Handelshögskolan i Göteborg

SKRIFTER 1970 · 2

GOTHENBURG SCHOOL OF ECONOMICS
AND BUSINESS ADMINISTRATION PUBLICATIONS

JAN RAMBERG

Cancellation of Contracts of Affreightment

on account of war and similar circumstances

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AKADEMISK AVHANDLING

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I GÖTEBORG

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AKADEMIFÖRLAGET · GÖTEBORG

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PREFACE

This study deals with the problem of the influence of changed conditions on the obligations of parties to contracts of affreightment. In order to keep the study within reasonable proportions it has been necessary to limit the scope in two essential respects; only changes resulting from "war and similar circumstances" are considered and the study concerns the contracting parties' *right of cancellation* only. By selecting the most typical *vis major* occurrence—war—it has been possible to get a natural delimitation, since the great variety of other non-performance situations presents a number of different problems difficult to treat within the scope of a study which does not purport to be a handbook in the art of escaping contractual obligations.

Unfortunately, the problem of cancellation of contracts of affreightment on account of war and similar contingencies seems to be of perennial practical importance. Even though every sane human being on earth hopes that there will never be another devastating World War, we do not seem to get rid of the tension between the Great Powers which has persisted ever since the end of the Second World War. And, every now and then, this tension explodes in geographically limited conflicts, such as the conflicts in Korea, Suez, Cuba and Vietnam. In some cases, the performance of the contract will be directly affected—e.g., in the case of risks of physical damage or inconvenience to the vessel and her cargo or when the voyage has to be performed by sailing round the Cape of Good Hope instead of via the Suez Canal—and in other cases the position of the contracting parties is affected indirectly by the fluctuations in the freight market resulting from the crisis. Hence, the occurrence of military conflicts in the world, involving the Great Powers, will give rise to a great number of disputes between parties to contracts of affreightment.

The original intention was to examine the problem under Scandinavian law, and notably § 135 of the Scandinavian Maritime Codes. In doing so, comparative material from other legal systems would be considered as well, but only for the purpose of casting some kind of "reflex

light" on the Scandinavian law. Although such an approach would have been theoretically interesting, and presumably not without practical value, I discovered when preparing my study concerning the charterer's liability for damages to the vessel in unsafe ports and berths[1] that this study required another approach. It would be far better to make a *direct* comparison between Scandinavian and Anglo-American law and to consider material from other legal systems only occasionally. Why then Anglo-American law? The answer is easy, almost selfevident, the problem *ex lege* seldom arises in practice, since the standard forms to contracts of affreightment almost invariably contain *clauses* having a bearing on the subject. And even in the absence of a clause in the particular contract to be considered, the "clausal law" has an impact of the same type as the non-mandatory law. And there can be no doubt that the standard forms and the clauses of interest for the present study originate from Anglo-American legal thinking. The somewhat "haphazard" comparison between Scandinavian law and the law of other countries first intended does not do justice to the practical importance of the clauses and to the legal *milieu* where they have their roots. In addition, charter parties often refer disputes to arbitration in London and it is, of course, interesting to know whether one can expect the same outcome of the dispute when tried in London as in Scandinavian proceedings. Although, as this study will show, it is not easy to give an accurate answer to this question, a *direct* comparison between Anglo-American and Scandinavian law will at least facilitate the issue.

It will appear from the study that the law of Denmark, Finland, Norway and Sweden is not, in all relevant respects, identical and that American law sometimes differs from English law not only in theory but in practice as well. Nevertheless, for the purpose of this study, purporting to compare the express provisions of the Scandinavian Maritime Codes and the interrelation between these provisions and the general legal doctrines of Scandinavian law with the basic legal approach practised in English and American law, it has been deemed appropriate to refer to "Scandinavian law" and "Anglo-American law".

The preparation of this study began in 1961 and the main part has been performed while I had the benefit of working as assistant to Professor KURT GRÖNFORS at the Gothenburg School of Economics and

[1] RAMBERG, Unsafe Ports and Berths. A Comparative Study of the Charterer's Liability in Anglo-American and Scandinavian Law, Oslo 1967.

Business Administration. He has guided me all the way through, and, quite apart from his invaluable advice and help, he has offered me the best conceivable facilities for the legal research at his Institute. Owing to the close co-operation between the Gothenburg Institute and The Scandinavian Institute for Maritime Law in Oslo, it was possible for me at an early stage to become acquainted with the Oslo Institute, its leader, Professor SJUR BRÆKHUS as well as the other members of the Institute. I have enjoyed the hospitality of the Oslo Institute on numerous occasions and received scholarships which have enabled me to study at the Institute for longer periods.

During the course of my studies I have also received the JANTZEN scholarship from Nordisk Skibsrederforening, Oslo, and a contribution from Fonden för sjörättslig forskning. These contributions have enabled me to perform research in Germany and the United States respectively. A State scholarship from the Gothenburg School of Economics and Business Administration has financed my research in London. Through the financial support from the above sources it has been possible to broaden somewhat the scope and the depth of the comparative study.

Professor JAN HELLNER and Professor KNUT RODHE have given me valuable advice and Professor LENNART VAHLÉN has shown me confidence by submitting this work as a dissertation before the Law Faculty of the University of Stockholm. PETER DYMLING and LARS GORTON, research fellows at the Gothenburg School of Economics and Business Administraton, have helped me to read proofs and compile the list of cases and abbreviations. To all those, as well as to all persons not specifically mentioned who have generously helped me in the course of my work, I would like to express my sincere gratitude.

Gothenburg, January 1969.

JAN RAMBERG

PLAN OF THE STUDY

The book is divided into three parts. The first part contains the background material; the main features of the contracts of affreightment (§ 1), the war risks and the regulation of this risk in war clauses (§ 2), a brief presentation of the legal remedies which may be invoked by contracting parties affected by the changes brought about by war (§ 3) and an exposition of the relevant concepts of the international law of the sea (§§ 4–6). The second part deals with the general principles of contract law and constitutes the background to the third part dealing with the application of such general principles, and the special maritime law principles, to contracts of affreightment. The third part is subdivided into two chapters—chapter 4 containing the analysis of the legal principles and the cases and chapter 5 concluding the study with some general observations on clausal law.

It has not been possible to limit the study to one special type of contracts of affreightment; there are no "watertight bulkheads" between the various types but rather a sliding scale from the contracts in liner trade to the time charters. The first "natural stop" comes before the bare boat charter and, consequently, that contract type is not considered. It is customary to deal initially with the legal nature of the contract type which the study concerns. However, since speculations regarding the legal nature of contracts of affreightment have neither contributed much to the solution of practical problems nor clarified the position theoretically, the present study concentrates on an explanation of the main features of the various contracts of affreightment as they appear in practical life (§ 1). Special consideration is paid to the elements of interest for the present study; in particular the risk of delay. Needless to say, the character of the various contract types largely depends on the standard form clauses and, consequently, these clauses have received the same attention as the provisions of the statutory law. In view of the differences between the contract types, contracts in liner trade, voyage charters and time charters are treated separately in §§ 1.1, 1.2, and 1.3.

A short presentation of the war risks and of the possibility to obtain insurance coverage for such risks is given in § 2.1 and an account is given of the typical war clauses in § 2.2. These clauses should be read against the background of the general clauses explained in § 1. It is particularly interesting to observe how, originally, the protection under the general clauses has been deemed sufficient and how the growing need for additional protection lies behind the evolution from the sparse provisions of the old "restraint of princes" clause to the voluminous provisions of the modern war clauses.

In order to introduce, at an early stage, the legal remedies available to contracting parties affected by the changes caused by war and similar circumstances, a brief presentation of the statutory provisions of the Scandinavian Maritime Codes is given in § 3.1 and of the Anglo-American technique of implication in § 3.2.

A concentrated exposition of the relevant rules of the international law of the sea has been deemed warranted in order to avoid lengthy explanations and tedious repetitions when analyzing the maritime legal principles and the cases. However, the importance of the international law in this context must not be over-emphasized. While, earlier, the international law had a direct bearing on the rules determining the contracting parties' right of cancellation (see SMC § 159 in its reading before the amendments in the 1930s), their main importance to-day lies in their guidance with regard to the risks which the vessel and the cargo will encounter in case of war. Hence, the chapter dealing with the international law only concerns such material which is required for the understanding of the relevant statutory provisions, the clauses and the cases. The situation when the vessel belongs to a belligerent state is treated in § 4, while the protection for neutral vessels is considered in § 5. Here, the requirements for the protection of neutrality are discussed in § 5.2, the concepts of *arrêt de prince* and *jus angariae* in § 5.3, contraband in § 5.4 and blockade in § 5.5. The right of belligerents to interfere with sanctions is treated separately in § 5.6. Efforts are made to appreciate the standpoint of the present international law in § 6, where some recent phenomena—United Nations' actions and "pacific" blockades (Cuba, Rhodesia)—are commented upon. The literature of the international law is enormous and the opinions professed by the writers are often strongly affected by the particular needs of the country to which they belong. In order to demonstrate a diversity of opinion in some of

the relevant questions, statements of writers representing the different belligerent countries of the World Wars and the neutral countries respectively have been chosen. For the convenience of the Scandinavian reader some references have been made to the Scandinavian literature as well.

The general principles of the contract law are dealt with in chapter 3. The subject of the influence of changed conditions on contractual relations has always been in the focus of attention and given rise to several legal theories and numerous studies. For the purpose of the present study it has been deemed neither necessary nor desirable to enlarge on this topic. The exposition is strictly limited, since it is only intended as a background to the main chapter on the cancellation of contracts of affreightment. For this purpose it has been sufficient to present the legal remedies as they appear in Scandinavian and Anglo-American law. In § 7, dealing with impossibility and *vis major* (§ 7.2), the doctrine of "presupposed conditions" (§ 7.3) and the doctrine of "undue hardship" (§ 7.4) in Scandinavian law, references are mainly made to the observations by legal writers and references to the cases have been avoided. Instead, a certain place has been given to German law, since it has undoubtedly affected the Scandinavian legal thinking in the relevant field. On the other hand, when dealing with the Anglo-American law (§§ 8 and 9), which is mainly based upon case-law, it has, of course, been necessary to cite the leading cases. Efforts are made to explain the evolution of the doctrine of frustration (§ 8.2), the main theories behind it (§ 8.3) and its application in practice (§ 8.4). In view of the fact that war brings the prohibition against trading with the enemy into operation, this subject is treated in § 8.6 preceded by an explanation of the doctrine of illegality (§ 8.5).

In the section dealing with the American law (§ 9), efforts have been made to find the main differences—if any—between English and American law. Although, in § 9.4, the exposition is based upon the system of Restatement Contracts, it is frequently pointed out that this system does not always represent an authoritative explanation of the American law.

The comparative method used throughout chapter 3 purports to explain the Scandinavian legal thinking to persons well versed in the Anglo-American legal system and vice versa. I have purposely refrained from encroaching upon the limited space reserved for this part of the study

by presenting my own personal reflections. Nevertheless, the comparison as such will demonstrate the unsoundness of relying on the witch-craft of "formulas" emanating from the various doctrines of impossibility, *vis major*, "presupposed conditions", frustration, etc. And I have not tried to conceal my sympathy for a more "down to earth" approach considering the individual and typical characteristics of each case. In most cases, such a pragmatic method is to be preferred to general formulas, since such formulas only tend to explain the necessity in general of making exceptions from the stringent adherence to the principle of *pacta sunt servanda.* And experience shows that the choice between the various theories invented for such purpose is almost as elusive as artistic taste.

The main part of the study, Part 3, is subdivided into two chapters; chapter 4 contains the analysis of the maritime law and the relevant cases, while chapter 5 deals with some general problems relating to the "clausal law". In both chapters, the method of a *direct* comparison between Scandinavian and Anglo-American law is used. Owing to the fact that the general rules of contract law and the different thinking in the respective legal systems have been explained in the preceding chapter 3, such a direct comparison should not give rise to any risks of misunderstanding with regard to the basic differences in legal approach. Nevertheless, the special Scandinavian legislation in the Scandinavian Maritime Codes, in particular §§ 135 and 142, need to be treated separately (§ 11.1.1–§ 11.1.6) as well as the subject of hindrances affecting the charterer (§ 11.5.1).

After a brief introduction (§ 10), where the basic allocation of the risk between the shipowner and the charterer (§ 10.1), the interrelation between statutory law and general principles (§ 10.2) and the distinction between hindrances affecting the vessel (§ 10.3) and the cargo (§ 10.4) are treated, the question of cancellation is discussed in various typical situations under the heading "the type of the change of circumstances" (§ 11). First, the main problem resulting from war—the increase of danger—is dealt with in § 11.1 and, after the exposition of the Scandinavian law (§ 11.1.1–§ 11.1.6) and the Anglo-American law (§ 11.1.7), efforts are made in § 11.1.8 to compare the two legal systems in principle and to find out whether one can expect a different outcome of the relevant cases depending upon whether they are tried in Scandinavian or in Anglo-American proceedings.

Frequently, war gives rise to the loss or requisition of the vessel and various prohibitions and government directions. These situations are treated in § 11.2 and § 11.3 respectively. Other serious disadvantages and inconveniences arise as well, and these are dealt with under the heading "impracticability" in § 11.4. Comments on the Suez Canal cases are to be found under "blocking of intended route" (§ 11.4.1).

In view of the different approach in Scandinavian and Anglo-American law to the question of the charterer's right of cancellation, the problem has required a separate exposition in § 11.5, where the Scandinavian law is explained in § 11.5.1 and the Anglo-American law in § 11.5.2.

Finally, some general problems are treated in §§ 12 and 13. In appreciating the legal effect of a change of circumstances on the contractual relationship it is necessary to perform a kind of "double foreseeability test" (§ 12). First, it must be ascertained how the situation appeared to the contracting parties at the time of the conclusion of the contract and their possibility to foresee the future developments. Secondly, it must be ascertained whether the party who has chosen to refrain from further performance under the contract has correctly appreciated the situation and the future development at such time. These problems are treated in § 12.1 and § 12.2 respectively. The problem facing a contracting party wanting to cancel the contract in view of anticipated dangers and difficulties is also considered under the heading "cessation of contract" (§ 13). Here, it will be seen that the cessation of contract *ipso jure*, which is a characteristic consequence of the doctrine of frustration, does not free the contracting parties from their dilemma; they will still have to make up their minds how they shall adapt themselves to the situation that has arisen. And, in spite of the fact that the cessation of contract follows different principles in Scandinavian and Anglo-American law, the position will often be the same, since the parties are often required to give notice of cancellation (§ 13.2) according to the clauses in the contracts of affreightment.

In chapter 5 the observations from § 1 of the study concerning the importance of clauses in establishing the main features of the marine adventure are contrasted against the observations in chapters 3 and 4 with regard to the non-mandatory law. Here, it is pointed out that the clausal law and the non-mandatory law, as far as contracts of affreightment are concerned, in many respects bear a strong resemblance, al-

though the very fact that the law encompassed by the present study is non-mandatory raises special problems because of the abuse of the contractual freedom in sweeping and voluminous standard form clauses. The chapter begins with some general observations in § 14 concerning the interrelation between standard form clauses and legal principles (§ 14.1), the importance of clauses in contracts of affreightment (§ 14.2), the distribution of risk and freedom of contract (§ 14.3) and the traditional remedies against abuse of standard form clauses (§ 14.4). The special problems relating to war clauses are treated in § 15, where the method of interpreting standard form clauses is explained in § 15.1 and the fallacy of the phrase "*expressum facit cessare tacitum*" demonstrated in § 15.2; the non-mandatory law and the general legal principles may affect the relevant clauses by *reducing* or *broadening* their scope of application as the case may be. In this connection, the interpretation of the words "war" and "warlike operations", as well as the problem of the causal interrelation between the contingency mentioned in the clause and the possibility of performing the contract as agreed, receives particular attention.

Under the heading "some remarks in conclusion" (§ 15.3), the shortcomings of the traditional technique in counter-acting the abuse of the contractual freedom and the resulting unreasonable contract clauses as well as the advantages of another approach, are indicated (§ 15.3.1). And the present inadequate correlation between the functions of the drafters of standard form contracts and the function of the courts in trying to rule out unreasonable clauses and to supplement incomplete clauses explains why we will still have to wait some time before we can expect "the advent of the optimal war clause" (§ 15.3.2).

PART I

THE GENERAL BACKGROUND

Chapter 1

INTRODUCTION

§ 1. *Main Features of the Marine Adventure*

§ 1.1. *Introduction*

Before the legal effect of dangers, hindrances and other contingencies preventing or affecting performance is discussed, it is necessary to outline the main features of the shipowner's and the charterer's rights and obligations, and notably the risk of delay incumbent upon them according to the typical contracts of affreightment.

In cases where the shipowner has let the vessel on *bare boat terms*, i.e. left the operation of the vessel, including equipment and manning, to the charterer, the contract type is one of lease (*locatio conductio rei*), but, in the following, this particular kind of marine contract will only be considered occasionally.[1] The other types of contract of affreightment have one thing in common; the shipowner, apart from placing the vessel at the charterer's disposal, undertakes to perform services 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, while the shipowner mainly provides a seaworthy vessel and engages the master and the crew.[2] However, the main "commercial" dividing line is not between the time charter and the other types of contracts of affreightment, but between charter parties—voyage or time—and contracts concerning the transport of goods from one place to

[1] The Scandinavian reader is referred to FALKANGER, Leie av skib. Cf. also SUNDBERG, Fel i lejt gods.

[2] See for a discussion concerning the legal nature of the contract of affreightment SCRUTTON p. 102 at note d; SCHAPS-ABRAHAM vorbemerkung 16 to § 556; MAGNENAT, Essai sur la nature juridique du contrat d'affrètement; SUNDBERG, Air Charter p. 154 et seq.; and for further references GRÖNFORS, Successiva transporter p. 89; RAMBERG p. 54 note 104; id., in ETL 1966 p. 878 (note 2); and infra pp. 57–9.

another, in other words such contracts which are typical in liner trade. The Scandinavian Maritime Codes adhere to the traditional distinction between voyage charters (§§ 77–136), with a few special rules relating to liner trade (§§ 79, 88, 115), and time charters (§§ 137–150), but a more modern approach is adopted by the new French Code of 18 June 1966,[3] where a clear distinction is made between chartering of vessels and transport of merchandise.[4]

In view of the fact that time charters, voyage charters and contracts of affreightment in liner trade all involve co-operation between the parties in the marine adventure, these three basic marine contracts will be considered.

The obligation undertaken by the shipowner may, with regard to time, the geographical scope of the voyage, as well as the mode of performance, vary from being rather precise to an obligation of a more "diffuse" character. Thus, the shipowner, by means of "deviation", "liberty", "transshipment", "scope of voyage",[5] "near"[6], "ice",[7] "strike",[8] "restraint of princes", "war"[9] and similar clauses, secures himself the right in some situations to cancel the contract entirely and in other situations to alter the performance contemplated at the time of the conclusion of the contract. The fact that he can *alter* the contemplated performance will increase his possibilities of *fulfilling the contract* in spite of dangers and hindrances affecting the voyage.[10]

[3] Loi No 66–420, reprinted in D.M.F. 1966 p. 504 et seq.

[4] Art. 1 reads: "Par le contrat d'affrètement, le fréteur s'engage, moyennant rémunération, à mettre un navire à la disposition d'un affréteur", while art. 15 declares: "Par le contrat de transport maritime, le chargeur s'engage à payer un fret déterminé et le transporteur à acheminer une marchandise déterminée, d'un port à un autre." See the comments by RODIÈRE, La fin du sectionnement juridique du contrat de transport maritime, D.M.F. 1966 p. 579 et seq.

[5] See with regard to these clauses the comments by GRÖNFORS, Oncarriage pp. 35–54; and id., Successiva transporter pp. 25,71 et seq., 134 et seq., 181 et seq.

[6] See TIBERG p. 226 et seq.; SELVIG § 15.41 et seq.; MARSTON, J.B.L. 1966 p. 42 et seq.; and RAMBERG pp. 69 et seq., 94 et seq., 111 et seq.

[7] See BRÆKHUS, Ishindringer; RØRDAM p. 100 et seq.; and id., Eis-Hindernisse und Eisklauseln, Hansa 1957 p. 2441 et seq.

[8] See RØRDAM p. 76 et seq.

[9] See infra p. 67.

[10] In the current deviation, liberty and war clauses, the shipowner is anxious to point out that what he is doing is not really a deviation: "anything done or not done shall not be deemed a deviation" and "shall be considered fulfilment of the contract voyage". See infra p. 69.

Another main feature, strongly interrelated with the afore-mentioned, lies in the allocation of the *freight risk*.[11] In principle, the shipowner's right to the freight depends upon his success in fulfilling his promise to forward the goods to their destination. Hindrances preventing him from doing so will also prevent him from earning the contracted remuneration. This is the main principle of Anglo-American law, where the shipowner cannot recover any freight at all unless the contract has been performed—or at least substantially performed.[12]

See *Hunter* v. *Prinsep* (*The Young Nicholas*) (1808) 10 East 378 K.B. [10 R.R. 328] per Lord ELLENBOROUGH: ". . . the ship owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties: and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight; but it was only in that event, viz. of their delivery at the place of destination, that he, the freighter, engages to pay any thing" (at R.R.p. 336). Subsequently it is pointed out that the shipowner can earn his freight by carrying the cargo "by some other means". Otherwise he has not the right to any freight "unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject".

While Anglo-American law with regard to part performance adheres to the principle of "all or nothing", Scandinavian maritime law has adopted a more diversified standpoint. Thus, in voyage charters, the shipowner loses his right to the freight if the cargo does not exist *in specie* (Sw. "ej är i behåll")[13] at the termination of the voyage, unless the cargo has been lost due to inherent vice, insufficient packing or the shipper's negligence, or the goods have been dangerous and therefore disposed of by the shipowner. This principle also applies with regard to freight paid in advance, wich consequently must be returned (SMC § 125: "För gods, som ej är i behåll vid resans slut, skall frakt icke utgå, med mindre godset gått förlorat till följd av sin egen beskaffenhet, bristfällig förpackning eller annat vållande å avlastarens sida eller ock godset av bortfraktaren sålts för ägarens räkning eller lossats, oskadliggjorts eller förstörts enligt vad i § 119 sägs. Frakt som erlagts i förskott, skall återbäras, där enligt vad i första stycket sägs frakt ej skall utgå"). On the other

[11] This problem is exhaustively treated by SELVIG in The Freight Risk.

[12] See with regard to substantial performance SELVIG §§ 15–18.

[13] See concerning the interpretation of this expression ND 1948.13 SCN; SELVIG §§ 14.13, 16.3, 17; and RISKA p. 161 et seq.

hand, the shipowner is entitled to a certain portion of the freight if, before the contract is cancelled or ceases to operate on account of hindrances and war risks, etc., he has not succeeded in bringing the cargo to the destination but only to an intermediate place. In such a case, he is entitled to freight corresponding to the portion of the voyage performed. It does not matter if the cargo-owner has had any corresponding *benefit*—or any benefit at all—from the shipowner's part performance; he must pay the agreed freight minus a sum corresponding to the relationship between the length of the remaining portion of voyage and the length of the contracted voyage, in which connection the duration and costs relating to such voyages shall also be taken into account. This reduced freight, called "distance freight" (freight *pro rata itineris*), may not exceed the value of the cargo (SMC § 129: "Där efter resans anträdande avtalet häves eller upphör att gälla enligt vad ovan stadgats, vare bortfraktaren berättigad att för gods, som finnes i behåll, utfå avståndsfrakt. Avståndsfrakt utgöres vad av den avtalade frakten återstår, sedan avdrag skett med belopp som bestämmes efter förhållandet mellan längden av den återstående och av den avtalade resan, med fäst avseende tillika å varaktigheten av och de särskilda kostnaderna för sådana resor. Avståndsfrakten må dock icke bestämmas till högre belopp än godsets värde.").[14] In Anglo-American law, freight *pro rata itineris* may only be awarded on the basis of an agreement between the parties.[15] But such agreement must not necessarily be in express terms; it could be inferred from the behaviour of the parties.[16]

While Anglo-American law is less favourable to the shipowner with regard to the remuneration for part performance, *English* law recognizes a special rule in his favour with regard to *freight paid in advance.* Freight paid, or payable, in advance is considered earned upon shipment and is not recoverable by the cargo-owner, even if the cargo should perish[17] or the voyage become interrupted and the contract cease to operate

[14] The same principle applies i.a. in German law. See HGB §§ 630–1.

[15] See the dictum by Lord ELLENBOROUGH supra p. 22.

[16] See SCRUTTON art. 146; and SELVIG § 9.43. The mere fact that the cargo-owner receives the cargo at an intermediate port is not understood as an implied agreement to pay freight *pro rata itineris.* See, e.g., *St. Enoch Shipping Co.* v. *Phosphate Mining Co.* [1916] 2 K.B. 624, where the voyage was interrupted on account of the outbreak of the First World War.

[17] Unless the shipowner could be held liable according to the rules relating to his responsibility for loss of or damage to the cargo.

before the destination is reached.[18] However, this principle, is not recognized in *American* law,[19] The difference between English law on the one hand and American and Scandinavian law on the other with regard to advance freight is reduced in practice by means of bill of lading clauses. Such clauses frequently stipulate that the shipowner shall be entitled to full freight, and extra expenses in addition to the freight, even if he does not succeed in bringing the cargo on to the destination as contemplated.

See, e.g., Swedish American Line bill of lading (1966) cl. 14 a: "Prepayable freight, whether paid or not, to be considered as earned upon shipment and not to be returned or relinquished, vessel or goods lost or not lost" and cl. 22 e: "For any service rendered to the goods as herein provided, the Carrier shall be entitled to a reasonable extra compensation". The passage "vessel or goods lost or not lost" is not easily understandable and has therefore in Conlinebill been replaced by words clearly expressing the intention. See cl. 11 a: "Prepayable freight, whether actually paid or not, shall be considered as fully earned upon loading and non-returnable *in any event*" [my italics]. See for comments on the expression "vessel [or goods] lost or not lost" JANTZEN, in ND 1941 p. 481; GRAM, in ND 1943 p. 225; and id. Fraktavtaler pp. 12–17. In spite of its extraordinary wording it has served the intended purpose. See, e.g., ND 1922.382 SCS, where the vessel during the First World War did not get clearance for a voyage from Liverpool to Copenhagen; and ND 1942.273 Norw. Arb., where the cargo could not be forwarded to the destination on account of the German occupation 9 April, 1940. See from American case-law *The Bris* (1919) 248 U.S. 392 (refused export licence); *Mitsubishi Shoji Kaisha, Ltd.* v. *Société Purfina Maritime* (*The Laurent Meus*) 1943 AMC 415 CCA 9th (requisition); *De la Rama S.S. Co.* v. *Ellis* (*The Dona Aniceta*) (1945) 149 F 2nd 61 CCA 9th (refused clearance subsequent upon the Pearl Harbour attack); and *The Flying Fish* infra p. 32.

In voyage charters, it is usually stipulated that payment shall be effected upon delivery, but in times of war the clause "freight non-returnable" often replaces the usual conditions.[20] In older forms, after the provision that the freight should be paid "on signing Bills of Lading (ship lost or not lost)" it

[18] *De Silvale* v. *Kendall* (*The Shannon*) (1815) 4 M. & S. 37 K.B. [16 R.R. 373] per Lord ELLENBOROUGH at p. 42 [375]. In *Byrne* v. *Schiller* (1871) L.R. 6 Ex. 319, it was even plainly admitted that English law on this particular point was "anything but satisfactory" (per COCKBURN C. J. at p. 325) but the principle has been upheld ever since. See *Allison* v. *Bristol Marine Insurance Co.* (1876) 1 App. Cas. 209 at p. 219; *Rodoconachi* v. *Milburn Brothers* (1886) 17 K.B. 316 at p. 322; and *Dufourcet & Co.* v. *Bishop* (1886) 18 Q.B.D. 373 at p. 378.

[19] *National Steam Nav. Co. of Greece* v. *International Paper Co* (*The Athenai*) (1917) 241 Fed 861 CCA 2nd; and *The Cataluna* (1918) 262 Fed 212 SDNY.

[20] See, e.g., GRAM p. 51.

was often added "less . . . per cent. for Insurance and Interest"[21] thus indicating that the reduction of the freight should be used by the charterer to insure the freight risk. The words do not clearly express that the risk is *transferred* to the charterer but it must obviously be the intention of the parties.[22]

In *time charters*, the position is different compared with the other types of marine contracts, since the risk that the vessel cannot be used in the relevant trade is now transferred to the charterer. In principle, it is his problem if he cannot use the vessel within the agreed trading limits. Thus, the risk of restricted possibility of using the vessel, as well as any loss of time, lies *prima facie* with the charterer.

However, when the charterer has a strong bargaining position he may force the shipowner to accept less favourable terms. See, e.g., Shelltime 2, in the "off hire" clause (21), lines 148–50: "If the nation to which the vessel belongs becomes engaged in hostilities, hire and all other charges shall cease during the continuance of such hostilities if Charterers in consequence of such hostilities find it impossible to employ the vessel and in that event Owners shall have the right to employ the vessel on their own account". In Mobiltime it is stipulated in clause 8: "Any loss of time through detention by authorities except as otherwise expressly provided in this Clause shall be for Owner's account". And in Beepeetime's "off hire" clause (cl. 22, lines 142–4), the vessel comes off hire "at Charterers' option if the State of the flag of the vessel or the State in which the effective Management of the vessel is exercised becomes engaged in hostilities and Charterers find it impossible to employ the vessel. In this event Owners shall have the right to employ the vessel on their own account during such period".

The Scandinavian Maritime Codes adhere to a distribution of risk between the shipowner and the charterer also with regard to time charters. It is stipulated that the vessel comes "off hire" if the use of the vessel is prevented by circumstances "attributable to the shipowner" (SMC § 144.2, "beror av bortfraktaren"). The shipowner, through the time charter, undertakes i.a. the obligation to provide a seaworthy ship and to keep it in a thoroughly efficient state in hull and machinery during service.[23] If the use of the vessel is prevented by his failure to fulfil the said obligation the vessel will come "off hire". However, the expression

[21] See, e.g., Chamber of Shipping's and Baltic's Forms of Approved Documents 1957, documents 1–7.

[22] See ND 1921.446 SCS.

[23] Baltime cl. 3 conforming with SMC § 138: "Bortfraktaren skall hålla fartyget så bemannat, provianterat och utrustat och i övrigt i sådant skick som krävs för vanlig fraktfart . . ."

"attributable to the shipowner" is not very helpful when the circumstances preventing the use do not emanate from the shipowner but from "outside" sources. The expression may very well cover situations where the shipowner, although he or his servants cannot be blamed in any way, is prevented from fulfilling his obligation.[24] But the border-line cases are difficult.[25]

Anglo-American law has no principle corresponding to SMC § 144. Instead, the time charterer has to assume the risk of *all* circumstances preventing the use of the vessel during the currency of the charter, unless he can raise an action in damages against the shipowner for negligence.[26] But, again, the difference between the legal systems is modified by clauses. The time charter parties almost invariably contain "off hire" clauses *specifying* the circumstances which take the vessel off hire. This being so, the "statutory off hire clause" in SMC § 144 will, in practice, only become of limited importance.

The above outline of the basic allocation of risk inherent in the marine adventure will now be supplemented with some brief observations regarding marine contracts in liner trade (§ 1.2), voyage charters (§ 1.3) and time charters (§ 1.4).

§ 1.2. *Liner Trade*

In liner trade, for each voyage, the shipowner enters into av number of contracts of affreightment with various shippers tendering goods of different kinds destined for a number of consignees. Although, tradi-

[24] See, e.g., SOU 1936:17 p. 215 and cf. ND 1950.398 Norw. Arb., where the vessel by the German forces was ordered to install a special room for German soldiers ("flak-mannskap"). The installation took some 40 days and the vessel was considered off hire during such period, since the vessel could not be considered in an "efficient" state before the direction by the authorities had been complied with. See for a comment to this decision MICHELET, "Off Hire" p. 186 et seq.

[25] See, e.g., ND 1940.353 Norw. Arb., where two vessels for rather short periods (one and two weeks respectively) were requisitioned for military transports by the German forces in Norway. The arbitrators did not consider that the vessel came off hire. In the *travaux préparatoires* (SOU 1936:17 p. 215) it is pointed out that the vessel does not come off hire if the vessel is caught in the ice or in a blockaded port and this passage was relied upon by the arbitrators. Cf. the criticism by JANTZEN, in ND 1940 p. VII; and see further infra pp. 56,267.

[26] Cf. the same principle with regard to the charterer's fixed time obligation in the law of demurrage, infra p. 43.

tionally, the shipowner's obligation is linked to a specific vessel, named for the transport, there is a marked difference compared with voyage and time charters, since now the attention is more focused on the shipowner's obligation to forward the goods from one place to another than on the means of conveyance used to fulfil his obligation.[1] And this difference, which is apparent from the new French Maritime Code of 18 June 1966 (supra p. 21), is even more accentuated by the structural changes of modern transportation caused by container traffic.[2] In this sense, the shipowner's obligation becomes more *generic* than under voyage and time charter parties, where the promised performance is fixed to a specific vessel.

In the standard forms of contracts of affreightment in liner trade the shipowner may substitute other tonnage, or even other means of transport, but he is not considered to have the *duty* to exercise this right of substitution.[3] Nevertheless, it is possible that the traditional character of the shipowner's transport obligation in liner trade will change in this respect.[4]

Another typical distinction between liner trade and charters on voyage and time basis lies in the fact that liner trade is controlled by *mandatory* rules, and notably by the Hague Rules[5] ratified by a great number of countries.[6] In addition, by means of so-called Paramount Clauses, the Hague Rules have been given effect in situations beyond the scope where they apply according to the convention and the statutory enactments embodying the convention into the national systems of law of the con-

[1] See GRÖNFORS, Successiva transporter pp. 13, 117, 119; GRAM p. 132; and WILLNER p. 30.

[2] Cf. GRÖNFORS, Successiva transporter p. 278 et seq.; and RAMBERG, The Combined Transport Operator, J.B.L. 1967 p. 132.

[3] Some German writers have described the shipowner's obligation under such contract forms as "a hinkende Speziesschuld". See WÜSTENDÖRFER p. 236; ABRAHAM, Seerecht p. 98; LORENZ-MEYER p. 53; and infra p. 298 et seq.

[4] A new approach appears already from the Dutch Wvk, art. 517 g and r. According to these provisions the shipowner, in liner trade, is not obligated to perform the voyage with a specific vessel (art. 517 g) and, as a corollary to this principle, his duty to forward the cargo does not cease if the vessel, where the cargo has been loaded, cannot continue the voyage within a reasonable time (art. 517 r). See also PAPPENHEIM II s. 562 et seq.

[5] International Convention for the Unification of certain Rules relating to Bills of Lading, signed Brussels 25 August 1924.

[6] See SCRUTTON, Appendix V–VII; and GRAM p. 105.

vention countries.[7] By accepting, on a world-wide basis, the compromise between the shipowner's and cargo-owners' interests, embodied in the normative solutions of the Hague Rules, an international standard of liability has been reached replacing the former unsatisfactory practice of exemptions from liability in lengthy and complicated contract clauses.

In liner trade, the marine contract is usually covered by a bill of lading "representing the goods" and therefore enabling the transfer of the title to the goods from one party to another by the transfer of the document.[8]

Although the Hague Rules have had a strong "stabilizing" effect on the shipowner's transport obligation, there are considerable loop-holes, particularly in the field encompassed by the present study. The Hague Rules have satisfactorily regulated the shipowner's liability for *loss of or damage to the cargo*, while it may be subject to dispute whether the liability for non-performance, delay and mis-performance *not* resulting in loss of or damage to the goods is adequately controlled by the Rules.[9] True, art 4.4 of the Rules stipulates that any deviation must be reasonable but, in *English* law, this does not *per se* seem to prevent the shipowner from obtaining the freedom of varying the nature of his transport obligation by "liberty", "scope of voyage", "transshipment", "ice", "war" and similar clauses. As evidenced specifically by the name "scope of voyage", the exercising of the rights which the shipowner has secured himself by way of such clauses is not considered a deviation but a performance of the voyage according to its contractual terms.[10] Thus, art.

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[7] GRÖNFORS, The Mandatory and Contractual Regulation of Sea Transport, J.B.L. 1961 pp. 46–52.

[8] See generally KNAUTH pp. 133 et seq., 384 et seq.

[9] Cf. *Hellenic Lines, Ltd.* v. *The American Tobacco Co.* (*The Katingo Hadjipatera*) 1951 AMC 1933 CCA 2nd, where it was discussed whether a clause relating to war demurrage (see infra p. 83) was repugnant to US Cogsa (46 U.S. Code sec. 1304(3)) regarding the shipper's liability. It was held that Cogsa only had regard to "physical loss or damage and not to a breach of a contractual obligation with respect to compensation for carriage".

[10] See, in particular, *Renton (G.H.) & Co.* v. *Palmyra Trading Corp. of Panama* (*The Caspiana*) [1957] A.C. 149; *Stag Line* v. *Foscolo, Mango & Co.* [1932] A.C. 328; and *Foreman & Ellams, Ltd.* v. *Federal S.N Co.* [1928] 2 K.B. 424; CARVER § 297; and SCRUTTON pp. 425–6. Cf. from American law KNAUTH pp. 254–5: "To constitute deviation there must be a departure both from the geographical route, the customary route, *and also from the contract route, if that differs from the customary route.* There is no deviation if the ship does not go out of the ordinary *or the contracted route, no matter how indirect such route may be*" [my italics].

4.4 of the Hague Rules, in spite of its mandatory character, is a rather dubious protection for the cargo-owner, since the shipowner can avoid it by simply exercising a certain technique in drafting the standard clauses. In Scandinavian law, GRÖNFORS has indicated that Swedish Courts may "take a less formalistic view" of the problem and not allow such an easy circumvention of the Hague Rules art. 4.4. stating that only reasonable deviations are accepted.[11] And *American* jurisprudence supports the view that the shipowner is only entitled to the protection afforded by "liberty" clauses if, under the circumstances, he has acted reasonably.[12]

It appears from the current bill of lading forms that the shipowner tries to retain an almost complete liberty to fulfil the contract in a manner suitable to him, not only for the purpose of avoiding dangers and hindrances but also with a view to protecting his own economical interests in other respects.[13] Thus, in "scope of voyage" clauses it is usually stated:

"As the vessel is engaged in liner service the Carrier has the right to make any departures from the direct and immediate transport from port of loading to port of discharge. The vessel may thus call at any port for any purpose, whether of the current voyage or of any prior or subsequent voyage. Drydocking and repairs may take place with the goods onboard." (Swedish American Line Bill of Lading (1966) cl. 6.)

And in "substitution" clauses we find words to the following effect:

"The Carrier has the right, but no obligation, to carry the goods to their destination by any other vessel, either belonging to the Carrier or not, than the vessel named herein, or by land or air transport, and may tranship, land or store the goods either on shore or afloat and reship or forward the same at Carrier's expense but at Merchant's risk, and may also convey the goods

[11] See GRÖNFORS, Oncarriage p. 39; GRAM pp. 132, 142; SCHAPS-ABRAHAM Anm. 2 to § 636 a. Cf. SELVIG § 15.53 at notes 74–8, where he suggests that this requirement, in spite of the different approach, would be upheld under English law also, and with regard to liberty-to-tranship clauses he points out that the liberal right for the carrier to tranship the goods is not so serious as long as he remains liable for the transport according to the Hague Rules until the goods reach the agreed destination. But this is not the situation under Scandinavian law, see SMC § 123 and NJA 1962.159 *The Gudur.*

[12] See, e.g., *Surrendra (Overseas) Private, Ltd.* v. *Steamship Hellenic Hero, Steamship Hellenic Sailor and Hellenic Lines, Ltd.* 1963 AMC 1217 SDNY at pp. 1222–4.

[13] See for a typical example the facts of NJA 1962.159 *The Gudur.*

in lighters to and from the vessel at Merchant's risk. In all cases of transhipment, lighterage, forwarding, reshipment or storage, the Carrier acts as agent for the Merchant only, and is authorized to accept the terms of any warehouseman or carrier, even although less favourable to the Merchant than those contained in this B/L.

The responsibility of the Carrier shall be limited to the part of the transport performed in his own vessel, and the Carrier shall not be liable for damage or loss arising during any other part of the transport, even if the freight for the whole transport has been collected by him." (Swedish American Line Bill of Lading (1966) cl. 9.)

Although, ordinarily, the shipowner does not assume the obligation to have the vessel ready or to perform the transport within a fixed time (see SMC § 98, stipulating that the voyage shall be performed with due dispatch, Sw. "tillbörlig skyndsamhet"), he usually contracts out any liability caused by *delay*.[14] SMC § 130 stipulates a liability for damage caused by delay unless the shipowner can prove that it has not resulted from negligence on the part of himself or his servants. But since this provision is non-mandatory, it does not prevent the effect of the current bill of lading clauses to exempt, for all practical purposes, the shipowner from such liability.

The Maritime Law Revision Committee preparing the amendments of the Swedish Maritime Code in the 1930s did consider the question of making the liability for delay mandatory but since, in the opinion of the Committee, the Hague Rules "did not directly concern liability for delay" (Sw. "ej torde direkt avse någon morareglering"), it was felt that an imposition upon the shipowner of a mandatory liability for delay would "at least to a certain extent" involve a "heavier burden upon Swedish shipowners than upon foreign ones" (Sw. "en dylik tvingande lagstiftning skulle medföra en, åtminstone i någon mån, större tunga för svensk än för utländsk rederiverksamhet").[15] However, it is subject to dispute whether damage on account of delay, other than physical damage to the goods, is encompassed by the mandatory Hague Rules. The expression of art. 3.8 "liability for loss or damage to *or in connection with* goods" [my italics] seem to permit a broad interpretation and make it possible to include damage for delay and indirect damages as

[14] See for an example Conlinebill cl. 13: "The Carrier shall not be responsible for any loss sustained by the Merchant through delay of the goods unless caused by the Carrier's personal gross negligence".

[15] SOU 1936:17 p. 187 et seq.

well.[16] A recent decision by the English House of Lords supports such a view[17] and it has been favoured in the jurisprudential writing too.[18]

Undoubtedly, from a commercial viewpoint, liner trade requires that the shipowner be given comparatively great liberty to vary performance in order not to upset the economy of his bargain. The fact that there usually are numerous parties representing the cargo contracted for shipment, or loaded onboard, makes it necessary to give the shipowner the possibility of altering the contemplated performance in order to avoid that the contract is performed to the benefit of a few and to the detriment of the rest, including himself or not as the case may be. Nevertheless, it hardly seems feasible that the standard clauses in the contract forms should accord the shipowner *totally uncontrolled* liberty to "fulfil" the contract as he pleases. And since there is a provision in the Hague Rules stipulating that any deviation must be reasonable, it does not seem clear to me why the Courts should find themselves unable to uphold it for the simple reason that a contracting party refers to some clauses in the contract of affreightment, drafted in a manner especially designed for the very purpose of circumventing the provision. And, in order to give full effect to the rule that any deviation must be reasonable, it seems necessary to make liability for delay and other indirect losses mandatory as well. After all, it is of paramount interest for the merchant to get correct performance *in time* and not only to get a certain protection for loss of or physical damage to the goods, a risk which for that matter can easily be covered by insurance. Furthermore, the generic character of the shipowner's transport obligation in liner trade seems to warrant another approach *de lege ferenda* with regard to his duty to provide the necessary means for the purpose of fulfilling the contract. The traditional link between the cargo and a specific vessel seems unnatural in modern liner trade.

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[16] But cf. the French text: "responsabilité pour perte ou dommage concernant des marchandises" and the Swedish text: "ansvarighet för förlust, minskning eller skada". The French text does not seem to permit the same broad interpretation as the English text and the expression "förlust, minskning eller skada" of the Swedish text is ordinarily used as a reference to total or partial loss of or physical damage to the goods themselves.

[17] *Anglo-Saxon Petroleum Co.* v. *Adamastos Shipping Co.* (*The Saxonstar*) [1958] 1 Lloyd's Rep. 73 H.L.

[18] See, e.g., GÖTZ, Das Seefrachtrecht der Haager Regeln pp. 167–9, i.a. referring to *The Saxonstar*; SEJERSTED, Om Haagreglene p. 54 et seq.; and GRAM p. 140.

However, for the purpose of this study, it is important to observe, *firstly*, that the liberties embodied in the various clauses, purporting to give the shipowner an almost unrestricted possibility—in his option—of varying the contemplated performance and nevertheless preserve his right to the freight, are not always reduced by mandatory rules and, *secondly*, that dangers and hindrances of sufficient magnitude affecting the *specific* vessel may, as a rule, be invoked by the shipowner as a ground for cancellation or as an excuse for delivery of the cargo at an intermediate port—or even in the port of loading[19]—against full freight.

There lies another important difference between contracts of affreightment in liner trade and charters on voyage and time basis in the *different distribution of functions* with regard to operations in port. The Scandinavian Maritime Codes recognize such a distinction with regard to the determination of the lay-time (SMC §§ 88, 106) but, apart from this, they still adhere to the traditional system that the shipper shall "deliver the cargo for shipment alongside" (Sw. "avlämna godset vid fartygets sida") and that the shipowner shall "take it onboard, provide any dunnage and other things necessary for the stowage and effect the same" (Sw. "taga det ombord, sörja för underlag, garnering och annat, som erfordras för stuvningen, samt utföra denna"). The corresponding system applies to the discharge (SMC § 107); the shipowner shall deliver and the receiver take delivery from alongside (Sw. "Bortfraktaren skall avlämna och lastemottagaren taga emot godset vid fartygets sida"). Similarly, the Hague Rules recognize this so-called "tackle-to-tackle" principle, since they only cover the period from loading to discharge (See art. 1 (e) and art. 7).[20] And the traditional bills of lading follow the same pattern. Thus, in "period of responsibility" clauses, it is usually stated that "the carrier or his agent shall not be liable for loss of or damage to the goods during the period before loading and after dis-

[19] See *Colonialgrossisternes Forening* v. *Moore-Mc Cormack Lines, Inc.* (*The Flying Fish*) 1950 AMC 253 CCA 2nd, where the vessel, due to the German occupation of Norway, had to return from the port of discharge (Bergen) without having been able to discharge the cargo. The shipowner, under the "dangerous and disadvantageous situation" clause of the bill of lading, was entitled not only to retain the freight prepaid but also to freight for the return voyage from Bergen to the port of loading (New York).

[20] See with regard to the point where the shipowner's liability ceases under Swedish law NJA 1951.130; NJA 1956.274; and the comments to these cases by GRÖNFORS, Allmän transporträtt pp. 67–70; and RAMBERG, Sv StT 1966 p. 795 et seq.

charge from the vessel, howsoever such loss or damage arises" (Conlinebill, cl. 4.).

Nevertheless, it is clear that, in practice, the cargo is frequently delivered to a warehouse owned or controlled by the carrier, often before the vessel has arrived, and that the receiver or his representative does not take the cargo from alongside but rather from a warehouse where it has been stored on his behalf. Therefore, in order to maintain the traditional liability for loss of or damage to the goods, it is frequently stipulated that:

"Goods in the custody of the Carrier or his agents or servants before loading and after discharge, whether awaiting shipment or whether being forwarded to or from the vessel, landed, stored ashore or afloat, or pending transshipment, at any stage of the whole transport, are in such custody at the sole risk of the Merchant and thus the Carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from his vessel." (Swedish American Line Bill of Lading (1966) cl. 5.)

From the cargo-owner's standpoint the "tackle-to-tackle" principle is unfortunate, since it will be difficult, in case of loss of or damage to the goods, to ascertain who is liable. Some shipowners have now adopted another approach and accepted the full consequences of the fact that, in practice, they do not receive and deliver the goods alongside the vessel,[21] thus assuming liability for the cargo from the reception until delivery. This change of attitude is by no means sensational, since it conforms with the non-mandatory rule of SMC § 118 relating to the shipowner's liability for loss of or damage to the goods while they are in his custody and, indeed, the new French Maritime Code of 18 June 1966 introduces a *mandatory* liability for the shipowner during such period (See arts. 27, 29; "depuis la prise en charge jusqu'à la livraison").

The cargo-handling procedures in liner trade also imply that the distribution of risk according to the rules relating to demurrage seldom becomes applicable.[22] Under the customary bills of lading used in liner trade, the goods must be ready for loading alongside as soon as the vessel arrives and loading shall take place as fast as the vessel can load. If the goods are not available when the vessel is ready to load, the

[21] See, e.g., the bill of lading of Atlantic Container Line cl. 3; and of England Sverige Linjen cl. 5. In Sweden, changed custom's procedures have contributed to the voluntary extension of the shipowner's liability. See TFS 1963:204.

[22] Cf. SMC § 88 and the comments in SOU 1936:17 pp. 77–8.

carrier has no obligation to wait; the vessel may leave the port and the cargo-owner has to pay the freight (so-called "deadfreight"). Similarly, the receiver must take delivery as soon as the vessel is ready to discharge and receive the goods as fast as the vessel can discharge, the goods are stored at his risk and expense, and if he does not collect them they may be sold.[23]

If delay is caused to the vessel, some bills of lading stipulate that demurrage shall be paid[24] and this principle may also apply to situations, not connected with loading or discharge, where the vessel has been detained owing to dangers or hindrances of various kinds.[25] This principle conforms with the general idea behind the various "liberty" clauses mentioned above; the vessel must be able to move as freely and quickly as possible in order not to upset the economy of the trade.[26]

§ 1.3. *Voyage Charters*

Voyage charters are in several respects fundamentally different from contracts of affreightment in liner trade. The "*bargaining position*" *of the voyage charterer is often stronger*,[1] the *specific vessel* named in the charter party is of fundamental importance, and the voyage charterer *plays a much more active role* in the performance of the common venture. Evidently, these factors will create contracts of affreightment of another type than those appearing in liner trade. Owing to the bargaining position of the voyage charterers, and their organizations, the charter party

[23] See, e.g., Swedish American Line bill of lading, cl. 12 (a)–(c).

[24] See, e.g., Swedish American Line bill of lading cl. 12 f.

[25] See, e.g., Swedish American Line bill of lading cl. 22 f and further infra p. 83.

[26] This demurrage provision was invoked by the shipowner in a decision of the Court of Appeal for Western Sweden, 21 December 1967 *The Svaneholm*, where he maintained that the cargo-owner suffered no loss by the vessel's failure to load the cargo in a congested port, since the cargo-owner would have had to pay demurrage if the vessel had remained. This reasoning was approved by the majority of the City Court of Gothenburg, although the shipowner was not considered to have had the right to avoid the performance. However, the Court of Appeal, affirming the decision of the City Court, held — i.a. owing to the fact that the contract mainly concerned liner trade — that the shipowner had been entitled to cancel the contract.

[1] See the observation by CAPELLE p. 74: "Das Kräfteverhältnis von Reeder und Befrachter ist hier ein wesentlich anderes als beim Stückgutvertrag. Der Reeder der freien Fahrt ist im allgemeinen ungleich schwächer als die Linienreederei. Sehr viel kleiner ist sein Kapital—oft besitzt er nur e i n Schiff—und vollständig fehlt ihm die umfangreiche und durchgebildete Organisation der Linienfahrt".

forms may vary from being favourable to the shipowner to a more compromizing type containing a better balance between the respective interests of the contracting parties. Furthermore, the voyage charter party forms are adapted to suit the carriage of different commodities. Thus, in several respects, the voyage charter party forms become more individualistic than the standard bills of lading in liner trade. In the following I will only make some general comments as a background to the position of the contracting parties when war risks and similar contingencies emerge and adversely affect the possibilities of performing the contract as intended.

The mandatory provisions of the Hague Rules, for all practical purposes, do not apply to voyage charters.[2] Thus, the charterer has no protection from art. 4.4 of the Hague Rules stating that only reasonable deviations are accepted; the charterer must rely on the principles of the general law of contracts restricting the shipowner's power to shift the risks and burdens to his counter-party. As will be seen below (infra p. 415), these principles will firstly require the parties to express themselves in clear and unambiguous words and, secondly, safeguard the balance between the contracting parties from being upset to an extent where it would appear manifestly unjust or unreasonable to allow an unlimited operation of the clause.[3]

The fact that the *specific vessel* named in the charter party is important for the charterer reduces the frequency of substitution clauses in the charter party forms.[4] And if they appear they are often restricted by provisions to the effect that the substituted vessel must be in the same position as the vessel named in the charter party, in order to prevent any delay in the vessel's readiness to load the cargo, and that the characteristics of the substituted vessel must equal those of the named vessel.[5]

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[2] See art. 1 (b): "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and holder of the same. See for a commentary SCRUTTON pp. 405–8.

[3] See infra p. 417.

[4] See for charter party forms where substitution clauses appear CAPELLE p. 126; FALKANGER, Konsekutive Reiser p. 57 note 14; and STRETCH, pp. 55, 167.

