanent registration.

Foreign vessels, temporarily carrying the GDR flag are specially listed. However, such a "registration" is only a documentation of the fact, that a chartered vessel, not being permanently registered in the GDR register, has the right to fly the flag of the GDR. Therefore, such documentation doesn't affect the permanent registration of the chartered vessel. Thus property rights remain registered in the permanent shipping register. Consequently, the documentation mentioned above does not have any impact on the registration, existence, or validity of property rights. In other words, such documentation must not be confused with a "change of registry" of the vessel. Therefore, the law determining the ownership in the chartered vessel or the constitution of a valid mortgage remains the law of the place where the vessel is permanently registered.

Denmark

There are no restrictions for Danish shipowners to charter-in a foreign flag ship on a bareboat charter basis, but such ships cannot be registered in the two Danish registries. It should, however, be noted that in the law governing the Danish International Shipping Registry, the concept "Danish owner" covers foreign companies in which there is 20% or more Danish capital interest.

Great Britain

English law does not restrict the chartering in of foreign ships but the British registry does not permit dual registration. A foreign vessel chartered in by British nationals cannot be registered in the British registry since only those vessels owned by persons who are qualified to be owners of British ships can be registered in the British registry. The persons who qualify to be owners of British ships are set out in S.3 of the Merchant Shipping Act 1988 and are essentially British citizens or bodies corporate incorporated in the United Kingdom which have their principal place of business in the United Kingdom.

Ireland

As stated in MLM-105, this is not possible.

Italy

Also the flagging-in of foreign flag ships is not at present expressly regulated by Italian law. Nor is the bill mentioned under (e) above dealing with foreign flag ships chartered-in by Italian bareboat charterers.

Netherlands

Chartering-in of foreign ships is allowed under Dutch law. No registration is possible because non-Dutch-owned vessel. For the same reason, no certificate of registry and thus no Dutch flag is obtainable.

Switzerland

See schedule attached.

U.S.A.

Under U.S. law, American flag vessels may not be chartered to foreign charterers without the permission of the Maritime Administration, and as a matter of policy, the Administration does not permit U.S. vessels to be bareboat chartered to foreign charterers.

g. The law regarding:
(i) the nationality of crew members

Argentina

If the owner expects to benefit from the Cargo Reservation Act, the crew must be Argentine. Otherwise, what is established by the law of the ship's flag will have to be abided by.

Canada

The law of the flag of the ship and this even though the ship is crewed by the bareboat charterer and is engaged in international trade. The ship, if foreig registered, would not qualify to engage in the Canadian coasting trade and, in this respect, the question does not call for a reply.

DDR

There are no particular legal provisions governing the nationality of crew members of the GDR - the vessel, chartered out to a foreign charterer and temporarily flying a foreign flag.

However, the nationality of crew members of a vessel flying the flag of the GD (even temporarily) is governed by GDR law. Thereunder, crew members, as well as the master, have to be GDR citizens.

Denmark

The law of the flag applies to seafarers employed on a ship bareboat chartered by a Danish company.

France

Unless the owner has obtained a derogation, the crew must be French.

Great Britain

The Master, Chief Mate and Chief Engineer must all be British or Commonwealth citizens. There is sometimes the requirement that the Radio Operator holds a British or Commonwealth certificate.

India

g. (i) Merchant Shipping Act requires that all ships' officers and crew to man Indian registered ships (which are Indian owned ships) must be Indians. There is no such legal compulsion of manning by Indians on foreign ships bareboat chartered by Indian charterers. Indian registered (Indian owned) ships bareboat chartered out to foreign parties must have Indian officers and crew under provisions of Merchant Shipping Act.

Ireland

There is no requirement that the crew must be Irish.

Italy

Pursuant to Article 318 of the Code of Navigation (CN) the mater, officers and crew of Italian flag vessels must be Italian citizens. However, the Minister of Merchant Marine may, in special cases, authorise that a maximum of 1/3 of the crew members may be of foreign nationality. Pursuant to Article 319 CN, in foreign ports a maximum of 20% of the total number of crew members employed may be of foreign nationality if Italian citizens are not available, but this is only for the duration of the voyage.

Netherlands

Dutch law requires Dutch master for Dutch vessels.

Switzerland

See schedule attached.

U.S.A.