[5] See, e.g., GRAM pp. 35 et seq., 148, 192; and BRÆNNE-SEJERSTED pp. 59–60.

In voyage charters, it is equally as important as in liner trade that the performance is effectuated *without delay*. The charter parties usually provide that the vessel shall proceed to the port of loading "with all convenient speed"[6] and that she is "expected ready to load about" a certain time. In addition, the position of the vessel at the time of the conclusion of the charter party is often referred to by the word "now" followed by a description of the vessel's nautical position. Similarly, the shipowner does not warrant that the vessel will be in the port of discharge at a specified time. He only undertakes that the vessel "shall proceed with all convenient speed" (or similar expression) to the nominated port (Cf. SMC § 98: "The voyage shall be performed with due despatch". Sw. "Resan skall utföras med tillbörlig skyndsamhet"). Normally, this practice is satisfactory to the charterer. The economic consequences of a delay primarily affects the shipowner, since the charter hire—as distinguished from the time charter hire—is independent of the time used for the voyage. This is normally a sufficient guarantee for the voyage charterer that the voyage is not unduly delayed. However, the charterer may suffer from a delay, especially if the vessel is not ready for *loading* as expected. He may have sold the cargo under such conditions that the buyer may cancel the contract if the cargo is not loaded within a specified time, he may have taken steps to have the cargo ready for shipment and may incur considerable expenses for storage awaiting the vessel's arrival, etc. In such cases, the voyage charterer sometimes succeeds in getting a *cancellation clause* into the charter party to the effect that he may cancel the contract if the vessel is not ready to load within a specified time. This practice is recognized in SMC § 126, where it is stipulated that, if the vessel shall be ready to load within a specified time, *any* delay will permit the charterer to cancel the contract.[7] Even in the absence of a cancellation clause the charterer may, in exceptional cases, cancel the contract and this appears from SMC § 126, which is one of the statutory provisions of Scandinavian law expressing the same

[6] That time is of essence appears more clearly from expressions such as "all possible speed" or "with utmost despatch".

[7] Cf. RGZ (1927) 117.354 *The Hansa* expressing the view that a minor delay (in this case less than one hour) could be disregarded as insignificant under the general principle of BGB § 242 that the parties must exercise their rights in a manner "wie Treu und Glauben mit Rücksicht auf die Verkehrsitte es erfordern". See also MARSTON, The cancelling clause in charterparties, J.B.L. 1969 p. 187 at p. 192.

idea as lies behind the Anglo-American doctrine of frustration (see further infra p. 381). In SMC § 126 it is stated that "the charterer may cancel the contract if, at the time of the conclusion of the contract, the shipowner realized or should have realized that the commercial object of the carriage would be frustrated by such delay" (Sw. "äge befraktaren häva fraktslutet, där godsets befordran skulle bliva utan nytta för honom och bortfraktaren vid avtalets ingående insett eller bort inse betydelsen av sådant dröjsmål varom fråga är").

See for an analysis of SMC § 126 GRÖNFORS, Befraktarens hävningsrätt, where this author points out (p. 20 et seq.) the unfortunate discrepancy between the rules relating to the buyer's and the charterer's right of cancellation on account of delay and suggests that the provisions of SMC § 126 are unnecessarily restrictive. But cf. RISKA, pp. 237–8, referring to the difficulty, owing to nautical factors, in warranting the vessel's arrival at a specified time[8] and to the protection offered the charterer by the shipowner's liability for delay according to SMC § 130. It might be added that SMC § 126 correctly balances the interests of the contracting parties, since the shipowner would be subjected to the risk of a substantial loss if, after a long voyage to the port of loading, he was met by the charterer's cancellation.[9] On the other hand, the vessel's late arrival in port does not always cause a loss to the charterer. And if it does, the charterer may draw the shipowner's attention to the necessity of a timely arrival—and thus increase his possibility of invoking the "frustration defence" according to SMC 126—or insist upon a cancellation clause in the charter party.

It is clear that the words "*expected ready*" do not mean that the shipowner *warrants* the vessel's readiness at a fixed time[10] but if it should have been apparent to the shipowner that the vessel could not reach the port of loading within the time indicated as *expected*, he may find

[8] See, e.g., *Jackson* v. *Union Marine Insurance Co.* (1874) L.R. 10 C.P. 125 per CLEASBY J.: "In such a contract as a charterparty, where so many circumstances may arise at the port of departure to prevent an exact compliance . . . it would be most unreasonable to enable the freighter, because the bargain turned out to be an unprofitable one, to throw up the charter for such a default" (at p. 133). See also BENGTSSON § 20 at notes 5, 21; BRÆKHUS, in AfS Vol. 3 (1959) p. 614; and LEBUHN, Hansa 1953 p. 427.

[9] This is recognized by SMC § 126.3 obligating the charterer, upon the shipowner's notice that the vessel is not expected to reach the port of loading in time, to inform the shipowner within a reasonable time if he intends to exercise his right of cancellation. It should be observed that this principle does not exist in Anglo-American law in the absence of words to such effect in the contract. See further infra p. 410.

[10] See ND 1920.505 SCS; ND 1922.177 SCS; and *Petroleum Export Corp.* v. *Kerr S.S. Co.* (*The Silverpine*) 1929 AMC 905 CCA 9th.

himself in the same position as if he had *misrepresented* the position of the vessel. And it follows from some cases that such a misrepresentation would ordinarily amount not only to a breach of *warranty* which would make him liable in damages but also to a breach of *condition*[11] which would entitle the charterer to cancel the contract.[12]

The principle that a misrepresentation of position amounts to a breach of condition entitling the charterer to cancel the contract was established in *Behn* v. *Burness*,[13] where the charter party incorrectly stated that the vessel was "now in the port of Amsterdam".[14] If the shipowner expressly guarantees that the vessel will be ready to sail at a fixed time, and cannot keep his promise, this would likewise amount to a breach of condition entitling the charterer to cancel the contract.[15]

Even though the shipowner does not ordinarily assume a fixed time obligation, he must, of course, take care to fulfil the contract within a

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[11] See concerning the distinction between breach of warranty and breach of condition REYNOLDS, Warranty, Condition and Fundamental Term, L.Q.R. Vol. 79 (1963) p. 534 et seq.; RAMBERG pp. 44–5; BENGTSSON § 6.4; and MARSTON, The cancelling clause in charterparties, J. B. L. 1969 p. 187 at p. 189. See for a suggestion to a new, less conceptual approach TREITEL, M. L. R. 1967 pp. 139–55.

[12] See *Corkling* v. *Massey* (*The Ceres*) (1873) L.R. 8 C.P. 395; and *Heiskell* v. *Furness Withy & Co.* (*The Eibergen*) 1925 AMC 385 CCA 2nd, where it was stated in the charter party: "Expected time of loading late March/early April". This was considered "merely a representation as to the expectation of vessel owner, and the contract is not breached by the vessel's arriving April 21, *unless the representation was made in bad faith*" [my italics]. See also ND 1922.454 SCS. The shipowner's duty to evaluate the expected time properly was considered in *Compagnie Algerienne de Meunerie* v. "*Katana*" *Societa di Navegazione Marittima, S.P.A.* (*The Nizetti*) [1960] 1 Lloyd's Rep. 132 C.A., where the loading was delayed on account of sanctions from Syrian authorities against vessels which had earlier traded to Israeli ports. Since the vessel had earlier been able to perform voyages to Syria without being delayed by the authorities, the shipowner was considered to have had reason to state the vessel "expected ready to load" at the relevant time. Cf. ND 1963.27 *The Netta* SCD infra p. 159.

[13] (1863) 3 B. & S. 751 [122 E.R. 28].

[14] See also JANTZEN, Baltconcertepartiet pp. 17, 190.

[15] See *Dexter Carpenter Co.* v. *U.S.A.* (*The Ala*) 1926 AMC 1415 SDNY, where it was stated in the charter party: "owners guarantee to sail vessel on or before June 30". The court considered that "the fact that within a few hours after June 30 the vessel might have sailed is no different in principle from an offer for sailing a month after the time limit" (at p. 1417). But cf. the contrary opinion of the German Reichsgericht in RGZ (1927) 117.354 and supra note 7.

reasonable time and if the voyage is delayed owing to *negligent* acts or omissions on the part of himself or his servants, he may become *liable in damages* (SMC § 130: "Damage caused by delay on the part of the shipowner or by the cessation of the contract shall be compensated by the shipowner, unless it may be assumed that neither the shipowner himself nor his servants have been negligent". Sw. "Uppkommer skada genom dröjsmål å bortfraktarens sida eller enär avtalet upphör att gälla, vare bortfraktaren därför ansvarig, där ej antagas må, att varken han själv eller någon för vilken han svarar gjort sig skyldig till fel eller försummelse"). Furthermore, the mere fact that the shipowner has been negligent may also, under Scandinavian law, give the charterer a *right of cancellation* but it should be observed that only negligence *on the part of the shipowner himself* is relevant in this regard.[16]

Thus, according to the Scandinavian Maritime Codes, the charterer's right of cancellation on account of the shipowner's delay is restricted, while the remedy of damages is somewhat more readily attainable. But, in practice, this comfort is usually swept away by contract clauses.[17]

[16] The technique to base a right of cancellation *on the mere fact* that the promisor has been negligent is rather unusual but should be seen in relation to the restrictive right of cancellation awarded the charterer under the relevant provision. See BENGTSSON § 20.3 with further references. The expression "the shipowner himself" also appears in SMC § 254 relating to the limitation of the shipowner's liability and in the Hague Rules art. 4.2 (b). Cf. also SMC § 122 and from the current clauses Baltime cl. 13. See for the interpretation of the expression LUND, Egenfeil, AfS Vol. 8 (1966) p. 309 et seq. and RAMBERG, Radar Navigation and Limitation of Liability, J.B.L. 1966 pp. 118–21.

[17] See for a typical clause Gencon cl. 2: "Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.

Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused."

Although the voyage charterer under the charter party has a certain *power to direct the vessel* to ports, places and berths, it should be noted that his power is restricted by way of the current clauses. Thus, the "*Near*" *clause*, which invariably appears in the voyage charter parties, contains several elements which should be observed in this context.

The Scandinavian Maritime Codes contain in § 77 a "statutory Near clause" to the effect that, failing agreement to the contrary, the vessel shall proceed to the berth for loading ordered by the charterer if there is nothing to prevent the vessel from going there, lying there safely afloat, and proceeding therefrom with the agreed cargo onboard. If the charterer fails to name such a place he loses his option and the vessel shall proceed to a customary loading place (Sw. "sedvanlig lastningsplats") or, if there is no such place, to a place chosen by the shipowner, provided the loading reasonably can be performed there (SMC § 77.2). The rules relating to the discharge are entirely corresponding (SMC § 105 with cross-reference to § 77). However, it should be observed that the "statutory Near clause" only relates to the place *within* the port where the vessel may be ordered for loading or discharge. Consequently, the Near clause inserted in the charter parties fulfils an important supplementary function.[18]

The primary purpose of the Near clause is to give the shipowner the possibility *of refusing to proceed* further than to a point where the vessel may safely get and lie always afloat. But the fact that the vessel may stop before the intended place has been reached causes several side-effects, which are not always observed. Perhaps the most obvious consequence lies in the calculation of the laytime; the vessel may be treated as an "arrived ship" when the point has been reached beyond which she has no obligation to proceed. But this raises the further question of the *nature of the obstacle* and, in particular, the question of to which extent the vessel must *wait* for the disappearance of the obstacle before it can be said that there is a real prevention from reaching the primary place agreed upon in the charter party. In English law, it was settled already in the leading case of *Dahl* v. *Nelson*[19] that the obstacle need not be permanent in the literal sense of the word. The matter is a question of commercial reasonableness and, as pointed out by TIBERG,[20] in deciding what is reasonable due consideration must be paid to the shrinking of time limits in modern transportation.

[18] Cf. from German law HGB §§ 560, 592.

[19] (1881) 6 App. Cas. 38.

[20] TIBERG p. 234; see also MARSTON pp. 45–6; BRÆKHUS, Ishindringer p. 18 et seq.; JANTZEN, Godsbefordring p. 99 et seq.; id., Närklausulen p. 49; CAPELLE p. 172; and WvK art. 480.2.

The Scandinavian Maritime Codes, in applying the principle that delay and hindrances could be attributed to either the "shipowner's sphere" or the "charterer's sphere",[21] place the main risk for delay in berthing the vessel upon the charterer. Thus, in SMC § 83 it is stipulated: "Even if the ship cannot be berthed, notice may be given that it is ready for loading with the result that the laytime commences to run provided the hindrance is attributable to the shipper. When no particular berth has been agreed upon, the same shall apply when the hindrance is caused by congestion or similar circumstances which the shipowner could not reasonably have taken into account at the time of the conclusion of the contract." (Sw. "Kan fartyget, på grund av hinder som beror av avlastaren, icke förläggas till lastningsplatsen, må fartyget likväl anmälas färdigt för lastning med verkan att liggetiden börjar löpa. Är ej viss lastningsplats avtalad, vare lag samma, där hindret utgöres av trafikanhopning eller annan dylik omständighet och bortfraktaren ej skäligen kunnat taga denna i beräkning vid avtalets ingående"). The same principle applies to the discharge (SMC § 106 with cross-reference to § 83).

If the vessel is prevented from reaching *the port of discharge*, she must be allowed to discharge the cargo in another way, or in another place, than originally contemplated by the contracting parties. This raises the problem whether the shipowner shall have duty to pay additional expenses necessary to bring the cargo to the destination—such as the costs for lighterage[22]—or whether discharge in a substitute port may amount to substantial performance of the contract.[23] And, last but not least, the charterer's power to direct the vessel to the contemplated places may be counter-acted by the fact that, under Anglo-American law, the "Near" clause is understood to contain an *implied* warranty, or in American law even an *express* warranty, of the charterer that the ports, berths or places to which the vessel is ordered are safe for the

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[21] See supra p. 25 and infra pp. 44,221.

[22] In Anglo-American law, he is not considered to have such a duty. See *The Alhambra* (1881) 6 P.D. 68 overruling *Hillstrom* v. *Gibson* (1870) 8 Macph. 463; and *Capper* v. *Wallace* (1880) 5 Q.B.D. 163 (*dictum* by LUSH J. at p. 166); and from American law *Mencke* v. *A cargo of Java sugar* (*The Benlarig*) (1902) 187 U.S. 248. See for comments and further references CARVER § 995 at notes 3 and 6; SCRUTTON art. 38 note 3; MARSTON pp. 42–54; POOR §§ 5, 24; and RAMBERG pp. 20, 69, 70. But the position under German law is different. See CAPELLE pp. 303–7; Hansa 1961. 1865 (MDR 1960.1016); and the comments to the last-mentioned decision by SELVIG § 15.43 at notes 43–7.

[23] See for a discussion of this problem *The Athamas* [1963] 1 Lloyd's Rep. 287 C.A.; MARSTON pp. 48–51; and SELVIG §§ 15.43–4, 15.5.

vessel. And if they are not, the risk of such damage and delay arising from the charterer's orders is *transferred to him.*[24]

Owing to the general wording of the "Near" clause it has been considered to protect the shipowner not only with regard to physical obstacles but also with regard to political hindrances.[25] But the effect of such disturbances is usually taken care of by *special* clauses.[26]

Few clauses give rise to such intriguing problems as the "Near" clause but although, perhaps, it would not be considered an "unreasonable deviation" to enlarge upon the subject in this context, the reader is referred to the comments on the clause made by JANTZEN,[27] TIBERG,[28] MARSTON,[29] SELVIG[30] and RAMBERG.[31]

Port operations will keep the vessel immobilized for a certain period of time. The shipowner obtains compensation by the freight which is assessed on the basis of the *normal* period of time required for the port operations. But if the normal time is exceeded owing to *unexpected circumstances* such as strikes, congestions, etc., we are again faced with the problem of distributing between the parties the risk of such delay. This specific problem is particularly considered in the rules determining the vessel's laytime, i.e. in the law of demurrage.[32]

Ordinarily, the functions in connection with the loading and the discharge are divided between the shipowner and the charterer; the charterer shall "deliver (receive) the goods alongside" and the shipowner shall "take them onboard, provide dunnage and other things necessary for the stowage and perform the same" (SMC §§ 89, 107). Sometimes, the entire work in connection with loading and discharge is transferred to the charterer by way of clauses in the charter parties (so-called F.I.O.

[24] See the leading cases *Grace (G.W.) & Co.* v. *General S.N. Co.* (*The Sussex Oak*) (1950) 83 Ll. L. Rep. 297 K.B.; *Park S.S. Co.* v. *Cities Service Oil Co.* (*The Clearwater Park*) 1951 AMC 851 CCA 2nd; and the comparative study by RAMBERG, Unsafe ports and berths.

[25] See *Ogden* v. *Graham* (*The Respigadera*) (1861) 1 B. & S. 773 [124 R.R. 739]; *Palace S.S. Co.* v. *Gans S.S. Line* (*The Frankby*) (1915) 13 Asp. M.C. 494 K.B.; CARVER § 980; and RAMBERG p. 91.

[26] See infra p. 67.

[27] Närklausulen, ND 1930 pp. 49–57.

[28] Demurrage pp. 226–38.

[29] The "Near" Clause, J.B.L. 1966 pp. 42–54.

[30] Freight Risk § 15.4.

[31] Unsafe ports and berths.

[32] See generally the broad comparative study by TIBERG, The Law of Demurrage.

clauses, Free In and Out). This clause is especially suitable when the charterer controls the port, berth or the loading or discharging facilities. In Scandinavian law, it is important to observe this division of functions between the parties with regard to port operations, since, according to the main principle, hindrances prolonging the vessel's stay in port will be for the charterer's account unless they can be attributed to hindrances on the part of the ship (SMC § 84: "I liggetiden inräknas uppehåll, som orsakas av fartygets förhalning, men icke tid, som går förlorad på grund av hinder å fartygets sida").

The Scandinavian Maritime Codes stipulate that the vessel is at the charterer's disposal without extra charge during a certain period of time, the laytime (Sw. liggetiden), and a further period, the "over laytime" (Sw. överliggetiden) against extra charge, demurrage (Sw. "överliggetidsersättning", SMC § 80). For smaller vessels the time can be derived from a certain formula, for larger vessels the time is determined according to what is reasonable considering the circumstances in each case (SMC § 81).[33] The laytime and "over-laytime" is usually determined in the charter party either directly to a fixed time or indirectly by some formula such as, e.g., so and so many tons"per workable hatch per day". The time may also be determined according to certain general standards such as the common clause "fast as can" (FAC), which is the rule in liner trade.[34] As previously mentioned the laytime is prolonged if hindrances which could be attributed to the ship (Sw. "hinder å fartygets sida", SMC § 84) intervene. Apart from this, the charterer stands the entire risk of contingencies affecting the loading and discharge, even if they may be considered *vis major* occurrences.[35] Anglo-American law is different, since the charterer who has accepted to load or discharge the vessel within a fixed time is considered to have assumed an unconditional obligation which is unaffected by hindrances of any kind, even such hindrances as under Scandinavian law would be considered "hindrances on the part of the ship."[36] It is only when the hindrance has arisen through the fault of the shipowner that the running of the laytime is suspended. On the other hand, if the charterer's obligation is undetermined, the charterer is only made responsible for the loss of the vessel's time where he can be charged with having shown lack of diligence[37] and this holds true even if expressions such as "fast as can" have been used to denote that time is essential. Under English law, this ex-

[33] With regard to general merchandise the same test of reasonableness is used but the special provisions relating to the "over laytime" do not apply (SMC § 88).

[34] See supra p. 33.

[35] See TIBERG p. 404.

[36] See the leading case of *Randall* v. *Lynch* (1810) 2 Camp. 352 [11 R.R. 727] per Lord ELLENBOROUGH; *Budgett* v. *Binnington* [1891] 1 Q.B. 35; TIBERG pp. 157, 351 et seq.; and GILMORE & BLACK p. 188.

[37] TIBERG p. 155 et seq.

pression does not involve the charterer in any further liability than if the laytime had been left entirely undetermined.[38]

The different rules prevailing in Scandinavian and Anglo-American law have by TIBERG, in his Law of Demurrage, been classified into three basic views; (1) "the hire view",[39] (2) "the pure default view"[40] and (3) "the risk line view".[41] The first view may be rooted in the old conception of the contract of affreightment as a lease (*locatio conductio rei*);[42] the lessee has to assume the whole risk of circumstances preventing the use of the object during the period of the lease. As pointed out by TIBERG, this stringent liability has led the English courts to the other extreme "the pure default view", when the laytime is not fixed in the charter party, regardless of the various expressions used for the purpose of setting a general standard of speed. And the Scandinavian Maritime Codes adhere to the compromise following from the "sphere theory"; "*the risk line*" falls between hindrances which could be attributed to the vessel and hindrances which could not.

The difference between Scandinavian and Anglo-American law is reduced by exception clauses alleviating the charterer's burden in case of hindrances of various kinds, in particular strikes and weather hindrances. Such clauses are frequently concluded by an exception of a more general kind exempting the charterer for *vis major* occurrences ("and other unavoidable occurrences beyond the charterer's control"). This result could also be obtained by making the exception for "Acts of God and King's Enemies, Restraint of Princes and Rulers and Perils of the Seas", primarily devised for the protection of the shipowner (infra p. 68), *mutual* ("always mutually excepted"), but in such a case the charterer should endeavour to get it into the *special clauses* dealing with loading or discharge, since otherwise the general exception may be narrowly construed as not applying to the charterer's obligation to pay demurrage.[43]

In voyage charters, the shipowner has the same desire to reserve to himself the privilege of avoiding hindrances which may make the performance of the contract less profitable. As we have seen, the rules relating to the determination of the laytime will, to a certain extent, protect him against the consequences of the vessel's immobilization in port but this is by no means sufficient. The vessel may be prevented from *reaching*

[38] See TIBERG p. 157.

[39] At pp. 45 et seq., 157, 351 et seq.

[40] At pp. 51 et seq., 155 et seq., 390 et seq.

[41] At pp. 54 et seq., 397 et seq.

[42] See concerning the legal nature of the contract of affreightment supra p. 20 and infra pp. 57–9.

[43] See, e.g., *Continental Grain Co.* v. *Armour Fertilizer Works* (*The Buffalo Bridge*) 1938 AMC 414 SDNY; *Yone Suzuki* v. *Central Argentine Ry. Ltd.* 1928 AMC 1521 CCA 2nd; and *Clyde Commercial S.S. Co.* v. *West India S.S. Co.* (1909) 169 Fed 275 CCA 2nd. See for comments to the current exception clauses TIBERG, p. 355 et seq.

the port owing to circumstances which could not be attributed to the charterer[44] and exception clauses may prevent the running of the laytime in port. The remedies available for the shipowner at law will be considered below, but, already at this stage, it should be pointed out that the Scandinavian Maritime Codes do *not* contain any *general rule* to the effect that the shipowner may cancel the contract if the vessel, owing to some unexpected contingency, faces an "inordinate delay".[45] In voyage charters, such delay may make the conditions for the performance fundamentally different from those contemplated by the contracting parties and seriously affect the shipowner's engagements but, nevertheless, SMC § 126 only regulates the *charterer's* possibility of cancelling the contract when the vessel arrives late at the port of loading and this causes the frustration of the charterer's commercial object; the shipowner finds himself in a vacuum which he must endeavour to fill by resorting to the protection of the general principles of contract law.[46] Although such general principles offer a certain protection in exceptional cases,[47] the shipowners have preferred the safer, more complete and diversified protection of explicit clauses. The wording of such clauses show an abundant variety but some common features can be noted.

Firstly, if the cargo has not been taken onboard, the shipowner tries to protect himself by reserving the right to cancel the contract on the occurrence of the hindrance.

Secondly, if the cargo has been taken onboard he reserves in deviation[48] or "liberty to call" clauses the right to deviate to "any port or ports in any order" for "any purpose" and by stating that all this is

[44] See further infra p. 330 concerning the effect of "near" and ice clauses with regard to hindrances outside the ambit of the port.

[45] See concerning this expression infra p. 165.

[46] Cf. the German HGB § 637 (supplementing the more specific preceding sections §§ 629–636) where *both* parties have been awarded a "Rücktrittsrecht" if "der erkennbare Zweck des Vertrages durch einen solchen Aufenthalt vereitelt wird". See SCHAPS-ABRAHAM Anm. 4 to § 637. Similarly, the Italian Code of Navigation arts. 427, 429 and the proposal of CMI to an "International Code on Affreightment" of 1922. See CMI Bulletin No. 57 (Antwerp 1923) pp. 12, 33, 59.

[47] See ND 1918.319 SCD infra p. 350; BRÆKHUS, Ishindringer p. 16; JANTZEN, Godsbefordring p. 270 et seq.; and id., Skibsforsinkelser, ND 1935 p. 337 et seq.; and infra p. 221 et seq.

[48] Since there are no mandatory rules restricting the draftsmen of the contract forms there is no need for euphemisms such as "scope of voyage" or similar expressions.

done "as part of the contract voyage", the shipowner retains the right to claim the freight under the same conditions as would have been the case if the voyage had been fulfilled as originally contemplated.

The general deviation and "liberty to call" clauses are usually supplemented by *special* and more explicit "strike", "ice", "liberty to *comply*" and "war" clauses.[49] The modern trend to establish a proper balance between the contracting parties—particularly apparent in the so-called "agreed documents"[50]—reduces the shipowner's options under deviation and "liberty to call" clauses by stipulating that any deviation must be reasonable, thus, by and large, restoring the position between the parties as it would have been *ex lege* in the absence of a clause.[51] The drafting technique used in such cases simply amounts to adding the word "reasonable" before the word "deviation" which (1) reduces the scope of the words "any other deviation", (2) indirectly implies that all the aforementioned, enumerated liberties must be exercised "reasonably" as well.

See Scancon cl. 5 and Polcon (1950) cl. 13. In Hydrocharter (1950) cl. 12 reads: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement . . ." This gives the impression that the enumerated liberties may be freely exercised, since the word "other" has been omitted. Similarly, Genorecon (1963), where cl. 24 starts with a rather extensive enumeration concluded by the words "or to make any reasonable deviation".

Some voyage charter party forms contain *options for the charterer* to choose between certain alternatives in case of hindrances affecting the performance of the charter party. This feature is well evidenced by the strike clauses of, e.g., the Gencon and Baltcon charter parties.

The Gencon General Strike Clause runs as follows:

"Neither Charterers nor Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this contract.

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[49] See concerning "liberty to comply" and war clauses infra p. 67.

[50] See for typical examples Baltcon and Scancon which were agreed between BIMCO and organizations representing the cargo-owners. See for commentaries JANTZEN, Baltconcertepartiet; RØRDAM, Treatises on the Baltcon-Charterparty; HAGBERG, Scanconcertepartiet; and BECH, Scancon. En kort orientering. However, the Scancon charter party has so far only had a limited success.

[51] See HAGBERG, op. cit. note 50 p. 12.

If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, Captain or Owners may ask Charterers to declare, that they agree to reckon the lay-days as if there were no strike or lock-out. Unless Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, Owners shall have the option of cancelling this contract. If part cargo has already been loaded, Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours, Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charter-party and of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion."

From the cited clause it appears that the charterer may choose between (a) the alternative of accepting the liability to pay strike-demurrage (provided the laytime running during the strike is exceeded) and (b) the alternative of accepting the shipowner's cancellation of the contract. The charterer's option seems, perhaps, at first sight to grant him a valuable benefit, but in the end it proves to be a rather diluted one; the only real protection he gets lies in the fact that he does not have to accept an arbitrary cancellation by the shipowner caused by an unduly pessimistic appreciation of the future developments. Now the choice is his, but, if he chooses the wrong alternative, he is the one to suffer from the immobilization of the ship (although with a certain distribution of risk with regard to the port of discharge where only half demurrage shall be paid).

Furthermore, the clause solves the problem when the cargo has been loaded, partly or wholly. The shipowner has the obligation to proceed with such cargo onboard in spite of the fact that the charterer has the duty to pay freight on loaded quantity only.[52] But this disadvantage

[52] Cf. SMC §§ 132, 133 infra p. 98 et seq.

may be neutralized by his liberty to fill up with other cargo on the way for his own account (Cf. SMC § 74 refusing the shipowner this remedy in the absence of a clause).

If a strike or lock-out affects the port of discharge the basic idea is the same; the charterer may choose between the risk of having to pay demurrage or the inconvenience of having the vessel discharged in a substituted port against payment of full freight or even an increased freight if the distance of the substituted port exceeds 100 nautical miles.

The Strike Rules of the Baltcon charter party express the same general idea with regard to the port of loading, although somewhat modified to the charterer's benefit by a more favourable distribution of the risk arising on account of the vessel's immobilization.[53] And the same pattern appears in some common ice clauses.[54]

Although in voyage charters, as distinguished from time charters, the shipowner is the one who will suffer the most if the performance of the voyage is prolonged during a longer time than contemplated, we have seen that his risk, by way of the current clauses, is considerably modified with regard to hindrances immobilizing the vessel *in the ports.*

The above outline of the distribution of risk between the shipowner and the voyage charterer has shown that the shipowner seeks to modify his risk by retaining a right of cancellation as well as liberties to perform the voyage so as to avoid any disadvantages whatsoever, while the charterer has to assume a risk increasing *more or less in proportion to his increased power to direct the ship.* Thus, there is, in this respect, a sliding scale which leads on to the time charter, where the charterer is given a general power to direct the vessel but with the ensuing obligation to assume the risk of delay as well as of physical damage to the vessel arising directly from his orders to the vessel.

There are also some special types of contracts of affreightment which, in several respects, are different from the typical voyage charters. Thus, the charter party may concern *a part of the vessel* only (Sw. "delbefraktning"). In such contracts, the similarity to the situation in liner trade will increase with the number of persons chartering different parts of

[53] However, under the Baltcon Strike Rules, the charterer will have to decide whether *he* wants to cancel on the shipowner's notice of the impending strike.

[54] See, e.g., Gencon General Ice Clause; Hydrocharter cl. 19; and Scancon cl. 15. See for commentaries to this type of clauses BRÆKHUS, Ishindringer p. 18 et seq.; BRÆNNE-SEJERSTED pp. 135–9; and HAGBERG, Scancon pp. 19–21.

the vessel.[55] As soon as the shipowner has *more than one* contracting party for each voyage, the possibility of extending options with regard to the operations of the vessel decreases, since the different charterers may wish to exercise their options in a different way. Thus, for example, a shipowner who has let different parts of the vessel to different charterers under a Gencon charter with the General Strike Clause (supra) may find himself in an awkward dilemma if one charterer wishes to assume the risk of having to pay strike demurrage, while the other would prefer to accept the shipowner's cancellation.[56]

There are two types of contracts of affreightment, charters for *consecutive voyages* (Sw. "konsekutiva resor")[57] and *general carrying contracts* (Sw. "transportkontrakt"),[58] which resemble the time charter in that such contracts usually concern as many voyages as the vessel can perform during a *certain period* (consecutive voyages) or the transport of a certain quantity of cargo over a *certain period of time* (general carrying contracts). However, both these contract types should be classified as *voyage charters*—at least for the purpose of this study—since the freight is determined for each voyage and for the amount of cargo transported respectively. This means that the shipowner *assumes the risk of delay* and is the one to become adversely affected if the vessel cannot perform as many voyages as expected or if the transport of the agreed merchandise cannot be performed as efficiently as contemplated.[59] The distinction between a contract concerning consecutive voyages and general carrying contract lies in the fact that the former concerns a *specific vessel*, while the latter does not. For the purpose of the present study it is particularly important to observe two main problems arising under consecutive voyages and general carrying contracts respectively. Since a contract concerning consecutive voyages involves re-iterated performances, we shall have to decide whether the contract is *divisible* so as to permit a cancellation of one or more voyages, while

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[55] See RAMBERG p. 36.

[56] Cf. SMC §§ 127, 133; HGB § 641; and Prot. HGB p. 2442.

[57] See FALKANGER, Konsekutive Reiser; and GRAM pp. 146–53.

[58] See FALKANGER, Kvantumskontrakter AfS Vol. 5 (1961) pp. 370–413; and GRAM pp. 154–8.

[59] See with regard to consecutive voyages FALKANGER, Konsekutive Reiser p. 47; and GRAM p. 147; and with regard to general carrying contracts FALKANGER, Kvantumskontrakter p. 373; and GRAM p. 154.

the rest of the contract still remains in effect.[60] And which is the nature of the shipowner's promise to carry a certain quantity of cargo over a certain period of time when his contemplated performance is affected by hindrances of various kinds?

The question whether consecutive voyages may be considered divisible contracts has been examined by FALKANGER[61] who concludes that the solution depends upon an interpretation of the precise terms and the general character of the contract in each case. In particular, it is important to see whether a cancellation of a part of the contract will disturb the intended performance of the rest.[62] It appears from the English cases that the courts are not inclined to regard contracts for consecutive voyages as divisible.[63]

Since, in general carrying contracts, the shipowner does not undertake to perform the contract with one or more *specific* vessels, his obligation becomes *generic* and it is not discharged even if the vessel(s) which he had contemplated to use for the performance of the contract become(s) unavailable. The case-law shows that it is only seldom that the shipowner is in a position to invoke general principles of law (such as impossibility, *vis major*, the doctrine of frustration) as an excuse from performance of such contracts.[64] This being so, the character of the shipowner's obligation in general carrying contracts resembles the obligation of the seller of unascertained goods.

See § 24 of the Uniform Scandinavian Sales Acts. But cf. RODHE § 48 at note 40, where he states that the principle of § 24 of the Uniform Scandinavian

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[60] Cf. successive performances in the law of sales §§ 22, 46 of the Uniform Scandinavian Sales Acts adhering to the principle that such contracts are *in dubio* divisible.

[61] Konsekutive Reiser p. 139 et seq.

[62] FALKANGER, op. cit. at p. 143.

[63] See, e.g., *Evangelos Eustace Ambatielos* v. *Grace Brothers & Co.* (*The Efstathios*) (1922) 13 Ll. L. Rep. 227 H.L., See for further references and for the position in French, Belgian and German law CARVER § 460; RIPERT II § 1368; SMEESTERS & WINKELMOLEN I § 279; CAPELLE pp. 91–3; and FALKANGER, Konsekutive Reiser pp. 144–6 at notes 36–51.

[64] See *Cork Gas Consumers Co.* v. *Witherington & Everett* (1920) 3 Ll. L. Rep. 194 K.B.; *Associated Portland Cement Manufacturers Ltd.* v. *William Cory & Son* (1915) T.L.R. 422 K.B.; and *Larrinaga & Co.* v. *Soc. Franco-Americaine des Phosphates de Medulla* (1923) 16 Asp. M.C. 133 H.L. See for a case where the doctrine of frustration has freed the shipowner from his obligations under a general carrying contract *Pacific Phosphate Co.* v. *Empire Transport Co.* (1920) 4 Ll. L. Rep. 189 K.B. See further infra p. 363 et seq.

Sales Acts, although appropriate, has not been applied to contracts of affreightment. However, he refers to JANTZEN, Godsbefordring p. 53, where JANTZEN states that the shipowner (1) warrants that he has secured himself the necessary tonnage and (2) becomes liable if he has not secured such tonnage or "later cannot procure the necessary tonnage *in spite of reasonable efforts*" (Norw. "ikke senere kan skaffe den nødvendige tonnasje *tross rimelige anstrengelser*") [my italics]. On the other hand, FALKANGER[65] thinks that JANTZEN has insufficiently stressed the absolute character of the shipowner's obligation ("synes å betone ansvarets strenghet for svakt") and concludes, referring i.a. to ND 1917.118 The Maritime Court of Kristiania and ND 1920.86 SCN (see infra p. 275), that the shipowner is only free in case of objective impossibility (Sw. "objektiv omöjlighet"), i.e. the same principle as appears in § 24 of the Uniform Scandinavian Sales Acts.[66] It happens that the shipowners by way of contract clauses try to obtain a protection which, owing to the nature of their bargain, they do not enjoy *ex lege*. Such a "hardship clause" may run as follows:

> "Both owners and charterers realize that circumstances may arise which could not be foreseen at the time of this agreement, and they agree that neither party shall seek to gain undue or unreasonable advantage over the other as a result of such unforeseeable circumstances. Should such circumstances arise during this contract placing undue hardship on either party, both sides should be free to approach one another with the expectation of an as amicable arrangement as possible." (Taken from FALKANGER, Kvantumskontrakter p. 398.)

But, as pointed out by FALKANGER loc. cit., it is highly questionable whether such a diluted clause implies any additional protection for the contracting parties if unforeseen contingencies emerge affecting their position under the contract.[67] On the other hand, general carrying contracts are sometimes provided with *more precise* clauses, such as the *escalation clauses*, stipulating an adjustment of the amount to be paid by the charterer subject to a rise or fall of the costs incurred for the performance of the contract (i.e. costs for wages to the crew, bunkers, insurance premiums), or *war clauses* freeing the parties from the contract in case of a war between the Great Powers or between the countries to which the contracting parties belong.[68]

§ 1.4. *Time charters*

The most apparent distinction between voyage and time charters lies already in the word "time" which indicates that the hire is running according to the actual time during which the vessel is put at the char-

[65] Kvantumskontrakter p. 400.

[66] See infra p. 144.

[67] See also NC (1967) p. 4067.

[68] See further infra p. 90.

terer's disposal. Thus, the risk of delay is in principle transferred to the charterer who, in his own interest, must see to it that the vessel is used as efficiently as possible. On the other hand, the *use of the vessel* may be more or less the same under voyage and time charters, since the charterer may very well fix the vessel on a time charter basis in spite of the fact that he wants to use it for *one specific voyage* only and for the carriage of a *specific cargo*. The important feature of the time charter is still there; the charterer has to pay hire according to the time spent for performance of the voyage, although the period is determined indirectly by the duration of the contract voyage(s).[1] However, the *typical* time charter shows several different features compared to the *typical* voyage charter. While the voyage charterer's power to direct the vessel to ports, places and berths rests upon provisions in the charter party specifically, *enumerating* his options, the time charterer is, ordinarily, given a *right of a more general kind.* He may direct the vessel within certain "trading limits"[2] for the carriage of "lawful merchandise" in "lawful trades". As a corollary to this general right it is usually stipulated:

"The Master to prosecute all voyages with the utmost despatch and to render customary assistance with the Vessel's Crew. The Master to be under the orders of the Charterers as regards employment, agency, or other arrangements. The Charterers to indemnify the Owners against all consequences or liabilities arising from the Master, Officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying goods. The Owners not to be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise.

[1] Such contracts have in German law been called "uneigentliche Zeitcharter" but are considered true time charters. See WILLNER p. 32; SCHAPS-ABRAHAM Einleitung to § 622; and cf. for a critical attitude to the term "uneigentliche Zeitcharter" LORENZ-MEYER p. 54; and id., Hansa 1958 p. 2362. See from English law *Admiral S.S. Co.* v. *Weidner, Hopkins & Co.* [1917] 1 K.B. 222 C.A.: "It is upon a time charterparty form, and although it is expressed to be for two Baltic rounds it is in fact a time charterparty, the period not being measured by months but by the indefinite standard of two Baltic rounds (per BAILHACHE J. in [1916] 1 K.B. 429 at p. 435); and *Ocean Tramp Tankers Corp.* v. *V/O Sovfracht* (*The Eugenia*) [1963] 2 Lloyd's Rep. 381 C.A. (Lord DENNING at p. 388).

[2] Usually restricted by the so-called Institute Warranties specifying the geographical limits within which the shipowner obtains coverage under the hull insurance policy. See DOVER, Analysis pp. 115–17, 357–8; and GRAM pp. 172, 220.

If the Charterers have reason to be dissatisfied with the conduct of the Master, Officers, or Engineers, the Owners, on receiving particulars of the complaint, promptly to investigate the matter, and, if necessary and practicable, to make a change in the appointments." (Baltime cl. 9.)[3]

The *specific vessel* is even more important than in voyage charters, since the charterer is more dependant upon the characteristics of the vessel in order to derive the full benefit of the charter.[4] The charterer is not only interested in the physical characteristics of the vessel but more generally in the possibility of using the vessel efficiently in the trade encompassed by the charter party.[5] Therefore, the frequency of substitution clauses is even less in time charters than in voyage charters, but may very well appear owing to the special character of the time charter concerned.[6]

The *duration* of time charters is usually longer than the duration of voyage charters and this fact has a considerable impact on the choice between the different remedies which should be allowed the charterer if the vessel does not meet the requirements with regard to seaworthiness, speed, oil consumption, etc. The hesitation in treating such discrepancies as sufficiently important to warrant the cancellation of a time charter, covering a long period of time, is apparent from the case-law as well as the opinions of legal writers.[7]

The typical *division of functions and costs* between the parties is different compared with voyage charters. The role played by the time char-

[3] Cf. Produce (1946) cl. 8: "The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency".

[4] See concerning the importance of the description of the vessel in time charters as compared with voyage charters FALKANGER, Konsekutive Reiser pp. 48–9.

[5] See, e.g., ND 1963.27 *The Netta* SCD, where the vessel was subjected to discrimination from the Syrian authorities owing to the fact that she had earlier sailed to Israeli ports. The charterer was considered to have had the right to repudiate the charter party, since his possibility to use the vessel was considerably reduced by the attitude of the Syrian authorities. But see ND 1922.193 *The Vikholmen* SCN infra p. 254; and *Compagnie Algerienne de Meunerie* v. "*Katana*" *Societa di Navegazione Marittima, S.P.A.* (*The Nizetti*) [1960] 1 Lloyd's Rep. 132 C.A. supra p. 38. Cf. the law of sales, where a restriction regarding the use of the goods may amount to a defect called "rådighetsfel". See HELLNER, Köprätt § 18.1 and for a typical example NJA 1961.330.

[6] See, e.g., MICHELET, Beskrivelsen av skipet pp. 407, 435.

[7] See *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 C.A.; ND 1949.312 Norw. Arb.; SOU 1936:17 p. 216 et seq.; JANTZEN, Godsbefordring p. 403; MICHELET, Beskrivelsen av skipet p. 405; RØRDAM pp. 31, 117; and generally BENGTSSON § 10.

terer is more accentuated and it is, perhaps, possible to state broadly that the entire "commercial function" is the charterer's affair, while the shipowner primarily has to take care of the "nautical function".[8] Thus, the shipowner has to provide a vessel with sufficient crew and stores and which is in all respects seaworthy (SMC § 138. Baltime cl. 3; and Produce (1946) cl. 1). The charterer shall provide bunkers and pay running expenses with the exception of wages to the crew, insurance premiums and costs to maintain the vessel in a seaworthy condition (SMC §§ 138, 140. Baltime cl. 4 and 5; Produce cl. 2). Furthermore, the charterer shall perform the loading, stowage and the discharge (SMC § 139. Cf. the FIO-clause supra p. 42). The fact that the charterer is in charge of the "commercial function", and often uses the time-chartered vessel in his own fleet, has been reflected in the system of liability under time charter parties. The charterer has, in principle, to assume the consequences for damage to the cargo, but, since the shipowner has the obligation to provide a seaworthy ship he will have to assume liability for cargo damage caused by the vessel's unseaworthiness. However, in this regard it should be noted that the Baltime charter party contains a favourable rule for the shipowner, since he is only liable for "want of due diligence on the part of *the Owners or their Manager*" [my italics].[9] Since the provisions of the charter party have no effect with regard to the remedies available to third parties to direct claims against the shipowner or the charterer as the case may be, the shipowner obtains an additional protection under the "employment clause" (Baltime cl. 9 and Produce cl. 8) for damages caused to him by the Master's signing bills of lading or the charterer's orders as regards "employment, agency or other arrangements".[10]

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[8] See the observations in SOU 1936:17 p. 209. But care should be taken not to base the solution of legal problems on such a broad distinction. Such efforts have been made by WILLNER, p. 32, with regard to the liability towards third parties but this method has been criticized by LORENZ-MEYER p. 65 et seq.; and SCHAPS-ABRAHAM Anm. 6 to § 510.

[9] Baltime cl. 13. See concerning this expression supra p. 39.

[10] See concerning the interpretation and consequences of this clause RAMBERG pp. 116–18 with further references; and cf. SMC § 141. In ND 1961.325 *The Vestkyst*, the Supreme Court of Norway adopted a restrictive attitude with regard to the shipowner's recourse action against the voyage charterer under the Gencon charter party, where there is no *express* warranty by the charterer to hold the shipowner harmless from actions directed against him by bill of lading holders.

As pointed out by the arbitrators in ND 1961.127 *The Granville* Norw. Arb., *the bargaining position of the contracting parties* is fairly equal in time charter party relations and, consequently, there is no need, in case of ambiguous clauses, to award the charterer the benefit of a generous interpretation in his favour. For this reason, the system of liability under clause 9 and clause 13 of the Baltime charter party was upheld, in spite of the fact that the individual charter party also contained a Paramount clause incorporating the Hague Rules.[11]

As already mentioned, the charterer has, in principle, to assume the risk of delay, since the charter hire runs in any event. But it is important to point out that the *shipowner* is struck by the consequences of a delay affecting the vessel *before* the delivery to the charterer. And if he does not succeed in tendering the vessel at a fixed time, the *charterer* may cancel, or if there is no fixed time for the delivery, he may cancel under the same requirements as the voyage charterer (SMC § 146 conforming with § 126, supra p. 37). Similarly, the shipowner will have to *pay damages* to the charterer if he does not succeed in satisfying the court that the delay could not be attributed to negligence on the part of himself or his servants (SMC § 147 conforming with § 130, supra p. 39).[12] The chapter on time charters is lacking in provisions giving the shipowner the right to cancel for other causes than such as could be attributed to the charterer (SMC § 148, failure to pay the charter hire). In this respect, the shipowner will have to rely on the protection of specific clauses or the general principles of contract law.[13] But when the shipowner has succeeded in delivering the vessel, the charterer is the one who becomes most interested in the right of cancellation and the shipowner is, ordinarily, not at all interested in having the contract cancelled, unless he can engage the vessel on new favourable terms. And the unfortunate charterer will find no provision in the Scandinavian Maritime Codes to support him. Now it is his turn to rely on specific clauses or on the general principles of contract law. In this regard it is important to observe *the distribution of risk* inherent in the rules determining the

[11] See RAMBERG p. 108.

[12] But see the exemption from liability contained in Baltime 13, supra p. 54, which is also applicable with regard to damage caused by delay.

[13] See infra p. 298. In English law, the shipowner was excused from performance on account of a delay *before* delivery of the time chartered vessel in one of the leading frustration cases, *Bank Line* v. *Capel & Co.* [1919] A.C. 435 infra p. 166.

cessation of hire. As previously mentioned, the charterer is relieved from the duty to pay the charter hire in certain instances and this appears from the "statutory off hire clause" in SMC § 144 (supra p. 25) as well as the "off hire" clause in the charter party forms. The "off hire" clause of the Baltime charter party (cl. 11) will be cited as an example.

11. (A) In the event of drydocking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owner's stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than twentyfour consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance to be adjusted accordingly.

(B) In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars or suffering an accident to her cargo, any detention of the Vessel and/or expenses resulting from such detention to be for the Charterers' account even if such detention and/or expenses, or the cause by reason of which either is incurred, be due to, or be contributed to by, the negligence of the Owners' servants.

It is often asserted that the general principles of contract law excusing the contracting parties from performance apply regardless of the type of contract of affreightment concerned[14] although due consideration must be paid to the particular circumstances of each case. And under this theory the Anglo-American doctrine of frustration has been permitted to free the parties to time charters as well; the matter has been considered one of degree (infra p. 314). But there is an important difference between voyage charters and time charters which must not be overlooked. In a voyage charter, as well as in a time charter *before* delivery of the vessel, the delay might be prolonged indefinitely,[15] whereas, under a time charter party, after the vessel has been delivered, the contingency preventing the use of the vessel may at worst operate to the charterer's detriment *during the period determined in the charter party*.[16] This being so, it is possible to maintain that the distribution of

[14] See infra p. 186.

[15] The duration of the time charter is ordinarily fixed for a certain period counted from the time the vessel is delivered. The delay might be prolonged indefinitely under a time charter *after* delivery as well, provided the period is to be measured by the duration of the contract voyage(s).

[16] Provided, of course, that the period of the charter is not prolonged by adding time lost to the agreed time charter period. This is not the case *ex lege*. See SOU 1936:17 p. 216. But the time charter party may provide for such prolongation. See, e.g., Standime cl. 9.

risk inherent in the "off hire" clauses should not be upset by the application of general principles such as the doctrine of frustration.[17]

Writers and judges treating a specific problem always seek an approach warranted by the pertinent facts. It is by no means certain that their classifications are suitable for other, seemingly similar, problems. And it is, of course, even more inappropriate to derive solutions for dissimilar problems from the same uniform concepts.[18] This is why the present study concentrates on the explanation of the main feature of the various contracts of affreightment as they appear in practical life, rather than on an effort to analyse their respective legal character. And, indeed, it does not seem that the speculation concerning the legal nature of the various contracts of affreightment has contributed much to the solution of practical problems. Generally it seems to have been at best rather extravagant, at worst misleading.[19]

Although, nowadays, it is generally recognized that contracts of affreightment in liner trade and voyage charters should be considered as contracts for work (*locatio conductio operis*), the element of lease (*locatio conductio rei*) has been considered more predominant in time charter parties. PLATOU, Forelæsninger p. 223, considers that there is no difference between a bare boat and a time charter party, since the contract may very well consist of the two components lease (*locatio rei*) and contract for work (*locatio operarum*). The same attitude has been taken by the Danish writer F. GRAM, Søret p. 156. However, it was pointed out by GRUNDTVIG, p. 137, that the time charter fell within the contract for work (Dan. "Værksleie"), since the shipowner undertook to achieve a certain result, *viz.* to carry out the voyages which the charterer ordered him to do pursuant to the terms of the charter. Nevertheless, GRUNDTVIG saw in all kinds of affreightment contracts "an element of lease" in that the shipowner undertook to perform the contract with a specific vessel. An apposite objection to this view was raised by the Finnish writer LANG, p. 376, who maintained that the fact that the contract concerned a specific vessel could not change the legal nature of the contract, since it only meant that the shipowner's option to perform the contract was limited with regard to the vessel (Sw. "emedan en sådan bestämning har betydelsen att utgöra endast ett närmare begränsande av sättet, varpå fraktföraren skall fullgöra sin prestation"). Nevertheless, LANG did not want to treat the time charter as a pure contract for work but rather as a contract *sui generis*. The same view was taken by KNOPH, p. 149, who stressed the point that the service performed by the ship-

[17] See infra p. 312.

[18] Cf. the observation by TREITEL, Some problems of breach of contract, M.L.R. 1967 pp. 139–155.

[19] Cf. GRÖNFORS, Successiva transporter p. 88 et seq.; and RAMBERG p. 36.

owner was less predominant than the placing of the vessel at the charterer's disposition. This being so, KNOPH regarded the time charter as a contract *sui generis* where elements from the contract for work as well as the lease appeared (Norw. "en kontrakt sui generis, hvor elementer både fra verks-, arbeids- og tingsleie gjør sig gjeldene").

The legal nature of the time charter was also discussed in the *travaux préparatoires* to the amendments of the Maritime Code in the 1930s. The time charter was considered a contract of affreightment although a rather peculiar one. The fact that the shipowner undertook to man the vessel distinguished the contract from the bare boat charter and this fact was referred to as an explanation of the classification of the time charter as a *locatio conductio navis et operarum magistri et nauticorum.*[20]

Several German writers adhere to the same classification ("Sachmiete in Verbindung mit einem Dienstverschaffungsvertrag").[21] The prevailing opinion in German law that the time charter is to be treated as a special kind of lease has been criticized by LORENZ-MEYER who points out that the difference between the bare boat charter and the time charter is considerably greater than between the time charter and the voyage charter. This being so, LORENZ-MEYER suggests that the rules relating to the voyage charter should be preferred when need arises for an analogous application. True, the terminology used in the current time charter party forms gives the impression that the contract is one of lease ("let", "right of withdrawal", "delivery", "hire", etc.) but LORENZ-MEYER makes the cogent remark that these terms "zu unverbindlichen Floskeln herabgesunken sind"[22] but he admits that even a "besitzlose Miete" is a lease, provided its object is "Gebrauchsüberlassung" and that it does not contain elements of "Dienst"– or "Werkvertrag" (at p. 96). However, he concludes that the time charter is not a lease, since "Die Raumüberlassung bleibt eine unter mehreren Leistungen des Eigentümers" (at p. 98).

The above exposition seems sufficient to conclude that one should not pay too much regard to the efforts to apply or create an appropriate uniform concept. The elements of the time charter party become more or less predominant according to the problem at hand. True, appropriate

[20] SOU 1936:17 p. 208.