The master, the deck and engineering officers, and the radio officer of a U.S. flag vessel must be U.S. citizens. At least 75% of the total number of unlicensed seamen must be U.S. citizens; the rest must be either U.S. citizens or aliens lawfully admitted to the United States. (This would appear to be academic here, since U.S. flag vessels may not be bareboat chartered to foreigners.)

(ii) the country where the ship is insured.

Argentina

Inclusion in the hire of the purchase price.

Canada

The charterparty usually provides that the charterer will, at its own expense, fully insure the vessel (Hull & Machinery) for the account of the owner, and mortgagee if there is a mortgage on the vessel, with no subrogation in favour of either the owner or insurer against the charterer and the latter is also required to carry liability insurance (P & I) covering vboth the owner and charterer. This is a purely contractual arrangement and enforceable under Canadian law.

DDR

No

Denmark

P.I. and Hull Insurance, when placed abroad, will be subject to foreign law, typically English law.

France

Usually, the French owner insures the vessel in France or in a Common Market country.

Great Britain

A British flag vessel may be insured in any country. Where British citizens bareboat charter in a foreign flag vessel, the law of the flag state will apply regarding the insurance of the vessel.

India

Hull & Machinery Insurance of all Indian registered (Indian owned) ships must be effected with Indian insurance companies. Indian registered ships are permitted to insure their P & I risks with P & I Clubs abroad by Government clearances from year to year. The present Government clearance in principle to place P & I insurances of ships abroad is for a period of five years, out of which two years have expired.

There is no legal requirement for insuring either Hull & Machinery risks or P & I risks in respect of ships bareboat chartered by Indian parties and ships could be insured anywhere.

Ireland

There is no requirement that the ship must be insured in Ireland. Any such provision would be a breach of EEC competition rules.

Italy

Under the present system, the hull insurance of an Italian flag ship must be taken out in Italy. This rule does not apply in respect of P&I insurance. Hull insurers, however, may reinsure in the national market.

Netherlands

No restrictions; free choice to those interested.

Switzerland

See schedule attached.

U.S.A.

A U.S. flag vessel bareboat chartered to an American charterer may be insured in any country. U.S. law would not govern the question of where a foreign flag vessel under bareboat charter to an American charterer may be insured; the law of the flag State would presumably govern.

h. Where the charterer has the option to purchase at the conclusion of the charter period the law regarding:

(i) deregistration
(ii) inclusion in the hire of the purchase price.

Argentina

The law of the flag will be applied, but there are no rules on the matter and the application could be upheld of the law carrying out the contract, that is to say, the buyer.

Canada

(i) de-registration?

If the ship under bareboat charter is registered in Canada in the name of her owner, only a transfer of ownership to the bareboart charterer need be effected when the purchase is made.

If the ship is registered outside of Canada, de-registration will be required before the ship can be registered in Canada in the name of the bareboat charterer as purchaser, assuming that the latter qualifies to own a ship in Canada.

(ii) inclusion in the hire of the purchase price?

Such inclusion will give rise to fiscal considerations, namely what part of the hire payable is on account of the purchase price and what part is in payment of the services of the ship, this latter part only being taxable.

DDR

As far as bareboat charter parties are concerned, an option for the charterer to purchase the chartered vessel is not provided for under the SHSG. However, under a ship leaase contract, following sections 87 to 89 of the SHSG, the ownership in the vessel passes to the lessee at expiration of the agreed lease period, provided the hire was paid by the lessee in due time. Consequently, after payment of the last instalment of charter (lease) hire, the ownership in the vessel is transferred to the lessee. The lessee is not obliged to pay an additional purchase price to the lessor. The purchase price is calculated as part of the hire.

After transfer of title, the ship will be deregistered if the lessee wishes to enter the vessel in another shipping register. However, under section 24 of the SCHRVO of the GDR a ship must not be deregistered.:

- until proof is given by way of certificate that the ship will be entered in the register of another country, and
- without the consent of all mortgages.

Denmark

(i) The law of the flag.

(ii) The law of the charter party/sales contract, subject to mandatory national rules on retention of ownership until payment is made etc.

France

There are no specific provisions in our domestic law regarding (i) the de-registration of ships or (2) inclusion in the hire of the purchase price.

Great Britain

(i) This is purely mechanical since once the vessel leaves the ownership of persons who qualify as owners of British ships (see above) the vessel must be removed from the register.