[21] See WILLNER p. 208. The German HGB does not contain any provisions specifically relating to time charters. However, HGB recognizes a special contract type, "Ausrüstervertrag", mainly introduced in HGB (§ 510) in order to solve the question of liability to third parties and not for the purpose of regulating the bare boat charter (see Prot. HGB p. 1657 et seq.). The current employment clauses of the time charter parties (see supra p. 52) are not understood to mean that the possession is transferred to the charterer so as to make him an "Ausrüster" See SCHAPS-ABRAHAM Anm. 5 to § 510; BGHZ (1956) 22.197 (regarding the Deuzeit charter party); and BGHZ (1957) 26.152 (Baltime).

[22] At p. 79. Cf. JANTZEN, Den saakaldte "Tilbagetrækningsret", ND 1913 p. 337 at p. 355.

solutions could be found by the application of rules from other contract types when the relevant circumstances warrant such a method. But, clearly, this can be done without classifying the time charter once and for all into one of the contract types of contract law.[23]

§ 2. *War Risks and War Clauses*

§ 2.1. *War Risks*

War risks have threatened merchant shipping through the centuries, and as the statutory provisions of the Maritime Codes in Scandinavian and Continental law,[1] as well as the current clauses, bear witness, such risks have had a considerable impact on the relationship between the parties to a contract of affreightment.

While, formerly, the risks were ordinarily confined to certain trades and mainly concerned seizure, capture, confiscation and subsequent condemnation in prize proceedings of vessel and merchandise, as well as dislocation of commerce by blockades and prohibitions, modern wars give rise to risks of quite another kind. And, as will be seen below, the changed methods of warfare are well reflected in the current clauses originating with the sparse provisions of the old "Restraint of Princes" clause and culminating in the voluminous "Government Directions" clauses.

The 20th century has brought about quite a few unpleasant changes:

(1) the *total war* where the entire resources of the participating States are engaged under strict governmental control;
(2) the *dilution of the international law of the sea* resulting in an insufficient—or even worthless—protection of not only belligerent but also neutral merchant shipping;
(3) *new methods of warfare* aggravating the war risks to an extent never known in history, and
(4) the *"confined conflicts" of the Korea, Middle East, Vietnam type*, where the Great Powers play a more or less dominant role, through the United Nations or quite independently.

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[23] In this regard the observations by KNOPH, p. 149 et seq., are entirely cogent when he states that it goes without saying that the classification of the contract of affreightment as a contract for work does not mean that detailed solutions can be derived from such a concept.

[1] See infra pp. 94 et seq., 221 et seq.

Naturally, such phenomena must have a considerable impact on the current clauses and on the relationship between the contracting parties *ex lege* when they do not enjoy the protection of a clause. We shall see how the increased risks of physical damage to the vessel, its crew and its cargo, and the more or less accentuated dislocation of commerce, will cause embarrassment to the contracting parties and induce them to elaborate special war clauses in protection.

Before an account is given of the current war clauses, some brief remarks will be made concerning *war risk and war risk insurance.* Since it would go far beyond the purpose of this study to enlarge upon the subject of war risk insurance—a topic which needs considerable attention and space owing to its variety and complexity—I will only stress a few important circumstances having a direct bearing upon the subject of the present study.

A distinction is made between marine perils and war risks. Thus, the usual marine insurance policies with regard to cargo as well as hull exclude the war risks by way of special clauses—in English policies the so-called Free of Capture and Seizure Clause (F.C. & S.).[2] The usual F.C. & S. clause of the Institute of London Underwriters' Clauses shall be cited as an example:

"Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty 'power' includes any authority maintaining naval, military or air forces in association with a power. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom or piracy."[3]

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[2] See concerning the origin of this clause Varekrig p. 25 et seq.

[3] See for the corresponding practice in Norway, Sweden, Germany and France NoPl 1964 §§ 15–17; NoPlV 1967 §§ 17–21; SvPl 1957 § 24; RITTER-ABRAHAM, comments to § 35 of the Allgemeinen Deutschen Seeversicherungs-Bedingungen; and RIPERT III §§ 2665–95. See generally MARQUET, Assurances Maritimes contre les Risques de Guerre; and DOVER, Handbook p. 292 et seq.

However, even in time of peace there is a need for a protection against war risks[4] and such insurance, with respect to cargo as well as to the vessel, is ordinarily taken out and paid for over and above the standard marine insurance policies. The standard Institute War Clause (1/10 1955) will be cited as an example:

1. This Policy covers:

(a) the risks excluded from the Standard Form of English Marine Policy by the clause: "Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty 'power' includes any authority maintaining naval, military or air forces in association with a power. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom or piracy."
(b) loss of or damage to the interest hereby insured caused by:
1. hostilities, warlike operations, civil war revolution rebellion insurrection or civil strife arising therefrom
2. mines torpedoes bombs or other engines of war
but excluding loss or damage covered by the Standard Form of English Marine Policy with the Free of Capture etc. Clause (as quoted in 1 (a) inserted therein.

2. Notwithstanding the foregoing:

(a) the insurance against the said risks, except the risks of mines and derelict torpedoes, floating or submerged, referred to in (b) below, shall not attach to the interest hereby insured or to any part thereof
(i) prior to being on board an oversea vessel,
(For the purpose of this Clause 2 an oversea vessel shall be deemed to mean a vessel carrying the interest from one port or place to another where such voyage involves a sea passage by that vessel)
(ii) after being discharged overside from an oversea vessel at the final port of discharge or
after the expiry of 15 days counting from midnight of the day of arrival of the oversea vessel at the final port of discharge, whichever shall first occur
(iii) after expiry of 15 days from midnight of the day of arrival of the oversea vessel at an intermediate port or place to discharge the interest for on-

[4] See, e.g., the observations by MARQUET § 5; and DOVER, Handbook p. 521.

carriage from that or any other port or place by another oversea vessel, but shall re-attach as the interest is loaded on the on-carrying oversea vessel. During the said period of 15 days insurance remains in force whether the interest is awaiting transit or in transit between the oversea vessels.
(b) the insurance against the risks of mines and derelict torpedoes, floating or submerged, attaches as the interest hereby insured is first loaded on the vessel or craft after such interest leaves the warehouse at the place named in the policy for the commencement of the transit and ceases to attach as the interest is discharged overside finally from the vessel or craft prior to delivery to warehouse at the destination named in the policy (or a substituted destination as provided in Clause 6).
(c) this policy is warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests restraints or detainments of Kings Princes Peoples Usurpers or persons attempting to usurp power.

If the contract of affreightment is terminated at a port or place other than the destination named therein such port or place shall be deemed the final port of discharge for the purpose of this clause and the insurance shall cease to attach in accordance with Paragraph (a) (ii) above, but if the goods are subsequently re-shipped to the original or any other destination, provided notice is given before the commencement of such further transit and subject to the payment of an additional premium, the insurance shall re-attach as the interest is loaded on the on-carrying oversea vessel for the voyage to the original or other destination.

If anything contained in this policy shall be inconsistent with this Clause 2 it shall to the extent of such inconsistency be null and void.

3. Warranted free of loss or damage proximately caused by delay inherent vice or loss of market, or of any claim for expenses arising from delay except such expenses as would be recoverable in principle in English law and practice under York-Antwerp Rules 1950.

4. General average and salvage charges payable (subject to the terms of these clauses) according to Foreign Statement or York-Antwerp Rules if in accordance with the contract of affreightment.

5. Claims for loss or damage within the terms of these clauses shall be payable without reference to average conditions.

6. Held covered (subject to the terms of these clauses) at a premium to be arranged in case of deviation or change of voyage, or other variation of the adventure by reason of the exercise of any liberty granted to the Shipowner or Charterer under the contract of affreightment, or of any omission or error in the description of the interest vessel or voyage.

7. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.[5]

[5] See for an interpretation of this clause DOVER, Handbook pp. 297–307.

Owing to the advent of nuclear weapons and the tremendous risks and dislocations of commerce to be expected from a war between any of the Great Powers, the insurers, in modern war risks policies, tend to except:

"loss damage or expense arising
(a) from any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter, hereinafter called a nuclear weapon of war;
(b) from the outbreak or war (whether there be a declaration of war or not) between any of the following countries
United Kingdom, United States of America, France, the Union of Soviet Socialist Republics, the People's Republic of China."[6]

In addition, they usually retain the right to terminate the policy *with short notice*[7] or *immediately*. A modern Institute Notice of Cancellation and Automatic Termination of Cover Clause runs as follows:

"(1) This insurance may be cancelled by either the Underwriters or the Assured giving 14 days notice (such cancellation becoming effective on the expiry of 14 days from midnight of the day on which notice of cancellation is issued by or to Underwriters). Underwriters agree however to reinstate this insurance subject to agreement between Underwriters and the Assured prior to the expiry of such notice of cancellation as to new rate of premium and/or conditions and/or warranties.
Whether or not such notice of cancellation has been given this insurance shall TERMINATE AUTOMATICALLY
(a) upon the occurrence of any hostile detonation of any nuclear weapon of war as defined in Clause 4 (1) (a) wheresoever or whensoever such detonation may occur and whether or not the property hereby insured may be involved
(b) upon the outbreak of war (whether there be a declaration of war or not) between any of the following countries
United Kingdom, United States of America, France, the Union of Soviet Socialist Republics, the People's Republic of China
(c) in the event of the property hereby insured or any part thereof being requisitioned, either for title or use, in respect of the part so requisitioned.
(2) In the event either of cancellation by notice or of automatic termination of this insurance by reason of the operation of section (1) of this Clause, or

[6] Institute War And Strikes Clauses, Containers (Hulls)—Time 27 May 1968.

[7] See DOVER, Analysis pp. 391–2 (48 hours' notice with regard to cargo); id., Handbook p. 305 (14 days with respect to hull); NoPl 1964 § 33 (14 days with respect to hull); NoPlV 1967 § 44 (14 days with respect to cargo, or 3 days if the coverage has not yet come into effect); SvPl 1957 § 43 (14 days with respect to hull and cargo).

[8] Institute War And Strikes Clauses, Containers (Hulls)—Time 27 May 1968.

of the sale of the property hereby insured pro rata net return of premium shall be payable to the Assured."

The insurers are not readily prepared to extend the coverage to encompass the so-called *frustration risk*, i.e. the risk of other loss than appears in connection with a physical damage to or loss of the insured object. Thus, in English marine insurance practice, the following clause is automatically included when, by the deletion of the F.C. & S. clause, the policy is enlarged to encompass war risks:[9] "Warranted free of any claim based on loss of, or frustration of, the insured voyage or adventure caused by arrests, restraints or detainments of Kings, Princes, Peoples, Usurpers or persons attempting to usurp power".[10]

It is also important to note that the shipowner, in the case of a total loss, may not get sufficient compensation to replace the lost vessel—if this can be done at all under the prevailing conditions.[11]

It is of paramount importance for belligerent as well as neutral States that commerce is not entirely interrupted in time of war[12] and, there-

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[9] However, not in time policies on hulls. See DOVER, Analysis p. 30.

[10] See for an explanation DOVER, Handbook pp. 295–7; ARNOULD § 829; and concerning insurance of the frustration risk generally DOVER, Analysis p. 30; SELVIG §§ 11.2 (at notes 26–30, 37), 11.42 (in fine), 11.45 (at notes 81–2), 11.55–6, 12.1, 12. 31 (at note 5); RISKA p. 197 et seq. But cf. Proposal (1966) to NoPlV p. 48 et seq., suggesting an extended cover when the frustration risk arises in connection with restrictions induced by the war ("krigsmotiverte restriksjoner").

[11] See, e.g., C. F. ELMSLIE in General Meeting of Association of Average Adjusters, London 17 May 1940, Report p. 9: "To put the matter briefly, as I see it the scheme makes it impossible for the shipowners to insure a vessel at a valuation representative of the cost of replacement. As the position is at present, the valuations at which vessels are accepted are far and away lower than the estimated replacement cost, and it would, therefore, seem that a shipowner, if he is to remain in business after the war, will be forced to replace tonnage lost by war risks from funds drawn from reserves or to resort to obtaining new capital by private or public subscription of shares". But see DOVER, Handbook p. 521.

[12] See generally BEHRENS, Merchant shipping and the demands of war; HÄGGLÖF, Svensk krigshandelspolitik under andra världskriget; and SOU 1952: 50 II p. 1051: "No matter how serious the situation, shipowners or merchants should not, by worries with respect to the insurance coverage be restrained, the shipowners from letting their vessels continue on the contemplated voyages and the merchants from continuing their normal import and export" (Sw. "I en än så hotande situation skulle därför icke några betänkligheter angående försäkringsskyddet behöva hindra redare att låta sina fartyg fortsätta på planerade resor, ej heller hindra köpmännen att fortsätta sin normala import och export").

fore, war risk insurance is in most countries secured by State intervention.[13]

The First World War took people by surprise and it was not possible to get the necessary war risk protection right away.[14] Furthermore, in the beginning, there was a certain unwillingness to cover the risks resulting from the carriage of contraband of war and from voyages where the vessel had to pass through blockaded zones.[15] It was necessary to obtain an approval for each voyage from the war risk insurers and as an example it may be mentioned that, on the German proclamation of wood as conditional contraband on 24 November 1914, Krigsforsikringen for norske skib decided not to approve voyages in the Baltic with such cargo. But the former gentleman-like attitude towards neutral shipping, recognizing the rules relating to contraband and blockade, disappeared by and by and, consequently, the war risk insurers had to change their policy. Voyages with contraband were approved and it was now asserted that, owing to the special nature of a violation of the rules relating to the international law of the sea, this did not mean the approval of an illegal act.[16]

After the First Great War, when people had lost some of their illusions, they stood better prepared on the outbreak of the Second Great War[17] and the character of *the first stages* of the war, which by CHURCHILL appositely have been called the "Twilight War", enabled Great Britain and the neutral powers to carry on merchant shipping without too serious losses.[18]

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[13] See Krigsforsikringen for norske skib I p. 15; Varekrig p. 93 et seq.; Protokoll från Nordiska Sjöförsäkringspoolens sjökrigskommitté 22–3 Febr. 1950 (see in particular pp. 130, 147 et seq.); SOU 1952:49 I pp. 46, 87; SOU 1952:50 II p. 1058; Proposal (1966) to NoPIV p. 44; DOVER, Handbook pp. 306, 520–2; MARQUET § 6; and cf. Hansa 1959 pp. 383, 572.

[14] Krigsforsikringen for norske skib I p. 12.

[15] See Krigsforsikringen for norske skib I p. 20: "Neutral States must comply with the rules relating to contraband of war and blockade and must not extend unneutral service to a belligerent power" (Norw. "De nøitrale måtte for eks. rette sig efter reglene for krigskontrabande og blokade og ikke yde en krigførende makt nøitralitetsstridig bistand"); and Varekrig p. 63 et seq.

[16] Krigsforsikringen for norske skib I p. 40; Varekrig p. 86 et seq. See further infra pp. 129, 289.

[17] See SOU 1952:50 II p. 977 et seq.

[18] See BEHRENS p. 5 et seq.; and CHURCHILL I pp. 332, 342 et seq., 392 et seq., 402 et seq.

Modern warfare at sea has given rise to new practices. The hardened attitude towards merchant shipping, particularly the threat from submarines, caused vessels to sail armed in order to obtain some protection by self-defence in lieu of the vanishing protection of the international law of the sea. And this made the treatment of neutral shipping even worse.[19] The system of forcing the vessels to deviate to belligerent ports for control (Svinemünde, Halifax, Kirkwall) caused serious delay and hardship to neutral shipping.

The advent, during the Second World War, of the so-called navicert-system—implying a free pass issued when the British authorities had satisfied themselves that the cargo had an innocent ultimate destination —alleviated the burdens but, by the same token, gave Great Britain better possibilities of controlling that neutral shipping was not used for the purpose of strengthening the resources of her enemies. This in turn further aggravated Germany's attitude and contributed to her unrestricted submarine warfare. And all this resulted in appalling losses of neutral tonnage.

As an example it may be mentioned that during 1917 Norway lost 424 vessels, totalling 670.444 gross register tons (Krigsforsikringen for norske skib I p. 99). And, during the First World War, Norway lost 2000 seamen and 55% of her tonnage (Krigsforsikringen for norske skib II p. 141). The losses for the British merchant marine were, of course, considerably worse. During April 1917 alone a total of 373 vessels were sunk. During the Second World War 30.000 British seamen lost their lives (BEHRENS p. 181) and it is stated by BERBER, p. 195, that "von einer Gesamtwelttonnage bei Ausbruch des Krieges 1939 von 69.430.000 BRT wurden 39.300.000, also mehr als die Hälfte, versenkt, 14.000.000 t. deutsche und verbändete Handelsschiffe, 24.500.000 t. gegnerische"; the German merchant fleet disappeared almost entirely.[20]

It goes without saying that the conditions prevailing during the Great Wars caused a tremendous rise of insurance premiums and war bonus to the crew. In order to reduce the risks as much as possible, the voyages to be performed had to be approved by the war risk insurers and the entire commerce was subjected to a strict governmental control.[21]

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[19] See further infra p. 116.

[20] See for an account of the Swedish losses SOU 1952:50 II p. 1013 et seq.; SOU 1963:60; and further infra p. 134.

[21] See BEHRENS p. 52 et seq.; CHURCHILL I pp. 332, 442 et seq.; SOU 1952:49 I pp. 30, 43, 45, 59–60, 82, 84, 439–40; SOU 1952:50 II pp. 923 et seq., 1001 et seq., 1133; and generally HÄGGLÖF, Svensk krigshandelspolitik under andra världskriget.

For the purpose of the present study it can thus be noted that war risks *to a certain extent* can be converted into a cost—the insurance premium. However, the influence of war risks on contracts of affreightments is not limited to an increased cost, since *the coverage is incomplete* with regard to the risks as well as the amount. And even if a satisfactory coverage in both these respects could be obtained, *a sum of money is not equivalent to a vessel or a piece of merchandise*, which, owing to the very existence of war conditions, perhaps cannot be replaced, or only replaced with the greatest difficulty.

§ 2.2. *War Clauses*

§. 2.2.1. Introduction

The pattern set by the clauses primarily purporting to protect the shipowner in case of hindrances *other* than war risks constitutes the background of the clauses specifically designed to solve the problems arising on account of war and similar contingencies.

Indeed, quite a few of the current general clauses—in particular the "Near" clause, the great variety of liberty, scope of voyage, transshipment and deviation clauses as well as the "lawful trade", "lawful merchandise" and indemnity clauses in time charters—seem to cover a substantial part of the problems arising in time of war as well. This explains why special war clauses were infrequent in older standard forms. The contracting parties relied on the protection of clauses of a more general wording and scope of application. But, as time went by, special clauses were introduced and we shall see that they tend to become more and more explicit, enumerative and voluminous.

The "*Restraint of Princes*" *clause*[1] is the oldest type of war clause and owing to its brevity the variations were rather few and mostly insignificant. The following clause may be cited as an example:

"The Act of God, the Queen's Enemies, Restraints of Princes and Rulers, or Peoples, including interferences of Government Authorities or their officials, and Perils of the Seas shall be mutually excepted" (appearing in i.a. BIMCO's Forms 1–13).

[1] See generally CARVER §§ 173–9; SCRUTTON art. 83; KNAUTH p. 224 et seq.; and for the meaning of this expression in the law of marine insurance ARNOULD §§ 827–32.

In spite of the sparse provisions of the Restraint of Princes clause it was intended—or at least invoked—for the protection of the contracting parties in a number a widely different situations. By adding the word "mutually" its scope was enlarged to encompass the charterer's problems as well, when he found himself unable to fulfil his part of the bargain on account of certain *vis major* hindrances.[2]

However, when the Restraint of Princes clause is invoked as an *excuse from performance* we shall find three apparent shortcomings.

(1) The enumeration of the *events* bringing the clause into operation is insufficient and, in particular, war *risks* are difficult to comprise by the term "restraint".[3]

(2) The clause does not say which *preventing effect* is required for the operation of the clause; should the restraint be permanent and, in a commercial sense, amount to "the perishing of the thing"?[4]

(3) Indeed, it is arguable that the clause does not warrant the cancellation of the contract at all, since it only says that the enumerated events are "excepted" and this word is not synonymous with "render the contract null and void" or "give the shipowner(parties) the right to cancel the contract".

Nevertheless, in spite of these shortcomings, the clause has served an important function in Anglo-American law, where the courts have shown a considerable reluctance to excuse a contracting party from the contract *in the absence of an excusatory clause.*[5] The clause has apparently been sufficient to reassure the courts that they did not commit the unforgivable sin of "making a new contract for the parties", if they excused them in case of a change of circumstances sufficiently serious to warrant such a solution. But as the courts became increasingly sure of themselves, the need for the clause as a support for a right of cancellation in case of substantial war risks was correspondingly reduced.[6] However, we shall see that the more liberal view of the courts was not sufficient to reassure the contract drafters.

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[2] But cf. supra p. 44 concerning the restrictive attitude of the courts in this regard.

[3] This would rather be "an anticipated restraint" which formerly was not considered an excuse. See *Atkinson* v. *Ritchie* (1809) 10 East 530; and infra p. 277.

[4] See infra p. 164.

[5] See infra p. 283.

[6] See, e.g., *North German Lloyd* v. *Guaranty Trust Company of New York* (*The Kronprinzessin Cecilie*) (1917) 244 U.S. 12 and infra p. 297.

§ 2.2.2. War clauses in voyage charters and liner trade

The general liberty clauses have been deemed insufficient in time of war and the shipowners have *extended their liberties* by way of special clauses. Thus, older bills of lading and voyage charter party forms often stipulated that the vessel should have the right to carry contraband and to sail armed or unarmed.[7] Moreover, in so-called "*liberty to comply*" clauses, the shipowner reserved the right to comply with orders and directions by the government or by the war risk insurers. This element of the war clauses has been considered sufficiently important to warrant the heading of the common "Government Directions" clauses in the current bill of lading forms. The "liberty to comply" clause appears frequently in the voyage charter party forms as well. The Chamber of Shipping War Risks Clauses 1 and 2 (cl. 2) shall be cited as an example:

"The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such Government or any department thereof, or by any committee or person having, under the terms of the War Risks Insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be in fulfilment of the Contract voyage and the freight shall be payable accordingly."[8]

Since it was essential that the shipowner did not incur a liability towards other persons than the charterer, and notably bill of lading holders, it was often stipulated: "No bills of lading shall be signed for any port

[7] See for examples STRETCH pp. 14, 31, 33, 35, 37, 220. It was sometimes added "and with or without convoy". See op. cit. p. 35.

[8] See for other forms where this type of clause appears STRETCH pp. 169, 220, 230, 257; and Merseycon (1950) cl. 5; Coastcon Sailer (1950) cl. 16; Baltwood (1950) cl. 14 (b); Pitwoodcon (1950) cl. 12 (b); BIMCO's Saigon Charter Party (1950) cl. 40 (2); Cemenco (1950) cl. 4; Cemencosail (1950) cl. 4; Britcont (1950) cl. 14; Coasthire (1954) cl. 18; Ferticon (1950) cl. 14 (2); Spanfrucon (1926) cl. 25 (b); Conbill (1946) cl. 12 (3); Conlinebill (1952) cl. 16 (a); Conlinethrubill (1952) cl. 16 (a); Sovietwood (1961) cl. 14 (b); Nubaltwood (1964) cl. 14 (b); Baltwar (1938) cl. 5; Voywar (1950) cl. 5 (a); Conwartime (1939) (D); Chamber of Shippings War Risks Clauses (Tankers) (1952) cl. 3. The year within parenthesis indicates when the form was introduced or, if amended, when it was last amended.

which is, or is declared to be, blockaded or for any port to which entry of the vessel or at which discharge of the cargo is prohibited."[9]

However, the impact of war on the performance of the marine adventure warranted an *express right of cancellation* and this important element of the war clause shall be cited from Nubaltwood, where it has been retained in its older version:

"If the nation under whose flag the Vessel sails shall be at war, whereby the free navigation of the Vessel is endangered, or if prohibition of export or blockade prevent the loading or completion of cargo, this Charter shall be cancelled forthwith at the last outward port or at any subsequent period when the difficulty may arise."[10]

The requirements necessary to bring the cited clause into operation are rather stringent. Thus,

(1) it is only when *the nation under whose flag* the vessel sails is
(2) *at war* and under the further requirement that
(3) the free navigation of the vessel is *endangered* that the charter may be cancelled owing to hindrances *affecting the vessel.* And as further hindrances *affecting the cargo* are only recognized
(1) prohibitions of *export* or *blockade*
(2) *preventing* the *loading* or *completion* of the cargo.

We shall se how the impact of the World Wars caused the drafters of the contract forms to be considerably more explicit. In order to exemplify the evolution leading up to Voywar 1950 some commonly used clauses will be cited and commented upon.

GENCON GENERAL WAR CLAUSE

If the nation under whose flag the vessel sails should be engaged in war and the safe navigation of the vessel should thereby be endangered either

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[9] See for clauses to the same effect STRETCH p. 169; BIMCO's Saigon Charter Party (1950) cl. 40 (1); Ferticon (1950) cl. 14 (1); Gencon (1922) General War Clause in fine; Baltwar (1938) cl. 3; Voywar (1950) cl. 3; Chamber of Shipping War Risks Clauses 1 and 2, cl. 1; Chamber of Shipping War Risks Clauses (Tankers) (1952) cl. 1.

[10] The same ingredient is to be found in Centrocon (1914) cl. 32; Benacon (1927) cl. 13; Baltwood (1950) cl. 14 (a); Russwood (1950) cl. 14 (a); Pixpinus (1950) cl. 8; Pitwoodcon (1950) cl. 12 (a); Azcon (1931) cl. 10; Sulcon (1931) cl. 13; Bulcon (1931) cl. 11; Russcon (1931) cl. 13; The 1890 Azoff Charter Party cl. 17; The 1890 Black Sea Charter Party cl. 17; The 1890 Danube Charter Party cl. 17; Austral (1950) cl. 28; Austwheat (1956) cl. 26; Spanfrucon (1926) cl. 25 (a); and Sovietwood (1961) cl. 14 (a).

party to have the option of cancelling this contract, and if so cancelled, cargo already shipped shall be discharged either at the port of loading or, if the vessel has commenced the voyage, at the nearest safe place at the risk and expense of the Charterers or Cargo-Owners.

If owing to outbreak of hostilities the goods loaded or to be loaded under this contract or part of them become contraband of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any of the belligerent powers each party to have the option of cancelling this contract as far as such goods are concerned, and contraband goods already loaded to be then discharged either at the port of loading, or if the voyage has already commenced, at the nearest safe place at the expense of the Cargo-Owners. Owners to have the right to fill up with other goods instead of the contraband.

Should any port where the vessel has to load under this Charter be blockaded the contract to be null and void with regard to the goods to be shipped at such port.

No Bills of Lading to be signed for any blockaded port, and if the port of destination be declared blockaded after Bills of Lading have been signed, Owners shall discharge the cargo either at the port of loading, against payment of the expenses of discharge, if the ship has not sailed thence, or, if sailed at any safe port on the way as ordered by Shippers or if no order is given at the nearest safe place against payment of full freight.

In the Gencon General War Clause we find some improvements to the benefit of the shipowner as well as the charterer. Thus, the mere fact that the goods become *contraband of war whether absolute or conditional*[11] —*or* liable to confiscation or detention not only according to international law but also to the *proclamation of any of the belligerent powers*— is sufficient to give the contracting parties the option of cancelling the charter party.

Owing to the evolution during the World Wars, turning practically all merchandise into contraband of war,[12] the part of the clause referring to contraband has become much too wide. But, on the other hand, it does not cover an *increase of war risk*, since it refers to the *outbreak* of hostilities; changed methods of warfare *during* the war are not covered. Consequently, when the drafters were called upon to make the clause more protective shortly before the outbreak of the Second World War, they chose to be somewhat more explicit. Thus, in Baltwar 1938, we find the following text:

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[11] See infra p. 121.

[12] See infra p. 122.

1. (A) If the nation under whose flag the vessel sails be engaged in war, hostilities or warlike operations or be involved in civil war or revolution whereby the safe navigation of the vessel may be endangered, or

(B) if any port at which the vessel is to load under this contract of carriage be, or be declared to be, blockaded, or if owing to any war, hostilities, warlike operations, civil war, revolution or the operation of international law, entry thereto or departure therefrom become in the Master's discretion dangerous or be prohibited, or

(C) if owing to or during any war, hostilities, warlike operations, civil war or revolution any cargo loaded or to be loaded under this contract of carriage become, or be declared to be, contraband, whether absolute or conditional, or liable to confiscation or detention, but only insofar as cargo so affected is concerned,

either party hereto may declare that this contract of carriage shall be terminated.

2. In the event of such a declaration all cargo loaded, or if the declaration be made by virtue of the provisions of sub-clause 1 (C) hereof such cargo, shall be discharged at the charterers' risk and the owners shall have the right to load other cargo in place of cargo discharged or not loaded. Discharge of cargo shall be effected at the port of loading and at the charterers' expense if the vessel has not left the port, the contract of carriage thereupon being at an end so far as such cargo or cargo not loaded is concerned, and if she has then at such port as sub-clause 4 provides for in respect of cargo discharged under that clause.

3. No bills of lading shall be signed for any port which is, or is declared to be, blockaded or for any port to which entry of the vessel or at which discharge of the cargo is prohibited.

4. (A) If any port of discharge nominated in the contract of carriage be, or be declared to be, blockaded or

(B) if owing to any war, hostilities, warlike operations, civil war, revolution or the operation of international law (a) entry to any such port of discharge of cargo intended for any such port be in the Master's discretion dangerous or be prohibited, or (b) it be found in the Master's discretion dangerous or impossible for the vessel to reach any such port or the port to which she may be ordered after bills of lading have been signed

the cargo or such part of it as may be affected shall be discharged at such safe port which the vessel may call at or would pass in the ordinary course of the contract voyage as may be nominated by the charterers within 48 hours after receiving the owners' request for nomination of a substitute discharging port or at such safe port as the Master may decide on should the charterers fail so to make such nomination.

5. The vessel shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, discharge or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or any person (or body)

acting or purporting to act with the authority of such government or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such orders or directions. If by reason of or in compliance with any such orders or directions anything is done or is not done it shall not be deemed a deviation.
6. The discharge of any cargo at other than the loading port under the provisions of sub-clause 2 hereof or of any cargo under the provisions of sub-clause 4 hereof, so far as such cargo is concerned, and/or the conclusion of the adventure consequent upon compliance with any orders or directions referred to in subclause 5 hereof whether the cargo be discharged or not, shall be deemed to be in fulfilment of the contract voyage and freight shall be payable accordingly. All extra expenses in consequence thereof shall be paid by the charterers and/or cargo owners, the owners having a lien on the cargo for freight and all expenses incurred by them whether for discharging or otherwise.

(1) In order to avoid a literal and restricted interpretation of the word "war", other calamities have been enumerated ("hostilities or warlike operations", "civil war or revolution").

(2) It is not necessary that the port of loading or discharge be blockaded, but it suffices if, owing to the enumerated events," entry thereto or departure therefrom become in the Master's discretion *dangerous* . . ." or, with regard to the port of discharge, "it be found in the Master's discretion dangerous or impossible for the vessel to reach any such port . . .".

(3) In addition, we find an old friend from the ordinary "liberty to call" clauses in the passage stipulating that the *discharge of the cargo* or the *conclusion of the adventure* "shall be deemed to be in the fulfilment of the contract voyage and freight shall be payable accordingly", but in the last sentence of the clause we find that the shipowner has also secured himself the right to claim compensation for *extra expenses*. Discharge at the *port of loading* under the provisions of sub-clause 2 does not give the shipowner the right to claim freight but only the discharging expenses. However, he has the right to load other cargo in place of the cargo discharged.

In spite of the fact that the clause by now has become rather voluminous it does not give the shipowner the desired protection. The introductory words refer to the fact that the nation to which the vessel belongs "*be* engaged in war . . . or *be* involved in civil war". The impact of *increased risks* on a contract of affreightment concluded *during* the war is only considered with regard *to the cargo* which may become contraband and liable to confiscation or detention.

In order to improve the position of the shipowner a special clause was drafted, the Baltic Conference Aggravation of Hostilities Clause 1946.

If after signing of the charter the risks of the vessel and/or the cargo being exposed to seizure, capture or any damage by reason of threatened act of war, war, hostilities, civil commotion, torpedoes, bombs, mines and other occurrence due to war or warlike operations, being substantially aggravated, either party hereto shall have the option of cancelling the charter. Such option must be exercised without undue delay.

If the charterers exercise their option of cancellation, and if such cancellation is effected after the vessel's arrival at or off a loading port, charterers shall in consideration of their exercising such option pay half of the amount of the estimated freight as liquidated damages. Should any cargo already have been loaded such cargo shall be discharged at the charterers' risk. If the owners exercise their option of cancellation when any cargo has already been loaded such cargo shall be discharged at the charterers' risk and expense. The owners shall have a lien on the cargo for all expenses.

In the case of immediate danger necessitating the vessel to leave the port of loading without delay the vessel shall be at liberty to sail with the cargo then on board.

In place of any cargo discharged or not loaded the owners shall have the right to load other cargo for the vessel's benefit at any other port or ports either for the same destination or for any other port or ports whether any of such ports are in the course of the chartered voyage or not.

If the vessel has left the port of loading and the master or the owners deem it too risky to proceed to the destination the charterers shall within 48 hours after receiving the owners' request nominate a substitute safe discharging port. Failing such nomination the cargo shall be discharged at such safe port as the owners or the master may decide on.

If the vessel arrives at a discharging port and the master or the owners at any time consider in his or their discretion that it is dangerous to remain longer in the port or to discharge or complete discharge, the vessel shall be at liberty to leave the port with the cargo on board and to carry such cargo to any safe port which the master or the owners in his or their discretion may decide on, and there discharge the same.

The discharge of any cargo at other than the loading port shall be deemed to be in fulfilment of the contract voyage and full freight shall be paid accordingly. All extra expenses incurred in such case shall be paid by the charterers and/or cargo owners, the owners having a lien on the cargo for freight and all expenses incurred by them whether for discharging or otherwise.

If by reason of or in compliance with this clause anything is done or is not done this shall not be deemed a deviation.

In this clause we find that a *direct reference* is made to the *aggravation of the war risk* and that the events, which brought the former clauses into operation, now are referred to as *causes* of the aggravation of the risk. In this sense, the clause follows the pattern of SMC § 135, which at that time had come into effect in the Scandinavian countries.[13] But the principle of a *mutual* right of cancellation recognized by SMC § 135 has been modified in that

(1) the charterers exercising their option of cancellation after "the vessel's arrival at or off a loading port" must pay "half of the amount of the estimated freight as liquidated damages" and

(2) "in the case of immediate danger necessitating the vessel to leave the port of loading without delay the vessel shall be at liberty to sail with the cargo then on board".

The former war clauses, and notably Chamber of Shipping War Risks Clauses 1 and 2 and Baltwar, give the shipowner insufficient protection *between the time of the signing of the charter* and *the signing of the bills of lading*. Since they contained the words "No bills of lading to be signed, etc. . . ." they were understood to refer to the time of such signing as the earliest moment when the clause could be brought into operation.[14] By the introductory words "If after signing of the charter . . ." the important period between the signing of the charter and the time of the signing of the bills of lading is covered.

Nevertheless there remained risks to be considered. The shipowner, who under voyage charters had to suffer from detentions and delay, i.a. caused by the belligerents forcing the vessels to deviate to ports for control (Svinemünde, Kirkwall, Halifax), preferred to shift the main part of this risk to the charterer by way of special detention clauses. The Baltic Conference War Detention Clause 1946 may serve as an example:

If the vessel should be detained or delayed in any port or otherwise, whether on, before, during or after loading or while proceeding on her way or at any time thereafter and until final discharge and such detention or delay is caused by the direct or indirect action of any government or authorities, or a refusal or reasonable cause to fear a refusal of prompt shipping or docking or discharging facilities, the charterers and/or the receivers shall pay compensation for such detention at the rate provided for demurrage after the expiration of forty eight hours and if permission to continue the loading and/or voyage

[13] See infra p. 100 and p. 256.

[14] See *Government of the Republic of Spain* v. *North of England S.S. Co.* (*The Hartbridge*) (1938) 61 Ll. L. Rep. 44 K.B. per LEWIS J. at p. 57.

and/or by the cargo owners discharge has not been obtained within a fortnight, the owners shall have the option either to let the vessel remain for the charterers' account or to discharge the cargo where the vessel is detained or in the nearest safe and convenient port where such discharge can take place without delay and shall be entitled to full freight and demurrage as per charter. The owners shall have a lien on the cargo for the claim for detention of delay under this clause. The charterers' liability under this clause shall not cease notwithstanding the stipulations in the cesser clause, if any.

This exposition of the evolution since the Restraint of Princes Clause leads up to the modern war clauses where all the ingredients of the older war clauses have been conglomerated. Voywar 1950 shall be cited as an exponent of the drafting technique of our times:

1) In these Clauses "war risks" shall include any blockade or any action which is announced as a blockade by any Government or by any belligerent or by any organised body, sabotage, piracy, and any actual or threatened war, hostilities, warlike operations, civil war, civil commotion, or revolution.

2) If at any time before the vessel commences loading, it appears that performance of the contract will subject the vessel or her Master and crew or her cargo to war risks at any stage of the adventure, the Owners shall be entitled by letter or telegram despatched to the Charterers, to cancel this charterparty.

3) The Master shall not be required to load cargo or to continue loading or to proceed on or to sign Bill(s) of Lading for any adventure on which or any port at which it appears that the vessel, her Master and crew or her cargo will be subjected to war risks. In the event of the exercise by the Master of his right under this Clause after part or full cargo has been loaded, the Master shall be at liberty either to discharge such cargo at the loading port or to proceed therewith. In the latter case the vessel shall have liberty to carry other cargo for Owners' benefit and accordingly to proceed to and load or discharge such other cargo at any other port or ports whatsoever, backwards or forwards, although in a contrary direction to or out of or beyond the ordinary route. In the event of the Master electing to proceed with part cargo under this Clause freight shall in any case be payable on the quantity delivered.

4) If at the time the Master elects to proceed with part or full cargo under Clause 3, or after the vessel has left the loading port, or the last of the loading ports if more than one, it appears that further performance of the contract will subject the vessel her Master and crew or her cargo, to war risks, the cargo shall be discharged, or if the discharge has been commenced shall be completed, at any safe port or vicinity of the port of discharge as may be ordered by the Charterers. If no such orders shall be received from the Charterers within 48 hours after the Owners have despatched a request by telegram to the Charterers for the nomination of a substitute discharging port, the Owners shall be at liberty to discharge the cargo at any safe port which they

may, in their discretion, decide on and such discharge shall be deemed to be due fulfilment of the contract of affreightment. In the event of cargo being discharged at any such other port, the Owners shall be entitled to freight as if the discharge had been effected at the port or ports named in the Bill(s) of Lading, or to which the vessel may have been ordered pursuant thereto.

5) (a) The vessel shall have liberty to comply with any directions or recommendations as to loading, departure, arrival, routes, ports of call, stoppages, destination, zones, waters, discharges, delivery or in any other wise whatsoever (including any direction or recommendation not to go to the port of destination or to delay proceedings thereto or to proceed to some other port) given by any Government or by any belligerent or by any organised body engaged in civil war, hostilities or warlike operations or by any person or body acting or purporting to act as or with the authority of any Government or belligerent or of any such organised body or by any committee or person having under the terms of the war risks insurance on the vessel, the right to give any such directions or recommendations. If, by reason of or in compliance with any such direction or recommendation, anything is done or is not done, such shall not be deemed a deviation.

(b) If, by reason of or in compliance with any such directions or recommendations, the vessel does not proceed to the port or ports named in the Bill(s) of Lading or to which she may have been ordered pursuant thereto, the vessel may proceed to any port as directed or recommended or to any safe port which the Owners in their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract of affreightment and the Owners shall be entitled to freight as if discharge had been effected at the port or ports named in the Bill(s) of Lading or to which the vessel may have been ordered pursuant thereto.

6) All extra expenses (including insurance costs) involved in discharging cargo at the loading port or in reaching or discharging the cargo at any port as provided in Clause 4 and 5 (b) hereof shall be paid by the Charterers and/or cargo owners, and the Owners shall have a lien on the cargo for all moneys due under these Clauses.

By Voywar 1950 the circumstances required for an excuse from performance, or for deviations and performances in substituted ports, have become considerably diluted. Reference is made to "war risks" and these risks include "any blockade or any action which is announced by any Government or by any belligerent or by any organised body, sabotage, piracy, and any actual or threatened war, hostilities, warlike operations, civil war, civil commotion, or revolution". Seemingly, it is not necessary that there has been an *increase* of risk as compared with the situation when the contract was entered into. And the "liberties to comply" have been enlarged by inserting the word "recommendation" and, as an extra precaution, the liberties have been enumerated at length. The right to

substitute performance against full freight and the right to extra expenses have been retained. And, finally, the principle of reciprocity has vanished entirely; nowhere in the clause is it stated that *the charterer* is entitled to cancel the contract.

The liberty and war clauses of the *bills of lading* have undergone a similar evolution and it may be sufficient to cite the "Government directions" clause of Conlinebill as a typical example:

a) The Master and the Carrier shall have liberty to comply with any order or directions or recommendations in connection with the transport under this contract given by any Government or Authority, or anybody acting or purporting to act on behalf of such Government or Authority, or having under the terms of the insurance on the vessel the right to give such orders or directions or recommendations.

b) Should it appear that the performance of the transport would expose the vessel or any goods onboard to risk of seizure or damage or delay, resulting from war, warlike operations, blockade, riots, civil commotions or piracy, or any person onboard to the risk of loss of life or freedom, or that any such risk has increased, the Master may discharge the cargo at port of loading or any other safe and convenient port.

c) Should it appear that epidemics, quarantine, ice—labour troubles, labour obstructions, strikes, lockouts, any of which onboard or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the Master may discharge the cargo at port of loading or any other safe and convenient port.

d) The discharge under the provisions of this clause of any cargo for which a Bill of Lading has been issued shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the Merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.

e) If any situation referred to in this clause may be anticipated, or if for any such reason the vessel cannot safely and without delay reach or enter the loading port or must undergo repairs, the Carrier may cancel the contract before the Bill of Lading is issued.

f) The Merchant shall be informed if possible.

Here, we recognize as a typical feature of liner trade the words "risk of seizure or damage or *delay*" [my italics], which further enlarges the scope of application. And there is no requirement that the said risk has *increased* compared with the situation at the time of the conclusion of

the contract, since the text continues" . . . *or* that any such risk has increased" [my italics].

The "Government directions" clause also refers to other than war hindrances, such as "epidemics, ice, strikes, etc.". We recognize the essential feature of liner trade that the vessel must not be *delayed* in ports of loading and discharge, and that deviations and substitute performances are considered due fulfilment of the contract. The shipowner reserves himself the right to claim "a reasonable compensation for any extra services rendered to the goods" and the right of cancellation also applies before the time of the issuance of bills of lading. And, as in Voywar 1950, the charterer has not been given a right of cancellation at all.

As we know, merchant shipping could go on during the World Wars and it may be that the character of potential future conflicts—perhaps confined to limited areas—will not paralyse shipping entirely. This being so, the alternative of *modifying the terms of the contract* instead of cancellation comes into the focus of attention. Although the special clauses—designed for the purpose of giving the shipowner a right to increased compensation owing to increase of insurance premiums, wages or other expenses—certainly are not intended to *replace* the cancellation clauses but rather as a supplementary remedy, such clauses should be observed in this context. The fact that the shipowner has secured himself an alternative remedy may very well have a bearing on the *degree* of risk, delay or disadvantage required to bring the cancellation clause into operation.[15] The following clauses are appropriate examples of such "escalation" clauses:

Baltic Conference Increase of War Risks Insurance Clause 1946.
This charter is concluded on the basis of the war risks premiums on the vessel for the voyage, in force on the date of this charter. If the premiums actually payable for the voyage should be higher, the charterers shall pay the owners the difference. Should the actual premiums be smaller, the owners shall refund the charterers the difference. This clause shall also apply to the vessel's voyage from her last port of discharge to the (first) loading port under this charter.

Baltic Conference Increase of Wages Clause 1946.
The rate of freight is based on the wages and war bonus to officers and crew and on the war insurance premiums, if any, for officers and crew, in force on the date of this charter. If such wages and/or bonus and/or premiums are increased before completion of the voyage, the charterers shall refund the owners the actual difference.

[15] See further infra p. 297 and p. 425.

Swedish American Bill of Lading (1966) cl. 14 g.
The Merchant shall reimburse the Carrier in proportion to the amount of freight for any increase of war risk insurance premium and war risk increase of the wages of the Master, officers and crew and for any increase of the cost for bunkers and for deviation or delay caused by war or warlike operations or by government directions in such connection.

Baltic Conference Stoppage of Panama Canal Traffic Clause 1962, Code Name "Panstop".
If before the vessel commences loading navigation on the Panama Canal is interrupted the owners/carriers shall be entitled to cancel this contract; if navigation is interrupted as aforesaid after loading has commenced the vessel may proceed by some other route and the freight shall be increased in proportion to the longer sailing distance.

Baltic Conference Stoppage of Suez Canal Traffic Clause 1956. Code Name: "Suezstop".
If before the vessel commences loading navigation on the Suez Canal is interrupted the owners/carriers shall be entitled to cancel this contract; if navigation is interrupted as aforesaid after loading has commenced the vessel may proceed by some other route and the freight shall be increased in proportion to the longer sailing distance.

We have seen that the clauses have been enlarged in stages with one protection after the other and it is, of course, understandable that a contracting party—provided he is in a position of having his clauses accepted by his customers—seeks every protection possible in order to avoid or alleviate the consequences ensuing upon war and similar contingencies. And the courts in the Scandinavian as well as the Anglo-American legal systems, always guided by a sense of reasonableness and fair play, try by various means to *reduce* the effect of the clauses so far as they work too much in the favour of one of the parties and to the detriment of the other.[16] But it may be subject to dispute whether the courts in doing so have chosen the right approach. By the *contra proferentem* and *ejusdem generis* principles[17], particularly used in Anglo-American law, they have required the drafters to express themselves in *clear* words but, by the same token, the formidable twin couple of *contra proferentem* and *ejusdem generis* have induced them to use *many* words. In fact, most standard forms to contracts of affreightment contain a mass of words abhorrent to commercial men. Normally, they are only studied by

[16] See further infra p. 417.
[17] See infra p. 420.

organizations representing the contracting parties concerned, and some words are primarily intended as a deterrent to difficult customers too readily inclined to criticize the counter-party for having abused his liberties under the clause. It is only natural that the courts try to keep the effect of such clauses within proper limits, but, at the same time, their interference seems to make the clauses even more voluminous and complex. Some clauses commonly used shall be cited as typical examples:

Chamber of Shipping War Risks Clauses (Tankers) 1952

1) The Master shall not be required or bound to sign Bills of Lading for any blockaded port or for any port which the Master or Owners in his or their discretion consider dangerous or impossible to enter or reach.

2) (A) If any port of loading or of discharge named in this Charter Party or to which the vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or

(B) if owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port of loading or of discharge or the loading or discharge of cargo at any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discretion dangerous or impossible for the vessel to reach any such port of loading or of discharge—the Charterers shall have the right to order the cargo or such part of it as may be affected to be loaded or discharged at any other safe port of loading or of discharge within the range of loading or discharging ports respectively established under the provisions of the Charter Party (provided such other port is not blockaded or that entry thereto or loading or discharge of cargo thereat is not in the Master's or Owners' discretion dangerous or prohibited). If in respect of a port of discharge no orders be received from the Charterers within 48 hours after they or their agents have received from the Owners a request for the nomination of a substitute port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on (whether within the range of discharging ports established under the provisions of the Charter Party or not) and such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of the cargo being loaded or discharged at any such other port within the respective range of loading or discharging ports established under the provisions of the Charter Party, the Charter Party shall be read in respect of freight and all other conditions whatsoever as if the voyage performed were that originally designated. In the event, however, that the vessel discharges the cargo at a port outside the range of discharging ports established under the provisions of the Charter Party, freight shall be paid as for the voyage originally designated and all extra expenses involved in reaching the actual port of discharge and/or discharging the cargo thereat shall be

paid by the Charterers or Cargo Owners. In this latter event the Owners shall have a lien on the cargo for all such extra expenses.

3) The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destinations, zones, waters, delivery or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or local authority including any *de facto* government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

If by reason of or in compliance with any such direction or recommendation the vessel does not proceed to the port or ports of discharge originally designated or to which she may have been ordered pursuant to the terms of the Bills of Lading, the vessel may proceed to any safe port of discharge which the Master or Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge has been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port of discharge shall be paid by the Charterers and/or Cargo Owners and the Owners shall have a lien on the cargo for freight and all such expenses.

Swedish American Line Bill of Lading (1966) cl. 22. Government Directions, War, Epidemics, Ice, Strikes, Congestion Etc.

a) The Master and the Carrier shall have liberty to comply with any orders, directions or recommendations as to loading, departure, routes, ports of call, stoppages, destination, arrival, discharge, delivery or in any other wise whatsoever given by any government or any person or body acting or purporting to act with the authority of such government or by any committee or person having under the terms of the insurance of the vessel the right to give any orders, directions or recommendations.

b) In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Carrier or the Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the vessel or any port of her cargo, to make it unsafe, imprudent, or unlawful for any reason to proceed to the loading port or the usual or agreed place of loading in such port or to commence or proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual or agreed place of discharge in such port,

the Carrier or the Master may before loading cancel the contract of carriage and—if loading has already commenced—proceed with such cargo taken onboard;
or, if the goods have been loaded, the vessel, whether or not proceeding towards or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may remain at or proceed or return, directly or indirectly, to or stop at any port or place whatsoever, as the Master or the Carrier may consider safe or advisable under the circumstances, or the vessel may retain the goods onboard until the return trip or until such time as the Carrier or the Master may think advisable, and the goods, or any part thereof, may be discharged at any such port or place or, if the Master may deem it necessary, thrown overboard or destroyed without responsibility for the Carrier;
or the Carrier or the Master may forward the goods as provided in clause No. 9 hereof, but at the risk and expense of the Merchant.

c) The Carrier or the Master shall not be required to give notice of any action taken in accordance with this paragraph.

d) When the goods are discharged from the ship as herein provided, they shall be at the Merchant's risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Carrier shall be freed from any further responsibility.

e) For any service rendered to the goods as herein provided, the Carrier shall be entitled to a reasonable extra compensation.

f) In the event of any detention to the vessel due to any of the afore-mentioned causes, the Carrier shall be entitled to demurrage payable at the rate of U.S. $ 0.35 per gross register ton per day or pro rata for portion of a day.[18]

These clauses contain a number of phrases purporting to protect the shipowner against potential allegations that he has not acted reasonably under the circumstances. Thus, in the bill of lading clause we discover (1) that the clause becomes operative "in any situation whatsoever and wheresoever occurring . . . *likely* to give rise to . . ."—and here follows an enumeration where the events become successively more and more diluted— ". . . risk of capture . . . disadvantage to or loss of the vessel (here, all of a sudden, a serious calamity!) or any part of the cargo . . .",
(2) that hindrances anticipated, or even existing, already at the time for the conclusion of the contract may be invoked as excuses ("whether existing or anticipated"),
(3) that the exercise of the option shall be wholly subjective ("in the judgment of the Carrier or the Master", "as the Master or the Carrier may consider safe or advisable under the circumstances"),

[18] This type of clause, which may be considered an enlarged "Government directions" clause appears in a great number of liner bills of lading.

(4) that "the Carrier or the Master shall not be required to give notice of any action taken",
(5) that the Carrier retains the right to the freight, no matter where the cargo is discharged, and, of course, reserves himself the right to claim extra compensation for any service rendered to the goods, and finally,
(6) that, "in the event of any detention due to any of the afore-mentioned causes, the Carrier shall be entitled to demurrage payable at the rate of U.S. $ 0.35 per gross register ton per day or pro rata for portion of a day".

The Chamber of Shipping War Risks Clauses (Tankers) 1952 do not recognize the innovations brought about by Voywar 1950. Direct reference is still made to the events "blockade", "war", "hostilities", etc. and to the "operation of international law" making it "dangerous" or "impossible" to enter or reach the ports or to load or discharge the cargo. There is not, as in Voywar 1950, any direct reference to "war risks". But some extra precautions have been taken by referring to the Master's or Owner's discretion not less than six times in the clause![19]

Some recent clauses evidence a new approach to the drafting technique. The efforts of retaining unreasonable liberties have been restrained and greater reliance has been placed on the power of the courts to uphold a proper balance between the contracting parties in case of the occurrence of unexpected war risks. This tendency may be noted from the Options clause in the bill of lading of the international container consortium Atlantic Container Line and in the Scancon charter party:

12. OPTIONS OF ACL. If it shall considered by ACL at any time that the performance or continued performance of this contract may subject the ocean vessel, her crew and cargo or other transport to any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind, ACL shall be entitled, whether or not the events in question existed or were anticipated at the time of entering into this contract, if the carriage has not already commenced, to cancel this contract, or, in any event, to discharge, tranship, land or deliver the goods at any convenient port or place or to forward them at the sole risk and expense of the Merchant, or otherwise to deal with the goods as ACL may think advisable under the particular circumstances. In any such event ACL shall be entitled to full freight and to a reasonable extra compensation for any service rendered to the goods.