(ii) There are no regulations affecting the inclusion of hire in the purchase price although there may be tax consequences.

India

(i) There is no law regarding registration of ships where the charterer has the option to purchase the ships at the conclusion of the charter period. When the option to purchase is exercised, the foreign owner of the ship will have to get the ship deleted from his registry to enable the Indian bareboat charterer to register the ship in India on acquiring her ownership.

(ii) There is no specific law regarding inclusion in the hire of the purchase price. This will depend on the contractual arrangement between the parties which will be approved by the Government whilst approving the bareboat charter-cum-purchase of the ship under the provisions of the Merchant Shipping Act.

Ireland

(i) If the charterer is a person qualified to own an Irish ship, he must register the ship in the Irish Register unless he obtains the Minister's consent under Section 21 of the Mercantile Marine Act 1955.

If the charterer is not qualified to own an Irish ship, he must get the consent of the Minister to the transfer of the registry. Alternatively, an application to the High Court may be made to have the ship sold and the proceeds of sale paid to the new owner. In certain circumstances, an interest in an Irish ship acquired by a person not qualified to own such s ship may be subject to forfeiture.

(ii) So far as I know there are no statutory provisions relating to this.

Italy

(i) The law regarding deregistration of ships is the same in all cases where the vessel must be deregistered from the Italian register as a consequence of her sale to a person or company who is not entitled to own ships under the Italian flag. Pursuant to Article 156 CN, the owner who intends to sell thevessel to a foreigner must file a declaration to this effect with the Registrar and the Registrar gives notice of such a declaration to the public at large by affixing a copy of the declaration in the office of the port of registration and by its publication in the Official Gazette with a request to all parties interested to enforce their rights, if any, within 60 days. The authorisation to deregister the vessel is granted by the Ministry of Merchant Marine provided, however, that no opposition is made within the aforesaid 60-day period. In case there is opposition to the deregistration, deregistration is not effected until after the opposition is rejected by a

final judgment or satisfactory security is provided by the owner. The owner may obtain the immediate authorisation by providing a bank guarantee for an amount equal to the sale price of the vessel.

(ii) The authorisation to deregister the vessel is discretional and one of the bases on which it is granted is that the purchase price is in line with the market price of the vessel. Therefore, in case the purchase price is paid by the bareboat charterer together with the hire, the assessment of the correaspondence of the purchase price with the market price becomes much more difficult, both because normally the part of the hire representing payment (by instalment) of the purchase price is not identifiable and because the Ministry of Merchant Marine makes an assessment of the market price at the time of deregistration, whilst the value of the vessel on the basis of which the option to purchase was granted is the value at the time the contract is made.

Netherlands

(i) If purchase by foreign party, Dutch nationality of ship ceases at time of transfer of ownership, necessitating deletion from register.

(ii) Payment of purchase price through agreed hire instalments permitted.

Switzerland

See schedule attached.

U.S.A.

(i) This question is moot, since a U.S. flag vessel may be bareboat chartered only to a U.S. charterer.

(ii) If the charterer becomes entitled to receive a bill of sale of the vessel upon payment of all instalments of hire, the contract may be found to be a conditional sale contract, rather than a bareboat charter. If it were found to be a conditional sale, state law, rather than federal law, would govern such questions as the interpretation of the terms of the contract, filing under the Uniform Commercial Code, etc., since under U.S. law a contract of sale, unlike a bareboat charter, is not considered a "maritime" contract, and only "maritime" contracts are governed by federal law, except, of course, that federal law regulates such questions as the right to sell or charter U.S. flag vessels to foreigners.

i. Who is the party liable (owner or charterer) in respect of damage done by the vessel to third parties.

Argentina

The person liable is the charterer, but the third party damaged has a lien on the ship.

Canada

The charterer.

DDR

The "operator of a vessel" is a central issue of the whole liability in tort concept under the Merchant Shipping Act of the GDR. Section 104 of the SHSG reads as follows:

> "For the purpose of this Act, an operator is a person who operates a ship in his name."

Anyone who owns a vessel or is using a ship in his own name is considered as an operator (German: Reeder) of a vessel. The operator bears the risk of nautical and technical operation of a ship. Consequently, he is liable for any damage done by the vessel to third parties.