[19] It is improbable that this will improve the shipowner's remedies under the clause. But cf. NEBIOLOU, p. 34, where he states with regard to the same passage in Deuzeit that the shipowner's exercise of his remedies "... ist nur anfechtbar, wenn sie sich als eine 'offenbare Unbilligkeit', reine Willkür oder Missbrauch der Klausel darstellt".

Scancon war clause (cl. 14).
If subsequent to the conclusion of this contract it appears that its performance will expose the vessel or cargo to risks of war or hostilities, or that such risks have really increased, both parties shall have the option of cancelling. As to further effects if any of the aforementioned contingencies on this contract the governing law as per clause 18 [the clause relating to applicable law] of this Charter shall apply.

In the ACL Options clause, the original starting point of bills of lading war clauses—the "liberty to comply" passage—has vanished, since it is covered by the general words of the clause. Furthermore, we do not find any reference to "the Master's and the Owner's discretion". The clause applies whether or not the events "existed" or "were anticipated at the time of entering into this contract".[20] This passage shall be seen in relation to the nature of liner trade, and notably container traffic, where a quick turn-over of the vessels is a must. The shipowner does not want to be criticised for having sent the vessel to a port where hindrances could be anticipated or even existed. In both cases, he wishes to retain the right to take the chance that the hindrances will not appear or, if they exist, that they will disappear before the vessel reaches the port. Since the clause does not stipulate that the merchant has to pay demurrage for detention (cf. Swedish American Line clause 22 (f) supra p. 83), the risk of an abuse of the shipowner's option seems comparatively small. And in all circumstances, in spite of the general wording of the clause, he will be required to use his option with due regard to the merchant's interests[21] and, if hindrances exist or may be anticipated at the time of the conclusion of the contract, to notify the merchant and discuss the situation with him.

The clause contains fewer enumerations and repetitions than the traditional clauses. Thus *direct* reference has been made to "any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind". No efforts have been made to enumerate circumstances *causing* such "hindrances", etc. Indeed, we do not find the word "war" in the clause at all. In short, the clause makes a rather peaceful impression. This seems to be a considerable improvement, since the potential causes of "hindrances" etc., are countless. The drafters have been wise in not demonstrating their imagination and foresight by extensive enumerations of such

[20] See concerning foreseeability generally infra § 12.
[21] See infra § 15.3.

causes and thus invite the courts to interpret the clause *ejusdem generis* with regard to such causes which they did not mention or which they *could* not enumerate in view of the limited space available on the document. In spite of its brevity, the clause contains all the traditional elements; the shipowner retains the right of cancellation before the carriage has commenced and a complete freedom "in any event" to "deal with the goods as he may think advisable under the particular circumstances". And in such cases he "shall be entitled to full freight and to a reasonable extra compensation for any service rendered to the goods".

In the Scancon war clause we find that reference has been made to "risk of war or hostilities" and to the substantial "increase" of such risks. The scope of the clause is restricted and SMC § 135 has set the pattern. However, the scope of the Scancon war clause is more restricted in enumerating the relevant events but, on the other hand, the scope is enlarged compared to SMC in that reference is made to "war risks", while SMC § 135 only refers to *the risk of damage* to the vessel and the cargo.[22] As in SMC § 135 the right of cancellation is *mutual*. As to further effects reference has been made to *the governing law* which according to another clause of the charter party may be Danish, Finnish, Icelandish, Norwegian, Swedish or *English* law. It may seem a daring experiment to rely on the supplementing principles of English law, which traditionally adheres to the principle set by *Paradine* v. *Jane*[23] that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract".[24] But one of the purposes of this study is to show that Anglo-American law, in spite of lacking support from statutory provisions, protects a contracting party who has chosen to be less explicit and complete in the drafting of his contract clauses.

§ 2.2.3. War clauses in time charters

As previously mentioned there is, in time charters, a substantial protection for the shipowner already in the fact that the charterer may only use the vessel in "lawful trades" for the conveyance of "lawful mer-

[22] See further infra p. 100 and p. 241. HAGBERG, Scanconcertepartiet p. 19, mistakenly considers the clause "solely a translation of § 135".

[23] (1647) Aleyn 26 K.B.

[24] See further infra p. 296.

chandise" and he may only order the vessel to *safe* ports, places and berths. And such safety does not only regard safety in a physical sense but in a political sense as well. Furthermore, the range covers not only the ports but also the route to or from the ports.[25]

The words "lawful" requires an explanation in this context. According to the doctrine of illegality[26] the contracting parties have no power to enter into *illegal bargains*, such contracts becoming "void *ab initio*" under the common law.[27] And, upon the outbreak of war, the general principle in Anglo-American law *prohibiting trading with the enemy* comes automatically into effect,[28] while in Scandinavian law, for all practical purposes, the same effect will be attained by special war time legislation. But if the word "lawful" only refers to these principles it is entirely superfluous, since the result would be the same anyway.

As will be further elaborated in the chapter on the international law of the sea, contracts to carry contraband of war and involving the breach of blockade, in the absence of domestic legislation to the contrary, are not *per se* unlawful, although they certainly involve the contracting parties in the risk of sanctions.[29] This being so, the expression "lawful" normally does not in itself limit the shipowner's obligation to carry contraband cargo or to perform voyages involving the breach of blockade.[30]

The expression "lawful merchandise" was considered in *Leolga Compania de Navigacion S.A.* v. *John Glynn & Son Ltd.* (*The Dodecanese*) [1953] 2 Lloyd's Rep. 47 Q.B., which concerned a Baltime 1920 charter party. The charterers had ordered the master to take military stores and munitions for British forces in Egypt and they were aware, before loading, of an Egyptian prohibition to discharge such cargo in the relevant port of discharge. The vessel was black-listed by the Egyptian authorities upon arrival and on account of this she was refused facilities of repair and suffered a delay for 26 days. The court found that the charterers were in breach of the charter party in ordering the master to ship "unlawful merchandise" and awarded the shipowners damages

[25] See generally RAMBERG, Unsafe ports and berths.

[26] See infra § 8.5.

[27] Cf. Code civil art. 1131; and BGB § 134.

[28] *The Hoop* (1799) 1 C. Rob. 196 [149 R.R. 793] referring to the statement by BYNKERSHOEK: "Ex natura belli commercia inter hostes cessare non est dubitandum".

[29] See *Ex p. Chavasse, re Grazebrook* (1865) 4 D. J. & S. 655 [46 E.R. 1072] per WESTBURY L.C. at pp. 658–61 [1074–5]; *Northern Pacific Railway Co.* v. *American Trading Co.* (1904) 195 U.S. 439 (at p. 465); and further infra p. 129.

[30] See, e.g., *Atlantic Fruit Co.* v. *Solari* (1916) 238 Fed 217 SDNY infra p. 290.

on the basis of the charter hire. To constitute "lawful merchandise" the goods must not only be "such as can be *loaded* without breach of the law in force at the port of loading" [my italics] but also "be the type of cargo which can be *lawfully carried* and *discharged* [my italics] at the port to which the charterer has ordered the vessel to proceed" (per PILCHER J. at pp. 55–6). Thus, regard is paid to *lex loci solutionis* but this does not mean that *other foreign law* would be taken into account.[31]

So far the clauses have only concerned the scope of the shipowner's obligation *during the currency of the charter party* (Similarly, SMC § 142 infra p. 102). And the impact on the contract of an outbreak of war or an increase of war risks needs to be considered in special clauses. In such clauses we shall find three basic ingredients;

(1) they *improve the shipowner's protection* under the general standard terms of the charter party;

(2) they *modify* the relationship between the parties and, notably, ameliorate the hardship for the shipowner who is struck by increases of insurance premiums, wages, costs for provisions and stores, etc.;

(3) they contain provisions enabling the parties to *cancel* the charter party.

The clause Conwartime (corresponding to clause 21 of the Baltime 1939 charter party)[32] shall be cited as an example:

(A) The Vessel unless the consent of the Owners be first obtained not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone which is dangerous as the result of any actual or threatened act of war, war, hostilities, warlike operations, acts of piracy or of hostility or malicious damage against this or any other vessel or its cargo by any person, body or State whatsoever, revolution, civil war, civil commotion or the operation of international law, nor be exposed in any way to any risks or penalties whatsoever consequent upon the imposition of Sanctions, nor carry any goods that may in any way expose her to any risks of seizure, capture, penalties or any other interference of any kind whatsoever by the belligerent or fighting powers or parties or by any Government or Ruler.

(B) Should the Vessel approach or be brought or ordered within such zone, or be exposed in any way to the said risks, (1) the Owners to be entitled from time to time to insure their interests in the Vessel and/or hire against any of the risks likely to be involved thereby on such terms as they shall think fit,

[31] But cf. the *obiter dictum* in *Esposito* v. *Bowden* (1857) 7 E. & B. 763 [119 E.R. 1430] per WILLES J. See generally HJERNER pp. 498 (at notes 32–4) and 613 et seq.; and further infra p. 318.

[32] Conwartime is sometimes inserted in Produce (1946) where there is no war clause in the standard text.

the Charterers to make a refund to the Owners of the premium on demand; and (2) hire to be paid for all time lost including any lost owing to loss of or injury to the Master, Officers, or Crew or to the action of the Crew in refusing to proceed to such zone or to be exposed to such risks.

(C) In the event of the wages of the Master, Officers and/or Crew or the cost of provisions and/or stores for deck and/or engine room and/or insurance premiums being increased by reason of or during the existence of any of the matters mentioned in section (A) the amount of any increase to be added to the hire and paid by the Charterers on production of the Owners' account therefor, such account being rendered monthly.

(D) The Vessel to have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or in any other wise whatsoever given by the Government of the nation under whose flag the Vessel sails or any other Government or any person (or body) acting or purporting to act with the authority of such Government or by any committee or person having under the terms of the war risks insurance on the Vessel the right to give any such orders or directions.

(E) In the event of the nation under whose flag the Vessel sails becoming involved in war, hostilities, warlike operations, revolution, or civil commotion, both the Owners and the Charterers may cancel the Charter and, unless otherwise agreed, the Vessel to be redelivered to the Owners at the port of destination or, if prevented through the provisions of section (A) from reaching or entering it, then at a near open and safe port at the Owners' option, after discharge of any cargo on board.

(F) If in compliance with the provisions of this clause anything is done or is not done, such not to be deemed a deviation.

(G) The Baltic Conference War Risks Clause for Voyage Charters 1938, Code Name "Baltwar", shall be incorporated in all sub-charters and Bills of Lading entered into or issued in respect of the Vessel during the currency of the Charter.

In Conwartime we find

(A) provisions, largely enumerative, *supplementing the "lawful merchandise/trade" and "safe ports/berths" provisions,*
(B) provisions *supplementing the "employment" and "off hire" clauses;*[33]
(C) an *"escalation" clause* giving the shipowner the right to claim extra compensation from the charterer in case of increase of wages, costs, insurance premiums caused by the events enumerated in (A);[34]

[33] See supra Baltime 9 and Produce 8; and cf. Baltime 11 B. See for a commentary of Baltime 11 B, RAMBERG pp. 39 (note 50), 121.

[34] See for a separate "escalation" clause Baltic Conference Economical War Clause 1951 so reading: "In the event of the wages of the Master, Officers and/or Crew or

(D, E, G) the "liberty to comply" and "not to be deemed a deviation" provisions, as well as a certain synchronization between the shipowner's position in relation to the time charterer and his position in relation to bill of lading holders (by the stipulation regarding the incorporation of Baltwar) and, finally, (E) the essential part of the clause giving the parties a *mutual right of cancellation* provided "the nation under whose flag the Vessel sails becoming involved in war, hostilities, warlike operations, revolution, or civil commotion".

With regard to the right of cancellation it is important to note that, according to the clause, *the mere fact* that the nation, under whose flag the vessel sails, becomes involved in war is sufficient. The clause does not stipulate that such an event must prevent, or even affect, the performance of the charter party. Normally, such an outbreak of war would seriously affect performance, but this is not necessarily so when, e.g., the vessel is *registered pro forma* under a flag of convenience or belongs to a country which becomes involved in a minor, local war.[35] This raises the problem whether the clause should be interpreted literally and come into operation *irrespective of whether the enumerated events have affected the performance or not.* This problem, which will be considered in chapter 5, becomes more accentuated when the scope of relevant events is enlarged. Modern time charters are much more extensive in specifying such events which may include a number of countries, in particular the Great Powers, as well as United Nation's actions.

Time charter party forms *drafted by the time charterers* usually contain considerable restrictions of the shipowner's liberties and right of cancellation. Thus, in Mobiltime, it is stipulated that "no contraband of war shall be shipped, *but petroleum and/or its products shall not be*

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the cost of provisions and/or stores for deck and/or engine room and/or insurance premiums being increased by reason of or during the existence of any actual or threatened act of war, war, hostilities, warlike operations, acts of piracy or of hostility the amount of any increase to be added to the hire and paid by the Charterers on production of the Owner's account therefor, such account being rendered monthly"; and cf. the "Price Revision" Clause (cl. 13) in U.S. War Department (1941) Time Charter Party. See STRETCH pp. 240–3. In an American case, *The Norwegian Shipping and Trade Mission* v. *Nitrate Corp. of Chile Ltd.* (*The Martin Bakke*) 1942 AMC 1523 Arb., it was held that such compensation (war insurance premiums) is due even when the vessel is "off hire".

[35] See concerning the *pro forma* registrations under flags of convenience BOCZEK, Flags of convenience (reviewed by GOLDIE, I. C.L.Q. 1963 p. 989).

deemed contraband of war" [my italics]![36] The charterers have apparently chosen to profit from their bargaining position and fallen into the bad habit, customarily practised by shipowners, of resorting to the "not deemed to be" drafting technique.[37] Furthermore, when it is stated that the vessel shall not be required to enter dangerous zones, etc., it is added "without the consent of Owner which shall not be unreasonably withheld". In the event of the existence of war *subsequent* to the date of the charter party, the charterer agrees to pay "proved additional cost of wages and insurance properly incurred in connection with Master, Officers and Crew as a consequence of such war or actual hostilities". The vessel comes "off hire" during periods of requisition, the Owner having the right to recover the requisition compensation.[38] *But there is no provision in the war clauses giving the parties a right of cancellation.*[39]

§ 2.2.4. War clauses and the freight market risk

Apart from the effect on the marine adventure—risks for physical damage, delay, increase of costs and other inconvenience—war also has a considerable impact on the freight market. The situation may vary owing to the type of conflict but the experiences from the World Wars and the Korean conflict show that the demand for tonnage increases while, at the same time, the risks and difficulties caused by the war reduce the available tonnage or prevent its efficient use.[40] And this causes a sharp rise of the freight market. Similarly, a closure of the Suez Canal, forcing the vessels to proceed round the Cape of Good Hope, reduces the supply of tonnage and results in a shipping boom.

Although a point may be reached where the shipowners do not want to expose their ships or crews to the risks of war, there are frequent

[36] Similarly in Standime cl. 40, but with the addition: "unless shipped or intended to be shipped to or intended for a country involved in war".

[37] See for an extreme variant of this technique Gencon cl. 2 in fine: "Damage caused by contact with or leakage, smell or evaporation from other goods . . . not to be considered as caused by improper or negligent stowage, *even if in fact so caused*" [my italics].

[38] Similarly Shelltime 2 cl. 32; Beepeetime cl. 37; Petrofina cl. 43.

[39] But a right of cancellation on the outbreak of war between some countries, to be inserted in the charter party form, is provided for in Shelltime 2 cl. 33; and Beepeetime cl. 38.

[40] See, e.g., BEHRENS p. 4 et seq.; and ALEXANDERSSON-NORSTRÖM, World Shipping p. 38.

examples where they have been willing to do so at the freights prevailing at the time inclusive of compensation for increased risks and costs (insurance premiums, war bonus to the crew, etc.). Therefore, it cannot always be said that war, in view of the risks, *prevents* the contract from being performed. Nevertheless, it may create an *entirely new situation* which was not in the contemplation of the contracting parties when the contract was made. And in this new situation *the rise of the freight market* may often become the dominant factor. Hence, war clauses giving the shipowner a right of cancellation will, *at the same time*, enable him to take the benefit of the rising freight market.

The fluctuations of the freight market introduce an element of speculation into the contracts of affreightment. It becomes of comparatively small importance in liner trade—except in booking agreements fixing the freight for a longer period of time—while it increases in voyage charters and becomes predominant in consecutive voyages, general carrying contracts and time charters. On the other hand, if the contract covers a period equalling or approximating the commercial lifetime of the vessel, the market fluctuations are evened out.[41]

Under general principles of law, contracting parties are not allowed to invoke market fluctuations as an excuse from performance—"... contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it".[42] Nevertheless, while it may be perfectly natural to say that the contracting parties have intended to fix their bargain to the agreed terms in spite of the potential market fluctuations, of which they are normally well aware, the same is not necessarily true with regard to *abnormal* fluctuations caused by unexpected calamities such as war and similar contingencies. In such exceptional cases, the mere fact that the *general economy* of the contract is affected may be sufficient to serve as an excuse from performance.[43]

[41] It is not unusual that shipowners for financing purposes have their vessels built by or sold to financiers who let them out to the same shipowners on bare boat or time charter terms.

[42] Lord SUMNER in *Larrinaga & Co.* v. *Soc. Franco-Americaine des Phosphates de Medulla* (1923) 16 Asp. M.C. 133 H.L. at p. 141; Cf. ND 1959.333 Sw. Arb.

[43] See, e.g., *Pacific Phosphate Co.* v. *Empire Transport Co.* (1920) 4 Ll. L. Rep. 189 K.B. "... circumstances have now arisen under which one cannot imagine anybody could possibly have made the contract which is now in dispute ..." (per Row-

The standard forms of contracts of affreightment do not contain "freight market risk clauses". Any "peace-time" fluctuations have, so far as the clauses are concerned, been permitted to work to the advantage of one of the contracting parties and to the disadvantage of the other. However, although the war clauses do not specifically refer to the "wartime" fluctuations of the freight market, they will *automatically* enable the shipowner to take the benefit of a rising market as soon as the circumstances required to bring the clause into operation are at hand. If the shipowner's possibilities of cancelling are *restricted to situations where the marine adventure as such is seriously affected by the war risks*, any complaints from the charterer that the shipowner's cancellation enables him to take advantage of the rising market seem unjustified. The fact that, *in addition* to the war risk, the general economy of the bargain is *also* affected, seems to be no reason to refuse him his option under the clause.[44]

But the situation becomes different if the war clause should give the shipowner a right of cancellation on the occurrence of certain events ("war", "warlike operations", etc.) *irrespective of whether they affect the marine adventure or not*. In such a case, the clause may operate to serve two distinctly different purposes; one to free the contracting parties from performance in case the marine adventure is affected, the other to give the parties an opportunity to cancel for the *mere* purpose of taking the advantage of a market fluctuation occurring at the same time as the relevant event. And, in such a case, this latter option may be used *irrespective of whether or not there is any causal interrelation between the event and the market fluctuation.* Hence, the option may become of value for the charterers too, provided, simultaneously with the occurrence of the event, there is a *fall* of the freight market.

It would seem that the type of clauses, stipulating that the parties may cancel if certain enumerated countries "become involved in war"

LATT J. at p. 191); and ND 1923.517 SCS both concerning general carrying contracts. See further infra p. 363.

[44] See, e.g., *Associated Metals & Minerals Corp.* v. *Swedish America Mexico Line, Ltd.* (*The Svaneholm*) 1944 AMC 362 CCA 2nd, affirming 1942 AMC 1528 SDNY. The shipper maintained that the shipowner's cancellation "constituted a mere device to get . . . an increased freight rate and [was] not taken in good faith . . .". But the judge stated: "I fail to see how its effort through cancellation to avoid a prospective loss can properly be denominated bad faith" (per CAFFEY D. J. at p. 1541).

(or similar expressions), without requiring that such events affect the marine adventure, presupposes that such events will always seriously affect the marine adventure so as to make any additional requirement superfluous. However, the political situation in the world after the Second World War has proved the fallacy of such an assumption. The Great Powers—frequently referred to in the relevant war clauses—have a tendency to "become involved" in conflicts *confined to certain areas* (Korea, Suez, Vietnam) and, although world peace may sometimes be threatened on the occurrence of such events, they do not necessarily affect the marine adventure, or shipping generally, at all.[45] If clauses of this type should be interpreted literally, they will serve as a kind of "combined war and freight market" clauses. It may be subject to serious dispute whether this has been the original intention and whether it is practical to operate with clauses possessing "hidden forces", sometimes working to the benefit of the shipowner and sometimes to that of the charterer, as the case may be.[46]

§ 3. *The Legal Remedies*

§ 3.1. *The Statutory Provisions of the Scandinavian Maritime Codes*

Following the traditional "continental approach", the Scandinavian countries, in the Scandinavian Maritime Codes, have laid down provisions purporting to regulate the relationship between the contracting parties in various typical situations. However, with regard to the problems discussed in the present study, it is particularly apparent that the relevant provisions are an "off-spring" of the general principles of contract law governing the difficult question of the impact of changed conditions on the relationship between the contracting parties. These principles will be dealt with in chapter 3 and the interrelation between the statutory provisions and the general principles of contract law is discussed in chapter 4.

For an Anglo-American jurist it may very well be natural to regard the "casuistic type" provisions of the Scandinavian Maritime Codes as "statutory clauses". Their function becomes more or less the same and they could, exactly as clauses in the standard forms, be *supplemented* by

[45] See, e.g., the observations in *The Yankee Fighter* 1951 AMC 579 Arb. infra p. 405.

[46] See further infra p. 431.

other provisions or by general principles of law of a more sweeping character. We shall see how the most important provision for the present study—SMC § 135—has such a casuistic character.

The provisions of the Scandinavian Maritime Codes relating to hindrances of various kinds will be found in three separate groups. The first concerns "delay and hindrances on the part of the shipowner" (§§ 126–33) and the second "the charterer's withdrawal and hindrances on his part" (§§ 131–34).[1] The shipowner's and the charterer's mutual right of cancellation on account of war risks is treated under a separate heading (§§ 135–6).

It appears from the *travaux préparatoires* to the amendments in the 1930s that, in order to get a system corresponding to that of the Uniform Scandinavian Sales Acts, the incorporation of similar provisions into the groups dealing with delay and hindrances on the part of the shipowner and the charterer respectively was considered. However, the Maritime Law Revision Committee found that practical considerations warranted a separate treatment of "the mutual right of cancellation".[2] Presumably, the true reason lies in the fact that the system of the Uniform Scandinavian Sales Acts is unsuitable to contracts of affreightment which represent a contract type widely different from the sale of goods. It may seem strange that any effort at all was made to follow the pattern of the Uniform Scandinavian Sales Acts, but this is probably due to the impact which this legislation has had on the whole field of contract law. The attitude adopted in connection with the amendments in the 1930s has resulted in the peculiar fact that we will find the charterer's remedies in similar situations treated under different headings, while it does not appear to have been possible to squeeze the general right of cancellation in case of *vis major* hindrances affecting the voyage ("... fartygets resa ... genom annan åtgärd av högre hand hindras", § 159) into the present system at all. It may be subject to dispute whether the amendments of the 1930s, on this particular point, have brought about a valuable improvement.[3]

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[1] The technique to attribute the hindrances to the one or the other of the contracting parties resembles the German "Sphärentheorie". See LARENZ, Geschäftsgrundlage p. 62; and TIBERG p. 398 at note 6.

[2] See SOU 1936: 17 p. 203.

[3] See further infra p. 240; and cf. HGB § 628 et seq., where hindrances of the relevant type are treated in a systematical order.

In SMC § 131.1, the principle that the charterer is not bound to *specific performance* of the contract is codified.

Frånträder befraktaren fraktslutet innan lastningen börjat, äge bortfraktaren rätt till ersättning för fraktförlust och annan skada.

(Transl. If the charterer cancels the contract of affreightment before the commencement of loading the carrier shall be entitled to compensation for loss of freight and other damage.)

While this passage purports to hold the shipowner fully indemnified for the consequences of the charterer's withdrawal, it does not give him the right to claim the agreed freight when he has been in a position to take other cargo instead. Hence, it is stipulated in SMC § 134:

Vid bestämmande av ersättning för fraktförlust och annan skada skall hänsyn tagas därtill, att bortfraktaren utan skälig anledning underlåtit att medtaga annat gods.

Ändå att bortfraktaren ej äger njuta ersättning för skada, skall gottgörelse utgå för överliggetid och ytterligare uppehåll, som ägt rum innan fraktslutet frånträddes.

(Transl. When assessing the damages for loss of freight and for other loss, the question whether the shipowner has unreasonably failed to load other goods shall be taken into account.

Even when the shipowner is not entitled to any such damages the charterer shall pay any demurrage and damages for further detention, incurred before the cancellation.)

The cited passage follows the general principle that it is the duty of the contracting party to take reasonable steps to mitigate the damages resulting from the other party's behaviour.

In § 131.2 we find the special benefit awarded the charterer in certain situations preventing him from deriving the expected benefit from the contract:

Befraktaren vare dock från ersättningsskyldighet fri, där möjligheten att avlämna, fortskaffa eller i bestämmelseorten införa godset må anses utesluten i följd av omständighet, som ej bort av befraktaren vid avtalets ingående tagas i beräkning, såsom utförselförbud, införselförbud eller annan åtgärd av myndighet, undergång av allt gods av det slag avtalet avser eller därmed jämförlig händelse, eller där det bestämda gods avtalet avser gått under genom olyckshändelse. Skulle godsets befordran medföra väsentlig olägenhet för bortfraktaren, äge jämväl han frånträda avtalet utan ersättningsskyldighet. Den som vill åberopa omständighet som nu är sagd give därom meddelande utan oskäligt uppehåll.

Är vid lastningstidens utgång icke något gods avlämnat, anses befraktaren hava frånträtt avtalet.

(Transl. The charterer shall be free from his duty to pay compensation if the possibility of delivering or carrying the goods or entering them at their destination may be deemed prevented by circumstances which the charterer should not have taken into account at the time of the conclusion of the contract, such as prohibitions of export or import or other measure by authorities, accidental destruction of all goods of the kind to which the contract relates, or similar circumstances, or if the specific goods to which the contract relates have been destroyed by accident. If the carriage of the goods should be materially inconvenient to the shipowner he may also cancel the contract without having to pay compensation. The party who wishes to invoke circumstances as afore-said shall give notice to the other without unreasonable delay.

If no goods have been delivered by the end of the time allowed for loading, the charterer shall be deemed to have cancelled the contract.)

The cited passage is patterned upon § 24 of the Uniform Scandinavian Sales Acts and it solves once and for all the much-debated problem whether the charterer should be freed from his obligation to pay the freight in case of the perishing of the cargo.[4] But it should be observed that it does not suffice that the cargo *intended* for the transport is lost; it must be the cargo to which the contract of affreightment *refers* and which, consequently, has become "a part of the marine adventure".[5]

The shipowner is not entirely dependant upon the charterer's choice to use his option. If he should suffer a "material inconvenience" from the relevant hindrance he may cancel as well. The Norwegian text is even more liberal, since it gives the shipowner the right to cancel on exactly the same grounds as the charterer.[6]

The right of cancellation must be exercised without unreasonable delay. Even here the text of the Norwegian code is different, since it determines the consequences of a late notice; i.e. a liability to pay damages for the charterer and a loss of the right of cancellation for the shipowner.[7]

In §§ 127, 133 the effect of hindrances *partially* affecting the marine adventure is considered.

§ 127. Sedan lastning skett, må befraktaren ej häva fraktslutet, såvitt genom lossning av godset skada skulle tillskyndas annan befraktare.

[4] See infra § 11.5.1.

[5] See further infra p. 374.

[6] See further infra p. 406.

[7] See further infra p. 406.

(Transl. When the goods have been loaded, the charterer shall not have the option of cancelling the contract if the discharge of the goods would cause other charterers to suffer damage.)

§ 133. Sedan lastning skett, må fraktslutet ej, i lastningshamnen eller under resan, frånträdas, såvitt genom lossning av godset väsentlig olägenhet skulle uppkomma för bortfraktaren eller skada tillskyndas annan befraktare. I fråga om bortfraktarens rätt att njuta ersättning för skada och att häva fraktslutet i dess helhet gäller vad i 131 och 132 §§ sägs.

Uttages gods i hamn som anlöpes under resan, njute bortfraktaren städse avståndsfrakt efter vad i 129 § sägs.

(Transl. After the loading the contract of carriage cannot be cancelled in the port of loading or during the voyage if the discharge of the goods will really inconvenience the carrier or cause other charterers to suffer damage. With regard to the shipowner's right to compensation and his option of cancelling the entire contract of carriage the regulations contained in §§ 131 and 132 shall apply.

If the goods are discharged at an intermediate port, the carrier shall be entitled to freight *pro rata itineris* according to § 129.)

The typical features of liner trade appear from the cited passages. The charterer is no longer free to exercise his options as he pleases; both the charterer and the shipowner must pay due regard to other parties participating in the marine adventure. Hence, one of the main features of voyage chartering is diluted and it becomes the more so with the increasing number of parties representing the cargo.

In SMC § 132 the principle is expressed that the shipowner does not have to accept a partial performance of an entire contract:

Avlämnar befraktaren icke gods till den i avtalet bestämda myckenhet, anses han hava frånträtt fraktslutet beträffande det som ej avlämnats, och skall i fråga om bortfraktarens rätt till ersättning för fraktförlust och annan skada vad i 131 § sägs äga motsvarande tillämpning.

Evad rätt till ersättning föreligger eller ej, äge bortfraktaren häva avtalet i dess helhet, såvida ej, på anmaning, ersättning gäldas eller säkerhet därför ställes före lastningstidens utgång.

Varder avtalet hävt, njute bortfraktaren ersättning för därav följande fraktförlust och annan skada, där ej beträffande det felande godset föreligger sådan omständighet som i 131 § sägs.

(Transl. If the charterer does not deliver all the goods stipulated in the contract of affreightment, he shall be deemed to have cancelled the contract with respect to the goods not delivered and the shipowner's right to compensation for loss of freight and other damage shall be governed by the corresponding provisions of § 131.

Irrespective of whether the shipowner has such right to compensation, he

may cancel the whole contract if compensation is not paid or security put up before the time allowed for loading has elapsed.

If the contract is cancelled, the shipowner is entitled to compensation for loss of freight and other damage provided the charterer cannot invoke the circumstances referred to in § 131.)

The wording of § 132 may seem somewhat circuitous and peculiar, since it says that the shipowner may request compensation, or security therefore, irrespective of whether he has any right to compensation. However, it purports to say that the charterer cannot claim to have the part of the cargo unaffected by the hindrance carried at reduced freight. If the shipowner does not want to accept such a proposition from the charterer, and in consequence cancels the entire contract upon the charterer's failure to deliver the whole cargo or to give compensation or to put up security, the charterer may with regard to the *affected* part of the cargo invoke § 131.2. However, the charterer will still have to pay compensation for the *unaffected* part according to the main rule in § 131.1. Hence, if it is important for the charterer to have the unaffected part carried, he must be prepared to pay the whole freight.

The principle of the cessation *ipso jure* of the contract in case of the "perishing of the thing"[8] necessary for the performance of the contract appears from SMC § 128:

Går fartyget förlorat eller förklaras det icke vara iståndsättligt, upphöre fraktavtalet att gälla.

(Transl. The contract of affreightment ceases to be binding if the vessel becomes a total or constructive total loss.)

We have seen that the afore-mentioned passages provide excuses for the charterer and the shipowner respectively in certain cases where their bargain is adversely affected by hindrances of various kinds. The provisions bear a strong resemblance to the general principles of impossibility and *vis major*,[9] although the charterer's excuse from his obligation to pay the freight rather rests upon equitable grounds than on a strict application of those principles.[10] However, when we reach the passage dealing with the contracting parties "mutual right of cancellation", we shall recognize the casuistic flavour pertaining to the current war clauses.

[8] See infra p. 164.

[9] See infra § 7.2.

[10] See infra p. 370.

§ 135. Finnes efter fraktavtalets ingående att genom resans företagande fartyg eller last skulle utsättas för att, genom uppbringande eller eljest, drabbas av skada i följd av krig, blockad, uppror, oroligheter eller sjöröveri eller att sådan fara väsentligen ökats, äge såväl bortfraktaren som befraktaren häva avtalet; och drage var sin kostnad och skada.

Kan faran avvärjas genom att en del av godset kvarlämnas eller lossas, må avtalet allenast beträffande denna del hävas. Bortfraktaren äge dock, där det kan ske utan skada för annan befraktare, häva avtalet i dess helhet, såvida ej, på anmaning, ersättning för fraktförlust och annan skada gäldas eller säkerhet därför ställes.

Stadgandena i 129 § och 134 § andra stycket skola äga motsvarande tillämpning.

(Transl. The shipowner as well as the charterer shall have the right to cancel the contract of affreightment provided, after the time of the conclusion of the contract, it appears that the performance of the voyage will expose the vessel or the goods, through seizure or otherwise, to the risk of being damaged on account of war, blockade, riots, civil commotion or piracy, or that such risks have substantially increased, in which case each party shall bear his cost or damage.

If the danger can be averted by discharging or leaving a part of the goods behind, the contract may only be cancelled with respect to such goods. The shipowner may, however, where so can be done without damage to other charterers, cancel the entire contract provided, he does not receive requested compensation for loss of freight or other damage or security therefore.

The provisions of § 129 and § 134.2 shall be correspondingly applied.)

While, in time of war, the requirements for apportionment of losses and costs in general average may be at hand when the shipowner voluntarily and for the purpose of averting a danger threatening the vessel and the cargo has sacrificed certain interests or incurred certain expenses,[11] a need has been felt for special provisions providing for a similar apportionment even when the requirements for a general average are not fulfilled. A provision to this effect is to be found in SMC § 136:

Varder fartyget, sedan last intagits, av fara som i 135 § sägs uppehållet i lastningshamnen eller i hamn som under resan anlöpes, skall kostnaden för uppehållet fördelas å fartyg, frakt och last såsom för gemensamt haveri stadgas. Häves avtalet, skall dock sådan fördelning ej äga rum i avseende å kostnad, som därefter uppkommer.

(Transl. If, after the cargo has been loaded, the vessel is delayed either in

[11] See York-Antwerp Rules 1950 Rule A: "There is a General Average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure". See for a commentary LOWNDES & RUDOLF § 38 et seq.

the port of loading or in a port of call by reason of a hindrance or danger as set out in § 135, the expenses incurred in connection with the stay in such ports shall be borne by the ship, the freight and the cargo in accordance with the rules of general average. If the contract of carriage is cancelled, these provisions shall not apply to expenses incurred afterwards.)

It should be noted that SMC § 135 does *not* express a general principle of cancellation in case of "impracticability",[12] since it only regards *danger, or increase of danger, of physical damage to the vessel or cargo* on account of the enumerated contingencies.

Since the relevant contingencies emerge from outside the "sphere" of the respective contracting parties, it has not been possible to follow the system of attributing the hindrances to the one party or the other used in other sections of the Scandinavian Maritime Codes (§§ 83–4, 126–30, 131–34, 144, 146). Consequently, it has been deemed a natural consequence to stipulate that, upon a cancellation under SMC § 135, "each party shall bear his cost or damage". This implies that the shipowner has to deliver the cargo alongside and the charterer receive it from alongside according to SMC § 107, unless the individual contract contains provisions to the contrary.[13] This principle was introduced in connection with the amendments in the 1930s, since earlier the charterer had to pay the entire cost of the discharge when the hindrance only affected the cargo (SMC § 162). This was considered a deviation from the main principle of reciprocity, since, when the hindrance only affected the vessel, the shipowner could charge the charterer for his part of the discharging cost.[14]

SMC § 135.2 concerns hindrances affecting a part of the cargo and corresponds to § 132 in so far as the shipowner has no obligation to fulfil the contract partially against a reduced freight, although he must now not use his right to cancel the contract with respect to the unaffected part of the goods if other charterers would have to suffer therefrom (cf. §§ 127, 133). If, at the time of the cancellation, a part of the voyage has been performed, the shipowner is entitled to freight *pro rata itineris* ("distansfrakt") according to § 129 (see supra p. 23) and any demurrage or damages for detention incurred prior to cancellation is due according to the provision in § 134.2.

[12] See infra p. 256. Cf. "wirtschaftliche Unmöglichkeit" infra pp. 148, 324.

[13] E.g., by a so-called FIO-clause. See supra p. 43.

[14] See SOU 1936:17 p. 205.

In § 136 we recognize a portion of the current clauses giving the shipowner the right to demurrage on account of delay caused by the relevant contingencies as well as "reasonable remuneration" for extra services to the goods (see supra p. 83). But it should be noted
(1) that the compensation which the shipowner may claim according to § 136 only regards the *expenses* incurred in connection with the vessel's stay in the port of loading or in ports of call,[15]
(2) that these expenses are *apportioned* between vessel, freight and cargo according to the principles relating to general average and
(3) that the shipowner can claim no compensation for costs arising after the cancellation.[16]

In the chapter on time charters we find in § 142 the same principles which are expressed in the general charter party clauses stipulating that the charterer may only direct the vessel to safe ports, places or berths, and use it for the carriage of "lawful merchandise" in "lawful trades", and, more specifically, in the war clauses where it is stated that the vessel must not be ordered into "dangerous zones" (see supra p. 87).

Bortfraktaren vare icke pliktig att utföra resa, vid vilken fartyg eller ombordvarande skulle utsättas för fara, som bortfraktaren ej skäligen kunnat taga i beräkning vid avtalets ingående. Ej heller åligge det honom att medtaga gods av lättantändlig, explosiv eller eljest farlig beskaffenhet.

(Transl. The shipowner shall not be bound to perform any voyage which will expose the ship or those on board to a risk which the carrier could not reasonably have taken into account at the time of the conclusion of the contract. Nor shall he be bound to load inflammable, explosive or otherwise dangerous goods.)

However, apart from the provisions dealing with delay on the part of the shipowner (§ 146) and delay on the part of the charterer to pay the hire (§ 148), the chapter on time charters does not contain any rule giving the contracting parties a right of cancellation. But §§ 145 and 147 presuppose that the contract ceases *ipso jure* in the event the vessel is lost (cf. § 128).

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[15] This does not by far equal full compensation for the vessel's immobilization since *loss of time* (inclusive of insurance premiums for the vessel) is not included in the amount to be apportioned. See SOU 1936:17 p. 207. Cf. NJA 1916.531; and NJA 1917.574.

[16] The subject dealt with in this section is called "constructive general average" (Sw. "oegentligt gemensamt haveri"). The same principle is codified in HGB § 635.

There seems to be no reason why the time charterer, as distinguished from the voyage charterer, should always be bound to pay the agreed hire for the period of the charter even if he should find himself unable to use the vessel during the entire period. He should, to a certain extent, be able to protect himself by declaring that he does not want to use his right under the contract. And in such a case he will have to pay the time charter hire during the remainder of the charter party less any net profit which the shipowner has earned, or with reasonable efforts could have earned, during such period.[17]

The distribution of risk in a time charter party is fundamentally different from that in a voyage charter party and is primarily governed by the rules and clauses relating to "off hire" (see supra p. 56). It follows from these rules that the risk of impossibility or difficulty to use the vessel efficiently rests upon the time charterer and, consequently, there is no room for an analogous application of the principle in § 131.2.

Although, the chapter on time charters, apart from the provisions dealing with the shipowner's and the charterer's *delay* (§§ 146, 148), is lacking in provisions giving the contracting parties a right of cancellation, it seems clear that they can get it under general principles of law relating to breach of contract. But the requirement that the breach be sufficiently serious to warrant cancellation will be upheld.[18]

It appears from the *travaux préparatoires* that the contracting parties in exceptional cases may be excused from performance in situations *not* involving breach of contract and, in support of this proposition, reference is made to the doctrine of presupposed conditions.[19] However, it may be subject to dispute whether, in view of the distribution of risk inherent in the typical time charter party, there is much room—or any room at all—for applying this famous doctrine.[20]

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[17] See SOU 1936:17 p. 219. But cf. SELVIG, Naturaloppfyllelse p. 562, who maintains that the rules relating to the determination of the compensation work to the shipowner's disadvantage in time charters and that the time charterer should not be permitted to withdraw from performance unless the shipowner is better protected. See for suggestions regarding the methods to determine the charterer's liability to pay compensation FALKANGER, Konsekutive Reiser p. 167 et seq. Cf. generally RAMBERG, Avbeställningsrätt p. 30; and VAHLÉN, Avtal p. 233.

[18] See ND 1949.312 Norw. Arb.; MICHELET, Beskrivelsen av skipet p. 405; and infra p. 229.

[19] See SOU 1936:17 p. 220; and infra p. 272.

[20] But cf. ND 1963.27 *The Netta* SCD infra p. 159. See further infra p. 312.

§ 3.2. *The Technique of Implication*

In a system of law, where the principles in a changing society are primarily developed by the courts rather than the legislator, situations will frequently arise when there are no normative rules at hand which could serve as a basis for the decision. Hence, in Anglo-American law, there is much more room for an inductive method; the solution is found in the contract itself and in the surrounding circumstances. While such a method will enable the courts to develop suitable solutions with due regard to the particular facts of each case, and thus offers an elasticity which the deductive method sometimes fail to render, it is clear that situations will frequently arise when there is simply no material available for the inductive process. And this vacuum offers a fertile playground for legal fictions. The court places itself in the position of the contracting parties and finds a reasonable solution for them, while, at the same time, pretending that it is not "making a new contract for the parties". It is simply implying a term into the contract in order to give it "business efficacy"[1] and, in so doing, it really only supplements the contract with a term which the contracting parties obviously forgot to insert themselves.[2] It is often pointed out that this method is covering the truth; the court is often "making a new contract for the parties, though it is almost blasphemy to say so".[3] This fictitious approach has given rise to much criticism[4] but, nevertheless, as the present study will show, the fictitious approach has been indispensable.[5]

[1] See *The Moorcock* (1889) 14 P.D. 64.

[2] The so-called "officious bystander's test"; the court should not imply a term unless the parties, at the time of making their contract, would have testily suppressed the suggestion of an "officious bystander" to insert the term with a common "oh, of course". See *Southern Foundries (1926) Ltd.* v. *Shirlaw* [1940] A.C. 701 (per MAC KINNON L.J. in [1939] 2 K.B. 206 at p. 227). The legal scholars in the United States are not, as a rule, in favour of this technique. See WILLISTON § 1937 (p. 5424); and CORBIN §§ 632, 642, 1331 and 1350 at note 68. The judicial attitude has changed considerably in later years. See, e.g., *The Christos* 1966 AMC 1717 D.C. Cir. and the references given at p. 1719.

[3] WRIGHT, Developments p. 259.

[4] See, e.g., the statement by BENTHAM: "In English law, fiction is a syphilis which runs in every vein, and carries into every part of the system the principle of rottenness." Quoted from ECKHOFF p. 151.

[5] Cf. REU p. 68: "Gewiss, sie ist eine 'technische Notlüge', ist ein Notbehelf, eine Krücke. Aber: 'Besser Ordnung mit Fiktion, als Unordnung ohne Fiktion'. Es ist besser, die Wissenschaft *geht* mit einer Krücke, als dass sie diese stolz meidet und sich nicht von der Stelle wagt."

Every system has its disadvantages and, indeed, it seems that the courts in England and the United States have been able to deal with the problems discussed in the present study just as efficiently as—or even better than—the Scandinavian courts which have had to find their way through a spurious body of statutory provisions.

We shall see how, from the starting point of the famous *Paradine* v. *Jane*[6] laying down the stringent adherence to *pacta sunt servanda*, the technique of implication has enabled the Anglo-American courts to develop excuses from performance in typical situations. And we shall find that, in later years, the *results* attained under Anglo-American and Scandinavian law, in spite of the fundamentally different approach, are surprisingly similar.

[6] (1647) Aleyn 26 K.B.

Chapter 2

THE INTERNATIONAL LAW OF THE SEA

§ 4. *The Country of the Flag at War*

§ 4.1. *Introduction*

An outbreak of war has a considerable impact on merchant shipping. Vessels are requisitioned, their voyages and the freights are subjected to stringent control, they are required to follow certain routes or to sail in convoy, etc. It is manifest that the contractual obligations of the parties concerned must often yield to the needs created by the war. In Anglo-American law, there is a general prohibition against trading with the enemy invalidating contracts or commercial intercourse with parties domiciled in enemy territory[1] and in other legal systems the same result is usually attained by special wartime legislation.[2] Nevertheless, commerce goes on in spite of war and, in the rules of the international law of the sea, efforts have been made to protect the merchant shipping of countries at war, although experience shows that, in most cases, the rules failed to do service in practice. Only too often the belligerent warships acted and the authorities of their country had to find suitable arguments afterwards to support their action[3] and the system of retaliations, practised when one of the belligerents considered his enemy an offender of international law, tended to lead to a state of affairs where "each belligerent decides for himself which of the rules will suit him to observe and fastens upon his adversary the responsibility for his own illegalities".[4]

§ 4.2. *The Protection by International Law*

While, in the rules relating to warfare on land, private property may not be seized without compensation to the owner,[1] the rules relating to

[1] See infra pp. 190, 218.

[2] See DOMKE, Trading with the Enemy in World War II, New York 1943; and CASTRÉN p. 119 et seq.

[3] See UNDÉN p. 58.

[4] SMITH p. 211. Cf. SOHLER p. 10; SCHENK p. 119 et seq; and EEK p. 305 et seq.

[1] See the IV Hague Convention 1907 art. 46.2.

marine warfare acknowledge the opposite principle and confer upon the belligerents the right to seize and confiscate enemy private property encountered at sea.[2] The reasons presently invoked for the continued validity of this principle rest on the theory that the annihilation of the enemy's commerce is an aim which deserves consideration and that this aim would be seriously impaired if enemy private property had to be respected.[3]

The Continental powers have traditionally adhered to a statement by ROUSSEAU in Contrat Social to the effect that the war is not an affair between individuals but between states where private persons are enemies only occasionally, not as individuals, or even as citizens, but as soldiers. However, England has preferred the opinions expressed by GROTIUS and VATTEL to the effect that the outbreak of war renders all nationals of the countries involved enemies.[4] It is certainly no co-incidence that the different views professed by the respective countries have well corresponded to their military position; the Continental powers have often been unable to resist the English navy.[5] In spite of the different opinions regarding the legal nature of war, there seems to be general agreement that the present international law permits the seizure and confiscation of private enemy property at sea.

Originally, the belligerents also claimed the right to confiscate *neutral* property found onboard an enemy vessel or *neutral* vessels carrying enemy merchandise.[6] But this so-called principle of infection has been considerably modified in the present law upholding the principal protection of neutral property (subject to the exceptions of contraband and blockade) and the maxim "free ships free goods".[7] These principles were embodied in the Declaration of Paris of 1856 which also contains the important rule prohibiting privateering, i.e. private men-of-war. Since privateering tended to degenerate and to give rise to gross excesses it

[2] See COLOMBOS §§ 590–99; GIHL (1943) p. 18 et seq.; and for a historical review RÖPCKE, Das Seebeuterecht (Leipzig 1904); and WESKOTT p. 12 et seq.

[3] See COLOMBOS § 594; BREXENDORFF p. 1 et seq.; BRUNS p. 10; and GIHL (1955) p. 133 et seq.

[4] See GIHL (1955) p. 127 et seq.; and cf. the prohibition against trading with the enemy which is compatible with this conception of war.

[5] See CASTRÉN p. 37 et seq.; SCHENK p. 44; BERBER p. 199; and MARTINI, Reformvorschläge zum Seekriegsrecht (Berlin u. Bonn 1933).

[6] See further infra p. 111 et seq.

[7] See further infra p. 112.

was thought that the abolition of it should contribute to a better protection not only for neutral merchant shipping but for merchant shipping of the belligerent countries as well.[8] In spite of the fact that the risks meeting vessels belonging to a belligerent country now emanate from the military forces of the enemy, such risks, owing to the nature of modern warfare, by far surpass the threat from the privateers. And the rules of the international law of the sea are only capable of giving a rather modest protection.

It is the normal procedure that warships encountering enemy merchantmen, upon the reasonable suspicion that they are subject to confiscation, shall seize them and take them to port as "good prizes" for prize proceedings and confiscation. However, provided the crew and passengers are first placed in safety and the ship's papers taken care of,[9] the enemy merchantman may be sunk if it would be difficult to bring her to port or if such a procedure would expose the warship to risks.[10] In view of the principle that neutral goods in enemy ships, with the exception of contraband, enjoy protection from capture, the necessary consequence would seem to be that the belligerent power should pay compensation for such goods when destroyed in connection with the sinking of the vessel, but this principle was not recognized by Germany.[11]

While it is clear that the nature of modern warfare often puts the warships in dangerous situations when bringing the prizes to port, the proviso that the crew, passengers and ship's papers must be placed in safety before the destruction of the prize is unconditional. If this requirement cannot be fulfilled the warship must either expose itself to the risk when bringing the prize to port or release it.[12] Nevertheless, this principle

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[8] See COLOMBOS §§ 536–38; MIRUSS, Das Seerecht und die Fluss-schiffahrt nach den Preussischen Gesetzen mit Rücksicht auf die wichtigsten fremden Seegesetzgebungen (Leipzig 1838) I p. 504 at § 1040: "In Hinsicht auf die Gesetze des Krieges kann aber leicht die Kaperei in Seeräuberei ausarten, wenn die vorgeschriebenen Gränzen überschritten werden, und hauptsächlich aus diesem Grunde werden beide so oft mit einander verwechselt". See for historical reviews TØNNESSEN, Kaperfart og skipsfart 1807–1814 (Oslo 1955); SMITH p. 100 et seq.; and GIHL (1955) p. 140.

[9] See COLOMBOS §§ 911–15; and GIHL (1943) p. 98.

[10] See COLOMBOS §§ 909–15; GIHL (1943) p. 97; and SUNDBERG, Folkrätt p. 328.

[11] See COLOMBOS § 917. The German attitude is defended by FRASCONÀ p. 104; and QUINCY WRIGHT, A.J.I.L. Vol. 11 p. 377.

[12] See COLOMBOS § 914 referring to the London Protocol of 1936; and GIHL (1943) p. 98.

was not respected by Germany during the World Wars. From the First World War the case of *The Lusitania*, when more than 1100 persons were killed, is especially well-known. This vessel flew the then neutral American flag and the event was a result of the so-called unrestricted submarine warfare whereby Germany proclaimed the right to sink enemy and neutral tonnage within certain large war zones (Kriegsgebiete).[13] During the Second World War the German Admiralty issued an order to the effect that the crew of enemy vessels should not be rescued in connection with the destruction of the prizes ("Ständige Kriegsbefehl Nr. 154" and "Laconiabefehl" of 17 September 1942).[14] The passage in the Laconiabefehl to the effect that "Rettung widerspricht den primitivsten Forderungen der Kriegsführung nach Vernichtung feindlicher Schiffe und Besatzungen" caused the prosecution of the German Admiral DÖNITZ in the Nuremberg trial for having given an order to kill the crew *intentionally* but, on this specific point, Admiral DÖNITZ was not found guilty.[15]

Germany's naval warfare during the World Wars is explained by the fact that Germany's most efficient weapon was its submarines, which could only with the greatest difficulty capture vessels in the traditional way. And this difficulty was considerably increased by the practice of arming merchantmen for the very purpose of resisting the submarines.[16] The London Protocol of 1936 laid down the rule that submarines had to follow the same procedure as surface warships but, in spite of the fact that such a rule was embodied in the German Prize Ordinance of 1939 (art. 74), the exigencies of war caused Germany to abandon the rule purporting to protect the lives of people onboard merchant vessels. To some extent Germany supported her procedure by the argument that armed merchantmen must be regarded as enemy warships and, thus, were not entitled to the protection of international law. The British armed merchantmen did in fact cause serious losses to the German submarines and, in addition, the fact that the practice of arming mer-

[13] See infra p. 127.

[14] See for a full text SCHENK p. 130 et seq.

[15] See SCHENK p. 132. SOHLER, p. 60, acknowledges that the wording of Laconiabefehl is unfortunate but does not think it could be understood as an order to kill the crew intentionally, since there is a difference between "Nichtretten" and "Vernichten".