Under a bareboat charter party, the charterer (bareboat charterer) can usually be considered as the operator of the chartered vessel, because he (and not the owner) is using the vessel in his own name. Consequently, the bareboat charterer (and not the owner) bears all responsibility and liability mentioned above. There is one exception to this principle. The owner remains liable for oil pollution damage even under a bareboat charter parlty because the GDR is a member-State of the "International Convention on Civil Liability for Oil Pollution Damage, 1969".

Denmark

The charterer is in most cases liable because he is the "Reder". In some cases - particularly in the case of oil pollution - the owner is of course liable.

France

The party liable in respect of damage done by the vessel to third parties (e.g. collision) is the charterer; however if the damage is the consequence of an inherent vice of the vessel, the owner is liable unles of course the owner can prove a lack of surveillance from the charterer who could have detected the risk of an accident.

With regard to damage to cargo compensated by charterer and due to unseaworthiness of the vessel, the claim of recourse against the owner by the charterer is admissible and valid.

Great Britain

If the damage was done to the third party by virtue of the negligence of the charterer then it will be the charterer who will be responsible. The owner will not be responsible although the vessel may be liable in rem. The owner will not be liable to shippers for any acts of the master or crew, even if the shipper did not know the vessel was on demise charter to the charterers.

India

Although the owner is liable for the damage done by the vessel owned by him, the bareboat charterer in effect will get roped in because in rem proceedings under the Admiralty Jurisdiction can be taken against the ship. The U.K. Admiralty Courts Act 1861 which was made applicable to India by the Colonial Admiralty Jurisdiction Act of 1891 constitute the law under Admiralty Jurisdiction in India.

Ireland

The charterer is liable.

Italy

The party liable is the bareboat charterer, who is the operator of the vessel. However, pursuant to Article 272 CN, if the fact that the operation of the vessel has been transferred to the bareboat charterer is not endorsed in the Ships' Register, the owner is presumed to be the operator unless proof of the contrary is provided. Pursuant to the CLC 1969 ratified by Italy, the owner remains liable in respect of oil pollution damage.

Netherlands

The bareboat charterer is liable as operator ("Reder") to third parties. The owner is jointly liable to contractual debts if the bareboat charter is not registered (unless creditor otherwise aware of chaerter).

Under the oil pollution legislation there is a joint and several liability imposede on the owner and the bareboat charterer.

Switzerland

See schedule attached.

U.S.A.

Assuming fault, the bareboat charterer is liable. The owner is not liable in personam, although the vessel is liable in rem. Thus, if the vessel is lost and the charterer is insolvent, the third party is without a remedy (except against a negligent master, pilot or crew member).

j. Whether and to what extent claims against the bareboat charterer can be enforced against the ship (maritime and possessory liens, right of arrest, etc.).

Argentina

See letter i).

Canada

Maritime liens are always enforceable against the ship by way of an action in rem involving the arrest of the ship (refer to Goodwin Johnson Limited vs. The Ship (SCOW) AT & B, No. 28 et al. (1954) S.C.R. 513, a decision of the Supreme Court of Canada.

Possessory liens, like that of the shipyard for cost of repairs to the ship, and statutory rights of arrest, like that of the supplier of necessaries, victuals, stores and bunkers, or of services like stevedores, can also be enforced unless the charterparty contains a clause prohibiting the exercise of such possessory liens or rights of arrest and it is established that the creditor was aware of such prohibition.

DDR

In general, personal claims against a bareboat charterer can be enforced against his property under the Law of Procedure in the GDR. Undoubtedly, a bareboat chartered vessel does not belong to the property of the charterer. Consequently, claims against the charterer can generally not be enforced against the chartered vessel. However, there are various exceptions from this general legal principle well known under the law of the GDR, viz. the following:

Maritime Liens: Any maritime claim giving rise to a maritime lien on a vessel can be enforced against such a vessel, even if the debtor is not the owner of the vessel. Such a maritime lien is granted for all claims against the owner, operator or charterer of a vessel, listed under section 120 of the SHSG. As a consequence, a claim against a bareboat charterer can be enforced against the chartered vessel, insofar as the claim belongs to the category of claims secured by a maritime lien and listed in section 120 of the SHSG (Annex).

Possessory Liens: Besides maritime liens, another kind of lien is well known under the law of the GDR. Section 236 of the GIW provides for a possessory lien, granted to any contractor, as a security for claims against his customer. A contractual claim against a bareboat charterer may give rise to a possessory lien on the chartered vessel, provided the contractor is in possession of the vessel. 1.