[16] See infra p. 116.

chantmen became common during the war, made visit and search by submarines practically impossible.[17] Great Britain, however, insisted that the German arguments supporting the unrestricted warfare by submarines against merchant vessels were completely untenable. The submarines' vulnerability and difficulty of manoeuvring did not excuse them for not conforming to the humane rules adopted in naval warfare.[18]

Another serious threat against merchant shipping was caused by mines. In order to protect merchant shipping the VIII Hague Convention 1907 art. 2 prohibited the laying of automatic contact mines off the coasts and ports of the enemy with the sole object of intercepting commercial shipping. However, this prohibition proved to be without value, since a belligerent only has to assert a different object in order to make the prohibition illusory.[19] Similarly, the provisions of the Convention purporting to safeguard peaceful shipping (notification of mine-fields, devices to make the mines harmless shortly after they had parted from their moorings, etc.) were not always observed during the World Wars.[20]

The VI Hague Convention 1907 contains provisions protecting merchant vessels which, on the outbreak of the war, are in enemy ports or on the high seas. Such vessels may not be confiscated but may only be kept in custody until the end of the war or requisitioned against compensation. The Convention stipulates that it is "desirable"[21] that merchantmen in enemy ports be given permission to sail immediately or after a certain period of time in order to proceed to their destination or another nominated port. The same provisions should apply to vessels

[17] See for further comments SMITH pp. 106, 135, 211; SCHENK pp. 49–65; SOHLER pp. 11 et seq., 27; ZEMANEK, Wörterbuch des Völkerrecht III p. 466 et seq.; and GIHL (1943) p. 62.

[18] See COLOMBOS § 534 in fine.

[19] See COLOMBOS § 821; BRITTIN & WATSON p. 140; and KRUSE, in Wörterbuch des Völkerrechts II p. 539.

[20] See COLOMBOS §§ 567–8, 821, 857; SMITH p. 120 et seq.; and SCHWARZENBERGER p. 225 et seq.

[21] See Lord SHAW OF DUNFERMLINE in *Horlock* v. *Beal* [1916] A.C. 486 at p. 509, where he points out that the belligerents in earlier wars showed a greater generosity to the merchant shipping of their adversaries. The Convention proved to be worthless in the First World War, since Germany did not want to accept the procedure appearing from a British Order in Council of 4 August 1914 to the effect that, under the condition of reciprocity, German merchantmen in British ports were given "a period of grace for loading, unloading and departure" until midnight 14 August.

which have left the loading port and without knowledge of the outbreak of war sail into enemy ports. Furthermore, the Convention prescribed that enemy merchantmen which, unaware of the outbreak of war, were encountered on the high seas were not subject to capture and confiscation. The belligerents could only take such vessels in custody or requisition them against compensation. The same rules applied to the goods onboard.[22] The Convention was never ratified by i.a. the United States and Italy. German and Russia only ratified it with certain reservations.[23] And Great Britain denounced the Convention in 1925, since it had failed its purpose. Nevertheless, it may be that the principles of Convention still have some validity.[24]

The XI Hague Convention 1907 protects vessels which are used for "petty local navigation". Such boats and their cargoes are free from capture, but they may be requisitioned against full compensation.[25]

Although, in the international law of the sea, there are quite a few rules purporting to protect enemy merchant shipping, the experience from the World Wars shows that the protection became of slight value in practice. Owing to the ever increasing efficiency of modern naval warfare the risks, in a major conflict, of loss of crew, vessels and cargoes engaged in enemy merchant shipping are enormous. And these risks may only be reduced to a limited extent by arming merchantmen, placing them under convoys or similar measures.

§ 5. *The Country of the Flag Neutral*

§ 5.1. *Some General Observations*

It will be seen that naval warfare strongly affects neutral merchant shipping as well. Originally, the belligerents' right to capture enemy property at sea was unrestricted and the principle "free ships free goods" was not recognized.[1] And, although this principle was subsequently modified, the rules that the belligerents did not have to tolerate neutral merchant-

[22] See CASTRÉN pp. 335, 338; SUNDBERG, Folkrätt p. 321 et seq.; and GIHL (1943) p. 78 et seq.

[23] See COLOMBOS § 676.

[24] See COLOMBOS § 680.

[25] See COLOMBOS § 658; and CASTRÉN p. 340.

[1] In Consolato del Mare the dividing line was between enemy and neutral property without further distinctions.

men providing their adversaries with contraband goods or breaking through blockaded zones have been retained through the centuries.[2] The rules relating to contraband and blockade are closely interrelated. An extensive application of the rules relating to blockade would seriously impair neutral merchant shipping with the enemy countries concerned, since vessels breaking the blockade, in the same way as vessels carrying contraband, would subject themselves to the risk of being captured and confiscated.[3] The neutral powers demanded i.a. that the blockade must be *effective* in order to be respected, and not only a "paper blockade", and this request was complied with in the Declaration of Paris 1856 which has been ratified by a great number of States, with the exception of the United States. However, since, in practice, the United States recognizes the principles of the Declaration it is safe to say that the Declaration represents the international law of our time. The Declaration of Paris made further concessions to the benefit of merchant shipping; non-contraband enemy property onboard neutral merchantmen could not be confiscated ("free ships free goods") and the so-called theory of infection was rejected by excepting non-contraband neutral goods in enemy ships from confiscation. Subsequently, in the Declaration of London 1909, efforts were made to agree on certain provisions as to how the general principles of the Declaration of Paris and the rules relating to contraband goods should be applied in practice. This Declaration, although signed by Austria-Hungary, France, Germany, Great Britain, Italy, Japan, the Netherlands, Russia, Spain, and the United States, was never ratified. Nevertheless, the signatory powers unanimously declared that the provisions of the Declaration represented the governing international law.[4]

Even though, undoubtedly, international law to some extent protects the interests of the neutral powers and of their merchant marine, the

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[2] The word "contraband" emanates from *contra bannum* and a prohibition in the 1200s by the Pope to send certain merchandise to the infidel. See CASTRÉN p. 545 and for historical reviews WESKOTT pp. 9 and 23 et seq.; EHNINGER, Droits et Obligations des sujets neutres en matière de contrebande du guerre (Lausanne 1934) pp. 21, 29; and SCHEUNER, in Wörterbuch des Völkerrechts II (Berlin 1961) p. 290 et seq.

[3] See concerning the development of the rules relating to blockade COLOMBOS §§ 813–63; and GIHL (1943) p. 80 et seq.

[4] See for a Swedish text STAËL von HOLSTEIN, Sjöfarten under krig (Stockholm 1914); and for commentaries COLOMBOS §§ 24, 504; and CASTRÉN p. 547.

very nature of international law may easily make this protection illusory. The fact that the neutral powers are incapable, or for political reasons unwilling, to forcibly insist on their rights may often suspend the protection of the rules during the time when such protection is especially needed.[5] Furthermore, the principle that an offended belligerent may resort to retaliation may easily lead to a detoriation of international law.[6] The neutral powers usually maintain that the belligerents' right of retaliation may not affect innocent neutrals[7] but in Germany the view has been taken that measures affecting a neutral power are permissible when such a power has not itself been able to resist infringements of international law by any one of the belligerents ("Selbsthilfe")[8] and in Great Britain it is stressed that the neutral powers have to tolerate inconveniences from retaliations which are reasonable under the circumstances.[9]

In the following, a brief summary shall be given of the rules purporting to protect neutral merchant shipping in time of war. Firstly, the requirements for the protection of neutrality are dealt with in § 5.2. An account of the special rules relating to restraint and requisition of neutral private property—*arrêt de prince and jus angariae* (right of angary)—is given in § 5.3. And the rules relating to contraband and blockade are summarized in § 5.4 and § 5.5 respectively. Finally, in § 5.6 some comments are made regarding the belligerents' right to sanctions against neutral merchantmen and the practice in this respect during the World Wars.

§ 5.2. *Requirements for the Protection of Neutrality*

In distinguishing between neutral and enemy property, and determining the criterion of enemy character, the Continental legal systems have used the *nationality* of the owner as the decisive test, while the Anglo-American systems prefer to take the *domicile* as a point of departure. The question of determining the character of the *goods* is discussed in art.

[5] See the observations by SMITH pp. 125, 171.

[6] See GIHL (1943) p. 28 et seq.; SMITH pp. IX, 93, 176 et seq., 211; DUTTWYLER p. 29; and SOHLER p. 10.

[7] See, e.g., GIHL, Neutralitetsproblem pp. 30, 46 et seq.; WESTMAN p. 30; and CASTRÉN p. 286.

[8] See SCHENK pp. 120 et seq., 127 et seq.; and SOHLER p. 55.

[9] See SCHWARZENBERGER p. 226; and Krigsforsikringen for norske skib II p. 248.

58 of the Declaration of London 1909, but, in view of the different attitudes taken by the Continental and the Anglo-American powers,[1] the exact procedure has intentionally been left open. However, in the Declaration agreement was reached to treat the vessel's flag as the decisive factor in determining the enemy or neutral character of the vessel (art. 57). Nevertheless, in view of the practice to register ships under so-called flags of convenience,[2] it may be subject to serious dispute whether this principle can nowadays be upheld. During the World Wars, the principle of the domicile as the decisive test generally influenced the interpretation of art. 57 of the Declaration and consideration was paid to the location of the place from which the vessel was administered and controlled. In applying this test, the domicile of the shareholders becomes relevant indirectly, since the holders of the majority of the shares have the factual control of the vessel.[3] But the mere fact that a few shareholders are enemy citizens or domiciled in enemy territory is not sufficient to give the vessel enemy character.[4]

Since a *transfer* of the ownership of the property would constitute a means of avoiding the principle that the belligerents may capture and confiscate enemy property encountered at sea, the Declaration of London contains in arts. 55, 56 and 60 some detailed provisions purporting to distinguish *bona fide* transactions from mere camouflage. However, these provisions, and notably the presumtions for *bona fide* transactions, were considered artificial by the Prize Courts in Great Britain and the United States where it was preferred to let the decision depend upon the circumstances prevailing in each particular case.[5]

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[1] See PFLÜGER, Die "feindliche Eigenschaft" von Schiff und Ladung in der englischen Prisenrechtsprechung des Weltkriegs (Diss. Hamburg 1929); and BROWN, SIDNEY H., Der neutrale Charakter von Schiff und Ladung im Prisenrecht (Zürich 1926).

[2] See BOCZEK, Flags of convenience; and ROUX, Les pavillons de complaisance (Paris 1961). Cf. from Swedish law § 1 of the Maritime Code which permits registration under Swedish flag provided the *Board* consists of shareholders who are Swedish citizens; apart from the shares held by the members of the Board, the shares may be owned by foreigners.

[3] See CASTRÉN p. 327; and RØED p. 322. SMITH p. 101, maintains that this test is well warranted under the present conditions with frequent *pro forma* registrations of vessels. See also DEMAUREX, La nationalité des navires de mer (Lausanne 1958) p. 39 et seq.

[4] See PFLÜGER p. 42; DEMAUREX p. 60; and SCRUTTON, in L.Q.R. Vol. 34 (1918) p. 123. But cf. SUNDBERG, Folkrätt p. 318.

[5] See COLOMBOS §§ 607–10; and CASTRÉN p. 330 et seq.

Since neutral non-contraband goods cannot be captured and confiscated, even if they are carried on an enemy merchantman, it would be tempting to make arrangements to the effect that the goods be considered neutral property while *in transit*. However, the Declaration of London contains provisions reducing the possibilities of making such arrangements. Art. 59 stipulates that goods onboard enemy merchantmen are *presumed* to have enemy character. Furthermore, with the exception of the unpaid seller's right of stoppage *in transit*, the goods retain their enemy character even if agreements are made to transfer the title to neutral persons while the goods are *in transit*.[6] Conversely, according to the British view, a neutral seller may not safe-guard the neutral character of goods intended for the enemy by retaining the title to them while *in transit*.[7]

A vessel having neutral character may lose her protection by being found guilty of *unneutral service*. In this regard, the Declaration of London makes a distinction between "lesser" and "grave" offences. The "lesser" offences are enumerated in art. 45 (transport of enemy troops, conveying information to the enemy, etc.) and entitle the offended belligerent to treat the vessel in the same way as a vessel carrying contraband.[8] The "grave" offences are dealt with in art. 46 and consist of direct participation in enemy operations, subjecting the vessel to direct control of a person appointed by the enemy, chartering the vessel to the enemy, and exclusive use for transportation of enemy troops or for the transmission of information for the benefit of the enemy. In these cases, the neutral merchant vessel may be treated in the same way as an enemy merchantman.

The main idea underlying the rules relating to unneutral service is the same as lies behind the rules relating to contraband. The practical difference between the different rules may be slight depending upon the manner in which the vessel is used (cf. art. 46:3 of the Declaration of London). The decisive factor in bringing the rules relating to unneutral service into operation seems to be whether or not the shipowner has

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[6] See GIHL (1943) p. 76; and CASTRÉN p. 335.

[7] See COLOMBOS §§ 607–8; and for a more lenient standpoint taken by the German and French Prize Courts CASTRÉN p. 334.

[8] See infra p. 132.

retained the control of the vessel or surrendered such control to the enemy.[9]

As will be explained below,[10] enemy warships have the right to visit and search neutral merchantmen. If the merchantman forcibly tries to resist a warship exercising such right, she may be treated as an enemy vessel and exposes herself to the risk of confiscation. In addition, goods belonging to the master or the shipowner may be confiscated (Declaration of London art. 63). According to the Declaration of London, efforts to escape visit and search are not considered "forcible resistance" but may constitute an incentive for the warship to closely examine whether the vessel or her cargo may be confiscated.[11]

One of the most controversial questions has been raised by the practice during the World Wars to arm merchantmen. Since only *enemy* merchantmen have a right to forcibly resist a warship's visit and search it would seem that there is no legitimate reason to arm *neutral* merchantmen. Nevertheless, the naval warfare during the World Wars, in particular the German so-called unrestricted submarine warfare, provided a valid excuse for arming neutral merchantmen as well.[12] But, undoubtedly, this practice contributed to the deterioration of the rules purporting to protect merchant shipping, since the enemy warships had to take into account the risk of resistance from enemy merchantmen as well as neutral ones and acted accordingly. Owing to the vulnerability of submarines they usually preferred to sink enemy and neutral merchantmen at sight before exposing themselves to the risk of being shot at and sunk.[13]

The practice of protecting merchantmen by *convoys* constituted another means of escaping the interception by warships at sea. Hence, a distinction is made between *enemy* convoys and *neutral* convoys. A neutral

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[9] See CASTRÉN p. 575, who points out that the *proviso* that, in order to bring the rules into operation, the vessel should have been chartered by an enemy *government* was not observed during the World Wars. See also RÆSTAD p. 160 et seq. concerning the German concept of "feindselige Unterstützung"; and cf. COLOMBOS §§ 809–10.

[10] See p. 129 et seq.

[11] But cf. for the German opinion CASTRÉN p. 328; and SUNDBERG, Krig p. 28.

[12] See COLOMBOS § 887; BORCHARD, Armed merchantmen, A.J.I.L. Vol. 34 (1940); SCHWARZENBERGER p. 195; PARFOND p. 160; CHURCHILL I p. 332; and the case of *The Rockingham* commented by RØED p. 315. But cf. SCHENK p. 53 et seq.; and CASTRÉN p. 248 et seq.

[13] See CASTRÉN p. 251; GIHL (1943) p. 62; id. (1955) p. 178 et seq.; and SUNDBERG, Folkrätt p. 324.

merchantman sailing in an enemy convoy may be treated as an enemy merchantman, the idea being that she will most certainly get assistance from the warships of the enemy convoy.[14] According to the French and German view, a neutral merchantman sailing in enemy convoy may even be treated as an enemy *warship*, since she is a part of the enemy's "fighting unit".[15]

Although, according to the Declaration of London art. 16, a neutral merchantman under neutral convoy does not have to accept a visit and search by a warship, Great Britain has consistently refused to accept this principle.[16]

A dispute arose between England and Sweden owing to the Swedish Queen Christina's instructions in 1653 to Swedish warships to resist efforts from the belligerents to visit and search Swedish merchantmen under Swedish convoy. The same tension arose during the so-called armed neutrality treaties between Russia and the Scandinavian countries in the 1780s and the 1800s. One of the leading English cases concerned the Swedish *Maria*[17] which was captured in January 1789 and confiscated in subsequent prize proceedings owing to the fact that an escorting Swedish warship had forcibly resisted the efforts from the British warship to visit and search the vessel.[18]

It would seem that the extension of the concept of contraband[19] warrants an adoption of the English view, a neutral warship can hardly assert that the merchantmen under convoy do not carry articles which may be considered contraband under the present international law.[20] Neutral convoys were infrequent during the Second World War but neutral merchantmen, in spite of the risks, often sailed under enemy convoys, since this offered at least some protection against the risks resulting from the submarines.[21]

The method of obscuring the navigation lights at night constituted

[14] See COLOMBOS §§ 810, 878; and SMITH p. 244. But cf. for a more lenient attitude explained by the dangers resulting from the German unrestricted submarine campaign, *The Montana* commented upon by RØED p. 316 et seq.

[15] See SCHENK p. 66; and CASTRÉN p. 579. But cf. the criticism by RÆSTAD p. 158.

[16] Great Britain departed from her traditional opinion during the Crimean War and during the negotiations resulting into the Declaration of London but resumed her previous standpoint during the World Wars. See CASTRÉN p. 581 et seq.

[17] (1799) 1 C. Rob. 340.

[18] See COLOMBOS §§ 872–7.

[19] See infra p. 122 et seq.

[20] See COLOMBOS § 877 in fine; SMITH p. 244; and cf. infra p. 136 et seq.

[21] See Krigsforsikringen for norske skib II p. 89 et seq.

another means of avoiding visit and search. This method was practised during the Second World War but, according to the German view, such vessels could be treated as enemy *warships* and be sunk without previous warning.[22]

In order to facilitate the interruption of enemy commerce, another rule was adopted during the seven year war between England and France; the so-called "Rule of War of 1756".[23] Owing to the superiority of the British navy, France had difficulties in maintaining her commerce with the colonies and to avoid this dilemma she allowed Dutch merchantmen to be engaged in the relevant trade in spite of the fact that it was closed to them in time of peace. Under "The Rule of War of 1756" Dutch vessels participating in such trade were considered enemy ships "by adoption". Since no agreement could be reached, the question was left open in the Declaration of London (see art. 57: 2). "The Rule of War of 1756" has, as such, a rather limited effect but the extension of it in the form of the principle of the "continuous voyage" has had great practical importance during the world wars. Since the neutral vessels tried to avoid "The Rule of War of 1756" by transshipments in neutral ports, thus avoiding a direct transport in the prohibited trade, Great Britain, and later the United States, declared the Rule applicable as soon as there was an "ultimate enemy destination".[24] And, as will be seen below, the principle of "ultimate destination" applied in determining the concepts of contraband and blockade led to a dilution of the international law of the sea and a considerable inconvenience for neutral merchant shipping.[25]

§ 5.3. *Arrêt de Prince and Jus Angariae*

In order to prevent neutral vessels from conveying information to the enemy, the belligerents are considered to have the right to prevent such vessels from leaving port, *arrêt de prince.* However, the belligerents have no right to *use* the neutral vessel concerned under the concept of *arrêt*

[22] See SCHENK p. 67.

[23] The origin of the rule is older but it is considered fully accepted in 1756. See GIHL, NTIR 1943 p. 67 et seq.

[24] See COLOMBOS § 766; and concerning the corresponding practice in applying the custom's regulations to vessels passing through Öresund, when such vessels maintained Danzig as their destination instead of Narva, ATTMAN, Den ryska marknaden i 1500-talets baltiska politik, Lund 1944.

[25] See infra pp. 123 et seq.; 126 et seq. and 136.

de prince. Owing to the modern possibilities of communicating information, the concept of *arrêt de prince* has to-day a very limited importance in practice.[1]

The concept of *jus angariae* (right of angary) confers upon the belligerents the right to requisition neutral vessels in the belligerent power's ports, territorial waters or ashore.[2] Although *jus angariae* is not a remedy available to non-belligerent states, neutral powers resorted to the requisitioning of vessels flying neutral flags during the World Wars.[3] It is generally considered that *jus angariae* may only be exercised in cases of military exigency.[4]

The concept of *jus angariae* was frequently used by the belligerents during the World Wars and implied a considerable threat to neutral shipping. The requisition amount did not always provide a satisfactory compensation.[5] The fact that belligerents may requisition neutral tonnage under the concept of *jus angariae* facilitated "voluntary" agreements between neutral shipowners and the belligerent states.[6] There

[1] See CASTRÉN p. 508.

[2] See for further information concerning *jus angariae* BREXENDORFF, Die Beschlagnahme neutraler Schiffe. Ein Beitrag zum Angarienrecht unter besonderer Berücksichtigung der Freundschafts-, Handels- und Schiffahrtsverträge, Diss. Kiel 1939. *Jus angariae* is also considered to entitle the belligerent power to requisition neutral parties' rights under building contracts in the belligerent country. See COLOMBOS § 619 concerning the United States' requisition of Norwegian building contracts in 1917. These measures were considered legal by The Hague Arbitration Tribunal which also determined the compensation. See further BREDAL, TfR 1923 pp. 1–45.

[3] See CASTRÉN p. 509 et seq. The United States by an Act of Congress 6 June 1941 requisitioned neutral tonnage while the country was still neutral but it is sometimes maintained that these measures were legal, since the United States could not be considered really neutral at the relevant time. See COLOMBOS §§ 625–6.

[4] See COLOMBOS §§ 617–19, 622; DUTTWYLER p. 72; CASTRÉN pp. 509, 538; and SUNDBERG, Folkrätt p. 298; but cf. SMITH p. 126 note 1: "it seems quite unnecessary to use a rare word of Persian origin to describe what is nothing more than a special case of a normal legal right". Cf. also HJERNER p. 285.

[5] See, e.g., SCHREINER p. 320 et seq. concerning the conflict between the United States and Norwegian shipping interests on account of the requisitioning of Norwegian shipbuilding contracts under "The Urgent Deficiences Act" of 15 June 1917. See also Göteborgs Handels- och Sjöfarts-Tidning 14 December 1941 concerning the requisition by the United States of The Kungsholm.

[6] See BEHRENS p. 58 et seq. indicating other methods of coercion, e.g., refusal to deliver bunkers, to provide insurance and reinsurance, etc. See for a background to the so-called tonnage agreement between Norwegian shipowners and Great Britain during the First World War, SCHREINER p. 167 et seq.

are some limitations in the scope of *jus angariae*, since it is generally considered that it may not be exercised on the high seas outside the territorial waters of the belligerent states[7] and that it only relates to the vessel and not to the cargo.[8]

§ 5.4. *Contraband*

The rules relating to contraband have undergone a considerable change during the World Wars owing to the British efforts to cripple the enemy's commerce by all means. The preventing of neutrals from providing the enemy with weapons, ammunition and military stores, which was the original purpose of the rules, faded off into an almost general prohibition of providing the enemy with goods of any kind.

Neutral powers, of course, have always insisted on a restricted concept of contraband. Efforts to this effect were made as early as the 1700s during the time of the Armed Neutralities. The neutral powers tried to determine the proper boundaries of the concept of contraband by themselves prohibiting their nationals from carrying such goods which had been listed as contraband in statutory enactments. And this measure was combined with the principle that merchantmen under neutral convoy did not have to subject themselves to visit and search by belligerent warships, such vessels having to accept the declaration of the commander of the neutral convoy that the merchantmen did not carry contraband in the sense this concept was understood by the neutral power concerned. This approach was defended by MARTIN HÜBNER in his work "De la saisie des bâtiments neutres"[1] while VATTEL in "Le droit des gens ou principes de la loi naturelle"[2] maintained that the carriage of contraband could not be considered an unlawful act by the neutral powers but that in return the belligerents on account of military exigency had a right to visit and search neutral vessels and to capture such vessel which carried contraband. This theory would allay the tension between the belligerents and the neutral powers in that such powers did not have to accept any responsibility for the behaviour of their citizens. VATTEL's theory has been adopted in the V and XIII Hague Conventions 1907 where it is stipulated that neutral powers do not have to restrain their citizens

[7] See COLOMBOS § 620; but cf. CASTRÉN p. 512.

[8] See CASTRÉN p. 511.

[1] HÜBNER I and II. Hague 1759.

[2] Leiden 1758.

from engaging in the carriage of contraband. The Swedish Royal Decree of 30 April 1904 containing a prohibition to carry contraband and favouring a restricted concept of contraband ("vapen, projektiler och ammunition, militära utrustningspersedlar samt övriga omedelbarligen till krigsbruk användbara tillverkningar") goes further than required by the present international law.[3]

In the Declaration of London 1909, efforts were made to delimit the concept of contraband. The Declaration operates with two main prerequisites; (1) the merchandise must be susceptible of belligerent use and (2) must be on its way to the enemy. Nevertheless, these two prerequisites leave a considerable margin to the discretion of the states involved. Hence, the provisions of the Declaration purport to give the concept of contraband a more precise meaning by introducing classifications in three lists (art. 22, 24, 28). In art. 22 goods belonging to the category of "absolute contraband" are enumerated and in art. 24 goods susceptible of use in war as well as for purposes of peace, so-called "conditional contraband", are enumerated. Finally, a further list, a so-called "free list", is to be found in art. 28 consisting of goods which were never to be considered contraband (raw materials of textile and wool, raw cotton, silk, wool, rubber, resins, raw hides, metallic ores and paper). The distinction between "absolute" and "conditional" contraband is explained by the fact that in the case of "absolute" contraband hostile destination to enemy territory is sufficient, while in the case of "conditional" contraband the goods must be destined to and intended for the use of the enemy Government or the enemy's naval or military forces. Furthermore, the principle of the "continuous voyage"[4] is only applicable to "absolute" contraband (art. 30 compared with art. 33). But the Declaration of London was never ratified and the belligerents found themselves unable to respect its provisions during the World Wars.

In particular, English writers maintain that the concept of contraband

[3] See in particular § 5. GIHL, in Festskrift till Nils Stjernberg p. 103, considers this Decree obsolete. Cf. BRUNS, p. 84, stressing the fact that the theory of the State's irresponsibility for the acts of its citizens to carry contraband rests upon the assumption that trade is free from governmental interference in time of war which is not true under modern conditions. See also EHNINGER, p. 117, maintaining that the character of the concept of contraband and the state's responsibility for its citizens is probably not "établie de façon définitive". As pointed out by BERBER, p. 223, nothing prevents a neutral state from prohibiting carriage of contraband by its citizens.

[4] See supra p. 118; and infra p. 123 et seq.

cannot be constricted by rigid classifications; it must be flexible and adaptable to the technical development and the changes in methods of warfare.[5] Furthermore, the nature of a modern war, engaging all the resources of the State and subjecting all commerce to a stringent governmental control, tends to enlarge the scope of the concept of contraband and to reduce the practical importance of the distinction between "absolute" and "conditional" contraband.[6] Hence, during the World Wars, the concept of contraband was in stages enlarged to comprise practically all kinds of goods.[7]

The Declaration of London contains in arts. 31–36 a number of rules relating to the burden of proof and the evaluation of evidence with regard to the destination of the goods. According to these rules, in the case of absolute contraband, the belligerent power has the burden of proving the destination to enemy territory. If the ship's papers contain information of discharge in an enemy port, or if the enemy forces are named as consignees, such information constitutes irrebuttable evidence of enemy destination (*præsumptio juris et de jure*). In addition, the same presumtion applies if the vessel shall exclusively call at enemy ports, or if she shall call at an enemy port or contact enemy troops before she reaches the neutral port of destination named in the ship's papers. Full reliance shall be placed upon the ship's papers unless the ship has obviously deviated from the relevant route and there is no sufficient explanation for such deviation.

As previously mentioned, conditional contraband may only be confiscated if the goods are intended for the enemy's military forces or governmental bodies; the mere fact that they are destined to enemy territory is insufficient. Furthermore, the principle of the "continuous voyage" does not apply to conditional contraband. This being so, a discharge of conditional contraband in an intermediate neutral port will, according to the Declaration, prevent the confiscation of the goods by the belligerents. However, one exception has been made in art. 36 for the situation when the enemy territory has no seaboard; the reason

[5] See, e.g., SMITH p. 147; and SCHWARZENBERGER p. 221; the very first kind of merchandise enumerated in the "free list" of the Declaration of London, raw cotton, became one of the most important ingredients in the manufacture of explosive articles. See also GIHL, Neutralitetsproblem p. 45.

[6] See COLOMBOS §§ 772, 778; and SUNDBERG, Krig p. 32.

[7] See COLOMBOS § 778 in fine; SCHWARZENBERGER p. 221; SUNDBERG, Folkrätt p. 323; and GIHL, Neutralitetsproblem p. 46.

being that in such a case the risk of a circumvention is more obvious than in other cases. If the goods are destined directly to the enemy's military forces or governmental bodies, or to a merchant domiciled in enemy territory who is known to provide the military forces and governmental bodies with goods of the relevant kind, there is a presumtion that the goods are intended for such use of the enemy that suffices for confiscation. However, this presumtion may be rebutted (art. 34). Furthermore, if the shipment is intended for a place fortified by the enemy, or an enemy base, the same presumtion applies. On the other hand, if these requirements are not at hand, the destination is considered innocent.

Since the belligerents, and in particular Great Britain, did not adhere to the principles laid down in the Declaration of London, the whole system purporting to protect neutral merchant shipping fell to pieces. The value of the ship's papers as evidence of the innocent character of the goods became practically nil. In the words of COLOMBOS: "Often the consignees are mere 'dummies', 'covers' or 'conduit pipes' and it is only from extensive investigation that the real facts can be discovered".[8] The rules of the Declaration relating to the burden of proof and the various presumtions were considered unrealistic and a system of free evaluation of the evidence was resorted to instead. Hence, conditional contraband could frequently be considered destined to the enemy's armed forces or governmental bodies, since in a modern war the state keeps all goods and consumtion under a stringent control. And this led to the abolition of the practical importance of the distinction between absolute and conditional contraband[9] as well as the repudiation of the rule laid down in the Declaration of London that the principle of the "continuous voyage" may not be applied to conditional contraband.[10]

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[8] COLOMBOS § 774.

[9] See COLOMBOS § 780; SMITH p. 112; GIHL (1955) p. 140 et seq.; and id., Neutralitetsproblem p. 54. See in particular the reasoning in *The Kim* [1915] P. 215, which involved three Norwegian and one Swedish vessel, The Kim, The Alfred Nobel, The Björnstjerne Björnson and The Fridland. The case is in the relevant parts commented upon in NC 1615 et seq.

[10] This approach was taken in *The Kim* supra. The American *Springbok* case, [1866] 5 Wall. 1, where the principle of the "continuous voyage" was applied to contraband, was referred to. In *The Springbok* it was also stated that the issuance of bills of lading "to order" raises a presumtion for enemy destination. See further concerning *The Springbok* SUNDBERG, Folkrätt p. 324.

While, originally, the principle of the "continuous voyage" related to the situation when one and the same vessel first called at a neutral port and subsequently continued to an enemy port, the expression is now used in situations when the goods are transshipped on another vessel or even by other means of conveyance ashore. However, in these cases it would be more correct to use the term "ultimate destination" rather than "continuous voyage".[11] By the application of the principle of the "continuous voyage" the belligerents were able to confiscate goods on extremely feeble grounds during the World Wars. Even the mere fact that an import of goods of a certain kind to a neutral country exceeded the pre-war quantity was considered a presumtion that goods of the relevant kind had an enemy destination. And this led to a system of the "rationing" of neutrals which induced them to enter into agreements with the belligerents.[12]

The presumtion for enemy destination raised by the issuance of bills of lading "to order" or "to banks" could be avoided by adding a "notify address" and the name of the consignee, thus disclosing the intended destination of the goods.[13] If it was discovered that the consignee had earlier exported goods of the relevant kind to the enemy, this constituted a presumtion that the shipment in question would be exported to the enemy as well. And the threat from this presumtion became a reality on account of the extensive investigations by the British War Trade Intelligence Department and similar organizations in other belligerent countries. Black and gray lists were drawn up and persons or corporations introduced in these lists were considered enemies. Neutrals maintaining business relations with such persons and corporations were also black-listed.[14]

The dilution of the system embodied in the Declaration of London strongly affected the rules relating to visit, search, capture and confiscation. The new system necessitated a control of quite another kind than visit and search on the high seas and led to a control through organiza-

[11] See SCHWARZENBERGER p. 222; and CASTRÉN p. 556.

[12] See COLOMBOS § 775; CASTRÉN p. 541; PARFOND p. 91; GIHL (1955) p. 141; id., Neutralitetsproblem p. 50 et seq.; and HÄGGLÖF, Den svenska krigshandelspolitiken under andra världskriget.

[13] Cf. *The Springbok* case, supra, and the German *Lupus* case reported in relevant parts in NC 1791 et seq.; See also CASTRÉN p. 559 and circulars from the British Government to the neutrals accounted for in NC 3569 et seq.

[14] See further COLOMBOS §§ 632–4; CASTRÉN p. 537; and WESTMAN p. 35 et seq.

tions ashore. Great Britain introduced the system of issuing a kind of "commercial passport" for the goods and the vessel which assured the goods and the vessel so certified of an undisturbed passage—so-called navicerts (navigation certificates) and ship's warrants.[15] And this system induced the Prize Courts to conclude that goods and ships lacking navicerts and ship's warrants were *prima facie* subject to confiscation. Since the German Prize Courts were inclined to treat the participation of the neutrals in the navicert system as unneutral service, the neutrals during the world wars had lost most of the protection appearing from the Declaration of London which, at one time, was considered to represent general international law.[16]

§ 5.5. *Blockade*

Blockade has been defined as "the interception by sea of the approaches to the coasts or ports of an enemy with the purpose of cutting off all his overseas communications".[1] And its object is not only to stop the importation of supplies but to prevent export as well. Rules relating to blockade are to be found in the Declaration of Paris as well as in the Declaration of London. The former stipulates i.a. that a blockade in order to give the belligerents a right to interfere must be effective; "paper blockades" are not recognized. And in the Declaration of London some further rules have been laid down; (a) the blockade may not bar access to the ports or coasts of neutral states (art. 18; cf. art. 1), (b) it must be declared and notified (arts. 8, 9, 11 and 16), (c) the principle of the "continuous voyage" does not apply (art. 19; cf. also art. 17), and (d) the blockade must be applied impartially to the ships of all neutral states (art. 5). Furthermore, according to the Declaration of London, neutral vessels may not be captured for breach of blockade except within the area of operation (*rayon d'action*) of the warships detailed to render the blockade effective, unless they have been pursued directly from such area—so-called "hot pursuit" (arts. 17, 20).[2]

[15] See further COLOMBOS §§ 782, 786; and infra p. 130 et seq.

[16] See CASTRÉN p. 542 et seq.; and SMITH p. 155 maintaining that the British Order in Council of 31 July 1940, making the navicert system compulsory for all practical purposes by introducing a presumtion for enemy destination in the absence of navicert, "could not be defended under the ordinary rules of law". See also WESTMAN pp. 35, 40 et seq.

[1] COLOMBOS § 813.

[2] See generally concerning "hot pursuit" COLOMBOS §§ 171–5; and POULANTZAS, The right of hot pursuit in international law.

During the World Wars the "classical" blockade proved to be a rather inefficient means of cutting off the sea-borne commerce between the enemy and neutral countries. A close range blockade was usually inconceivable owing to the efficiency of shore batteries, torpedo-boats, submarines and mines.[3] And long range blockades would not, as a rule, conform with all the requirements laid down in the Declaration of Paris and the Declaration of London.[4] It is clear that the rules of these Declarations leave a considerable margin for the neutral merchants to forward the cargo to its enemy destination; the vessel may call at a port outside the area encompassed by the blockade and the goods may be transshipped from such place to its enemy destination. This being so, the means of cutting off the commerce between the enemy and the neutrals offered by the blockade may only be efficiently used against island countries such as England and Japan. Hence, it is not surprising that England, in particular, did not want to uphold the rule that the principle of the "continuous voyage" did not apply to blockade.[5]

Although the belligerents' right to interfere with contraband trade only enables them to prevent the *importation* of goods into the enemy country, it is clear that, with the extension of the concept of contraband, the additional means offered by blockade becomes of minor importance.[6]

There has been considerable discussion concerning the legality of long range blockades. English writers have maintained that the rules must be adapted to suit modern conditions of war,[7] while writers in other

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[3] See COLOMBOS §§ 840–1; and SMITH p. 144.

[4] But cf. BRITTIN & WATSON, p. 144, pointing out that the requirement that the blockade must be effective may easier be complied with to-day in view of the technical evolution and the modern methods of warfare.

[5] See COLOMBOS, § 835, admitting that the application of the principle of the "continuous voyage" to blockade "may not have the merit of exact logic, but it certainly is a principle of great assistance to a blockading power". England declared by Order in Council 7 July 1916 that the principle of the "continuous voyage" should be applied to blockade and France followed this example by a decree the same day. See SMITH p. 250 et seq.; and NUMERS p. 171.

[6] See VERDROSS & ZEMANEK, Völkerrecht (Wien 1959) p. 416; SMITH p. 144; and GIHL (1955) p. 140. But cf. KOTZSCH, Wörterbuch des Völkerrechts I p. 217, pointing out that blockade may become of practical importance in actions instituted under article 42 of the charter of the United Nations.

[7] See, e.g., COLOMBOS § 841 in fine. But cf. SCHWARZENBERGER, p. 225, who points out that the proclamations of extensive "war zones" during the World Wars were founded on the belligerents' right of retaliation.

countries have insisted that such changed conditions must not lead to an abolition of the accepted principles of international law.[8] In this connection it may be of certain interest to note that England did not want to acknowledge the standpoint taken by Germany that the introduction of submarines in naval warfare necessitated a change of international law with regard to visit, search and destruction of prizes.[9]

History shows several examples of long range blockades. During the American Civil War the North States declared some 3000 miles of the coasts of the South States blockaded, although it was abundantly clear that the 45 warships that the North States possessed were quite unable to fulfil the requirement that the blockade must be effective.[10] And during the World Wars the "classical" blockade was not frequently resorted to. Instead, "war zones" (Germ. "Kriegsgebiete") covering huge areas—the entire North Sea, the greater part of the Mediterranean, the waters round England and Ireland including the whole English Channel and during the Second World War extended to cover the waters to the east coast of the United States—were proclaimed. The neutral powers, of course, protested energetically against this practice[11] but were usually met by the belligerents maintaining that their right to proclaim such zones was founded on their right of retaliation against infringements of international law by their adversary.[12] In addition, it was pointed out that the mere proclamation of "war zones" was not contrary to international law[13] and, frequently, the proclamations were drafted as "warnings" to the neutrals that the belligerents could not assume any responsibility for damages occurring to neutral merchantmen on account of the naval warfare within the zones.[14] But the attitude towards neutral

[8] See, e.g., CASTRÉN p. 314; and SCHENK p. 89 et seq. with further references.

[9] See infra p. 129 et seq.

[10] See SMITH p. 140; and COLOMBOS § 819.

[11] See SCHWARZENBERGER p. 225; SCHENK p. 77; HECKER, Wörterbuch des Völkerrechts II p. 365; and NUMERS p. 166 et seq.

[12] See supra note 7 and infra note 17.

[13] See, e.g., SMITH p. 123 who, however, points out that "it is beyond dispute that what was done on both sides during the two great wars went far beyond what could have been permitted under the law, as it was generally accepted in 1914".

[14] See, e.g., the English proclamation of 3 November 1914 and the German proclamation of 4 February 1915 where it was also pointed out that the German naval forces, owing to the fact that English vessels often sailed under false flag, could not always avoid "dass die auf feindliche Schiffe berechneten Angriffe auch neutrale Schiffe treffen".

merchant shipping was considerably sharpened during the wars. In the famous German proclamation of 31 January 1917 it was declared that neutral tonnage within the zones would be sunk by German submarines without previous warning ("wird . . . jedem Seeverkehr ohne weiteres mit allen Waffen entgegengetreten werden")[15] and this proclamation resulted in the indiscriminate sinking of vessels at sight. The perils encountering merchant vessels within the zones were further aggravated by the laying out of extensive mine-fields, a procedure which hardly conformed with the spirit of the VIII Hague Convention 1907 art 2, since the main object was to prevent merchant shipping.[16] The laying out of German mine-fields on the high seas was met by English retaliations which consisted of new mine-fields and the proclamation of a "danger zone" (Sw. "Nordsjöspärren").[17] It is manifest that the proclamation of war zones and the behaviour of the belligerents within such zones created risks for neutral merchant shipping earlier unknown in history.[18]

§ 5.6. *Sanctions*

As previously mentioned, neutrals breaching the rules concerning unneutral service, contraband and blockade are not committing criminal acts unless such behaviour be prohibited in the respective national laws. Since, under the international law, neutral states were not required to enact such prohibitions, unneutral service, carriage of contraband and

[15] See NUMERS p. 169 et seq.

[16] But see supra p. 110 concerning the inefficiency of the provision.

[17] English Proclamations of 2 October and 3 November 1914. Germany answered with her "Kriegsgebietserklärung" of 4 February 1915 and, thus, the deplorable exchange of proclamations founded on the right of retaliations was initiated. See for further information on this subject CASTRÉN p. 534 et seq.; NUMERS p. 168 et seq.; and Krigsforsikringen for norske skib II p. 230 et seq.

[18] It is generally considered that the sinking of neutral vessels within such zones is contrary to international law. See, e.g., ZEMANEK, Wörterbuch des Völkerrechts III p. 286 et seq., i.a. referring to the passage in the Nuremberg trial against the German Admiral Dönitz where it is held that the sinking of neutral tonnage is not allowed within "Sperrgebiete". But cf. SOHLER, p. 42, maintaining that the concepts of "Gefahrzone", "Kriegszone", "Operationsgebiet", etc. should not be considered blockade *stricto sensu* but as "eine Weiterentwicklung der klassischen Blockade". SOHLER (at p. 63 et seq.) concludes that such zones must be considered "gewohnheitsrechtliche Massnahme des Seekrieges" and that neutral merchantmen may be sunk within the zones provided the extent of the zones is reasonably limited.

breach of blockade could not be regarded as *per se* unlawful. But the effect of the rules will be the same as the effect of prohibitions under domestic law, since the belligerents, under international law, have the right to interfere and apply more or less severe sanctions.[1]

§ 5.6.1. The right of visit and search

Since the neutral states do not have to assume any liability for the infringements of the international law of the sea by their citizens, it is clear that the belligerents must have the right to exercise the necessary control in order to find out if the rules have been respected. For this purpose they have an uncontested right to visit and search neutral merchantmen.[2]

The procedure of visit implies that the warship summons the vessel to stop and sends a visiting party of officers onboard for the purpose of examining the ship's papers. If there is any reason to suspect that a breach has been committed, the vessel may be searched.[3] The right of visit and search may be exercised by submarines and aircraft as well, provided they respect the same rules as apply to surface warships. Great Britain has always maintained that the procedure may not be modified on account of the difficulty for aircraft and submarines to observe these rules, while, at the same time, pleading with the greatest élan an adaptation of international law to promote a more efficient control by taking the vessels to ports for inspection.[4] It is considered that enemy merchantmen have the right to resist visit and search, but if

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[1] See concerning the nature of a breach against the international law of the sea in time of war CARVER § 497 and the dictum of Lord WESTBURY in *Ex parte Chavasse, re Grazebrook* (1865) 4 D.J. & S. 655. See also for further references id. § 498 at note 15; and CASTRÉN p. 308. In American law the same approach is taken in *Northern Pacific Railway Co.* v. *American Trading Co.* (1904) 195 U.S. 439 (at p. 465); *Balfour* v. *Portland* (1909) 167 Fed 1010 DC Ore.; *George J. Goulandris* 1941 AMC 1804; *Atlantic Fruit Co.* v. *Solari* (1916) 238 Fed 217 SDNY; and *Luckenbach S.S. Co.* v. *W. R. Grace & Co.* (1920) 267 Fed 676 CCA 4th. See also EHNINGER p. 47 et seq.

[2] See COLOMBOS § 866; and FRASCONÀ, Visit, Search and Seizure on the High Seas (New York 1938).

[3] See further concerning the formalities COLOMBOS §§ 879–82; CASTRÉN p. 353 et seq.; and SUNDBERG, Folkrätt p. 327.

[4] See FRASCONÀ pp. 15 et seq., and 78 et seq.; COLOMBOS § 892; and SCHWARZENBERGER p. 219.

neutral merchantmen try to do so they may be treated as enemy merchantmen and be met by force.[5]

The legality of the procedure practised during the World Wars of taking the vessels to port for visit and search has been the subject of much disagreement. Traditionally, the visit and search had to be performed on the very place where the warship encountered the merchantman.[6] The inconvenience caused to neutral shipping by the practice of bringing the vessels to port for control is obvious, the more so since the possibilities of getting compensation from the belligerents were remote.[7] While English writers have defended the practice, i.a. by stressing the need for an adaptation of international law to suit the altered conditions of war,[8] German writers have considered the system a clear infringement of international law.[9] Scandinavian writers profess the view that search in port may only be exercised when the circumstances *in casu* warrant such a procedure (such as the risks of attack by enemy aircraft, submarines, etc.).[10]

The procedure of bringing the vessels to port for control gave rise to another phenomenon, the so-called navicert system.[11] The Allies pointed out that the navicert system was introduced in order to alleviate the inconveniences to neutrals, since they escaped the contraband control by obtaining navicerts (navigation certificates) proving the innocent character of the goods carried in their vessels. If navicerts were held for the whole cargo onboard, a ship's warrant could be obtained, ordinarily by a certificate on the ship's manifest. These certificates were usually

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[5] See supra p. 116.

[6] See CASTRÉN p. 356.

[7] See from the First World War NC 1767 et seq.; and from the Second World War NC 3570, where it is recommended that the risk for delay and other expenses arising on account of the bringing of the vessels into ports of control should be transferred to the charterers by increasing the freight or by special clauses in the contracts of affreightment.

[8] See supra note 4.

[9] See, e.g., SCHENK p. 117 et seq.; and STÖDTER, Handelskontrolle im Seekrieg, Hamburg 1940.

[10] See CASTRÉN p. 356 et seq.; and SUNDBERG, Folkrätt p. 327.

[11] See MOOS, The Navicert in World War II, A.J.I.L. Vol. 38 (1944) p. 115 et seq.; RITCHIE, The "Navicert"-system during the World War, Washington 1938; and the criticism by BRUNS, p. 38 et seq., who considers the participation of neutrals in this system as "feindselige Unterstützung" (at p. 85). See also for the same critical attitude SOHLER p. 54.

issued by British consulates in the ports of shipment upon the application of the shippers in the export country, who had to supply the consulate with information regarding the character of the goods, weight and number, destination, name and address of consignees and the name of the vessel.[12] Although the navicert system alleviated the inconveniences for neutral shipping caused by the search of vessels in port, there can be no doubt that the prime object of the system was to provide an efficient control system in order to prevent any supply of goods to the enemy. Thus, neutral vessels refusing to co-operate were excluded from supply of bunkers and from the possibility of getting coverage by the British insurance market.[13] Furthermore, the system became in fact compulsory, since vessels lacking navicerts and ship's warrants were *prima facie* considered subject to seizure and confiscation (Order in Council 31 July 1940, founded on England's right to retaliation against Germany).

The neutrals participating in the navicert system were also required to co-operate in different respects, e.g. by sending their ship's manifests by air to the Ministry of Economic Warfare, by obliging themselves to withhold in the port of destination goods which became the subject of further investigation by the British authorities and to send them goods which they wanted to seize, by tendering guarantees from the consignees or the neutral government concerned that the imported goods would not be exported, etc.[14] And this control combined with other methods of coercion forced upon the neutrals contributed to various "voluntary" agreements with the belligerents. Only by such agreements was it possible for the neutrals to maintain their foreign trade, a possibility which they should have had already according to the principles of international law.[15]

§ 5.6.2. Capture

If the visit and search proves with a reasonable degree of probability that there are grounds for confiscation the vessel may be captured. The warship takes command of the merchantman by sending officers onboard

[12] See further NC 3576.

[13] See SMITH p. 154 et seq.; and SCHREINER p. 116 et seq.

[14] See for further information NC 3569.

[15] See the statement by War Minister SKÖLD, Göteborgs Handels- och Sjöfarts-Tidning 26 September 1939; HÄGGLÖF, Den svenska krigshandelspolitiken under andra världskriget; SCHREINER p. 162 et seq.; and DUTTWYLER p. 85.

or by following the vessel directing her course and speed. The vessel so captured is called "prize". When the vessel has been brought to port in the warship's country it is subjected to prize proceedings which may result in the confiscation of the vessel and/or the goods onboard. If there should prove to be no grounds for the confiscation of either vessel or goods, compensation for the damages suffered on account of the capture are normally not awarded. Compensation is only paid if it is proved that the warship has captured the merchantman without sufficient reason.[16]

§ 5.6.3. Confiscation

As previously mentioned, a neutral merchantman may lose its neutral character by rendering unneutral service to one of the belligerents[17] with the ensuing consequence that the vessel may be seized and confiscated. Goods having the same owner as the vessel may be confiscated as well.[18] In addition, enemy goods which would otherwise have enjoyed the protection of the principle "free ships free goods" lose this protection and are subject to confiscation.

While contraband articles with enemy destination are subject to confiscation, goods carried onboard belonging to the same person as the owner of the contraband articles may be confiscated as well under the theory that "contraband articles are infectious".[19] According to the Declaration of London, the vessel may only be confiscated where she carries contraband goods which either in value, weight, quantity or freight exceed half of the whole cargo (art. 40). But the Declaration does not deal with the effect of the shipowner's lacking knowledge of the contraband nature of the cargo. In English prize law such knowledge is an essential requirement for the confiscation of the vessel, but the fact that a great proportion of the goods proves to be contraband raises, of course, a presumtion for the fact that the shipowner has been aware of the contraband nature of the goods.[20] Some countries have applied the principle of the relative proportion of contraband to the whole cargo

[16] See the Declaration of London art. 64; and SUNDBERG, Folkrätt p. 330.

[17] See supra p. 115.

[18] See the Declaration of London art. 46.

[19] See the Declaration of London art. 39; and COLOMBOS § 787.

[20] See *The Hakan* [1916] P. 266 commented upon in NC 1801 et seq.; and COLOMBOS §§ 789–91.

mechanically without inquiring into the shipowner's state of mind; this proportion has been considered an irrebuttable *præsumptio juris et de jure*, while in English prize law, the presumtion can be rebutted if it is satisfactorily proved that the shipowner, in fact, had no knowledge of the contraband nature of the goods.[21] It should be borne in mind that, even if the vessel is not confiscated, the fact that, ordinarily, the shipowner will get no compensation for delay, costs and inconveniences caused by the capture and the prize proceedings constitutes a deterrent against the carriage of contraband even in small proportions to the whole cargo.

§ 5.6.4. Destruction of the prize

Although, under the international law of the sea, a prize may not be destroyed, there are exceptions to this rule. Thus, in the Declaration of London art. 49, it is stipulated that a neutral merchantman captured by a warship may be destroyed if taking the prize to port would jeopardize the safety of the warship or the progress of the military operations in which the warship is involved. But this may only be done when all persons onboard the prize have been placed in safety and all ship's papers have been taken care of.[22] The destruction of the prize shall subsequently be examined by a Prize Court and compensation shall be awarded to the shipowner if the vessel is not found subject to confiscation or if circumstances warranting destruction according to art. 49 have not been at hand. If neutral goods, not subject to confiscation, have been destroyed together with the vessel, their owner is entitled to compensation according to art. 53 of the Declaration. The principle "free ships free goods" would require that compensation be paid to enemy goods as well, although this is not explicitly stated in the Declaration. However, the prize courts in Germany and France, as opposed to the prize courts in England, have adopted a different view.[23] The opinion in England is most strongly against destruction of neutral merchantmen.[24]

During the World Wars, the exception to the rule that prizes must not be destroyed admitted in the Declaration of London art. 49 was

[21] See COLOMBOS § 791; and SCHEUNER, Wörterbuch des Völkerrechts II p. 292.

[22] This rule is generally understood as unconditional (but cf. the Swedish translation "bör"). See CASTRÉN p. 365.

[23] See CASTRÉN pp. 365, 585.

[24] See COLOMBOS §§ 918–9; and CASTRÉN p. 583.

extensively invoked by the belligerents. And, owing to the nature of submarine warfare, Germany found herself unable to comply with the requirement that all persons onboard must be placed in safety and all ship's papers taken care of before destruction. As a result of this, the neutral losses became appalling during the First and Second World War.[25]

To a large extent the destruction of neutral merchantmen resulted from the German submarine warfare. Owing to the submarine's vulnerability when emerged to the surface, an efficient submarine warfare could not be carried out if the rules laid down in the traditional international law of the sea had to be respected. And the difficulties for the submarines were accentuated by the practice of arming merchantmen and the use of false flag. In addition, Germany excused her submarine warfare by claiming the right of retaliation on account of the infringements of international law committed by England. The question of the legality of the German submarine warfare was considered in the Nuremberg trial against the German admirals Dönitz and Raeder but, after having established that according to an order from the British Admiralty of 8 June 1940 all vessels sailing in the Skagerack at night would be sunk and that, according to the statement of the American admiral Nimitz, the United States had introduced an unrestricted submarine warfare in the Pacific from the very first day of war, the court went on to say that "die Verurteilung von Dönitz [und Raeder] ist nicht auf seine Verstösse gegen die internationalen Bestimmungen für den U-Bootkrieg gestützt". The court seems to have applied the so-called *tu-quoque* principle to the effect that violations against international law by another state may not be invoked by a state which has itself committed the same violations.[26] But it is generally considered that submarine warfare of the kind practised by Germany during the World Wars is *per se* contrary to international law.[27]

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[25] See COLOMBOS § 923 note 2; Krigsforsikringen for norske skib II p. 141. BREDAL, p. 1, points out that, during the First World War, Norway lost some 40% of her tonnage and thus more than the belligerents themselves. See for further statistical material BROCHMANN, Med norsk skib i verdenskrigen, Oslo 1928, giving an account of the facts behind 1169 casualties; and SOU 1963: 60 containing information regarding the Swedish losses.

[26] See SCHENK p. 105 et seq.; BERBER p. 195; and ZEMANEK, Wörterbuch des Völkerrechts III p. 467.

[27] See COLOMBOS §§ 913, 915, 917, 920, 923; and WESTMAN p. 37 et seq. But cf. SCHENK p. 83; and SOHLER p. 63 et seq. The practice to arm merchantmen has by

§ 6. *The Evolution of the International Law of the Sea*

§ 6. 1. *Some General Observations*

When deciding whether the contracting parties should be freed from their obligations in view of the dangers threatening the vessel and her cargo at the time of the performance of the contract, under Scandinavian as well as Anglo-American law, the court will have to establish if there has been a considerable change in this regard as compared with the situation at the time of the conclusion of the contract. And, in appreciating this change of circumstances, the court derives guidance from the rules embodied in international law. True, the court shall try to appreciate the *factual* risks which the vessel and her cargo will encounter, and experience shows that the belligerents do not always adhere to the international law. In particular, the experience from the World Wars shows that the exigencies of war made the protection intended by international law of the sea almost illusory. Hence, in appreciating the risks, the court cannot rely on the fact that the rules of international law will be respected; it is necessary to consider the probability that the belligerents will chose to disregard the rules. The question of military power becomes of utmost importance[1] and it is certainly a fallacy to assume that international law has ceased to exist because of the fact that the powerful belligerents of the World Wars found themselves unable to adhere to some of its rules.[2] While, in a world conflict where only a few, minor powers remain neutral, the neutral interests certainly will have to yield to the demands of the belligerents, the situation will be quite different in minor conflicts or world conflicts where some of the Great Powers remain neutral.[3]

It is difficult to ascertain whether the international law of the sea has

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some writers been considered, if not an excuse, at least an explanation for the methods pursued by Germany. See CASTRÉN p. 586; SMITH p. 106; and BRITTIN & WATSON p. 144. See also PARFOND p. 165, suggesting *de lege ferenda* that the submarines should be entitled to pay less regard to *enemy* merchantmen, while upholding the protection for *neutral* merchantmen. The same general idea is professed by MARTINI p. 29 et seq. but has been criticised by GARIEL, Une nouvelle théorie allemande du droit de la guerre maritime, Paris 1936.

[1] See, e.g., SMITH pp. 125, 171; and SUNDBERG; Krig p. 5.

[2] See COLOMBOS § 496; SMITH p. 95 et seq.; CASTRÉN p. 534; SUNDBERG, Krig p. 5; and NUMERS p. 182.

[3] See SMITH pp. 96 et seq., 124 et seq.; and GIHL, NTIR 1943 p. 81.

undergone any changes as compared with the situation before the World Wars, since the action taken by the belligerents was largely founded on their right of retaliation and, in any event, may be explained by the conditions prevailing during the World Wars. Nevertheless, it is possible to make some general observations.

The concept of contraband, as it appears from the provisions of the Declaration of London, has probably been strongly affected by the changes brought about by the "total war" and the new methods of warfare. The categories of goods covered by the concept of contraband have undoubtedly been considerably extended and it seems difficult to uphold the system adopted in the Declaration of London (arts. 22, 24, 28).[4] In addition, the distinction between absolute and conditional contraband has become of minor importance, since the requirement for the confiscation of conditional contraband that the goods be intended for the use of the enemy's military forces or governmental bodies is often fulfilled in a modern war where the state controls all commerce for the purpose of strengthening its military power.[5]

During the World Wars England in particular applied the principle of the "continuous voyage" and "ultimate destination" to all categories of contraband as well as to blockade. But this fact does not warrant the conclusion that the extended use of those principles has been generally accepted in the modern international law of the sea. While some writers profess the view that the improved possibilities of sending goods to the enemy by railways, lorries and aircraft through neighbouring neutral countries warrant an extended application of the principle of the "continuous voyage" or "ultimate destination",[6] others maintain that the practice during the World Wars in this respect will not be re-iterated in a war where the neutrals are strong enough to insist on their normal rights.[7] Of course, it is even more improbable that powerful neutrals will accept the method of rationing and the navicert system introduced by England during the World Wars.[8]

The extension of the concept of contraband and the changed methods

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[4] See COLOMBOS § 778; and SMITH pp. 167 et seq., 122.

[5] See SMITH p. 167 et seq.; and GIHL (1955) p. 141.

[6] See COLOMBOS § 778.

[7] See, e.g., SMITH p. 168.

[8] See SMITH p. 154.

of naval warfare have possibly caused a change in the traditional rules relating to visit and search. The legality of the system of taking the vessels to port for control, and the navicert system which was offered the neutrals as a means of avoiding the inconvenience following from a control in port, is a highly controversial issue. Some writers are inclined to think that the customary law is in process of change on this point.[9] Be that as it may, it is hardly probable that the raising of a presumtion that vessels lacking navicerts or ship's warrants are subject to confiscation is in conformity with present international law.[10]

The principle "free ships free goods" embodied in the Declaration of Paris was not respected by England during the World Wars (Orders in Council of 11 March 1915 and 27 November 1939). But England founded this practice on its right of retaliation against Germany and there is no reason to expect that international law has undergone any change on this point.[11]

It has been maintained that the classical close range blockade is impracticable owing to the extended range of shore batteries, mine-fields and the action of torpedo-boats, aircraft and submarines. This raises the question whether long range blockades ("Kriegsgebiete", "war zones") can be accepted under present international law in spite of the fact that such blockades do not fulfil the requirement of the Declaration of Paris that the blockade must be effective.[12] Furthermore, the requirements that the blockade may not bar access to neutral ports (art. 18 of the Declaration of London) and that the principle of the "continuous voyage" may not be applied to blockade (art. 19) considerably limit the value of the blockade as a means of preventing the enemy's foreign trade. Nevertheless, it is a much-debated question whether a change of the rules relating to blockade should be acknowledged. Again, the matter will depend upon military strength; it is improbable that a powerful neutral state that wants to maintain its merchant shipping will accept the proclamation of long range blockades.

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[9] CASTRÉN p. 357. See also FRASCONÀ p. 114 et seq.

[10] See supra p. 131; and SMITH p. 155.

[11] See SMITH p. 169.

[12] However, it should be observed that the modern technique may enable the belligerents to make even long range blockades effective. See supra p. 126; and COLOMBOS § 839 in fine.

§ 6.2. *Warlike Operations*

Since there must be a state of war in order to bring the rules of the wartime international law of the sea into operation, it is important to determine when such a state of war exists.[1] This question is much-debated, and it appears that some of the traditional definitions of "war" are either too broad or too narrow to do service. Thus, "an armed conflict between states" does not necessarily amount to war, since it may happen that none of the states involved consider themselves at war; there is no *animus belligerandi*.[2] Furthermore, a neutral state is considered to have the right to use force in order to preserve its neutrality rights, but the armed conflicts that may arise on account of this are not considered wars.[3] On the other hand, a war may exist without any armed conflict at all between the states involved, since a mere declaration of war is sufficient to initiate a state of war.[4] Efforts are sometimes made to distinguish between war *de facto* and war *de jure*, but such a distinction does not seem really helpful in this context, since only war *de jure* brings the rules of wartime international law into operation.[5]

Special problems arise in the event of military operations initiated by the United Nations under article 42 of the United Nations Charter.[6] Since the very purpose of the Charter is to prevent war, it would be paradoxical to term such actions "war". Instead, the expressions "armed conflict" or "police action" are preferred. Nevertheless, it is clear that the situations arising on account of actions by the United Nations may often for all practical purposes equal the situation in an ordinary war.[7] Similarly, it happens that states interfering by force in the affairs of other states do not acknowledge that their interference amounts to a state of war. But this does not prevent the attacked state from declaring

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[1] See SUNDBERG, Folkrätt p. 290; and EEK p. 300 et seq.

[2] See CASTRÉN p. 31; and SUNDBERG, Krig p. 7.

[3] See SUNDBERG, Folkrätt p. 290.

[4] See CASTRÉN p. 31; and BRITTIN & WATSON p. 125, where it is pointed out that the United States was in war with Japan and Germany for a long time after the cessation of the hostilities in the Second World War. As a further example may be mentioned the situation subsequent to England's declaration of war against Germany on 3 September 1939 which by CHURCHILL has been described as "The Twilight War".

[5] See CASTRÉN p. 35.

[6] See EEK p. 314 et seq.

[7] See, e.g., with regard to the intervention in Korea 1950 the observations by BRITTIN & WATSON p. 125.

a state of war between itself and the aggressor. The interference of England and France in the conflict between Israel and Egypt in 1956 may serve as an opposite example of such a situation.[8]

Resolutions passed by the United Nations may also approve the initiating of "pacific blockades" against other states. Thus, the Security Council on 7 April 1966 resolved that, upon Rhodesia's unilateral declaration of independence in 1965, the British Government was authorized to prevent, by the use of force if necessary, the arrival at the port of Beira of vessels reasonably believed to be carrying oil destined for Rhodesia. And this right was used to prevent the Greek-owned tankers The Joanna V and The Manuela to discharge oil at the port of Beira for conveyance to Rhodesia. But "pacific blockades" initiated without the support of resolutions by the United Nations are considered contrary to the international law of the sea. Nevertheless, the delivery of offensive weapons to Cuba by Russia caused the United States in September 1962 to declare a quarantine of Cuba which in fact implied a pacific blockade. However, it is generally considered that this action, although explained by the exigency of the situation, was undertaken in disregard of the obligations of the United States as a member of the United Nations.[9]

It will be seen that the situation brought about by actions by the United Nations as well as by "pacific blockades", authorized by the United Nations or not, may fall within the expression "warlike operations" in the current war clauses or the expressions used in SMC § 135.[10] Frequently the war clauses read as follows: "If the nation under whose flag the vessel sails be engaged in war, hostilities or warlike operations . . .".[11] And this raises the question whether the participation in actions instituted by the United Nations may bring the clause into operation. The matter was considered in the American case of *The*

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[8] See *The Ulysses* 1959 AMC 18 infra p. 428. Here, it was stated that the speech of President Nasser, on 1 November 1956, confirmed by a statement two days later, had to be regarded as a declaration of war against England and France, in any event by "business men generally engaged in the shipping business". The fact that the Prime Minister of England, Anthony Eden, described the interference as a "police action" was considered irrelevant.

[9] See, e.g., COLOMBOS § 488 A with further references.

[10] See supra p. 89 and infra p. 428 et seq.

[11] See, e.g., Baltwar supra p. 72.

Simon Benson;[12] here the court found the participation of the United States in the United Nations' police action in Korea so intense that the United States was considered at war in the sense of the war clause. However, in view of the development in later years, several modern war clauses contain a direct reference to actions instituted by the United Nations. And, irrespective of the protection which the contracting parties may have provided for in clauses, it will be seen that the factual changes brought about by "warlike operations" and actions instituted by the United Nations may affect the contract to an extent where it will be possible under Anglo-American as well as Scandinavian law to free the parties from their contractual obligations.

[12] 1951 AMC 585 infra p. 427.

Chapter 3

ADJUSTMENT OF CONTRACTS ON ACCOUNT OF CHANGED CONDITIONS

§ 7. *The Legal Approach of Scandinavian Law*

§ 7.1. *Introduction*

It will be seen that in Scandinavian law the influence of changed conditions on the contract may be treated under different principles. The doctrines of impossibility and *vis major* may be invoked by the promisor in certain cases but subject to rather stringent requirements. The need for a fuller protection could be better satisfied by other means, such as the doctrine of presupposed conditions and undue hardship. We shall se how all these means fulfil the same purpose—to limit the scope of the promisor's undertaking *as it would appear to be* "on the face of it" according to the express, unconditional words, the individual behaviour of the promisor and the surrounding circumstances in connection with the conclusion of the contract.[1]

§ 7.2. *Impossibility and Vis Major*

The principle that no one can validly undertake to do the impossible —*impossibilium nulla est obligatio*—has had a paramount importance in German law which, to a certain extent, has also influenced Scandinavian law. In so far as *specific performance* is concerned the principle is a truism; no one can be compelled to specifically perform the impossible. But we shall see how the principle has been permitted to influence the determination of the *promise as such* with the ensuing consequence

[1] See concerning the diffuse borderline between an interpretation of the contract based upon the *expressions of the intention* of the contracting parties and a so-called interpretation employed for the purpose of *supplementing* their incomplete expressions of intention (Sw. "utfyllning") VAHLÉN, Avtal p. 194; id., Bidrag p. 380 et seq.; and JØRGENSEN, Forudsætning p. 169. Cf. the German "ergänzende Vertragsauslegung", BGB § 157.

that the promisee cannot claim damages for non-performance *in lieu of* specific performance.[1] The principle of *impossibilium nulla est obligatio* has retained a magic force through the centuries, although the reasons invoked for its application to commercial practices seem insufficient. The classical example that no one should be kept to a promise "hippocentaurum dare"[2] may seem well warranted but is hardly of any practical importance. And, indeed, there are other means better suited to deal with utterly fantastic promises of such kind.

However, with regard to promises of a normal type it is also possible to approach the problem from the opposite angle and support the view that a person should not give a promise unless he has satisfied himself that it is possible to perform and, in addition, to maintain that the risk should be his if—owing to circumstances existing at the time of the conclusion of the contract or supervening subsequently—the promise is not capable of being performed. It will be seen that the principle of *impossibilium nulla est obligatio* is no magic formula which can help us always to find the suitable solution. While, in some cases, impossibility may very well be warranted as an excuse for non-performance, other cases may need different solutions. Hence, the doctrine of impossibility—incapable of serving as a general formula—has needed a great number of complicated qualifications and distinctions.

The German BGB makes a distinction between "anfängliche (initial) Unmöglichkeit" (§ 306) and "nachträgliche (supervening) Unmöglichkeit" (§ 275). The former makes the contract "nichtig" (null and void), while the latter may be invoked as an excuse for non-performance provided the promisor does not have to assume responsibility for the circumstance making performance impossible ("die Leistung . . . infolge eines . . . eintretenden Umstandes, *den er nicht zu vertreten hat*, unmöglich wird" [my italics]). The relevant time for the determination of initial impossibility is the time of the conclusion of the contract and not the time when performance is due. Hence, it may depend on minutes or seconds whether the one or the other of the principles shall govern.[3] And, indeed, it may seem somewhat arbitrary that a contract is null and void if performance is impossible at the time of the conclusion of the contract but

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[1] As expressed in BGB § 306: "Ein auf eine unmögliche Leistung gerichtete Vertrag ist nichtig", i.e. null and void. See HELLNER, The Influence of the German Doctrine of Impossibility on Swedish Sales Law, Ius Privatum Gentium, Festschrift für Max Rheinstein, Tübingen 1969 p. 713: ". . . the principle in fact derives its validity from a false conception of the influence of physical necessity on law".

[2] TITZE p. 239; and ROOS p. 69.

[3] See TITZE p. 55.

becomes possible to perform at the time for the contractual performance.[4] The distinction between initial and supervening impossibility is also recognized in Scandinavian law although not codified and seemingly without great practical importance.[5] Since initial impossibility is of no importance for the question of the influence of changed conditions on the contract it needs no further attention in the present study.

§ 7.2.1. The delimitation of relevant impossibility

The different nature of the promisor's undertaking warrants special qualifications of the principle that impossibility provides a sufficient excuse from performance. While the principle may be suitable to free the promisor when his promise concerns a specific object, which has perished before performance is due, or when he is prevented from performing a contract requiring his own personal services, it becomes much too wide when the contract may or shall be performed by using the services of other persons. The risk as to the impossibility of performing such contracts—perhaps caused by the promisor's lack of financial resources or by unfortunate planning of his commercial engagements—should not, as a rule, be placed on the promisee.[6] Hence, the principle that only *objective* impossibility can serve as an excuse has been introduced, originally in German law but subsequently accepted in Scandinavian law as well. And the impossibility is only objective when the contract cannot be performed by *anyone*; the difficulties of the *individual* promisor are not taken into account.[7] Under this principle, the promisor's chances of invoking impossibility as a defence will be considerably reduced when his promise has a *generic* character.

In German law, the distinction between subjective impossibility ("Unvermögen") and objective impossibility ("Unmöglichkeit") becomes relevant in case of *initial* impossibility; only *initial* and *objective* impossibility makes the contract null and void according to BGB § 306. Nevertheless, a person who

[4] See TITZE p. 53.

[5] See ALMÉN § 23 at notes 39–53 and § 24 at notes 43–4; GODENHIELM p. 40; RODHE § 30 at notes 39–40; ROOS p. 69 et seq.; NJA 1934.209; and the comments to this case by KARLGREN, TfR 1938 p. 473.

[6] See ALMÉN § 24 at notes 6–9.

[7] There is subjective impossibility if "I cannot do it" but objective impossibility if "it cannot be done". See Restatement Contracts comments to § 455; and infra p. 208.

has given a generic promise may be subjected to a more stringent liability with regard to *supervening* impossibility, since his promise under the circumstances may be considered to contain a *guarantee* that the contract can be performed (BGB § 279).[8]

Even though the requirement that impossibility must be objective in order to serve as an excuse implies a considerable limitation of the defence, the distribution of risk between the contracting parties may warrant a still more stringent attitude towards the promisor. In Scandinavian law, this is well evidenced by the discussion concerning the liability of the seller of generic goods according to § 24 of the Uniform Scandinavian Sales Acts. While § 23 stipulates that the seller of specific goods is not liable to pay compensation to the buyer for damage caused by delay in delivery if he succeeds in proving that he has not been negligent, § 24 imposes upon the seller of generic goods a strict liability regardless of negligence. The exceptions from this liability are few and comprised in the words "if performance may be deemed impossible owing to a circumstance which the seller should not reasonably have been required to take into account at the time of the conclusion of the contract, such as the destruction of all goods of the relevant kind, war, prohibition of import or similar contingencies" (Sw. "möjligheten att fullgöra avtalet må anses utesluten i följd av omständighet, som ej bort av säljaren vid köpets avslutande tagas i beräkning, såsom förstörelse av allt gods av det slag eller det parti köpet avser, eller krig, införselförbud eller därmed jämförlig händelse"). Although § 24 only deals with the seller's liability in damages for delay, it denotes the absolute character[9] of his obligation and lays down the same stringent principle with regard to his duty to perform the contract; he is bound to specifically perform the contract or to pay damages in lieu of performance unless he can invoke any of the exceptions mentioned in § 24.

§ 24 of the Uniform Scandinavian Sales Acts rests upon two primary prerequisites:

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[8] See the comparative observations by LARENZ p. 210: "So kann man vielleicht sagen, dass das heutige deutsche Recht vom Verschuldensgrundsatz ausgeht, ihn aber in verschiedener Hinsicht zugunsten einer in Schuldversprechen sinngemäss gelegenen Garantie beschränkt, während das englische Recht umgekehrt vom Gedanken der Garantiepflicht ausgeht, diese aber zugunsten des Schuldners weitgehend abmildert."

[9] ALMÉN § 24 at note 9.

(1) performance must have become affected to a degree where it "may be deemed impossible" (Sw. "må anses utesluten")
(2) owing to circumstances which the seller at the time of the conclusion of the contract should not reasonably have been required to take into account (Sw. "ej bort av säljaren . . . tagas i beräkning"). And as *examples* of such circumstances reference is made to (1) destruction of all goods of the relevant kind, (2) war, and (3) prohibition of import. The first contingency seems to be merely an adaptation of the principle of objective impossibility to a generic obligation, while the two latter are examples of classical *vis major* occurrences. This raises the important question whether, apart from the destruction of all goods of the relevant kind, objective impossibility will suffice as an excuse or whether only objective impossibility caused by *vis major occurrences* will be permitted to free the seller from his liability under the contract. As pointed out by RODHE[10] insufficient distinction has been made between the concepts of objective impossibility and *vis major*. In Scandinavian law, the concept of *vis major* is used to denote "an extraneous event on an extensive scale and of rare occurrence, which carries with it an insurmountable obstacle to the debtor's performance of his obligation".[11] If the concept of *vis major* is based on such qualifications it will be clearly different from objective impossibility which may very well be brought about by contingencies falling within the seller's sphere of risk.[12]

The definition of *vis major* has been the subject of much disagreement. The concept *indicates* certain modifications of the promisor's undertaking but it is difficult to comprise the *precise nature* of these modifications in a general formula. Practical considerations as to the proper placing of the risk may give rise to different definitions of *vis major*. It may be considered synonymous with *casus* (accidental contingencies not caused by the promisor's negligence; Fr. "cas fortuit").[13] Or it may be qualified by special requirements of the type mentioned above ("extraneous", "of rare occurrence", "on an extensive scale", etc.), the purpose being to determine accurately the distribution of risk between the contracting parties. Hence, "das Kriterium der äusseren Provenienz" conveys the idea that a contracting party must bear the risk of contingencies

[10] RODHE, Adjustment p. 162; and id. Obligationsrätt § 30 at note 47, § 48 at notes 51–8.

[11] RODHE, Adjustment p. 160.

[12] Impossibility caused by the seller's *negligence* can never be invoked as an excuse. Cf. "self-induced" frustration infra p. 185.

[13] See, e.g., MAZEAUD & TUNC, Responsabilité civile II p. 545 et seq.

emanating from his own "Machtbereich",[14] while the requirements that the contingency must be of rare occurrence and take effect on an extensive scale are based on the idea that contingencies of a more "normal" type *in dubio* are considered included in the promisor's risk undertaking. However, if the concept of *vis major* is too broadly defined, it becomes an unsuitable instrument to determine the proper placing of the risk. The right solution must then be found without the aid of the concept and it is subsequently "explained" that the solution applied conforms with the definition. See for a typical example of this technique MAZEAUD & TUNC, Responsabilité civile II p. 557: "Jamais le débiteur ne pourra invoquer comme cause *étrangère*, une défaillance des personnes ou du matérial qu'il emploie à l'exécution du contrat." So far so good. But then it is stated: "Reconnaître ce principe n'est d'ailleurs pas admettre la théorie du risque. C'est reconnaître, dans une certaine mesure, que notre droit n'est plus seulement personnel, mais qu'il est aussi institutionnel, et que la plupart des contrats mettent aujourd'hui en cause des entreprises industrielles ou commerciales. C'est reconnaître aussi que les parties à un contrat assument chacune une certaine 'sphère de responsabilités' et que, aussi bien en vue d'éviter des contestations sans fin qu'en vue de leur donner intérêt à une plus grande diligence, il faut rendre chacune responsable de ses préposés, même choisis soigneusement et surveillés attentivement, ou de son matériel, même bien utilisé et bien entretenu." By the same device the category of contingencies falling within the "sphère de responsabilités" may be enlarged to correspond with the category acknowledged by the restricted concept of *vis major*. Conversely, if the concept is too restrictively defined, other remedies will be found instead to make up for the deficiences.

In Swedish law, RODHE has suggested that the coalescence between objective impossibility and *vis major* in § 24 of the Uniform Scandinavian Sales Acts may enable the seller to use the two concepts as *separate excuses*.[15] However, the text of § 24 gives the impression that the seller is only excused in case of objective impossibility *caused by vis major*. The issue is confused by the fact that "destruction of all goods of the relevant kind" is mentioned in the *enumeration* of the exceptions which *also* comprise *vis major* contingencies (war, prohibition of import). Hence, it is unclear whether the requirement, that the contingency making performance impossible must always have a *vis major* character, should be upheld.[16] It would seem that *the text* of § 24 will permit the court to adopt either course. If stress is laid upon the passage "which the seller should not reasonably have been required to take into account",

[14] See KEGEL, Veränderungen p. 201.

[15] RODHE, Obligationsrätt § 48 at note 52. See also SELVIG, Obligasjonsrett § 53 II: 3.

[16] KARLGREN, SvJT 1963 p. 108.

the field allowed to the court's discretion is wide and may range from a liability for negligence[17] to a strict liability with the exception of *vis major*. However, the fact that contingencies *of a certain type* are enumerated will enable the courts to construe § 24 more or less strictly *ejusdem generis*. It appears from the *travaux préparatoires* that the enumeration was intended as an indication of the stringent nature of the seller's obligation and, consequently, the view that only *vis major* contingencies suffice as excuses has prevailed in Scandinavian legal writing.[18] The fact that the courts have not yet been required to resolve the question *may* be explained by the current practice of making contractual exceptions, but it may also, perhaps, serve as an indication of the modest role played by the doctrine of objective impossibility in Scandinavian law.[19]

§ 7.2.2. The extension of the concept of impossibility

The concept of impossibility may serve as an excuse even when—in a logical sense—it is not absolutely impossible to perform the contract. As a frequent example reference is made to the case when the specific subject-matter is lost at sea and cannot be salvaged without an expense quite out of proportion to the value of the object. Considerations of such kind lie behind the principle relating to the "constructive" total loss of the vessel which causes the cessation *ipso jure* of the contract of affreightment (SMC §§ 6, 128).[20] This may be understood as an adaptation of the principle to the commercial setting where it is intended to do service. But a further extension of the principle to generally encompass situations of unforeseen burdens brought about by changed circumstances necessitates further distinctions between various kinds of impossibility. As such variants of *relative* impossibility we will find

[17] See, in particular, LUNDSTEDT, SvJT 1921 p. 344 et seq.

[18] See ALMÉN § 24 at notes 31a–33, 44 ba–51, 82–7 with further references.

[19] RODHE, Obligationsrätt § 48 at note 54, refers to NJA 1916.256, where objective impossibility not caused by *vis major* sufficed to free the promisor, but he also points out that the decision can hardly be understood as a general acknowledgement of objective impossibility as an excuse, since it concerned a case where practically all goods of the relevant kind had been destroyed, which is one of the examples expressly mentioned in § 24.

[20] See for the same principle in Anglo-American law *Moss* v. *Smith* (1850) 9 C.B. 94 C.P. [137 E.R. 827]; and infra p. 298.

economic impossibility ("wirtschaftliche Unmöglichkeit") requiring "überobligationsmässige Aufwendungen",[21] "impracticability"[22] or economic force majeure[23] and legal impossibility (Sw. "rättslig omöjlighet").[24]

Similarly, the element of time needs special consideration. In principle, only *permanent* impossibility suffices as an excuse for non-performance, but the prerequisite of permanency may also be regarded in a commercial sense. While temporary impossibility is no excuse for non-performance, such impossibility has nevertheless been treated in the same manner as permanent impossibility when the necessity of performing at some—maybe uncertain—time in the future would turn the contract into a "different obligation" and cause the frustration of the contract (Germ. "Zweckvereitelung").[25] Hence, with regard to relative as well as temporary impossibility, there will be a certain limit (Germ. "Opfergrenze")[26] confining the scope of the promisor's obligation.

For all practical purposes absolute impossibility will cover only a small fraction of the cases where the need for a modification of the promisor's undertaking is felt. Indeed, without an extension of the principle of impossibility to cover cases of relative impossibility, its function would be far too modest to warrant the rank of honour which has been given to it in German and Scandinavian law. But as soon as we depart from the principle of *absolute* impossibility, we are involved in difficulties requiring complicated qualifications and distinctions. And the more the sliding scale progresses from the point of departure, the more the doctrine of impossibility fades off into the doctrine of presupposed conditions or undue hardship or similar remedies devised in order to give the contractual promise a reasonable scope.

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[21] See, e.g., PALANDT § 275 1b.

[22] See infra p. 324.

[23] See RODHE, Adjustment pp. 159–65.

[24] Legal impossibility is at hand when performance would be possible but only at the risk of sanctions resulting from the breach of a prohibition. This particular kind of impossibility is partly covered by the doctrine of illegality. See generally HJERNER p. 567 et seq.

[25] The language chosen in some German decisions comes very close to the Anglo-American "different obligation" test. See, e.g., RGZ (1916) 88.71; (1917) 90.102; (1918) 92.87; (1918) 93.341; (1918) 94.45; (1920) 101.79; BGH LM No. 3, 4, 6, 7 to § 275; and cf. infra p. 174.

[26] See HECK, Grundriss § 28.

Severe criticism has been raised against the doctrine of impossibility as such. The dogma *impossibilium nulla est obligatio* has by RABEL been considered "Der tiefste Grund aller Verworrenheit" . . . "Niemand weiss, warum die Unmöglichkeit als solche wirkt und befreit und daher fehlt die begriffliche Grundlage zur Abgrenzung ihres Bereiches".[27] And the "spitzfundige Unterscheidungen" in the "Irrgarten"[28] of the doctrine of impossibility do not seem to have given a contribution to the development of law which stands in proportion to the efforts spent on the subject. In view of the deficiencies and complexities pertaining to the doctrine of impossibility, modern German and Scandinavian law favours a limited application of the doctrine and suggests other means for the determination of the "Opfergrenze".

See for the opinion in German law, SOERGEL-SIEBERT anm. 250 to § 242: "Heute ist anerkannt, dass es sich in Wahrheit stets um das Problem des Wegfalls der Geschäftsgrundlage und der Unzumutbarkeit der Vertragserfüllung handelt"; PALANDT vorbem. 2 to § 275, § 275 1 b: ". . . da es terminologisch bedenklich ist, eine an sich mögliche Leistung als unmöglich zu bezeichnen" (p. 232); ENNECCERUS-LEHMANN § 29 I. 2; RABEL, Warenkauf p. 154; and from Scandinavian law GODENHIELM p. 75: ". . . den traditionella omöjlighetsläran har fyllt sin funktion i rättsutvecklingen och [kan] numera saklöst lämnas åt sitt öde".

§ 7.2.3. Impossibility and vis major in maritime law

In spite of the criticism against the doctrines of impossibility and vis major they have indisputably been used as an important device to limit the promisor's obligation to fulfil the contract in spite of changed conditions adversely affecting performance. For the present study it is important to observe that impossibility and vis major constituted the main ingredients of SMC § 159 before the amendments in the 1930s (Sw. ". . . eller fartygets resa eller godsets försändning genom annan åtgärd av högre hand hindras". Transl ". . . or if the voyage or the carriage of the goods is prevented by other *vis major* contingencies"). And a portion of this general formula has been retained in the present SMC § 131.2. which has been influenced by the wording of § 24 of the Uniform Scandinavian Sales Acts (see supra p. 96). Consequently, before the express provisions relating to war risks were introduced in the

[27] RABEL, Unmöglichkeit p. 224.

[28] STOLL pp. 31, 107.

present SMC § 135, it was natural to treat such risks as a kind of impossibility and vis major excusing from performance. However, as this study will show, the doctrines of impossibility and *vis major* do not give any guidance at all for the distinction between cases where war risks provide an excuse from performance and cases where they do not. And the fact that it has sometimes been suggested that *any* danger of the destruction of the vessel on account of war will suffice to bring the principle of objective impossibility into operation[29] may serve as an adequate example of the difficulty involved in the deriving of proper solutions from general formulas of the type represented by the dogma *impossibilium nulla est obligatio.*

§ 7.3. *The Doctrine of Presupposed Conditions*[1]

§ 7.3.1. Introduction

When construing the contract and determining the scope of the contracting parties' obligations, the courts will often have to find the solution without the support of the text or other expressions of the intention of the contracting parties. And in this vacuum (Germ. "Vertragslücke") the doctrine of presupposed conditions plays a role closely corresponding to the technique of implication practised in Anglo-American law[2] although, in Anglo-American law, less attention is paid to the theories purporting to justify the operation of the doctrine.[3]

The justification for the legal relevancy of "presupposed conditions", not expressed in connection with the conclusion of the contract, has first been elaborated by WINDSCHEID[4] who suggested that the presupposed condition ("die Voraussetzung"), although not *expressed* as a condition limiting the scope of the promise, should be deemed relevant

[29] See ROOS p. 90: "Vad särskilt angår sjötransport måste omöjlighet anses föreligga, om fara finnes för fartygets förstörelse genom minor eller fientliga fartyg".

[1] In order to prevent any erroneous inference from the words, the translation "doctrine of presupposed conditions" is preferred before the "doctrine of implied conditions" (MAZANTI-ANDERSEN p. 36) or "doctrine of underlying assumptions" (RODHE, Adjustment p. 165; and HELLNER, Sanction p. 25).

[2] See supra p. 104; infra pp. 172, 203; and the observations by ARNHOLM, Privatrett I p. 247.

[3] But cf. the German "Geschäftsgrundlage" with the English "basis of contract" theory, infra p. 174.

[4] WINDSCHEID, Die Lehre des römischen Rechts von der Voraussetzung, Düsseldorf 1850; and id. Die Voraussetzung, AcP 78 (1892) pp. 161–202.

as "eine unentwickelte Bedingung".[5] The intention has been inadequately expressed; the promisor never intended to assume an unconditional obligation. But it goes without saying that, in order to maintain the stability in contractual relations, the acknowledgement of the "unentwickelte Bedingung" as a contract term can only be permitted under certain requirements. Although, historically, it was once assumed that the contract rested upon an implied term that the conditions prevailing at the time of the conclusion of the contract would remain unchanged —*clausula rebus sic stantibus*[6]—such a general implication does not suit the complex pattern of contractual relations in modern society. On the other hand, it would also be wrong to accept the other extreme and hold a contracting party unconditionally bound to his promise under the theory that he should have guarded himself by a proper stipulation. The right attitude to the problem lies somewhere in between the two extremes.

WINDSCHEID's theory concentrated on the "real intention" ("eigentliche Wille") of the individual contracting party and paid insufficient regard to the *expectation of the other contracting party*. Hence, further qualifications were necessary and it was not until these qualifications had been comprised in OERTMANN's famous definition of the "Geschäftsgrundlage"[7] that the German Reichsgericht acknowledged the legal relevancy of the "Voraussetzung".[8] By OERTMANN's definition stress was laid upon the expectation of the other contracting party; the "Voraussetzung" must not only be of such a substantial character so as to create the basis of the contract but this must also be apparent to the other party:

"Geschäftsgrundlage ist die beim Geschäftsschluss zutage tretende und von etwaigen Gegner in ihrer Bedeutsamkeit erkannte und nicht beanstandete Vorstellung eines Beteiligten oder die gemeinsame Vorstellung der mehreren Beteiligten vom Sein oder vom Eintritt gewisser Umstände, auf deren Grundlage der Geschäftswille sich aufbaut."

Nevertheless, further qualifications were necessary, in particular for the application of the doctrine to *changed conditions* adversely affecting performance. Again, we are searching for an answer to the question as to

[5] AcP (1892) 78 p. 195.

[6] See KEGEL, Veränderungen pp. 139–43 with references.

[7] OERTMANN, Geschäftsgrundlage.

[8] See LARENZ, Geschäftsgrundlage p. 20 et seq.

which one of the contracting parties shall carry the risk of the change of circumstances. Hence, we shall meet difficulties of the same kind as were met in the delimitation of the concepts of impossibility and *vis major*.

The doctrine of presupposed conditions has a much wider scope of application than the doctrines of impossibility and *vis major*. It is used not only for the purpose of alleviating the burden caused by circumstances adversely affecting the *possibilities of performing the contract* but also as a means of freeing a contracting party from paying the agreed remuneration *when changed conditions or an unexpected turn of events* have considerably reduced the advantage to be expected from the contract. And, in this latter regard, it may be used in situations involving breach of contract as well. In bilateral contracts the promises are mutually dependant; the failure to perform one promise may free the other party from his obligation. Here, the doctrine of presupposed conditions has been used for the purpose of determining whether the failure is sufficiently significant to serve as an excuse from giving the agreed exchange and, in the Anglo-American terminology, amounts to a failure of condition.

The doctrine of presupposed conditions does not only have a wide scope of application, it is also used for the purpose of solving problems of a different nature; the one being closely related to the problems regarding the individual formation and the interpretation of the contract, the other to the technique of *supplementing* the contract in a manner corresponding to the operation of non-mandatory law.

The doctrine of presupposed conditions works—sometimes silently—in the interpretative process. Hence, the data for the interpretation tend to become construed so as to give a reasonable protection for the contracting party who has failed to safe-guard himself by express and unambiguous contract terms.[9]

[9] Cf. BGB § 157: "Verträge sind so auszulegen wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern". See for a critical attitude to the term "ergänzende Vertragsauslegung" KEGEL, Veränderungen p. 149; and cf. SOERGEL-SIEBERT anm. 75 to § 157: "Da die ergänzende Auslegung auf einer sinngemässen Entfaltung des Geschäftsinhalts beruht, muss sie immer einen *Anhaltspunkt im Wortlaut der Erklärungen* haben. Eine weitergehende Vertragsergänzung kann nur auf § 242 gestützt werden. Die ergänzende Auslegung darf nur zu einer loyalen Vervollständigung des Vertragswillens, *nicht* aber zu einer den Vertragswillen inhaltlich ändernden *Berichtigung oder Korrektur* führen".

The doctrine may cover not only situations where a contracting party has made a wrong assumption concerning *the circumstances existing at the time of the conclusion of the contract* (Sw. "oriktiga förutsättningar"), but also situations where his position under the contract is affected by *supervening* events (Sw. "bristande förutsättningar"). In the latter case it should be observed that a contracting party seldom speculates in the possibilities of abnormal events of a *vis major* character. "Wer im Frieden abschliesst, denkt nicht an den Krieg; aber er denkt auch nicht an den Fortbestand des Friedens. Daher darf man nicht verlangen, dass etwas *Falsches vorgestellt* worden ist, sondern es muss genügen, dass etwas *Richtiges nicht vorgegestellt* worden ist."[10] Hence, the requirement that there must have been a "real intention" not to be bound in case of the occurrence of such event cannot be upheld. In this regard, a reference to some psychological phenomenon in the minds of the contracting parties will, in the vast majority of cases, be nothing but a pure fiction. And this fact has induced the advocates of a wide application of the doctrine to resort to artificial techniques in order to justify the operation of the doctrine without acknowledging the fictitious character of their reasoning. A fictitious approach is not neccessarily harmful, since it may be justified in order to reach reasonable results, which cannot be attained by other means. But it would seem that, in this particular field, it has created confusion, particularly in view of the difficulty of distinguishing between an interpretation of the contract based upon expressions of the intention of the contracting parties and a so-called interpretation employed for the purpose of supplementing their incomplete expressions of intention.[11]

§ 7.3.2. The prerequisites for the operation of the doctrine

As previously mentioned, the operation of the doctrine rests upon the theory that the promisor has made a kind of *reservatio mentalis* as a condition for his promise. If this reservation has been apparent to the promisee, it will be tempting for the courts to treat the reservation in

[10] KEGEL, Veränderungen p. 156.

[11] This problem has, in Sweden, recently been examined by VAHLÉN, Avtal och tolkning, who stresses the difficulties (at p. 194). See also id., Bidrag till avtalstolkningens systematik, FJFT 1964 p. 380 et seq.; and cf. from Danish law, JØRGENSEN, Forudsætning, UfR B 1963 p. 157 (at p. 169).

the same manner as an express contract term.[12] Presumably, this is the true reason behind the theory of the "common purpose" of the contracting parties (Sw. "ömsesidig förutsättning"). Under Scandinavian as well as Anglo-American law the courts are much more inclined to deem the frustration of such "common purpose" relevant than the frustration of the purpose of only one of the contracting parties. However, the *term* "common purpose" leads to confusion, since, normally, there is no such thing as a common purpose; each of the contracting parties has his specific purpose and often these purposes do not coincide but are directly opposite to one another.[13] It would be far better if the term "frustration of common purpose" (Sw. "ömsesidig förutsättning") was discarded and the courts openly admitted the true character of their reasoning.[14]

Now, even if we have ascertained

(1) the fact that one contracting party has made a *reservatio mentalis*,
(2) that this reservation had a decisive effect on his intention to enter into the contract in the sense that he would not have entered into the contract if he had known that the conditions were not as he assumed that they were or that later events would adversely affect his position under the contract, and
(3) that the above circumstances (1) and (2) were apparent to the other contracting party, it by no means follows that the "reservation" shall be deemed relevant. A further test is required and it is here that different views have been professed in Scandinavian law. The Danish writer JUL. LASSEN adhered to the method of the "hypothetical test"[15] which comes very close to the "officious bystander's test" in English law.[16] However,

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[12] See, e.g., NJA 1957.770; and the comments by VAHLÉN, Avtal p. 287 et seq.

[13] See KARLGREN, SvJT 1952 p. 262: "Överhuvud bestå svårigheterna i förevarande sammanhang särskilt däri, att även när en förutsättning vid första ögonkastet ter sig som gemensam — även när kontrahenterna tyckas ha handlat på basis av 'en och samma' grundval för avtalet — det dock i realiteten blott är endera kontrahentens intressen och förutsättningar det rör sig om." Cf. SMIT, Frustration, p. 287: "However, in most, if not in all, situations in which frustration of purpose has been found present, clearly the purpose of only one of the parties to the contract was frustrated"; and CORBIN §§ 1322 at note 19, 1353, 1355.

[14] See GULDBERG, SvJT 1953 p. 10 et seq.

[15] JUL. LASSEN, Haandbog i Obligationsretten (Copenhagen 1917–20) p. 118.

[16] See supra p. 104.

this "subjective approach" was criticized by the Danish writers MØLLER and USSING who suggested an "objective approach" instead;[17] the judge should not perform any retroactive experiment based upon an assumption as to the reactions of the contracting parties if the subject had been discussed between them at the time of the conclusion of the contract. This view co-incides entirely with the well-known statement of Lord RADCLIFFE: "By this time [i.e. at the time of the hypothetical test] it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself".[18] The "objective approach" is presently favoured in Scandinavian law and also appears from the international Hague Convention of July 1964 regarding the international sale of goods (art. 10). Here, when determining if a breach of contract entitles the suffering party to cancel the contract, the circuitous technique of the hypothetical test is used, but it is no true hypothetical test, since reference is not made to the *actual* contracting parties but to "une personne raisonnable de même qualité placée dans la situation de l'autre partie".[19]

In Norwegian law, ARNHOLM[20] has suggested a restrictive use of the doctrine of presupposed conditions and has termed some of the assumed "presupposed conditions" as "retroactive conditions" (Norw. "bakutsetninger"), which are simply used as a label for the conclusion reached.[21] A revival of the hypothetical test is signalled by the Danish scholar A. VINDING KRUSE, who suggests a mixture between the different theories; the hypothetical test should be tried but if it gives no answer, which it ordinarily does not do, then a solution must be found after

[17] MØLLER, Forudsætninger (Copenhagen 1894); and USSING, Bristende Forudsætninger (Copenhagen 1918).

[18] In *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696 at p. 728.

[19] Cf. HELLNER, SvJT 1965 p. 259, where he states that art. 10 of the convention implied a recognition of the doctrine of presupposed conditions in the form suggested by USSING.

[20] ARNHOLM, Privatrett I p. 247 et seq.

[21] ARNHOLM's observations are approved by ILLUM, Henry Ussings Forfatterskab, UfR B 1946 p. 115 (at p. 123) but are criticized by KRISTEN ANDERSEN, Kjøpsrett (Oslo 1962) p. 135 et seq.

an objective test.[22] JØRGENSEN discusses the problem on a comparative basis and criticizes the doctrine for its tendency to obscure the thoughts of the judge and cause him to investigate into the non-existent presupposed conditions of the contracting parties instead of basing the decision on a test of reasonableness—not freely according to what may appear just in each particular case but after a distribution of risk in typical situations.[23]

Presumably, the different views are explained by the fact that the doctrine is used for the solution of different problems. It may be natural to use the "subjective approach" if the application of the doctrine is limited to situations where a contracting party has in fact made an assumption apparent to the other party and where the court feels inclined to use an "interpretative method" based on circumstances related to the actual contracting parties, while the "objective approach" is clearly warranted in situations where the court has no basis whatever for finding out the intention of the actual contracting parties.

In Swedish law, VAHLÉN has suggested a restricted use of the doctrine of presupposed conditions. While it has always been recognized that so-called "typical presupposed conditions" (Sw. "typförutsättningar")—i.e. such assumptions which are normally made by contracting parties in similar situations—need special consideration, since the recognition of the relevancy of such conditions resembles the application of non-mandatory law, VAHLÉN suggests that the doctrine should not only be discarded with regard to "typical presupposed conditions" but also with regard to situations where the possibility of a change of circumstances was not at all within the minds of the contracting parties (Sw. "förutsättningar helt utanför kontrahenternas tankar"). The doctrine should only apply to situations where there had been a *conscious assumption* of a prevailing or expected state of things on the part of one or both of the contracting parties.[24] KARLGREN finds VAHLÉNS distinction between conscious presupposed conditions and other presupposed conditions appealing but points out the practical difficulties in making such a

[22] A. VINDING KRUSE, Misligholdelse af Ejendomskøb (Copenhagen 1962) p. 48 et seq. Remarks to the same effect have been made by AUGDAHL, Den norske obligasjonsretts almindelig del (Oslo 1963) p. 153 et seq. Cf. also GULDBERG, SvJT 1953 p. 5.

[23] JØRGENSEN, Forudsætning p. 170.

[24] See VAHLÉN, Formkravet p. 177 et seq.; TfR 1953 p. 394; and Avtal p. 55 et seq.

distinction[25] and with regard to "typical presupposed conditions" he stresses the fact that the doctrine has performed a useful service by permitting the courts, when left without the support of statutory provisions, to develop normative rules for typical situations.[26] And the borderline between the creation of new normative rules by the application of the doctrine and the application of such rules, when already established, must necessarily be diffuse.[27]

We have seen that efforts have been made to solve the problem of changed conditions within the doctrine of impossibility by the introduction of the concept of "economic impossibility" ("impracticability", "wirtschaftliche Unmöglichkeit") and how the same problems were deemed to be better treated under the doctrine of presupposed conditions ("Geschäftsgrundlage").[28] However, in view of the deficiencies of the doctrine of presupposed conditions—primarily caused by its wide and diffuse scope of application—we shall see in § 7.4. how the problem of the influence of changed conditions may be treated under a doctrine of a still more general character—the doctrine of "undue hardship"—which leaves even more room for the court's discretion. The problem will always be there and has to be solved in one way or another. Hence, WINDSCHEID's words with regard to the "Voraussetzung" seem entirely apposite: "Es ist meine feste Überzeugung, dass die stillschweigend erklärte Voraussetzung, was man auch gegen sie einwenden mag, sich immer wieder geltend machen wird. Zur Thüre hinausgeworfen, kommt sie zum Fenster wieder herein."[29]

§ 7.3.3. The operation of the doctrine in maritime law

Since the Scandinavian Maritime Codes do not contain a general provision purporting to free the contracting parties from their promise in case of changed conditions, the need for a support of other legal remedies

[25] KARLGREN, SvJT 1952 p. 794.

[26] See RODHE, Fastighetsindelningen p. 299 at note 3: "Förutsättningsläran blir på detta sätt en inkörsport för nya naturalia negotii vid olika avtalstyper"; HELLNER, Sanction p. 41; SUNDBERG, Fel i lejt gods p. 110; and cf. HALSBURY, Contracts Vol. 8 § 320 at note u–a.

[27] KARLGREN, SvJT 1952 p. 795.

[28] See supra p. 151.

[29] WINDSCHEID, Die Voraussetzung, AcP 78 (1892) p. 197.

has been strongly felt. As previously mentioned, the doctrine of impossibility has sometimes been suggested but the doctrine of presupposed conditions has generally been preferred on account of its greater elasticity and wider scope of application.

The charterer's right of cancellation in case of the perishing of the goods was the subject of extensive discussions before the codification of this rule in SMC § 131.2. It is interesting to observe how the doctrine of impossibility as well as the doctrine of presupposed conditions were invoked in support of the recognition of the charterer's right of cancellation. However, the spokesmen for the doctrine of impossibility were forced into a rather strained reasoning based upon the theory that the charterer's main obligation consisted of his duty to tender the cargo for shipment rather than paying the freight, while the advocates of the doctrine of presupposed conditions avoided this difficulty.[30]

A variant of the doctrine of presupposed conditions appears in SMC §§ 126, 146 dealing with the charterer's right of cancellation in case of delay on the part of the shipowner (Sw. ". . . där bortfraktaren vid avtalets ingående insett eller bort inse att det med befordringen avsedda ändamålet skulle väsentligen förfelas på grund av sådant dröjsmål")[31] but there is no general rule corresponding to HGB § 637 to the effect that frustration of purpose ("Zweckvereitelung") gives the contracting parties a mutual right of cancellation ("Rücktrittsrecht").[32] However, it is frequently suggested that the doctrine of presupposed conditions should be permitted to supplement the casuistic provisions of the Scandinavian Maritime Codes.[33] And for the present study it is particularly interesting to note that the doctrine of presupposed conditions was used before the introduction of the mutual right of cancellation on account of war risks in SMC § 135. The provisions of § 159 before the amendments were mainly based on the doctrines of impossibility and *vis major* but the need for a supplementary remedy was sometimes satisfied by the doctrine of presupposed conditions.[34]

[30] Se infra p. 231.

[31] See supra p. 37; and infra p. 381.

[32] See SCHAPS-ABRAHAM Anm. 4 to § 637.

[33] See BRÆKHUS, Ishindringer p. 16 et seq.; and ND 1918.319 *The Nordkap* SCD infra p. 350.

[34] See, in particular, ND 1919.118 *The Henry Brooke* SCN; it was considered that the charter party rested upon the basis that, in any event, the vessel could be insured against the risks of the voyage.

Nevertheless, it seems that where the doctrine of presupposed conditions has been applied in maritime law, it has mainly been used as a label for the conclusion reached; as a rule the court has been satisfied to find a material presupposed condition apparent to the other party but has not given a close account of the reasons *why* the condition has been deemed relevant. The result will be the same under the technique of implication in Anglo-American law. "You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusion."[35] There lies the same danger in the doctrine of presupposed conditions as in the doctrine of impossibility; the court will feel reassured by the magic forces inherent in the concepts—sometimes too reassured to penetrate sufficiently the exact nature of the bargain and the surrounding circumstances.

In ND 1963.27 *The Netta* SCD, where the time charterer could not use the vessel as contemplated in the relevant trade on account of black-listing by Syrian authorities caused by the vessel's previous calls to Israeli ports, the court did not find breach of contract on the part of the shipowner but allowed the charterer a right of cancellation under the doctrine of presupposed conditions. The *result* may, perhaps, be equitable under the circumstances[36] but it would be better supported by the provisions in the charter party relating to the shipowner's obligation to maintain the vessel in a thoroughly efficient state in hull and machinery during service (Baltime cl. 3). The fact that the vessel, *at the time of the delivery*, has an inherent deficiency preventing its efficient use by the charterer may warrant such an application.[37] The application of the doctrine of presupposed conditions may give rise to confusion with regard to the distribution of the risk between the shipowner and the charterer as to *supervening contingencies* affecting the use of the vessel under the charter party, since the doctrine dispenses with the necessity of accounting

[35] HOLMES, The Path of the Law, 10 Harv. L. Rev. (1897) p. 457 at p. 466.

[36] But cf. the different outcome in *Compagnie Algerienne de Meunerie* v. "*Katana*" *Societa di Navegazione Marittima, S.P.A. (The Nizetti)* [1960] 1 Lloyd's Rep. 132 C.A. supra p. 38; and ND 1922.193 *The Vikholmen* SCN infra p. 254.

[37] Cf. from the law of sales the concept of "rådighetsfel", i.e. a non-physical defect preventing the contemplated use of the subject-matter, often caused by prohibitions or restrictions imposed by the authorities. See for a typical example NJA 1961.330 and for further references HELLNER, Köprätt § 18.1.

for the difference between such contingencies—which are mainly the charterer's concern—and "non-physical deficiencies" inherent in the vessel already at the time of the conclusion of the contract preventing its efficient use during the charter party period.[38]

§ 7.4. *The Doctrine of "Undue Hardship"*

Scandinavian law has no general provision corresponding to BGB § 242[1] providing the legislative support for the "Geschäftsgrundlage" as well as the "wirtschaftliche Unmöglichkeit", which, under the principle of the so-called "Unzumutbarkeit", has been deemed more naturally flowing from § 242 than § 275.[2] And if the qualifications and refinements of the "Geschäftsgrundlage" would prove to be unsuitable, the general words of § 242 would be there to provide a legislative support for any new—less complicated—theory purporting to solve the eternal problem of the influence of changed conditions on the position of the contracting parties. Thus, BGB § 242 assisted the courts in adjusting contracts affected by the violent breakdown of the exchange in the 1920s ("Ausgleich", "Aufwertung")[3] before special legislation was enacted ("Vertragshilfeverordnung" 1939, "Vertragshilfegesetz" 1946, 1952).[4]

In Scandinavian law, the courts have, for all practical purposes, been referred to the doctrines of impossibility and presupposed conditions and, when the requirements of these doctrines have not been fulfilled, the courts have had the further possibility of using an "interpretative" method resembling the Anglo-American technique of implication. However, the principle of an adjustment of contracts or terms not conforming with good commercial practices appears within several

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[38] See for an explanation of the interrelation between the liability for defects and the operation of the doctrine of presupposed conditions in Danish law, JØRGENSEN, Forudsætning, UfR B 1963 p. 157 et seq.