1. For a comprehensive discussion of the possessory lien, See: Richter, R., "Six Legal Approaches to Protect the Unpaid Shipbuilder or Repair", Colloquium on Protection against Insolvency in Maritime Law, New Orleans 1987, pp. 87-100.

As a principle, such a possessory lien prevails irrespectively whether the property in the pledged vessel belongs to the customer or to a third party (charterer), being entitled to dispose of the vessel. Under a bareboat charter the vessel is usually under the complete disposal of the charterer. Consequently, a contractual claim against the bareboat charterer can be enforced against the vessel by a contractor who is entitled to a possessory lien under section 236 of the GIW. As an example, the claim of a repair yard against the bareboat charterer for unpaid repair bills is usually secured by a possessory lien to the yard under section 236 of the GIW. Such a claim against the bareboat charterer can be enforced against the chartered vessel, as long as the yard keeps the possession of the vessel.

Arrest: As already mentioned above, the operator bears all responsibility and liability arising out of the operation of the vessel. As far as claims coming out of this liability and responsibility of the operator are secured by a maritime or possessory lien, they can be enforced against the chartered vessel without any problems. However, there are maritime claims resulting from the operation of the chartered vessel against the bareboat charterer that are not secured by such liens. Therefore, it seems to be necessary to give such claimants a right to pursue their claims against the vessel, even if the bareboat charterer is the operator of the ship and thus the owner is not liable to compensate the claim in question. However, for the time being such a possibility is not provided for under the law of the GDR.

Denmark

Normally only the charterer is liable. However, a claim can be made against the owner, or arrest can be made in case there is a maritime lien for the claim.

France

In France, there is for the moment a controversy of this problem and our intention is to prepare special comments on this subject.

Great Britain

In respect of claims for inter alia (see the Supreme Court Act section 20(2)(c)-(r) for claims in full):-
- damage done by a ship
- loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment
- any loss of or damage to goods carried in a ship
- in the nature of salvage
- in the nature of towage in respect of a ship
- in the nature of pilotage in respect of the ship
- in respect of goods or materials supplied to a ship for her operation or maintenance.

- dock charges or dues or wages of the master or crew
- in respect of disbursements made on account of ship by master, shipper, charterer or agent
- bottomry

an action "in rem" may be brought in the High Court against the vessel giving rise to such claims. Such an action may also be brought against any vessel which at the time the action is brought is in the vbeneficial ownership of the charterer.

An action "in rem" gives rise to a right to arrest the vessel concerned.

In any case where a maritime lien exists, an action "in rem" is also available against the vessel concerned. A maritime lien exists in English law for the following claims: damage done by a ship, salvage, wages, masters disbursements and bottomry.

India

The claims against the bareboat charterer can be enforced against the ship in Admiralty Jurisdiction provided the ship herself has been the wrong doer and responsible for the claims. Under the U.K. Admiralty Courts Act, 1861 only the following types of claim can be enforced against the ship:-

A. Any claim for the building, equipping or repairing of any ship.

B. Any claim for necessaries supplied to any ship.

C. Any claim by the owner or consignee or assignee of any bill of lading of any goods for damage.

D. Any claim for damage done by any ship.

E. Any claim for damage received by any ship or sea-going vessel.

F. Any claim for the possession or ownership of a ship.

G. Any claim in the nature of salvage services.

H. Any claim by a master or crew for wages, etc.

I. Any claim by a master in respect of disbursements.

J. Any claim arising out of bottomry.

K. Any claim in the nature of towage.

L. A claim and cause of action in respect of any mortgage.

M. Any claim in respect of any registered mortgage.

Ireland

If a claim is of the type which gives rise to a maritime lien, it can be enforced by an action in rem against the ship even though the liability is that of the charterer.

Italy

Claims secured by maritime liens may be enforced against the ship even if they have arisen against the bareboat charterer. Italy has ratified the 1952 Arrest Convention and, therefore, the problem of the construction of Article 3 paragraph 4 has been considered by Italian courts. There are so far conflicting decisions in this respect, although one recent judgment excludes the right of the claimant who has a claim against a bareboat charterer to enforce a claim against the vessel. As regards possessory liens, the only lien which is conceivable is that of the ship repairer and such lien may be enforced against the ship even if the claim has arisen against a person other than the registered owner, provided the claimant acts in good faith.