[1] See generally WEBER, Treu und Glauben.

[2] See, e.g., MDR 1953.282 (BGH LM § 242 Bb 12); PALANDT, vorb. § 275 b; LARENZ p. 237 et seq.; STAUDINGER-WERNER vorb. 8 and anm. 2 to § 275; KEGEL, Veränderungen p. 157; RABEL, Warenkauf p. 154; but cf. ENNECCERUS-LEHMANN § 46 I. 2.

[3] See, e.g., RGZ (1923) 107.78; and (1923) 107.156.

[4] See WEBER B 298–9; and concerning the interrelation between § 242 and the special "Vertragshilfegesetze" KEGEL, Veränderungen p. 228 et seq.; and LARENZ, Geschäftsgrundlage pp. 186–7.

special fields of legislation.[5] And this has been deemed sufficient to warrant the extension of the principle by analogous interpretation to cover the entire field of contract law.[6] Nevertheless, the statements in the *travaux préparatoires* stress that the principle should only be applied in exceptional cases.[7] Hence, it is still to be expected that the courts will prefer the traditional approach to an open adjustment of the contract under the doctrine of undue hardship. In addition, it is subject to dispute whether the doctrine of undue hardship should at all refer to changed conditions occurring subsequently to the conclusion of the contract (see infra p. 435). Nevertheless, it is questionable whether one may consider satisfactory the traditional "qualitative" approach—operating with a number of more or less complicated distinctions—supplemented by the semicovert technique of implying in the contract terms, which were never in the contemplation of the contracting parties. While it may seem a hazardous experiment to leave a wide and unqualified margin to the discretion of the courts, it is manifest that the "test of reasonableness" can never be avoided. It will appear in one guise or another. The traditional "qualitative" approach has often induced the courts to direct too much attention to the complicated prerequisites of the various doctrines instead of concentrating on the central issue of the distribution of risk under the relevant contract. Hence, a "quantitative" approach may be preferred, provided the courts are capable of exercising their mitigating power with circumspection and with due regard not only to the individual characteristics of each contract but also to the necessity of developing solutions for *typical* situations, thus contributing to, instead of upsetting, the stability required in commercial transactions.[8]

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[5] The Uniform Scandinavian Promissory Notes Acts (1936) § 8; The Uniform Scandinavian Act on Installment Contracts (1915) § 8; The Uniform Scandinavian Insurance Contracts Acts (1927) § 34; The Swedish Act on Rights to Inventions by Employees (1949) § 9; The Swedish Leasing Act (1907), Chapter III, § 43.

[6] See RODHE, Adjustment p. 169; and cf. from Norwegian law The Price Act (Prisloven) § 18 and the comments by ARNHOLM, Privatrett II pp. 265–7 with further references.

[7] See NJA II 1936 pp. 49–53.

[8] See for a typical example of the reluctance to give the courts a mitigating power unrestricted by the traditional prerequisites RGZ (1922) 103.328. Here, the lower court feared that its interference would lead "zur völligen Rechtslosigkeit auf dem Gebiete des Vertragsrechts", while the Reichsgericht stated: "Diese Befürchtung ist

§ 8. *The Legal Approach of English Law*

§ 8.1. *Introduction*

> "No branch of the law of contract is so difficult to explain or so uncertain in its effects as that dealing with frustration."[1]

The method of describing the doctrine of frustration varies according to the context in which the doctrine is presented. For the purpose of the present study it has been deemed necessary to give an account of the evolution of the doctrine, the theories underlying the doctrine and its field of application, primarily with the intention of introducing the Scandinavian reader to Anglo-American legal thinking. Subsequently, some comments are given on the doctrines of illegality and trading with the enemy.

§ 8.2. *The Evolution of the Doctrine of Frustration*

> "It would be idle to deny that this evolution resulted in a fundamental change of the nature and the character of the doctrine of frustration in English law."[1]

The strict adherence to *pacta sunt servanda* and to the principle that the court should not make a new contract for the parties is often supported by an *obiter dictum* in a case from the 1600s, *Paradine* v. *Jane*.[2] In this case, a lessee had been deprived of his possession by a certain German prince Rupert, who had invaded the property with enemy troops. The court considered that this did not free the lessee from paying the rent. The *result* of this case is not particularly remarkable, since a risk of the relevant kind could very well be placed upon the lessee.[3]

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unbegründet; es gilt nur vorsichtig die Grenzen zu ziehen, innerhalb deren der Einwand Beachtung verdient". Cf. for an "open" approach in Anglo-American law SMIT, Frustration, p. 287 at p. 306 et seq., suggesting a "Gap Filling Doctrine".

[1] GOODHART, L.Q.R. Vol. 52 (1936) p. 7.

[1] SCHMITTHOFF, Some Problems p. 133; cf. also PARRY p. 74 et seq.

[2] (1647) Aleyn 26 K.B.

[3] Cf. CORBIN § 1322 at note 15: "Its decision on this exact issue is probably in accord with the existing modern law".

However, the case contains an *obiter dictum* which is considered one of the fundamental principles of the English law of contracts; "... when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract".

It will be seen that, in Anglo-American law, an analysis of the contractual promise may often lead to the result that the promisor is not considered to have undertaken an unconditional obligation. In this manner it is possible to uphold the validity of the principle in *Paradine* v. *Jane*, while at the same time alleviating the burden of the promisor in cases when changed conditions have adversely affected his position under the contract. Moreover, contracts may according to their *typical characteristics* be classified in "absolute contracts" and "contracts to use care to perform". Under the latter type of contract the promisor is not considered to have undertaken an "absolute" obligation in the sense that he is bound by the contract even when, in spite of the fact that he has used all reasonable efforts, the contract is incapable of being performed. However, most contracts belong to the category of "absolute contracts"—at least the type of contracts of interest for the present study.[4]

The case of *Taylor* v. *Caldwell*[5] is of great importance for the subsequent development. Here, the Surrey Gardens and Music Hall had been leased for four days but the Music Hall was destroyed by fire before the time for the performance of the contract. The lessor was freed from his obligation because of "an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor".[6] It appears that the result would have been the same by the application of the principle of *impossibilium nulla est obligatio* and, indeed, BLACKBURN J. seems to have been influenced by this principle:

[4] Contracts involving services of a personal nature fall under the category of "contracts to use care to perform". See, e.g., *Robinson* v. *Davison* (1871) L.R. 6 Ex. 269, where a female pianist was prevented from performing a concert on account of illness.

[5] (1863) 3 B. & S. 826 [129 R.R. 573].

[6] Cf. from maritime law *Moss* v. *Smith* (1850) 9 C.B. 94 C.P. [137 E.R. 827]; SMC § 128; HGB § 628; and WvK art. 519d dealing with the cessation of the contract of affreightment in case of the total or the "constructive" total loss of the vessel.

"Although the civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded".[7] Nevertheless, BLACKBURN J. did *not* directly apply the principle of *impossibilium nulla est obligatio* but preferred to rest the decision on an *implied condition* that the promisor should be excused from performance in case of the "perishing of the thing". Presumably, BLACKBURN J. was induced to this circuitous technique out of respect for the *obiter dictum* in *Paradine* v. *Jane*[8] in spite of the fact that the principle of the implied condition could cause a more serious threat to the general principle of sanctity of contracts than the restricted principle of excuse from performance in case of impossibility.[9] And we shall see how the implied condition can be used in a great number of different situations.

Some thirty years after the decision in *Taylor* v. *Caldwell* an extension of the principle of excuse from performance in case of the "perishing of the thing" was applied in the law of sales. Thus, in *Nickoll* v. *Ashton*,[10] the merchandise was according to the contract of sale to be shipped by the Orlando from an Egyptian port in January 1900 for England. The vessel stranded on December 1899 on account of "perils of the sea" and loading in January 1900 became impossible. The buyer's claim of compensation for non-performance was rejected, since "the contract must be construed as subject to an implied condition that, if at the time for its performance the Orlando should, without default on the defendant's part, have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end". VAUGHAN WILLIAMS L.J. stressed the fact that the contract could have been performed if the buyer had waived the time condition. However, it is unclear whether it had any bearing on the outcome that the buyer had had such a possibility but failed to exercise it.[11]

In view of the fact that BLACKBURN J. avoided the direct application of the doctrine of impossibility in *Taylor* v. *Caldwell*, this doctrine—by way of the technique of the implied condition—was swallowed by

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[7] 129 R.R. 573 at p. 578.

[8] See GOTTSCHALK p. 2; and MCELROY-WILLIAMS, M.L.R. Vol. 4 (1940) p. 242.

[9] See MCELROY-WILLIAMS op. cit. p. 243.

[10] [1901] 2 K.B. 126.

[11] [1901] 2 K.B. 126 at p. 138; and cf. *Huni & Wormser* v. *Sassoon & Co.* (1920) 5 Ll. L. Rep. 199 C.A.

another doctrine—the doctrine of frustration having its roots in maritime law.[12] Here, the doctrine was first used in breach of contract situations in order to establish the remedies available to the other party. In cases where the breach "frustrated the object" of the other party, the breach amounted to a failure of *condition* which freed him from his obligation to tender the agreed exchange, while a less important breach only amounted to a breach of *warranty* entitling the other party to recover damages.[13]

But the principle of frustration was also used generally in situations of so-called "inordinate delay". Hence, in *Geipel* v. *Smith*,[14] the doctrine was used for the purpose of freeing the *shipowner* from his obligation. The performance of the voyage had been affected by the war between France and Germany in the 1870s causing the blockade of Hamburg. The parties to the contract of affreightment were citizens of neutral Great Britain but it was manifest that the contract could not be performed within a reasonable time. COCKBURN C.J. stated: "But it would be monstrous to say that in such a case the parties must wait—for the obligation must be mutual—till the restraint be taken off—the shipper with the cargo, which might be perishable, or its market value destroyed —the shipowner with his ship lying idle, possibly rotting—the result of which might be to make the contract ruinous." The charter party contained a "restraint of princes" clause, and the "inordinate delay" entitled the shipowner to cancel the contract according to the clause.[15]

In *Jackson* v. *Union Marine Insurance Co.*[16] the charter party stipulated that the vessel should proceed "with all possible dispatch (dangers and accidents of navigation excepted)" from Liverpool to Newport and there load a shipment of iron rails for San Francisco. The shipowner insured the freight for the voyage. The vessel left Liverpool on 2 January 1872 and went aground the following day. It took some six weeks to

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[12] See, e.g., MCELROY p. 121 et seq.; and GUTTERIDGE p. 110.

[13] See *Davidson* v. *Gwynne* (1810) 12 East 381 K.B. [104 E.R. 149]; *Mac Andrew* v. *Chapple* (1866) L.R. 1 C.P. 643; DIPLOCK L. J. in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 at p. 492; *Suisse Atlantique Société d'Armement Maritime S.A.* v. *Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep. 529 H.L. at pp. 557, 562 supra p. 38; and infra p. 205.

[14] (1872) L.R. 7 Q.B. 404.

[15] See concerning the interpretation of the "restraint of princes" clauses supra p. 68; and infra p. 283.

[16] (1874) L.R. 10 C.P. 125.

get the vessel off ground and the time for repairs amounted to more than six months. The charterer cancelled on 15 February and had the cargo carried on to the destination by another vessel. The court held that the shipowner could recover the freight under the freight insurance policy, since the charterer on account of the inordinate delay did not have to fulfil his obligation under the contract.[17]

The application of the doctrine of frustration on account of "inordinate delay" was further considered in the much-debated cases of *Tamplin (F.A.) S.S. Co.* v. *Anglo-Mexican Co.*[18] and *Bank Line* v. *Capel & Co.*[19]

In the *Tamplin* case, the time charter party had been concluded on 18 May 1912 for sixty months and the vessel was to be delivered on 4 December 1912. The charter party concerned transport of oil in lawful trades between safe ports within a certain range and contained a "restraint of princes" clause. The *charterer* had the "liberty of subletting the steamer on Admiralty or other service". After the outbreak of the First World War the vessel, having still three years to sail under the time charter, was requisitioned in December 1914 by the Admiralty and was subsequently after certain alterations used for transport of troops. The requisition compensation exceeded the time charter hire. The shipowner maintained that the contract had ceased to exist on account of frustration, while the charterer, hoping to derive the benefit from the requisition compensation, insisted that the charter party was still in effect. The House of Lords (two judges dissenting) considered "that the interruption was not of such a character as that the Court ought to imply a condition that the parties should be excused from further performance of the contract, and that the requisition did not determine or suspend the contract".[20]

In the *Bank Line* case, the time charter party had been entered into during the war on 16 February 1915. The time charter period was twelve months and the vessel was to be delivered in a British port for transports between safe ports within a certain range. Exception was made for "loss or damage arising from restraints of princes". In a cancellation clause the *charterer* retained the right to cancel the charter party if the vessel was not delivered before 30 April 1915 or if the vessel should be "commandeered by the Government during the currency of the charter". The vessel was not delivered on 30 April, but

[17] Cf. McElroy pp. 128, 136, who suggests that the doctrine of frustration is suitable to the facts of *Geipel* v. *Smith*, where the *shipowner* was freed from performance, but criticizes the application of the doctrine in *Jackson* v. *Union Marine Insurance Co.* Here, the doctrine of "failure of consideration" should have been used instead.

[18] [1916] 2 A.C. 397.

[19] [1919] A.C. 435.

[20] See from the discussion of this case the observation by Scrutton, The War and the Law L.Q.R. Vol. 34 (1918) p. 116 et seq.: "This divided the House of Lords (three against two), and I am not sure that the majority of the profession agree with the majority in the House of Lords" (at pp 125-6).

the charterer did not exercise his option of cancelling the charter. The vessel was requisitioned on 11 May but the charterer still preferred not to use his option. In August the shipowner sold the vessel to a third party and promised in the contract of sale to try to get the vessel released. He succeeded in September but upon the condition that another vessel was delivered to the Government instead. The charterer maintained that the charter party was still in effect and claimed damages for non-performance. It was held that the requisition and the expected delay "destroyed the identity of the chartered service" and that the shipowner was entitled to invoke the doctrine of frustration in his defence.

One might ask why the House of Lords rejected the doctrine of frustration in the *Tamplin* case but applied it in the *Bank Line* case. Presumably, the different outcome in the two cases is explained by the fact that the charter party period in the former case was considerably longer (sixty months) than in the latter (twelve months). Furthermore, the potential delay in the *Bank Line* case, resulting from an event preventing delivery of the vessel, was indefinite,[21] while, in the *Tamplin* case, the charter would in any event have expired when the three years remaining under the charter party had elapsed. Nevertheless, it is interesting to observe that one of the judges who wanted to apply the doctrine of frustration in the *Tamplin* case was the only dissenting judge in the *Bank Line* case.[22]

Even before the application of the doctrine of frustration had been considered in the *Tamplin* and *Bank Line* cases, a new category of cases had fallen within the scope of the doctrine. While the doctrine earlier primarily covered cases of "the perishing of the thing" and "inordinate delay", the famous Coronation cases extended the application of the doctrine to situations where the object of one of the contracting parties had become frustrated on account of "an uncontemplated turn of events".

The contemplated coronation of Edward VII in June 1902 constituted the background of the "Coronation cases". It was intended that the coronation procession should pass along the Pall Mall and persons possessing rooms offering a view of the street took the opportunity of letting their rooms to interested spectators. However, the King became ill and the procession was

[21] Cf. Lord SUMNER [1919] A.C. 435 at p. 454.

[22] See Viscount HALDANE [1919] A.C. 435 at p. 444 and cf. his *dictum* in the *Tamplin* case [1916] 2 A.C. 397 at p. 412. In the *Bank Line* case the majority reached the decision after considerable hesitation. See Lord SUMNER, who considered the case "a very near thing" (at p. 451).

cancelled. The House of Lords considered that the lessees were free from their obligation of paying the agreed rent, since the contracts had ceased to exist on account of frustration.[23] It was stressed that there was no "demise of the rooms",[24] or even "an agreement to let and take the rooms", since the coronation procession was "the foundation of the contract".[25] VAUGHAN WILLIAMS L.J., after having accounted for the extension of the doctrine of frustration as applied in *Taylor* v. *Caldwell* to the situation in *Nickoll* v. *Ashton*, stated that the contract would cease on account of frustration "where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance".[26] Two judges (ROMER and STERLING LL.J.) raised some doubt as to who of the parties should bear the *risk* as to the cancellation of the coronation procession, but shared in other respects the opinion of VAUGHAN WILLIAMS.[27]

It seems particularly important that the lessor in *Krell* v. *Henry* in his advertisement had stated that "windows to view the coronation procession were to be let".[28] Provided this fact could be referred to as evidence of the nature of the bargain, it would seem possible to solve the case under the doctrine of failure of consideration.[29] However, the restrictive attitude of Anglo-American law towards "parol evidence" does not seem to have permitted the House of Lords to follow this path of reasoning.[30]

In another coronation case, *Herne Bay Steamboat Co.* v. *Hutton*,[31] the lessee was not freed from his obligation to pay the agreed remuneration.

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[23] *Krell* v. *Henry* [1903] 2 K.B. 740. See for further "coronation" cases MCELROY-WILLIAMS, M. L. R., Vol. 4 (1940) p. 245 notes 18–21.

[24] In such a case the decision would have overruled *Paradine* v. *Jane*, supra p. 162. See further infra p. 186 whether the doctrine of frustration can be applied to contracts of lease.

[25] See the *dictum* of VAUGHAN WILLIAMS L. J. [1903] 2 K.B. 740 at p. 750.

[26] [1903] 2 K.B. 740 at p. 748.

[27] [1903] 2 K.B. 740 at p. 754.

[28] See [1903] 2 K.B. 740 at p. 741.

[29] See, e.g., MCELROY-WILLIAMS, M.L.R. Vol. 4 (1940) p. 247 et seq.; GUTTERIDGE, L.Q.R. Vol. 51 (1935) p. 109; Lord FINLAY in *Larrinaga & Co.* v. *Soc. Franco-Americaine des Phosphates de Medulla* (1923) 16 Asp. M.C. 133 at p. 136; and concerning failure of consideration infra § 9.4.2.

[30] But cf. the dictum by VAUGHAN WILLIAMS L.J. [1903] 2 K.B. 740 at p. 749 et seq. See concerning parol evidence generally PHIPSON § 1851; UCC Section 2–202; Restatement Contracts § 242; and cf. WIGMORE, Evidence § 2740 et seq.

[31] [1903] 2 K.B. 683.

In the *Herne Bay* case, Hutton had chartered the Cynthia for the purpose of taking paying passengers on a cruise where they could witness the Royal naval review at Spithead. However, the naval review was cancelled on account of the King's illness. The House of Lords did not consider the contract frustrated suggesting that the cancellation of the contemplated review was Hutton's risk and that the review did not constitute "the sole basis of the contract", since it was still possible for Hutton to take his paying guests along in the Cynthia for the purpose of enjoying the sight of the fleet which remained at Spithead.

It is difficult to ascertain the true reasoning behind the decision in the *Herne Bay* case. One might ask whether the result would have been the same if the fleet had left Spithead.[32] Or whether the outcome is explained by the fact that in the *Herne Bay* case, as distinguished from *Krell* v. *Henry*, the object of the contract had only become *partially* frustrated.[33] Or perhaps the decision is explained by doubts as to the proper placing of the risk of the contingency *combined* with the theory that the object was only partially frustrated.[34]

Another important feature of the doctrine of frustration lies in the *legal effect* of the frustrating contingency and this appears from still another Coronation case, *Chandler* v. *Webster*.[35] Here, the contract stipulated that the rent should be paid *before* the time of the frustrating event. Some two thirds of the amount had already been paid and the House of Lords considered that the plaintiff was not entitled to recover the 100 £ which he had paid, and the defendant was entitled to payment of the balance, inasmuch as his right to that payment had accrued before the processions became impossible. Hence, the case lays down the principle that "the loss lies where it falls";[36] the contract remains valid up to the occurrence of the frustrating event which takes effect *ex nunc* and does not operate *ex tunc* from the time of the conclusion of the contract. Furthermore, the contract ceases to have any effect whatsoever subsequently to the frustrating event which "kills the con-

[32] This question is raised by VAUGHAN WILLIAMS L.J. at p. 689 and ROMER L.J. at p. 691.

[33] Cf. HALSBURY, Contracts Vol. 8 p. 325 at note o.

[34] Cf. STIRLING L.J. at p. 692: "I come to this conclusion more readily because the object of the voyage is not limited to the naval review, but also extends to a cruise round the fleet".

[35] [1904] 1 K.B. 493.

[36] See, e.g., Lord SIMON in *Constantine (Joseph) S.S. Line* v. *Imperial Smelting Corporation* [1942] A.C. 154 at p. 163.

tract". Notwithstanding the fact that, in an arbitration clause, the parties may very well have intended to submit the question of frustration to the arbitrators as well, there are cases to the effect that arbitration clauses are swept away by the frustrating event. "An arbitration clause is not a phoenix, that can be raised again by one of the parties from the dead ashes of its former self".[37] But it is frequently maintained that this view is unduly formalistic.[38] Furthermore, frustration applies automatically and does not require any notice of cancellation from the contracting parties.[39]

The principle of *Chandler* v. *Webster* that "the loss lies were it falls" has given rise to much criticism. In Scots law, the case of *Cantiare San Rocco* v. *Clyde Shipbuilding and Engineering Co.*[40] rejected the application of the principle which was only considered workable "among tricksters, gamblers and thieves".[41] But it was not until some forty years later that the principle of *Chandler* v. *Webster* was modified by another case, *Fibrosa* v. *Fairbairn*,[42] and by Law Reform (Frustrated Contracts) Act, 1943. In the *Fibrosa* case, the modification was attained by the device of the doctrine of failure of consideration.

A British corporation, in a contract dated 12 July 1939, had sold machinery to a Polish corporation for an amount of 4.800 £ and one third of this amount was to be paid at the time of the order. Delivery was to be effectuated c.i.f. Gdynia three or four months from settlement of final details. The contract contained a clause extending the time for the delivery in case of *force majeure*. The court considered that the outbreak of war between Germany and Poland, in spite of the force majeure clause extending the time for delivery, caused the cessation of the contract on account of frustration. Since delivery could

[37] Per Lord SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co.* [1926] A.C. 497 at p. 510.

[38] See, e.g., MCELROY p. 227 referring to *Scott* v. *Del Sel & Sons* [1922] S.C. 592; MCNAIR p. 182 at note 3 referring to *Heyman* v. *Darwins* [1942] A.C. 356 and concluding that the matter "must depend to some extent upon the precise wording of the arbitration clause"; and HALSBURY, Shipping Vol. 35 p. 407 at note o: "Dissolution of the contract by frustration of the adventure will not, as a rule, affect an arbitration clause in the contract, which will remain valid". Cf. from Swedish law DILLÉN SvJT 1937 p. 674.

[39] Cf. § 128 SMC and see further infra p. 401. This principle may cause difficult problems in case of frustration on account of "inordinate delay". See the observation by MCELROY p. 225 et seq.

[40] [1924] A.C. 226.

[41] [1924] A.C. 226 at p. 259.

[42] [1943] A.C. 32.

not be effectuated, the Polish firm had not received the promised counter-performance and could thus, on account of "total failure of consideration", not only be freed from its obligation to pay the remainder of the purchase sum but also recover the amount paid in advance.

By the *Fibrosa* case, English law had arrived at a standpoint where the legal remedy could work to the detriment of a contracting party who, at the time of the frustrating event, had already incurred expenses for the purpose of performing the contract.[43] Such a "black and white jurisprudence calls for a different approach, a jurisprudence of adjustment".[44] And a principle of adjustment was introduced by Law Reform (Frustrated Contracts) Act, 1943.[45] Here it is stipulated that, in principle, advance payments if paid should be recoverable and that the obligation to pay unpaid advance payments should cease (section 1, subsection 2). However, it is subsequently determined that the court in its discretion may allow a party, who has incurred expenses before the time of the frustrating event, wholly or partly to keep amounts paid in advance or to demand unpaid amounts agreed to be paid in advance. Furthermore, a party who has had a benefit from the contract before the time of the frustrating event may be required to pay a corresponding amount to the other party. Some types of contract are expressly excepted from the rules of the Act; viz. *all contracts of affreightment* with the exception of time and bare boat charter parties, as well as contracts of insurance and sale of specific goods (section 2, subsection 5). The exception of contracts of affreightment is explained by the ancient rules relating to prepaid and prepayable freight where the principle of "the loss lies where it falls" has become firmly settled, such freight being considered earned *ex lege* even if the voyage cannot be performed on account of supervening contingencies occurring without the fault of the shipowner.[46]

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[43] See, e.g., the observations by Viscount SIMON and Lord PORTER in the *Fibrosa* case at pp. 49, 76.

[44] SCHMITTHOFF, FJFT 1957 p. 360.

[45] See for a commentary WILLIAMS, Law Reform (Frustrated Contracts) Act, 1943: Text and Commentary (1944).

[46] See *Anonymous Case* 271 2 Show. 283 K.B. [89 E.R. 941]; *Byrne* v. *Schiller* (1871) L.R. 6 Ex. 319; *Allison* v. *Bristol Marine Insurance Co.* (1876) 1 App. Cas. 209. The continued validity of this principle has been explained by the practice for the merchant to insure prepaid freight and of the shipowner to make an allowance

§ 8.3. *The Main Theories Underlying the Doctrine of Frustration*

§ 8.3.1. The implied term

As previously mentioned, the decision in *Taylor* v. *Caldwell* does not rest on the principle of *impossibilium nulla est obligatio* but on the theory of the implied term, which has dominated the subsequent evolution of the doctrine of frustration. And, in view of the necessity of modifying the rigid principle that the court has no power to "make a new contract for the parties", it has fulfilled a useful function, since, in English law, the method of openly permitting the court to find a reasonable solution for the parties in case their bargain has been affected by unforeseen calamities has been rejected.

In *British Movietonews* v. *London & District Cinemas*[1] Lord DENNING stated: "The day is done when we can excuse an unforeseen injustice by saying to the sufferer 'It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself'. We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers."[2] But the House of Lords pointed out that "the Court has no discretion to qualify the contract for the purpose of doing what seems to it just and reasonable" and, reversing the decision of the lower court, held that the doctrine of frustration did not apply (but cf. infra p. 179).

Behind the "implied term" the courts may exercise different reasonings. Thus, the "implied term" may invite the court to perform a "hypothetical test" of the same kind as suggested by JUL. LASSEN for the application of the doctrine of presupposed conditions in Scandinavian law (see supra p. 154). Or it may cover an "objective test" having no reference to the intention of the actual contracting parties. Indeed, the court, as a rule, does not make a reference to the intention of the actual contracting parties at all but rather to contractual terms which could

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for that purpose. But cf. the critical attitude as to the merits of this standpoint SELVIG § 12.2. Scandinavian as well as American law does not conform with English law in this respect. See SMC § 125; *National Steam Nav. Co. of Greece* v. *International Paper Co.* (*The Athenai*) (1917) 241 Fed 861 CCA 2nd; and POOR § 29. But the practical importance of the different principles is reduced by the current clauses in the contracts of affreightment ("prepaid (or prepayable) freight non-returnable ship and/or cargo lost or not lost"). See, e.g., *The Laurent Meus* 1943 AMC 415 CCA 9th; and supra p. 24.

[1] [1952] A.C. 166.

[2] [1951] 1 K.B. 190 at p. 201.

be expected from "fair and reasonable men".[3] In the same manner an objective approach may lie behind the expression "true construction" of the contract.

It seems that the expression "true construction" may refer to an interpretation of the contract in the real sense of the word, or an implication of terms by means of a hypothetical test or by a purely objective method. See for an objective approach Lord WRIGHT in *Denny, Mott & Dickson* v. *Fraser & Co.* [1944] A.C. 265 at p. 274 and in *Constantine (Joseph) S.S. Line* v. *Imperial Smelting Corporation* [1942] A.C. 154 at p. 185. Cf. Lord REID in *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696 at p. 720: ". . . the true construction of the terms which are in the contract read in the light of the nature of the contract and of the surrounding circumstances when the contract was made." However, Viscount SIMON in the *British Movietonews* case stressed that the contract in a "fundamentally different situation" does not cease "because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation" (at p. 185). Nevertheless, this passage comes close to the situation where the court thinks it just and reasonable to *construe* the contract as not applicable in the new situation.

The elasticity of the technique of implication makes it extremely difficult to compare the English cases with the various theories purporting to explain the operation of the doctrine of presupposed conditions in Scandinavian law. Thus, it may be subject to dispute whether the House of Lords adopted a subjective approach in the *British Movietonews* case.[4] The fact that the House of Lords did not approve of Lord DENNING's "open approach", and that the technique of implication was used, does not necessarily mean that the House of Lords applied a subjective method referring to the presumed intention of the actual contracting parties.[5] In any event, it is clear that the court cannot easily

[3] See, e.g., Lord WATSON in *Dahl* v. *Nelson, Donkin & Co.* (1881) 4 Asp. M.C. 392 at p. 398, who suggests that the court "must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their common interests, and to the main objects of the contract". See also Lord SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co.* [1926] A.C. 497 at p. 510; BAILHACHE J. in *Comptoir Commercial Anversois* v. *Power, Son & Co.* [1920] 1 K.B. 868 at p. 879; and Lord RADCLIFFE in *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696 at p. 727; WEBBER p. 405 et seq.; and ATIYAH p. 143. But cf. Lord ESHER in *Hamlyn* v. *Wood* [1891] 2 Q.B. 488 at p. 491: "It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication . . ."

[4] But cf. GODENHIELM p. 93.

[5] See, e.g., the dictum of Viscount SIMON at p. 186; and the observation by BENGTSSON § 6 at note 40.

find an "implied term" in the contract. Such an implication is only permitted in order to give the contract "business efficacy"[6] or when the parties, at the time of making their contract, would have testily suppressed the suggestion of an "officious bystander" to insert the term with a common "Oh, of course".[7]

§ 8.3.2. The "basis of contract" and "identity of contract" theories

In the *Tamplin* case, Lord LOREBURN favoured the implied term in the sense that it was laid down in *Taylor* v. *Caldwell*, while Lord HALDANE suggested a further distinction in the form of a theory called "the disappearance of the foundation of the contract" resembling the German Geschäftsgrundlage.[8] And in the same way as a supervening contingency may sweep away the foundation or basis of the contract it may destroy the "identity of the contract" and make it a "different contract" which the affected party is not considered to have undertaken to perform. The two theories come very close to eachother, although it seems that the latter is generally preferred.[9]

The "basis of contract" theory already appears in the Coronation cases. See, e.g., *Krell* v. *Henry* [1903] 2 K.B. 740 per VAUGHAN WILLIAMS L.J. at p. 750. And the "identity of contract" test appears from an often cited *dictum* by Lord DUNEDIN in *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1918] A.C. 119 at p. 128: "It is admitted that an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted". This case concerned a building contract but the situation was considered comparable to the situation under a contract of affreightment. See at p. 129: "The difference between the new contract and the old one is quite as great as the difference between the two voyages in the case of *Jackson* v. *Union Marine Insurance Co.*" See for a recent case where the identity of contract theory was discussed, *Ocean Tramp Tankers Corporation* v. *Sov-*

[6] *The Moorcock* (1889) 14 P.D. 64; see for an application of this test to a case of refused licence for the seller *Partabmull Rameshwar* v. *Sethia (1944) Ltd.* [1951] 2 Lloyd's Rep. 89 H.L.

[7] *Southern Foundries (1926), Ltd.* v. *Shirlaw* [1940] A.C. 701 (per MAC KINNON L.J. in [1939] 2 K.B. 206 at p. 227). See also PEARSON J. in *Lewis Emanuel & Son, Ltd.* v. *Sammut* [1959] 2 Lloyd's Rep. 629 Q.B. at p. 642; and *Aktiebolaget Yettersfors Munksund* v. *Dixon & Son* (1922) 9 Ll. L. Rep. 558 K.B., where BAILHACHE J., in applying the hypothetical test, did not imply a "frustration" clause. But cf. the different outcome in *Acetylene Corp.* v. *Canada Carbide Co.* (1921) 8 Ll. L. Rep. 456 C.A.

[8] See [1916] 2 A.C. 397 at pp. 403, 406 respectively; and cf. supra p. 151.

[9] See, e.g., ANSON p. 442.

fracht [1963] 2 Lloyd's Rep. 381. It is clear that the contract cannot be dissolved unless the situation has become "radically different". See Lord RADCLIFFE in the *Davis Contractors* case; a performance of the contract in the new situation must imply "a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do" ([1956] A.C. 696 at p. 729). And cf. the statement of Viscount SIMON in the *British Movietonews* case; the situation must have become "fundamentally altered" (1952 A.C. 166 at p. 185). It is frequently asserted that the doctrine of frustration must be kept within very narrow limits. See, e.g., Viscount SIMONDS in *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.* [1962] A.C. 93 at p. 115.

Efforts have been made to explain the essence of the doctrine of frustration and the "basis of contract" and "identity of contract" theories by definitions. One of the most well-known definitions was given by Lord SIMON in *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd*:[10] "Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement."[11] And another definition of frustration on account of "inordinate delay" was earlier suggested by BAILHACHE J. in *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.*:[12] "The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for

[10] [1945] A.C. 221 at p. 228.

[11] See WEBBER p. 405 admiring the merits of this definition. But cf. the critical remarks by TREITEL, M.L.R. 1967 p. 155: "Lord SUMNER once said, with masterly understatement: "The phrase 'goes to the root of the contract', like most metaphors, is not nearly as clear as it seems. The constant use of this and similar phrases has been a grave impediment to the development of the branch of the law of contract . . ."

[12] [1916] 1 K.B. 429 at p. 436. The case was subsequently decided by the Court of Appeal together with *Scottish Navigation Co.* v. *Souter* [1917] 1 K.B. 222.

the accomplishment of which object or objects the contract was made".

Even though the above definitions are sometimes cited by legal writers, they seem to have had a limited importance in the court decisions. Hence, the following statement of Lord WRIGHT is to be found in the same case where Lord SIMON gave his definition: "But the doctrine of frustration is modern and flexible and is not subject of being constricted by an arbitrary formula."[13]

§ 8.3.3. A comparison between the different theories

"But the variety of description is not of any importance so long as it is recognized that each is only a description and that all are intended to express the same general idea." This statement by Lord RADCLIFFE[14] conveys the somewhat lax attitude of the English judges so far as definitions and theoretical explanations of the technique of implication are concerned. It is frequently pointed out that the choice of the one or the other theory is indifferent.[15] The statement by RODHE (1950),[16] that English law now tries to reach a synthesis between the "theory of implied condition" and the "theory of the disappearance of the foundation of the contract", must be read with this in mind.[17] In spite of the different theories there does not seem to be much disagreement as to the materials upon which the court must proceed.[18] "The data for the decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred."[19]

[13] [1945] A.C. 221 at p. 241.

[14] In the *Davis Contractors* case [1956] A.C. 696 at p. 727.

[15] See, e.g., MC NAIR, L.Q.R. Vol. 56 (1940) p. 173 at p. 179; id. in *Carapanayoti & Co.* v. *E. T. Green, Ltd.* [1958] 2 Lloyd's Rep. 169 Q.B. at p. 178; SCRUTTON p. 96 note (d); ANSON p. 442; WEBBER p. 430; and Lord PORTER in the *Denny, Mott* case [1944] A.C. 265 at p. 281.

[16] Jämkning p. 20.

[17] It happens that both theories are invoked in the same case as a justification for the application of the doctrine of frustration. See, e.g., *Huni & Wormser* v. *Sassoon & Co.* (1920) 5 Ll. L. Rep. 199 C.A. per BANKES L.J. at p. 201; and MCNAIR in the *Carapanayoti* case [1958] 2 Lloyd's Rep. 169 at pp. 178–9. But cf. HJERNER p. 487, who points out that the application of the one or the other theory may lead to different results.

[18] See, e.g., SMITH & THOMAS p. 370.

[19] Per Lord WRIGHT in the *Denny, Mott* case [1944] A.C. 265 at p. 274 et seq.

In English law, it is necessary to make a sharp distinction between "finding of fact" and "question of law", since the former is a matter for the jury, while the latter is the court's concern. An arbitrator's "finding of fact", as distinguished from his "finding of law", cannot be questioned by the court.[20] Even though the theoretical explanations of the operation of the doctrine of frustration have sometimes been considered superfluous, it has at least been necessary to analyse the judicial process in order to establish the necessary distinction between "finding of fact" and "finding of law".[21]

It appears that the distinctions suggested between "finding of fact" and "finding of law" in the frustration cases do not correspond to the different theories professed to explain the operation of the doctrine. Hence, the "presumed intention of the parties" has sometimes been considered a "finding of law", while "the disappearance of the basis of the contract" has sometimes resulted in a "finding of fact".[22] The difficulty of making a distinction between "finding of fact" and "finding of law" is demonstrated by cases where the matter has been considered a "mixed question of fact and law"[23] but it seems to be the prevailing opinion that the matter is ultimately a "question of law".[24] However, CARVER makes exception for "the assessment of a period of delay sufficient to constitute frustration" which according to his view "appears to be a question of fact".[25] Hence, it would be necessary to distinguish between two typical situations, the one being the application of the doctrine to the same performance at a different time and the other to a different performance at the same time. It is not quite clear to me why, in determining whether the procedure is one of finding a fact or applying a principle of law, the former situation should be treated differently from the latter.

The question whether the arbitrators' opinion could be reconsidered was thoroughly discussed in *Tsakiroglou & Co.* v. *Noblee Thorl G.m.b.H.* [1962]

[20] See, e.g., RUSSELL p. 309 et seq.

[21] See, e.g., Lord REID in the *Davis Contractors* case [1956] A.C. 696 at p. 719.

[22] See BANKES L.J. in the *Comptoir* case [1920] 1 K.B. 868 at p. 886; and cf. Lord REID in the *Davis Contractors* case [1956] A.C. 696 at p. 719; the question "might seem to be largely a matter for the judgment of a skilled man comparing what was contemplated with what has happened". See for further cases where the question of frustration has been considered a "finding of fact" the *Bank Line* case [1919] A.C. 435 per Lord SUMNER at p. 459; and the *Larrinaga* case 16 Asp. M.C. 133 at p. 139 et seq. See for further references CARVER § 452; and MCELROY p. 197 et seq.

[23] See Lord MORTON OF HENRYTON in the *Davis Contractors* case [1956] A.C. 696 at p. 717 et seq.; and MCELROY p. 218 et seq.

[24] See CARVER § 453 with references; and the *dictum* by Lord WRIGHT in the *Denny, Mott* case [1944] A.C. 265 at p. 276: "The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the view taken of the event and of its relation to the express contract by informed and experienced minds".

[25] See CARVER § 453 at note 22; and DEVLIN J. in *Universal Cargo Carriers* v. *Citati* [1957] 1 Lloyd's Rep. 174 Q.B.

A.C. 93. Here, in a case where a sales contract c.i.f. Hamburg could not be performed by shipping the merchandise through the Suez Canal in November 1956, the arbitrators did not find shipment round the Cape of Good Hope "commercially or fundamentally different". The House of Lords considered unanimously that the arbitrators' opinion could be reconsidered but upheld their award. Viscount SIMONDS stated generally that the application of the doctrine of frustration is a question of law (at p. 116). Lord HODSON considered that frustration is "ultimately" a question of law (at p. 129). Lord GUEST made no general statement but on the pertinent facts he found that the arbitrator's opinion has "the utmost relevance . . . although it is not . . . conclusive" (at p. 134), while Lord REID stated: "The commercial importance of the various differences involved in the change of route—delay, risk to the goods, cost, etc.—is fact on which specific findings by arbitrators are entirely appropriate. But the inference to be drawn on a consideration of all the relevant factors must, in my view, be a matter of law—was there or was there not frustration" (at p. 119). And the statement of Lord RADCLIFFE is much to the same effect (at p. 124). In spite of the *dicta* in the *Tsakiroglou* case, CARVER maintains with respect to the question whether the assessment of a period of delay necessary to constitute frustration is a "finding of fact": "Nothing in their Lordships' judgments in that case seems sufficient to displace this well-established principle" (See CARVER § 453 note 22). With all respect, I find myself unable to agree with such an analysis of the case.[26]

Although the question whether the application of the doctrine of frustration involves a "finding of fact" or a "matter of law" has great practical importance, it does not give much guidance as to the theoretical basis of the doctrine. However, the fact that the application of the doctrine is mainly considered a "matter of law" would seem to reveal that "it is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands".[27]

It is clear that English law has preferred the semi-covert technique of the implied term to the overt method of applying a principle of law devised for the purpose of modifying absolute contract in case of changed conditions seriously affecting the position of the contracting parties. The fictitious character of the technique is plain and "so long as it is understood that what is implied is what the court thinks the parties ought to have agreed on the basis of what is fair and reasonable, not what as individuals they would or might have agreed",[28] it seems

[26] See concerning the difficulty to distinguish between "finding of fact" and "question of law" the observations in Sol. J. Vol. 104 (1960) p. 8.

[27] Lord SUMNER in the *Hirji Mulji* case [1926] A.C. 497 at p. 510.

[28] Per Lord WRIGHT in the *Fibrosa* case [1943] A.C. 32 at p. 70. See for cases where the technique of the implied term has been preferred the *Sidermar* case [1961] 2 Q.B. 278 at p. 294 per Lord PEARSON; the *Constantine* case [1942] A.C. 154 at pp. 163, 166

that no serious objections could be raised against the method. On the other hand, there seems to be great merit in the proposition that "it is usually a mistake to call a thing that which it is not—at least it does not make for clear thinking".[29] And there is a strong body of opinion that English law should now be prepared to "consign the fiction of implied term to the already large heap of other fictions which have out-lived their usefullness".[30] One of the fore-most spokesmen of the overt approach, Lord WRIGHT, in rejecting the method of the hypothetical test, acknowledged in an often cited statement: "The truth is that the Court or jury as a judge of fact decides the question in accordance with what seems to be just and reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. The Court is, in this sense, making a contract for the parties, though it is almost blasphemy to say so."[31] In the recent cases some judges show a marked reluctance to use the traditional technique. Hence, in *Ocean Tramp Tankers Corporation* v. *Sovfracht* (*The Eugenia*) Lord DENNING concluded that "the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth".[32] The most accurate summing-up of the position of present English law is probably to be found in HALSBURY: "Implied term was the view which prevailed when the doctrine was first introduced and is still current, but the view as respects intervention of law now has considerable support."[33] But

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per Viscount SIMON and Viscount MAUGHAM; the *Comptoir* case [1920] 1 K.B. 868 per BAILHACHE J. at p. 879; the *Hirji Mulji* case [1926] A.C. 497 per Lord SUMNER; and the *Bank Line* case [1919] A.C. 435 at p. 455. See also MCNAIR p. 176; SCRUTTON p. 96; and CARVER § 442 at notes 50–1.

[29] PAGE, 18 Mich. L. Rev. (1920) p. 614.

[30] See CHORLEY, M.L.R. Vol. 4 (1940) p. 63 et seq.; and for the same view MC ELROY p. XXXIII; WEBBER p. 414; and DIPLOCK L.J., in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 at p. 491 et seq., suggesting that the technique now could be abandoned: "The common law evolves not merely by breeding new principles, but also, when they are fully grown, by burying their ancestors".

[31] WRIGHT, Developments p. 252 at p. 259. See also id. in the *Denny, Mott* case [1944] A.C. 265 at p. 275.

[32] [1963] 2 Lloyd's Rep. 381 at p. 389.

[33] HALSBURY, Contracts Vol. 8 § 320 at note u–a; see also PARRY p. 50 et seq.; and cf. from American law WILLISTON § 1937 (p. 5424); CORBIN §§ 632, 642, 1331 and 1350 at note 68; and *The Christos* 1966 AMC 1717 D.C. Cir. and the references given at p. 1719. See also the observations by ARNHOLM, Privatret I p. 247; JØRGENSEN, Afhandlinger p. 63; and SUNDBERG, Air Charter p. 440. But cf. MCNAIR p. 176: "Our

although, in examining the attempts of judges and writers to explain the theoretical foundation of the doctrine of frustration, we shall find "differences in choice which seem almost as elusive as differences in artistic taste",[34] there is no evidence that the different theories have led to different results in practice.

§ 8.4. *The Application of the Doctrine of Frustration*

While it is clear that the doctrine of frustration is flexible, it is equally certain that it is only applied *in exceptional cases.* It is often asserted that the doctrine may not be used as an easy escape from the obligations undertaken by the contract. "Nothing, in my opinion, is more dangerous in commercial contracts than to allow an easy escape from obligations undertaken; and I desire to reiterate what the older judges have so often said, that the parties must be held strictly to their contracts; it is their own fault if they have not adequately protected themselves by suitable language. This view has been very forcibly repeated by MC CARDIE J. in *Blackburn Bobbin Co.* v. *Allen & Sons*, and is, in my opinion, a view deserving more than mere lip-service."[1] And it does not seem that there has been any change of attitude in later years. "In the present

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submission is that the balance of judicial authority is in favour of the implied term as the basis of the doctrine of frustration, and history appears to be on that side".

[34] PATTERSON, Constructive Conditions in Contracts, 42 Col. L. Rev. (1942) p. 903 at p. 945.

[1] Per BAILHACHE J. in *Comptoir Commercial* v. *Power* [1920] 1 K.B. 868 at p. 878 et seq. This case concerned a contract of sale c.i.f. Antwerp cash against documents. On the outbreak of the World War, war risk insurance could not be obtained in the beginning of August 1914 and, as a result hereof, the sellers were not in position to sell in America exchange on Rotterdam or Antwerp (a kind of financing arrangement corresponding to letters of credit which was customary in the relevant trade). The contract of sale contained a clause freeing the sellers from their obligation in case of circumstances "preventing shipment". However, the court considered the clause inapplicable, since there was no "physical or legal prevention". And it was held that "the buyers were not concerned with the general method by which the sellers financed their exports of wheat to Europe". The *Blackburn Bobbin* case, [1918] 2 K.B. 467, which was referred to, concerned a contract of sale of timber from Finland which had been sold by an English seller to an English buyer with delivery in Hull. The outbreak of the World War made shipment from Finland impossible by the customary route. However, the seller was kept to his bargain, since the timber could be sent by rail to a Norwegian port or a port on the Swedish west-coast for oncarriage to Hull.

climate of judicial opinion it is not easy to persuade an English judge to rule that a contract is frustrated; he considers that plea 'a kind of last ditch', 'a conclusion which should be reached rarely and with reluctance.'"[2]

It follows from the nature of the doctrine of frustration that no qualifications of the kind practised in Scandinavian and Continental law are necessary.[3] Nevertheless, it is often maintained that *difficulties of an economical character* do not suffice to bring the doctrine into operation. "It hardly needs reasserting that an increase of expense does not constitute a ground for frustration."[4] However, there is often—or even usually—an interrelation between physical hindrances and economical difficulties, since physical hindrances may be removed by certain arrangements, risks may be insured against, etc. But it is not always that this interrelation is appreciated. Nevertheless, in maritime law, the concept of "constructive total loss" implying that the contract ceases to operate where "it may be physically possible to repair the ship, but at an enormous cost" clearly shows that a physical hindrance may be converted into a sum of money.[5] Increased costs may also be considered indirectly when determining whether there is an "inordinate delay"[6] or whether there exists a sufficient "prevention" to free a contracting party from his contractual obligation; "economic unprofitableness is not 'prevention', though a very high price for the article sold may be evidence of such a physical scarcity due to hostilities as amounts to prevention by hostilities".[7] In the American Restatement Contracts § 454 it is expressly recognized that "impracticability because of extreme and

[2] SCHMITTHOFF, Some Problems p. 138. And, in spite of his dictum in the *British Movietonews* case (see supra p. 172), Lord DENNING has, so far as the application of the doctrine to the pertinent facts is concerned, adopted a rather strict attitude in *Ocean Tramp Tankers Corp.* v. *V/O Sovfracht* (*The Eugenia*) [1963] 2 Lloyd's Rep. 381 C.A. infra p. 346.

[3] See concerning the doctrines of impossibility, vis major, and presupposed conditions supra p. 141 et seq.

[4] Per Viscount SIMONDS in the *Tsakiroglou* case [1962] A.C. 93 at p. 115. See for statements to the same effect MCELROY p. 194; GUTTERIDGE, L.Q.R. Vol. 51 (1935) p. 111; and WEBBER p. 419.

[5] MAULE J. in *Moss* v. *Smith* (1850) 9 C.B. 94 C.P. [137 E.R. 827] at p. 103 [831]. This passage was cited with approval by Lord BLACKBURN in *Dahl* v. *Nelson* (1881) App. Cas. 38 at p. 52. See also MCELROY p. 56.

[6] MCELROY p. 191 et seq.

[7] See the *Comptoir* case [1920] 1 K.B. 868 at p. 898.

unreasonable difficulty, expense, injury or loss involved" may suffice to free the affected party from his obligation and it is also clear that "extreme difficulty or expense" as such has been considered a sufficient excuse from performance in English law as well.[8] Therefore, it is not possible to state as a general principle that, in English law, economical difficulties may never be invoked as an excuse.[9]

On the other hand, it is also possible to adopt the view that an absolute hindrance should be insufficient as an excuse when a contracting party is in a position to avoid the hindrance by tendering or accepting *substitute performance.* In some instance, it may be natural to require the parties "to cooperate in order that their common venture might be carried out as intended".[10] But this view, which has been expressed in Restatement Contracts § 463,[11] has not been frequently applied in English law; ordinarily it is considered that a contracting party cannot be considered to have undertaken to fulfil the contract in another manner than according to its precise terms. However, it is also clear that exception must be made from this rigid principle. In the words of Lord RADCLIFFE in the *Tsakiroglou* case, where the vessel was prevented from proceeding through the Suez Canal in November 1956 but had the possibility of proceeding to the destination by sailing round the Cape of Good Hope; "A man may habitually leave his house by the front door to keep his appointments, but, if the front door is stuck, he would hardly be excused for not leaving by the back".[12]

The question of the legal effect of war risks will be extensively discussed in Chapter 4, but it should be mentioned already here that English law has no specific principles dealing with cases where a *danger*

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[8] See MCELROY p. 50.

[9] The statement of BAGGE, SvJT 1944 p. 867, is too general. Cf. Lord SUMNER in the *Larrinaga* case: "All the uncertainties of a commercial contract can ultimately be expressed, though not very accurately, in terms of money". But at the same time a restrictive attitude is taken: ". . . and rarely, if ever, is it a ground for inferring frustration of an adventure that the contract has turned out to be a loss or even a commercial disaster for somebody" (16 Asp. M.C. 133 at p 140).

[10] SCHMITTHOFF, Some Problems p. 143.

[11] See infra p. 216.

[12] See [1962] A.C. 93 at p. 119. See also MCELROY p. 242; and GOTTSCHALK, p. 14, commenting upon *Nickoll* v. *Ashton* supra p. 164. See further infra p. 385 and the discussion concerning the cases of *The Teutonia* (1872) L.R. 4 P.C. 171 and *Reardon Smith Line* v. *Ministry of Agriculture* [1963] 1 Lloyd's Rep. 12 H.L.

situation has emerged subsequent to the conclusion of the contract.[13] On the contrary, it is often stated that a danger affecting the performance of the voyage does not *ipso facto* suffice as an excuse.[14] However, Mc NAIR points out, referring to the dangers threatening the merchant vessels during the World Wars, that the effect of the warfare may be such that the peaceful character of the voyage is "fundamentally changed and the contract dissolved".[15] This being so, English law enables the courts to reach the same results as would be possible under the specific provisions of the Scandinavian Maritime Codes. The question is one of *degree* and any difference in result would rather follow from a different "judicial climate of opinion"[16] than from the different theoretical approach. And it seems that, in English law as well as in Scandinavian law, "the judicial climate" may vary from time to time. Thus, for example, with regard to the test of "inordinate delay", it was stressed in the earlier cases of *Hadley* v. *Clarke*,[17] *Beale* v. *Thompson*[18] and *The Olympic*[19] that an embargo could not dissolve the contract but only cause "a temporary suspension" of it, while, in later cases, this stringent attitude was considerably modified.[20]

In English law, care is taken not to express any general statement to the effect that frustration may only be invoked where the frustrating event has been *unforeseeable* at the time of the conclusion of the contract. Foreseeability is only considered one of several circumstances to be taken into account when it shall be determined whether performance

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[13] Cf. SMC §§ 135, 142; and HGB § 629.