Netherlands

Claims against the bareboat charterer which are enforceable (as preferential debts) against the ship: costs of execution, wages, salvage, collision damages, debts due in respect of business carried on with the ship (e.g. supplies, repairs, cargo claims), and debts based on charterer's liability as an operator.

Switzerland

See schedule attached.

U.S.A.

Under U.S. law, a maritime lien arises for cargo loss or damage, for salvage, and for general average contributions.

A maritime lien also arises for repairs, supplies and other necessaries ordered by the bareboat charterer and furnished to the ship unless the charter contains a "prohibition of lien clause" and the clause is brought to the repairer's or supplier's attention before the repairs or other necessaries are furnished.

A right of arrest exists whenever there is a maritime lien; the lien is exercised by instituting an action in rem in a U.S. district court and causing the arrest of the vessel, unless, as most frequently happens, security is posted to avoid the arrest

The exercise of possessory liens is not common in the United States. Thus, a repairer who has not been paid will be more likely to rely on his right of arrest to enforce his maritime lien than to tie up his drydock or berth by exercising a possessory lien. But the fact that the ship was operating under a bareboat charter would not prevent him from exercising any right to a possessory lien that he might have had if the shipowner had been operating the vessel for his own account.

NOTE: Please see schedule overleaf for Swiss replied (translation).

SCHEDULE

Swiss Replies to Questionnaire

a) The hiring of a ship (bareboat charter) under Swiss flag (registered in Switzerland) is governed by Swiss law (the law of the flag).

b) The law (Art. 90 of the Swiss Maritime Code) defines the hiring of a ship as follows:-

> "The bareboat charter of a ship is the contract by which the owner binds himself to provide the charterer, against payment of hire, with the use and control of a ship without crew and equipment.
> "The validity of the contract is governed by the written terms of the contract."

To safeguard the special Swiss character of a ship under the Swiss flag, the charter and subcharter of a Swiss ship is only valid in favour of a charterer or subcharterer who fulfils the conditions of a Swiss ship operator, namely a ship operator who fulfils the same conditions of nationality ("genuine link") as an owner of a ship (Art. 91 and 46 of the Code).

The chartering can be entered in the shipping register with the effect that anyone who purchases the ship is obliged to allow to the charterer, in accordance with the charterparty, the full use of the ship (Art. 92 AL 4).

c) In view of the restrictions set out above, the chartering of a ship has a somewhat limited scope and only Swiss owners and operators charter Swiss ships..

d) There are no standard forms in Switzerland; it is normal to use forms of contract found in the larger maritime countries.

e) A Swiss vessel cannot be bareboat chartered to a foreign enterprise and be registered in the state of the charterer.

f) A ship that is under foreign flag can be chartered by a Swiss enterprise if the law of the flag of that ship permits it; but it can neither be registered in Switzerland nor fly the Swiss flag.

g) Under Swiss law there are no provisions covering the nationality of crew members. However, the authorities favour the employment of Swiss crew members. On board a Swiss ship Swiss labour law applies. There are no provisions concerning the country in which insurance should be placed except compulsory insurance against accidents and illness of crew members on board a Swiss ship which must, as a general rule, be covered in Switzerland.

h) The charterer has no right of option (or purchase) of the ship at the conclusion of the contract unless expressly so stated in the contract. The cancellation of the ship in the Swiss register is governed by Swiss law. The hire paid can be included in the purchase price in accordance with the conditions set out in the contract.

i) The liability of the ship operator - whether as owner or disponent owner is in personam. (Art. 48 of the Code). To determine the person liable, the law provides: "Provided that the charter of the ship has not been registered in the register of Swiss ships, the shipowner is liable as operator towards third parties who had no knowledge of the charter at the time that the claim arose." Thus if there is no entry of the charter, the third party can proceed against the registered owner; if, however, there is an entry, he must proceed against the operator as notified. In the former case, the proprietor is still entitled to show that the the third party making the claim had knowledge of the charter with the result that the action should be brought against the disponent owner/charterer.

j) If the claim is protected by a maritime lien, the claimant may, even if the person against whom he is pursuing his claim is the disponent owner, take recourse against the ship and also take arrest proceedings. The 1926 Convention on Maritime Liens and Mortgages has been incorporated into Swiss maritime law. The 1952 Convention on Arrest of Ships has been ratified by Switzerland.