[14] See ABBOTT p. 867; CARVER § 499 at notes 18–9; MCELROY p. 58 et seq. stressing that "anticipated impossibility" may only serve as an excuse where it is *certain* that the vessel would perish if the voyage was performed, but "nothing short of this certain knowledge will suffice". Reference is made to Illustration 6 of Restatement Contracts § 465; *Atkinson* v. *Ritchie* (1809) 10 East 530; and *Watts, Watts & Co.* v. *Mitsui & Co.* [1917] A.C. 227.

[15] MCNAIR p. 207. See also *Behn* v. *Burness* (1863) 3 B. & S. 751; and *Nobel's Explosives Co.* v. *Jenkins* (1896) L.R. 2 Q.B. 326, where stress is laid upon the shipowner's duty to consider the safety of the cargo.

[16] SCHMITTHOFF, Some Problems p. 149.

[17] (1799) 8 T.R. 259 K.B. [101 E.R. 1377].

[18] (1813) 4 East 546 K.B. [102 E.R. 940].

[19] [1913] P. 92.

[20] See, e.g., *Horlock* v. *Beal* [1916] 1 A.C. 486; and the *Jackson, Geipel* and *Bank Line* cases supra pp. 165, 166.

would imply a "fundamentally different contract".[21] But it seems that "the element of unexpectedness must not be overlooked".[22] In the words of SCHMITTHOFF: "Normally an event which was within the contemplation of the parties when they entered into the contract does not operate as a frustrating event though they did not expect or consider it probable that it would happen."[23]

While the doctrine of frustration ordinarily cannot be easily invoked as a defence for non-performance, the requirements for the operation of the doctrine are even more stringent in cases where the contract contains an accentuated *element of speculation.* "In effect most forward contracts can be regarded as a form of commercial insurance, in which every event is intended to be at the risk of one party or another . . . No one can tell how long a spell of commercial depression may last; no suspense can be more harassing than the vagaries of foreign exchanges, but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it."[24]

[21] See, e.g., SCHMITTHOFF, Some Problems p. 151; PEARSON J. in *Société Franco-Tunisienne d'Armement* v. *Sidermar* (*The Massalia*) [1961] 2 Q.B. 278: ". . . the possibility, appreciated by both parties at the time of making their contract, that a certain event may occur, is one of the surrounding circumstances to be taken into account in construing the contract, and will, of course, have greater or less weight according to the degree of probability or improbability and all the facts of the case" (at p. 303); *Tatem* v. *Gamboa* [1939] 1 K.B. 132; and the *Bank Line* and *Sovfracht* cases supra pp. 166, 179. See also MCNAIR J. in *Reardon Smith Line, Ltd.* v. *Ministry of Agriculture* [1959] 2 Lloyd's Rep. 229 at p. 253 et seq. But cf. the definitions of BAILHACHE J. and Viscount SIMON supra pp. 175, 176; WEBBER p. 419; and Lord RADCLIFFE in the *Davis Contractors* case; the frustrating event must be one "which the parties could not reasonably be thought to have foreseen" ([1956] A.C. 696 at p. 731).

[22] MCNAIR p. 198.

[23] SCHMITTHOFF, Export Trade p. 100, where it is also stated that another solution may be applied "in exceptional cases" as follows from *Tatem* v. *Gamboa* [1939] 1 K.B. 132. Cf. from American law SMIT, Frustration p. 307: "Unforeseeability ordinarily establishes that a promisor cannot reasonably be presumed to have assumed the risk of occurrence of the unforeseen circumstances. However, the applicability of the gap filling doctrine (see infra p. 393) ultimately hinges on whether or not proper interpretation of the contract shows that the risk of the subsequent events, whether or not foreeseen, was assumed by the promisor". See concerning the test of foreseeability in maritime law, infra p. 389.

[24] Per Lord SUMNER in *Larrinaga & Co.* v. *Soc. Franco-Americaine des Phosphates de Medulla* (1923) 16 Asp. M.C 133 H.L. at p. 140 at seq. Cf. from Scandinavian law, ND 1959.333 Sw. Arb.

It follows from the nature of the doctrine of frustration that it cannot be applied where the contract contains a "full and complete provision" regulating the situation which has arisen; *expressum facit cessare tacitum.*[25] But when the provision is not considered to cover the new situation entirely, the doctrine may be applied. "The principle is that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of limited interruption."[26]

The frustrating event cannot be invoked as an excuse where it has been "self-induced". It is not always easy to determine whether or not the event has been "self-induced"; "the possible varieties are infinite, and can range from the criminality of the scuttler who opens the seacock and sinks his ship, to the thoughtlessness of the prima-donna who sits in a draught and loses her voice".[27] While, in some cases, it may be difficult to determine whether the event is "self-induced", it is clear that there is no frustration where the event has been brought about by a deliberate act.[28] But the party who wishes to invoke the doctrine may find certain comfort in the fact that *the other party must prove* that the event has been "self-induced". Hence, in a case where the performance was prevented by an explosion onboard the vessel, the shipowner was permitted to invoke the doctrine of frustration in his defence, since it could not be ascertained that the explosion had been caused by his negligence.[29]

Although the doctrine of frustration may only be applied in exceptional cases, its potential scope of application is wide. It has originated in maritime law but has subsequently been considered to encompass all

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[25] See, e.g., McElroy p. 204; Gutteridge, L.Q.R. Vol. 51 (1935) p. 91 at p. 111; and *Banck* v. *Bromley & Son* (1920) 5 Ll. L. Rep. 124. K.B.

[26] Per Viscount Simon in the *Fibrosa* case, [1943] A.C. 32 at p. 40, referring to the *Bank Line* case and *Tatem* v. *Gamboa.*

[27] Per Lord Russel of Killowen in the *Constantine* case, [1942] A.C. 154 at p. 179, presumably referring to madame Poussard in *Poussard* v. *Spiers* (1876) L.R. 1 Q.B.D. 410. See also Viscount Simon at p. 166 et seq.

[28] See *Ocean Trawlers* v. *Maritime National Fish* (1935) 51 Ll. L. Rep. 299 P.C.; and cf. *Ciampa* v. *British India S.N. Co.* [1915] 2 K.B. 774.

[29] *Constantine (Joseph) S.S. Line* v. *Imperial Smelting Corp.* [1942] A.C. 154.

kinds of contracts,[30] possibly with the exception of lease.[31] Needless to say, the factual circumstances under the various contract types may be widely different and the doctrine, although in principle covering most contract types, is only seldom permitted to operate in some contractual relations.[32] In maritime law, the doctrine has been more readily applied to voyage charters, while it was earlier uncertain whether the doctrine could at all be applied to time charters[33] and a restrictive attitude has been taken to the application of the doctrine to general carrying contracts.[34] For contracts covered by bills of lading it is particularly important to observe that the doctrine does not only apply to executory contracts, i.e. contracts which are still to be performed, but also to contracts which are *wholly or partly executed*, although the possibilities of invoking the doctrine in the latter case are diminished.[35]

§ 8.5. *Illegality*

Since war brings into operation the Anglo-American prohibition against trading with the enemy, which may serve as an independent excuse from performance, a brief summary of the doctrine of illegality in English law will be given primarily intended as a background to the prohibition against trading with the enemy.

[30] See, e.g., McElroy p. 121; Lawrence J. in *Admiral S.S. Co.* v. *Weidner, Hopkins & Co.* [1917] 1 K.B. 222 at p. 249; and Pearson J. in *Lewis Emanuel & Sons, Ltd.* v. *Sammut* [1959] 2 Lloyd's Rep. 629 at p. 640 (c.i.f. contract concerning unascertained goods).

[31] See Anson p. 445 et seq.; and Gottschalk p. 38. Webber, Current Legal Problems 1951 p. 299 et seq., acknowledges that the matter is unsettled in English law but suggests that the House of Lords might very well find it proper to apply the doctrine to contracts of lease. But cf. the restrictive attitude taken by Lord Russel of Killowen and Lord Goddard in the *Cricklewood* case [1945] A.C. 221 at pp. 233, 244; and Halsbury, Contracts Vol. 8 § 322 at note s.

[32] The requirements for the operation of the doctrine on c.i.f. contracts have been stringent. See, e.g., the *Tsakiroglou* case and cf. the *Sidermar* case (infra pp. 344, 346). The difference between a c.i.f. contract and a contract of affreightment is stressed in the *Tsakiroglou* case by Lord Simonds and Lord Guest [1962] A.C. pp. 116, 133. But cf. Lord Denning in the *Sovfracht* case [1963] 2 Lloyd's Rep. 381 C.A. at p. 391 et seq.

[33] See infra p. 311.

[34] See infra p. 363.

[35] See, e.g., *Nobel's Explosives Co.* v. *Jenkins & Co.* (1896) L.R. 2 Q.B. 326; Mc Elroy p. 193; and Lord Denning in the *Sovfracht* case [1963] 2 Lloyd's Rep. 381 C.A. at p. 390.

English law makes a distinction between two main categories of illegal bargains. One category concerns situations where the contract has an "illegal object". Hence, *common law* forbids contracts where the performance would involve the contracting party in acts which are criminal or *contra bonos mores*. Furthermore, contracts contrary to public policy are void. In these cases the contract is not given legal effect to the benefit of a contracting party who has had the *intention* of entering into a contract with an illegal object. If both parties have had such an intention the contract becomes wholly unenforcible.

The other category concerns illegal bargains forbidden in *statute law*. Here, the subjective prerequisite—the intention of the respective contracting parties—is irrelevant.[1] And the principle that such contracts are *void ab initio* conforms with Continental law.[2] However, in Scandinavian law such a general principle has not been adopted, since it cannot be assumed *a priori* that the relevant legislation necessitates the abrogation of the contract.[3] It is considered that the legislator should be required to find a solution of this question in each particular statute. In spite of the different approach in English and Scandinavian law, it seems that the English courts have felt the inconvenience of always applying the principle that contracts forbidden in statute law are automatically to be considered *void ab initio*. A restrictive interpretation of the relevant statute may enable the courts to avoid such a result. In *St. John Shipping Corp.* v. *Rank*, the charterer tried without success to invoke the principle with regard to a contract of affreightment in order to defeat the shipowner's claim for freight to the extent it corresponded to the extra profit resulting from the overloading of the vessel in violation of the international load line convention. However, the court did not consider that the prohibition of the convention concerned the *contract as such*.[4]

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[1] See, e.g., DEVLIN J. in *St. John Shipping Corp.* v. *Rank* [1957] 1 Q.B. 267 at p. 283.

[2] See Code Civil art. 1131: "L'obligation sans cause ou sur une fausse cause ou sur une cause illicite, ne peut avoir aucun effet"; and BGB § 134: "Ein Rechtsgeschäft, das gegen ein gesetzliches Verbot verstösst, ist nichtig, wenn sich nicht aus dem Gesetz ein anderes ergibt".

[3] See, e.g., NIAL, Om förvärv i strid mot legala förbud, TfR 1936 p. 7 et seq.; and cf. from Danish law USSING, Aftaler p. 194; and from Norwegian law STANG, Innledning till formueretten (3rd ed.) pp. 527 and 579 et seq.

[4] See [1957] 1 Q.B. 267 at p. 279.

Even if the *contract* as such has been perfectly legal, it may happen that the *performance* of it has entailed illegal acts ("unlawful performance"). A contracting party who has been guilty of such unlawful performance cannot enforce the contract towards his counter-party. But, in view of the voluminous legislation regulating commerce in modern society, the principle of unenforcement of contracts involving unlawful performance cannot be upheld without exceptions. Firstly, it is necessary that the illegal act in connection with the performance of the contract have been committed with the contracting party's *actual knowledge and privity*. Secondly, *any* illegal act does not make the contract unenforcible but only such acts which make the *contract* illegal in the sense of the relevant statute. Thus, in practice, the rules with regard to "unlawful performance" only become a rather insignificant supplement to the main principle of unenforcement of illegal bargains.[5]

In addition to the above-mentioned principles, the further principle applies that a contracting party must not *rely upon his own illegal act* for the enforcement of the contract; *ex turpi causa non oritur actio.* However, if the *ground* for the enforcement of the contract is unaffected by the illegal act, the contract may be enforced. Hence, in the case of *St. John Shipping Corp.* v. *Rank*, the *ground* for the shipowner's claim was the fact that he had delivered the cargo in the same condition as when received by the charterer. Since in such a case he did not have to prove that he had undertaken all precautions necessary for the safe transportation of the goods, he was entitled to recover the full freight in spite of the fact that the vessel had been overloaded.

§ 8.5.1. Supervening illegality

The doctrine of illegality meets the doctrine of frustration when an unexpected event, such as the outbreak of war, intervenes and makes performance or further performance illegal (supervening illegality).[6] Since a contracting party cannot be required to commit an illegal act, the contract is then affected by an event equally effective as a physical

[5] See DEVLIN J. in *St. John Shipping Corp.* v. *Rank*: "... it is plain that they [i.e. earlier cases] do not proceed upon the basis that in the course of performing a legal contract an illegality was committed; but on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute" ([1957] 1 Q.B. 267 at p. 284).

[6] See MCNAIR p. 179.

hindrance. And, owing to the public interest that people abide by the law, supervening illegality dissolves the contract *ex lege*. Hence, it is not necessary to seek an explanation of the cessation of the contract in the contract itself or in the presumed intention of the contracting parties.

§ 8.5.2. Legal effect of illegality

English law has adopted the general rule that a party who has performed an illegal bargain cannot force the other party to render the promised counter-performance or to return the received exchange, since he has himself committed an illegal act which forms the basis of his claim.[7]

See concerning the consequences of *ex turpi causa non oritur actio*, *Pearce* v. *Brooks* (1886) L.R. 1 Ex. 213, where the lessor of a van could not obtain the agreed rent from a prostitute, since he knew that it was to be used "as part of her display to attract men". It seems that the legal effects of illegality in this regard are much too rigid. The result may be completely unwarranted and work to the benefit of persons who do not only behave in a manner prohibited by society but, in addition, do not keep their promises.[8] In Swedish legal writing, the sale of a brothel has been discussed as an example of a *pactum turpe* and it has been suggested that the purchaser should be required to pay the remuneration, provided he has already received the agreed exchange. See GRÖNFORS, Några synpunkter på tvingande rättsregler i civilrätten, Festskrift till NIAL (Stockholm 1966) p. 214 note 22 and cf. generally RODHE, SvJT 1951 pp. 593–4. Cf. from Danish and German law USSING, Aftaler p. 199 et seq. and BGB § 817. The fact that, in English law, the illegal bargain cannot be restored, when the mutual promises have already been performed, reduces to some extent the legal effect of the doctrine of illegality, which only operates to the effect that the promisees cannot turn to the courts in order to have the respective illegal promises enforced. In some cases this might be a suitable solution but the result becomes unsatisfactory when the infringed statute purports to prevent the transfer of the property encompassed by the illegal bargain. See NIAL, op. cit. supra note 3 at p. 13 et seq.; and cf. USSING, Aftaler p. 201.

While *initial* illegality makes the contract *void ab initio*, *supervening* illegality operates exactly as frustration; it causes the cessation of the contract *ex nunc* counted from the time of the occurrence of the event.[9] The legal effect of supervening illegality is also in other respects the

[7] See concerning the application of the principle of *ex turpi causa non oritur actio* to this situation *Singh* v. *Ali* [1960] A.C. 167.

[8] Cf. HJERNER p. 610 et seq.

[9] See concerning the legal effect of frustration supra p. 169.

same as the legal effect of frustration[10] and it is considered that the expression "has become impossible of performance or been otherwise frustrated" in the Frustrated Contracts Act also covers supervening illegality.[11]

§ 8.6. *Trading with the Enemy*

§ 8.6.1. The prohibition

Common law has since long recognized a prohibition against trading with the enemy.[1] The principle is laid down in the often cited case of *The Hoop*,[2] where reference is made to the statement of BYNKERSHOEK: "*Ex natura belli commercia inter hostes cessare non est dubitandum.*"[3] This principle shall be seen in relation to the Anglo-American concept of war[4] and is explained by the object of the belligerent powers to counter-act enemy trade and thereby the strengthening of the enemy's resources. In *Potts* v. *Bell* it is pointed out that ". . . trading affords that aid and comfort in the most effectual manner, by enabling the merchants of the enemy's country to support their government"[5] and in *Esposito* v. *Bowden* the presumed object of war is considered "being as much to cripple the enemy's commerce as to capture his property".[6]

In principle, the prohibition comes into effect on the outbreak of war and in this regard "war" is taken in the sense in which the expression is understood according to international law.[7] However, in *Janson* v. *Driefontein*[8] it was held that the mere threat of war may bring the prohibition into operation.

In *The Hoop*, it was thought that the prohibition against trading with the enemy governed as "a general principle of law in most of the countries of Europe".[9] However, the existence of such a general principle is not

[10] See, e.g., *Karberg & Co.* v. *Blythe, Green Jourdain & Co.* [1916] 1 K.B. 495.

[11] See MCNAIR (3rd ed.) p. 419; and supra p. 171.

[1] See for a historical review regarding the concept of "enemy" HOLDSWORTH, A History of English Law (London 1926), Vol. IX p. 99 et seq.

[2] (1799) 1 C. Rob. 196 [149 R.R. 793].

[3] Questiones Juris Publici, book i.c. 3.

[4] See supra p. 107.

[5] (1800) 8 T.R. 548 [5 R.R. 452 at p. 460].

[6] (1857) 7 E. & B. 763 [110 R.R. 816 at p. 823].

[7] See supra p. 138 and cf. infra p. 426.

[8] [1902] A.C. 484.

[9] See 149 R.R. at p. 795.

supported by Scandinavian case-law. Presumably, the matter has to be regulated in special war-time legislation.[10] In order to give the general principle a more precise meaning, common law has during the World Wars been supplemented by Trading with the Enemy Acts, the latest one of 1939. It will be seen that the Trading with the Enemy's Acts have considerably enlarged the scope of the prohibition.[11]

In maritime law, the effect of foreign law becomes of great practical importance. It is clear that foreign prohibitions, affecting performance of the contract in the sense that the performing party is subjected to the risk of sanctions (imprisonment, fines, confiscation), may always be treated in the same way as physical hindrances. The rules of the international law of the sea are recognized in the same manner; they are not considered as prohibitions according to the *national* law of the respective countries involved but, undoubtedly, they subject the contracting parties to the risk of sanctions when violating the rules.[12] However, it is subject to dispute whether foreign law could be treated in the same way as national legislation. In Scandinavian law, this subject has been studied by HJERNER with particular regard to foreign exchange control legislation and from the angle of international private law. HJERNER concludes that, as a rule, "political" legislation is not recognized in foreign countries, with the possible exception of prohibitions purporting to protect public health or of a similar character.[13] It is only seldom that "political" legislation emanates from general standards of morality and, consequently, it may be subject to dispute whether such legislation should be recognized in foreign countries, the more so since "political" legislation may even be opposed to the interests of other

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[10] But cf. JANTZEN, Tidsbefragtning p. 201, suggesting that the prohibition against trading with the enemy governs as a general principle in Scandinavian law as well. Cf. also ROOS p. 87; and GODENHIELM p. 63.

[11] See for a brief commentary PARRY, The Trading with the Enemy Act and the Definition of an Enemy, M.L.R. Vol. 4 (1941) pp. 161–182.

[12] See supra p. 129.

[13] See HJERNER p. 613 et seq. referring to *Foster* v. *Driscoll* [1929] 1 K.B. 470, which concerned the smuggling of whisky to North America during the years of prohibition. Some legal writers have understood this case as laying down a general principle to the effect that foreign prohibitions make the contracts void under the national law according to "comity of nations", but this standpoint is questioned by HJERNER p. 498 at notes 32–4.

states.[14] However, in English law, an *obiter dictum* in *Esposito* v. *Bowden*[15] heralds a rather generous approach to foreign law. Here, a contract of affreightment between a Neapolitan shipowner and a British charterer concerning a shipment from Odessa was dissolved on the outbreak of the Crimean War involving Great Britain as well as Russia while the Kingdom of the two Sicilies remained neutral. The performance of the contract would have necessitated the charterer's loading of the cargo in an enemy port. However, it was stated in an *obiter dictum* that the outbreak of war between the shipowner's country and Russia also would have caused the dissolution of the contract on account of illegality: "This is not an unequal law, because, if war had broken out between the Czar and the King of the two Sicilies, instead of her Majesty, the vessel would, according to the principles stated above, have been absolved from going to Odessa." The ground for this proposition does not seem to have been *comitas gentium* but rather "the common principle of reciprocity". The principle of *lex loci solutionis* under international private law could have been used to reach the same result.[16]

§ 8.6.2. The scope of the prohibition

It should be observed that the prohibition regards "trading" and not only "contracting" with the enemy. Hence, it is not only direct contracts with the enemy which are affected by the prohibition but also contracts where performance necessitates "intercourse with the enemy", e.g., the tendering of shipping documents under pre-war c.i.f. contracts where the goods are shipped with tonnage acquiring enemy character on the outbreak of war[17] or pre-war contracts of affreightment where the country of destination subsequently becomes involved in war with a

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[14] See HJERNER, p. 615, pointing out that not even comparatively serious penalties can affect the ethical indifference of the average man with regard to "political" legislation.

[15] (1857) 7 E. & B. 763 [110 R.R. 816].

[16] See HJERNER p. 61 et seq. and p. 167 et seq.

[17] See *Duncan, Fox & Co.* v. *Schrempft & Bonke* [1915] 3 K.B. 355; *Karberg & Co.* v. *Blythe, Green Jourdain & Co.* [1916] 1 K.B. 495; and *Baxter, Fell & Co.* v. *Galbraith & Grant* (1941) 70 Ll. L. Rep. 142. However, when the outbreak of war does not involve the application of the doctrine of trading with the enemy, but only a risk affecting the transportation of the goods, such risk ordinarily falls upon the c.i.f., buyer. See *Weis & Co.* v. *Crédit Colonial et Commercial* [1916] 1 K.B. 346.

country to which one of the contracting parties belongs.[18] Similarly, in *Reid* v. *Hoskins*,[19] a contract of affreightment between two British citizens has been declared void on the outbreak of war between Great Britain and Russia while the vessel was laying in Odessa. It should be observed that, under English law, not only the English contracting party but also a contracting party belonging to a neutral or even an enemy state is freed from his contractual obligations.[20] Thus, in *Barrick* v. *Buba*,[21] a Russian charterer was freed from a contract with a British shipowner under the doctrine of illegality. Indeed, it may seem that such an application of the prohibition against trading with the enemy might sometimes be contrary to the *ratio* behind the prohibition. "It might seem to be a praiseworthy act for a British shipowner or charterer to remove a cargo of grain from an enemy port."[22] But the necessity of passing the cargo through the custom house and of obtaining a permit for its shipment would no doubt be a case of dealing with the enemy and therefore the prohibition against trading with the enemy abrogates the contract. On the other hand, if the ship can get clearance without involving any intercourse with any enemy person, the contract remains in effect. McNAIR suggests that—apart from any special exceptions clause—it would even be a breach of the charter party if the vessel did not sail.[23]

It is not surprising that the Trading with the Enemy Act (1939), purporting to prevent contracts adversely affecting the interests of the state in time of war, proceeds on the basis of the general principles of common law and further enlarges the scope of the prohibition. Thus, The Act prohibits "any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy" (Sect. 1, subsect. 2 a). The Act expressly enumerates some cases where the prohibition clearly applies but, in order to avoid any interpretation *ejusdem generis*, it is stressed that the enumeration is "without prejudice to the generality of the foregoing provision". And it seems that a party who is in doubt has

[18] See *Esposito* v. *Bowden* supra note 15.

[19] (1856) 6 E. & B. 953 [103 R.R. 703].

[20] This result follows already from the fact that the court should apply the doctrine of illegality *ex officio*. See McNAIR p. 205 at note 1.

[21] (1857) 2 C.B., N.S. 563 [109 R.R. 789].

[22] McNAIR p. 205.

[23] See McNAIR p. 206.

every reason to be careful, since good faith is no excuse. "The intention of the parties might be perfectly innocent; but there is still the fact against them of that actual contravention of the law, which no innocence of intention can do away . . . I may feel greatly for the individuals who, I have reason to presume, acted ignorantly under advice that they thought safe: but the Court has no power to depart from the law which has been laid down . . ."[24] From the case-law reference can be made to *Stockholms Enskilda Bank AB* v. *Schering, Ltd.*,[25] where the Swedish bank's claim against a British company to get payment according to a pre-war contract was rejected upon the ground that a performance of the contract during the war would work to the benefit of a German company which owing to the payments of the British company to the Swedish bank would be freed from its debt to the Swedish bank.[26] It is stated in this case that the expression "for the benefit of an enemy [is] of the widest possible character".[27]

When one of the contracting parties has performed his part of the bargain and the contract entitles him to the promised counter-performance he is considered to have an "accrued right". While it may be prohibited to enforce this right *during* the war, it may be enforced after the termination of the war.[28] In the case of *Stockholms Enskilda Bank*, the question whether the bank had acquired an "accrued right" was left open but in a new trial the British company maintained that its obligation had disappeared entirely.[29] The House of Lords held (two judges dissenting) that the bank had acquired an "accrued right" since it had

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[24] *The Hoop* (1799) 1 C. Rob. 196 [149 R.R. 793 at p. 798 et seq.].

[25] [1941] 1 K.B. 424.

[26] The transaction concerned a sale in 1936 of "Sperrmark" (see concerning "Sperrmark" HJERNER p. 10 et seq.) from the Swedish bank to a German company against payment in English currency. It was subsequently agreed that the British company, which was affiliated to the German company, should guarantee the German company's payments. The contract was considered favourable by the German-British parties, since the Swedish bank sold the exchange for only 60% of the nominal value.

[27] [1941] 1 K.B. 424 at p. 437.

[28] An "accrued right" may even be enforced during the war provided this should not be of any benefit for the enemy. See *Halsey* v. *Lowenfeld* [1916] 2 K.B. 707. But the procedural status of allied enemies may prevent them from instituting law-suits during the war. See MCNAIR p. 78 et seq.; and *Rodriguez* v. *Speyer Brothers* [1919] A.C. 59 at p. 115.

[29] *Schering, Ltd.* v. *Stockholms Enskilda Bank AB* [1946] A.C. 219.

fulfilled its whole part of the contract before the outbreak of the war.[30] In the Trading with the Enemy Act it is mentioned as an example of the principle of "accrued right" that the mere receipt of money from an enemy debtor is not a case of trading with the enemy, provided the creditor has wholly performed his obligations at a time when the debtor was no enemy.

§ 8.6.3. The persons affected by the prohibition

The prohibition against trading with the enemy affects persons domiciled in British territory. Old cases support the theory that British subjects residing and trading in neutral countries could be allowed to recover under contracts with persons belonging to countries at war with Great Britain[31] but it is pointed out by McNAIR that "we should not recommend a British subject to-day to test the continued validity of these decisions by a personal experiment".[32] With regard to the legal effects on the contractual obligations, the legislation also applies to the subjects of states allied with Great Britain.[33] However, the legislation is not similarly extended with regard to the elements of criminal law.[34]

The determination of the concept of "enemy" has given rise to much discussion.[35] With regard to natural persons the domicile is, in principle, the decisive criterion. A person residing in enemy territory is considered an enemy even if he is a British subject.[36] Nevertheless, the nationality is not without importance. It is natural that subjects of enemy states are looked upon with suspicion even if they are residents of a neutral state, while it would be more difficult to qualify a British subject as "enemy" than to thus regard other persons residing in enemy territory.[37] However, the definition in the Trading with the Enemy Act

[30] See for an analysis of the case McNAIR p. 258.

[31] *The Danous* (1802) 4 C. Rob. 255 [165 E.R. 603]; and *Bell* v. *Reid* (1813) 1 M. & S. 726 [14 R.R. 557].

[32] McNAIR p. 356.

[33] See *The Panariellos* (1916) 32 T.L.R. 459, which concerned the condemnation of property in prize proceedings; and *Kreglinger & Co.* v. *Cohen, Trading as Samuel and Rosenfeld* (1915) 31 T.L.R. 592.

[34] See McNAIR p. 148 note 4.

[35] See PARRY, op. cit. supra note 11 p. 161 et seq.; and concerning the corresponding problem in the international law of the sea supra p. 113.

[36] *Porter* v. *Freudenberg* [1915] 1 K.B. 857 at p. 869.

[37] See PARRY, op. cit. p. 137.

only refers to the domicile ("any individual resident in enemy territory", sect. 1, subsect. 1 b).[38]

The greatest difficulties when determining the concept of "enemy" arise with regard to corporations (artificial persons). It has been deemed insufficient to look only at the formal side of it and attribute to the corporations the domicile and nationality which follows from the incorporation in the respective states. In order to give full effect to the prohibition it has been necessary to "pierce the corporate veil". In the leading case of *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.*,[39] the so-called control test was laid down. The decisive test is whether the corporation's "agents or the persons in de facto control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies".[40] By the application of this test in the *Daimler* case a company registered in England was considered an "enemy", since it was affiliated to a German corporation practically holding all shares in the English company except a few which were held by members of the board residing in Germany and by a British subject residing in England but born in Germany.[41] The quality of the shareholders is not directly relevant but does, of course, become an important element in deciding where the real control of the corporation is exercised.[42] The principle of the *Daimler* case has been followed in the Trading with the Enemy Act where it has been enlarged to encompass "unincorporate associations" as well.[43] Since all corporations incorporated or registered "under the

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[38] PARRY, op. cit. p. 172 et seq., criticises the general statement in *Porter* v. *Freudenberg* to the effect that the true criterion is not the nationality but "the place in which he resides or carries on business" and suggests that the test should concern the "commercial domicile" rather than the "civil domicile". Cf. also Trading with the Enemy Act, sect. 2, subsect. 1 e.

[39] [1916] 2 A.C. 307.

[40] Per Lord PARKER OF WADDINGTON [1916] 2 A.C. 307 at p. 345. Cf. the criticism by PARRY, op. cit. p. 169.

[41] See for the application of the same principle *In Re Badische Company* (1921) 9 Ll. L. Rep. 20.

[42] See MCNAIR p. 237.

[43] Sect. 2, subsect. 1c so reading: "... any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy".

laws of a State at war with His Majesty" are considered "enemies",[44] English law applies a *combination* of the formal test and the control test. But it should be observed that the formal test does not apply to corporations registered in enemy territory *outside* the enemy state, e.g. in occupied territory.[45] However, such corporations may be considered "enemies" on account of their activity or according to the control test.[46]

In spite of the fact that the general principle of common law and the statutory provisions of the Trading with the Enemy Acts have covered a great deal of acts and contracts, the English authorities have enlarged the scope of the prohibition by special provisions. According to the 1939 Trading with the Enemy Act the Board of Trade has unrestricted power to determine which persons shall be considered "enemies" in the sense of the Act.[47] Furthermore, the Board of Trade may enlarge the scope of the Act by declaring that the provisions shall apply to such territories which cannot be considered "enemy territory" according to the provisions of the Act and this remedy was frequently used during the Second World War.[48]

§ 8.6.4. The legal effect of the prohibition

A violation of the prohibition against trading with the enemy is considered a "misdemeanor" which according to common law subjects the offender to fines or imprisonment and may result in the confiscation of the property involved in the transaction.[49] In this context, however, we are primarily interested in the legal effect on the contract.

We have seen that a hindrance of comparatively long duration does not necessarily cause the dissolution of the contract according to the doctrines of frustration and illegality.[50] Similarly, exception clauses often lead to the *suspension* of performance and not to the dissolution of the contract. However, the prohibition against trading with the enemy

[44] Trading with the Enemy Act, sect. 2, subsect. 1 d.

[45] See PARRY, op. cit. p. 166 at note 19.

[46] See Trading with the Enemy Act, sect. 2, subsect. 1 e.

[47] Trading with the Enemy Act, sect. 2, subsect. 2. See also PARRY, op. cit. p. 178, who points out that the 1939 Act in this regard gives the authorities better power of interference than the 1915 Act.

[48] See Trading with the Enemy Act, sect. 15, subsect. 1 A.

[49] See *Gist* v. *Mason* (1786) 1 T.R. 88 [1 R.R. 154]; and Trading with the Enemy Act, sect. 1, subsect. 1.

[50] See supra p. 183.

warrants another approach; a suspension of the contract is not allowed, since the mere fact that the enemy can count upon performance of the contract *after* the war may strengthen his position *during* the war.[51]

In *Clapham S.S. Co.* v. *Vulcaan* [1917] 2 K.B. 639, a British vessel had been time-chartered for five years to a Dutch company (Vulcaan) with German shareholders. The charter party had a clause to the effect "that in the event of war between the nation to whose flag the chartered vessel belongs and any European Power . . . charterers and/or owners shall have the option of suspending this charter for the time during which hostilities are in progress". On the outbreak of the war between Great Britain and Germany on 4 August 1914 the Vulcaan company notified the shipowner that the contract was suspended. The court, however, declared the contract dissolved. Similarly, in *Ertel Bieber* v. *Rio Tinto Co.* [1918] A.C. 260, a suspension clause was held invalid in a contract concerning successive deliveries of copper from a British company to three German companies. And in the case of *In re Badische Company* (1921) 9 Ll.L. Rep. 20, where the suspension clause was not considered to regard a war between England and Germany, it was stated *obiter* that a suspension clause of such kind would be contrary to public policy.

In view of the nature of the prohibition it is the duty of the court to dissolve the contract *ex officio*.[52] And if the contract at one time has been affected by the prohibition a subsequent licence will not revive it.[53]

The above principle of automatic dissolution applied to contracts of affreightment means that the contract ceases to operate if the prohibition intervenes before the loading of the cargo; the charterer is freed from his obligation to tender the cargo and the shipowner from his obligation to perform the voyage. The same principle applies after the loading of the cargo if the destination is situated in enemy territory. In such case the goods must be unloaded in the port of loading.[54] On the other hand, if the loading port, subsequent to loading, becomes enemy territory, it is possible that the vessel should be allowed to sail provided this could be done without any dealing with the enemy authorities.[55] If the parties, before the time when the prohibition applies, have

[51] See the statement by Lord DUNEDIN in *Ertel Bieber* v. *Rio Tinto* [1918] A.C. 260 at p. 275.

[52] See MCNAIR p. 205 at note 1.

[53] See *Esposito* v. *Bowden* (1857) 7 E. & B. 763 [110 R.R. 816 at p. 820]; *Sovfracht v. Gebr. Van Udens Scheepvart en Agentuur Maatschappij* [1943] A.C. 203 (per Lord PORTER at p. 254 et seq.); and MCNAIR p. 132.

[54] See ABBOTT p. 867; CARVER § 495 at note 4; and MCNAIR p. 206.

[55] See MCNAIR p. 206; and cf. supra p. 193.

already acquired "accrued rights", e.g. demurrage, such rights subsist in spite of the dissolution.[56] Similarly, prepaid or prepayable freight can be retained and recovered according to the English rules regarding advance freight,[57] but the shipowner has no right to freight *pro rata itineris* if he has performed a part of the voyage when the prohibition comes into effect.[58]

§ 9. *The Legal Approach of American Law*

§ 9.1. *Introduction*

When account is given of the general principles of American contract law it must be borne in mind that the standpoint regarding the relevant questions may differ in the different states, while on the other hand a certain unification of the law may be obtained in so far as the cases are subjected to federal instead of state jurisdiction. In the following some observations are given concerning the distribution of functions between the state courts and the federal courts and the unification of contract law (§ 9.2). Subsequently, some differences between English and American law (§ 9.3) and the main rules as they appear from the jurisprudential writing and Restatement Contracts are indicated (§ 9.4). Some comparative remarks are given in § 9.5 with regard to the application of the legal remedies as well as the question of foreseeability and the cessation of the contract. Finally, the doctrine of illegality and the prohibition against trading with the enemy are treated in § 9.6.

§ 9.2. *State and Federal Jurisdiction and the Unification of the Law*[1]

As a main rule, matters involving the application of general contract law are referred to the jurisdiction of the state courts; it is only when competence has been expressly granted the federal courts that the cases fall within the federal jurisdiction. For the present study it is of particular interest to observe that the federal courts have such competence in cases involving maritime law and "diversity of citizenship".

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[56] See supra p. 194; CARVER § 494 at note 97; and TIBERG p. 410 at note 2.

[57] See supra p. 23.

[58] *St. Enoch Shipping Co. Ltd* v. *Phosphate Mining Co.* [1916] 2 K.B. 624.

[1] The Scandinavian reader is referred to ECKHOFF, Rettsvesen og rettsvitenskap i U.S.A.; and MAYERS, The American legal system, for a fuller treatment of this subject.

The federal courts are obligated to apply the law of the state to which the matter is most closely connected.[2] However, it has been subject to dispute whether the federal courts are obligated to follow not only the statutory law of the relevant state but the case-law as well. In the case of *Swift* v. *Tyson*[3] it was considered that the federal courts had no such duty and as a result hereof it was considered that there existed a "general common law" governing throughout the United States. This standpoint was heavily criticized, i.a. by the well-known judge OLIVER WENDELL HOLMES,[4] and the *Swift* v. *Tyson* principle was expressly rejected in the case of *Erie Railroad Co.* v. *Tompkins*[5] where the Supreme Court based the decision on the case-law of the relevant state. Thus, apart from the matters subjected to federal legislation, a unification of general contract law may not be obtained by federal case-law.

Nevertheless, there are strong forces promoting the unification of American contract law. English law has still a considerable impact and references to English cases are frequent, particularly in matters involving maritime law. The statement of the majority of the Supreme Court in *The Eliza Lines*[6] seems still pertinent: "Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree."[7] In order to "promote the clarification and simplification of the law and its better adaption to social needs, to secure the better administration of justice and to carry on scholarly and scientific legal work",[8] the American Law Institute started in the 1920s to work out Restatements of the law and, in view of the fact that well-known experts have participated, this achievement has undoubtedly had a certain unifying effect.[9] The function of the Institute is to "state clearly and precisely in the light of the decisions the principles and rules of the common law".[10]

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[2] See Judiciary Act 1789 sec. 34; and cf. 28 U.S.C. (1948) § 1652.

[3] (1842) 41 U.S. 1.

[4] See *Black and White Taxicab and Transfer Co.* v. *Brown and Yellow Taxicab and Transfer Co.* (1928) 276 U.S. 518 at p. 533.

[5] (1938) 304 U.S. 64.

[6] (1905) 199 U.S. 119.

[7] 199 U.S. 119 at p. 128.

[8] See Restatement Contracts VIII.

[9] Cf. Restatement Contracts XI et seq.; and ECKHOFF p. 276.

[10] Restatement Contracts XI.

A further important step towards the unification of contract law was taken by the Institute in co-operation with The National Commissioners on Uniform State Laws. These bodies started in the 1940s to elaborate the text of a Uniform Commercial Code. The first text was ready in 1951 and a new "Offical" Text was presented in 1957. In order to counteract local initiatives to establish new, special rules a Permanent Editorial Board was constituted in 1961 and this body has recommended certain alterations in a new "1962 Official Text". However, it is intended that alterations should be avoided and only permitted when (a) a rule is "unworkable or for any other reason obviously requires amendment", (b) court decisions "have rendered the correct interpretation of a provision of the Code doubtful" and an alteration may clarify the matter, and (c) "new commercial practices" make alterations desirable.[11]

In addition to the above-mentioned factors it seems that the great standard works on contracts, in particular WILLISTON and CORBIN on Contracts, have contributed to the unification of the law, at least to judge from the frequent references to these works in the court decisions.

§ 9.3. *Some Main Differences between English and American Law*

Although, in American law, the same concepts as in Continental and Scandinavian law, in particular the doctrine of impossibility, have been used more frequently than in English law, the deficiencies of "a supposedly logical or mechanical test" are often observed.[1] Uniform Commercial Code uses the vague expressions "good faith" and "commercial reasonableness"[2] which are generally preferred and considered "less uncertain and variable in their application" than the more stringent and complicated doctrines.[3]

The rules in Restatement Contracts relating to the legal effect of changed conditions seem to give the different variants of the doctrine of impossibility nearly the same rank of honour as has been attributed

[11] See Uniform Commercial Code, 1962 Official Text, edited by The American Law Institute and The National Conference of Commissioners on Uniform State Laws, pp. VII–XIII.

[1] See CORBIN § 1339 note 48.

[2] See UCC, General Provisions, § 1–203 and §§ 2–614, 615. Cf. "Treu und Glauben" in the German BGB § 242 supra p. 160 et seq.

[3] See CORBIN loc. cit. Cf. HOLMES, Law and Science in Law (1899), Collected Legal Papers pp. 238–40, 306; and from Swedish law SCHMIDT, The German Abstract Approach to Law, S.S.L. Vol. 9 (1965) pp. 133–58.

to them in the German BGB.[4] Restatement Contracts stresses the interdependence between the promises in bilateral contracts, where the duty to perform disappears on account of "failure of consideration" if the other party cannot perform his part of the bargain (§ 274). The principle of "failure of consideration" has been extended to cover situations where counter-performance is duly tendered but where one of the parties has a certain "object" in mind or expects a certain "effect" from the contract, provided this might be said to constitute the "basis" of the contract (§ 288)[5] and this object or effect fails. As far as hindrance affecting the performance of one of the contracting parties is concerned, the doctrine of impossibility is used with the same basic distinctions as in Continental and Scandinavian law (§ 454 et seq.).[6]

Since Restatement Contracts is primarily built on case-law, the general principles are presented on the basis of situations known from earlier court decisions. Thus, the doctrine of "failure of consideration" is not only expressed in principle in § 274 but in later sections the application of the doctrine to certain typical situations is explained. In § 281 we find the situation where counter-performance has become impossible on account of "the non-existence, destruction or impairment of the requisite subject-matter or means of performance" and in § 282 "the death or physical incapacity of some person whose action is requisite" is considered. Similarly, with regard to impossibility preventing performance, situations of the same kind as referred to in §§ 281–2 are treated in §§ 459–60.

In later years, a more flexible method than appears from the system of the Restatement Contracts seems to be generally preferred.[7] Indeed, it may be subject to dispute whether, with regard to the legal effect of changed conditions, the system of Restatement Contracts has ever been generally applied by the American courts. The cases frequently refer to the *dicta* in the English cases[8] and this trend is particularly apparent in

[4] See supra p. 141.

[5] Cf. the German "Geschäftsgrundlage" supra p. 151 et seq.

[6] See supra p. 142 et seq.

[7] See, e.g., UCC, General Provisions, section 1–203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." It is expected that the principles of UCC will be applied *ex analogia* in other fields of the contract law. See CORBIN § 1354 (p. 460).

[8] See CORBIN § 1331 at note 56–7 and § 1339. But cf. Lord WRIGHT in *Monarch S.S.Co.* v. *Karlshamns Oljefabriker* [1949] A.C. 196 at p. 231, where he warns against an uncritical comparison between American and English cases.

the cases dealing with maritime law.[9] In *Texas Co.* v. *Hogarth Shipping Co.* (*The Baron Ogilvy*),[10] dealing with the legal effect of the requisition of the vessel, the doctrine of impossibility was preferred by the lower court,[11] while the Supreme Court, referring to a number of earlier decisions, favoured the English theory that the contract rested upon an "implied condition for the availability of the thing".[12] Similarly, in *The Poznan*,[13] LEARNED HAND J. stressed the fact that American courts generally prefer the test that "the intervening event which prevents performance shall be so improbable as to be outside any contingeny, which, had the parties been faced with it, they would have agreed that the promisor should undertake".[14]

Scandinavian writers, in commenting upon American law, seem to have paid too much regard to the doctrine of impossibility.[15] True, the doctrine of impossibility has been favoured in Restatement Contracts and in the standard works on contracts by CORBIN and WILLISTON but it seems that the cases convey a somewhat different impression.[16]

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[9] See ROBINSON pp. 652–63.

[10] (1921) 256 U.S. 619.

[11] The court stated with regard to the English doctrine of frustration: "To me it seems only an equivalent for, and no improvement on, impossibility of performance, using impossibility in the practical sense." See (1919) 265 Fed 375 at p. 378 SDNY.

[12] See (1921) 256 U.S. 619 at p. 629 et seq. See also *The Tornado* (1883) 108 U.S. 342; *Chicago, Milwaukee & St. Paul Railway Co.* v. *Hoyt* (1893) 149 U.S. 1; *The Kronprinzessin Cecilie* (1917) 244 U.S. 12; *Wells* v. *Calnan* (1871) 107 Mass. 514; *Butterfield* v. *Byron* (1891) 153 Mass. 517 at pp. 519–20; *Dexter* v. *Norton* (1871) 47 N.Y. 62 at pp. 64–5; *Clarksville Land Co.* v. *Harriman* (1895) 68 N.H. 374; *The Martin Emerich Outfitting Co.* v. *Siegel, Cooper & Co.* (1908) 237 Ill. 610 at pp. 615–6; and *Spalding* v. *Rosa* (1877) 71 N.Y. 40 at p. 44. See for a comparison between the doctrine of frustration, implied condition and impossibility SMITH, Some practical aspects of the doctrine of impossibility, 32 Ill. L. Rev. (1938) p. 672.

[13] (1921) 276 Fed 418.

[14] See 276 Fed 418 at p. 425; and cf. from English law *Southern Foundries (1926), Ltd.* v. *Shirlaw* [1940] A.C. 701 supra p. 174. The test is basically the same as suggested in Scandinavian law by the Dane JUL. LASSEN in the subjective variant of the doctrine of presupposed conditions. See supra p. 154.

[15] See, e.g., BAGGE, SvJT 1944 p. 853 et seq.; RODHE, Jämkning p. 20 note 3; SUNDBERG, Air Charter p. 440 at note 195; GODENHIELM p. 28; and JØRGENSEN, Afhandlinger p. 131.

[16] Cf. JØRGENSEN loc. cit.; who points out that, generally, the *results* of the American cases do not differ from the English cases.

§ 9.4. *The System of Restatement Contracts*

§ 9.4.1. Introduction

In Anglo-American law, the principle that the promises in bilateral contracts are mutually interdependent is based on the theory that they rest upon the "condition" that the counter-performance shall be duly performed.[1] Originally it was required that the promise rest upon an "*express* condition".[2] However, this attitude proved to be too stringent and the technique of implication was used to reach more equitable results; the promise was deemed to rest upon an *implied* condition that the promisor obtained "consideration" for his promise.[3] While, in English law, the technique of implication has been generally accepted,[4] much criticism has been raised against it in American law. Here, it is often pointed out that the implied condition does not rest upon any expression of intention by the parties. "In other words, because the court thinks it fair to qualify the promise, it does so and quite rightly; but clearness of thought would be increased if it were plainly recognized that the qualification of the promise or the defense to it is not based on any expression of intention by the parties."[5] In order to make a distinction between an implied condition, resting upon an expression of intention

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[1] Cf. from Continental law Code Civil art. 1131, 1184; BGB §§ 325, 327, 346–61, 454, 542–4, 636; and for Scandinavian law RODHE, Obligationsrätt § 37. See for a historical review SUNDBERG, Air Charter p. 419 et seq.

[2] Cf. from Continental law the *lex commissoria* emanating from Roman law. See for an explanation of this term SUNDBERG, Air Charter p. 420; and RODHE, Obligationsrätt § 37 (p. 422).

[3] This principle was established by Lord MANSFIELD in *Boone* v. *Eyre* (1777) 1 Bl. H. 273 K.B. [2 R.R. 768]. See for a historical review DIPLOCK L. J. in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 C.A. at p. 491 et seq.; and CORBIN, J.C.L. Vol. 29 (1947), Parts 3 and 4, p. 3.

[4] See supra p. 178 et seq.

[5] WILLISTON § 1937 (p. 5424); see also CORBIN §§ 632, 642, 1331, 1350 at note 28; and id. in J.C.L. Vol. 29, Parts 3 and 4, p. 8. The case-law seems to be heterogeneous in this respect; sometimes the "implied term" is used in the same manner as in English law, sometimes a more "objective variant" is preferred. See CORBIN § 632 at note 27, § 1331 at notes 56–7, § 1350 at note 68; ROBINSON p. 660; 80 C.J.S. pp. 672–3, 734; and cf. WILLISTON § 1931 (p. 5411), § 1963 note 9; UCC, Sales, 2–615, comment 4 ("the identity of contract test"); *Earn Line S.S. Co.* v. *Sutherland S.S. Co.* (*The Claveresk*) (1920) 264 Fed 276 CCA 2nd ("basis of contract theory"); and *Isles Steamshipping Co.* v. *Gans S.S. Line* (*The Isle of Mull*) (1921) 278 Fed 131 CCA 4th ("the inavailability of the thing").

by the parties, and a condition lacking such foundation, the term "constructive condition" has been introduced to cover the last-mentioned situation.[6]

§ 9.4.2. Failure of consideration

The term "failure of consideration" may easily lead the student of Anglo-American law astray, since it may be taken to refer only to the so-called "doctrine of consideration" which upholds the theory that, in principle, a contract is not valid unless some kind of "consideration" has been given for the contractual promise. This doctrine requires a certain technique with regard to the formation of the contract but does not necessarily reflect the interdependence between the respective promises in bilateral contracts, since the "consideration" may consist of the other party's promise or of a "nominal consideration" given for the mere purpose of complying with the formal requirements for a valid contract.[7]

What then is the difference between a "failure of consideration" and a "failure of condition"? While "consideration" is something "bargained for by the promisor in exchange for his promise", a "condition" may be of any type, either expressly agreed upon or else deemed to be a condition for the promisor's duty to perform. As previously mentioned, a *total* failure of the counter-performance is recognized as a "failure of condition" even in the absence of any express term in the contract to this effect; in this case the "failure of condition" coincides with the term "failure of consideration".[8] But there might very well be "failure of condition" even though the promised counter-performance has been partly received.[9] In this sense "failure of condition" is the wider concept. The "conditions" are subdivided into "conditions precedent" (§ 250), "conditions subsequent" (§ 250) and "conditions concurrent" (§ 251). By this method a distinction is made between situations where

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[6] See Restatement Contracts § 253; and CORBIN §§ 631–2.

[7] See CORBIN § 130; one dollar has in some cases been deemed a sufficient "consideration" for contractual promises of great economical value. See for a critical analysis of the doctrine MAZANTI-ANDERSEN, The Doctrine of Consideration, Copenhagen 1957. But cf. WILLISTON (1957) § 100 (in particular p. 371); and CORBIN § 111 who both to a certain extent acknowledge the practical value of the doctrine.

[8] See Restatement Contracts § 278.

[9] See CORBIN § 151 (p. 674); and WILLISTON (1957) § 112.

the "condition" refers to a fact present *before* the promisor shall fulfil his promise ("condition precedent"), at the same time ("condition concurrent") or subsequently ("condition subsequent").

§ 9.4.3. Frustration of purpose

In Restatement Contracts § 288 "Frustration of purpose", under the heading "Frustration of the Object or Effect of the Contract", is defined as follows:

"Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears."

The passage "forms the basis on which both parties enter into it" corresponds to "die gemeinsame Vorstellung der mehreren Beteiligten vom Sein oder Eintritt gewisser Umstände, auf deren Grundlage der Geschäftswille sich aufbaut" in OERTMANN's famous "Geschäftsgrundlage".[10] And, as previously mentioned, the same idea lies behind the English "basis of contract" theory.[11] In American law, the expression "frustration" usually refers to "the frustration of the commercial object", which, in principle, is considered an extended application of the theory of "failure of consideration"; in spite of the fact that "literal performance" is possible the promisee does not get the "consideration" which he *de facto* had reason to expect. It goes without saying that such an extension of the theory of "failure of consideration" may only be applied with circumspection. There must be a "total failure of consideration" or the promisee must have been deprived of "substantially the whole benefit" which he had reason to expect from the contract.[12]

The principle expressed in Restatement Contracts § 288 has been criticized by CORBIN who stresses the fact that the object of the contract for

[10] See supra p. 151.

[11] See supra p. 174. See also WILLISTON § 1954 note 2, where the English Coronation cases are referred to as an illustration. It is considered that Restatement Contracts § 288 has been directly inspired by the Coronation cases. See CORBIN, J.C.L. Vol. 29, Parts 3 and 4, p. 4.

[12] Cf., e.g., DIPLOCK L.J. in *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478 C.A. at p. 492.

one of the contracting parties can only seldom form the basis of the intention of *both* parties.[13] As a rule, the court cannot find any expression of the common intention of the contracting parties; the court must find the solution "by looking into its own mind and conscience as directed by the practices and *mores* of men in general". CORBIN suggests that the court should preferably follow such a course rather than explore "a non-existent intention of the contractors". The term "doctrine of frustration" is only "perpetuating the use of a bad term to state the result".[14] Instead, CORBIN favours a clearly objective approach where the court tries to establish the proper distribution of risk between the contracting parties. In other words, who shall bear the risk of the impossibility of attaining the expected object or effect of the contract? It would seem to be a natural point of departure that each party himself bears this risk, but, nevertheless, there are cases where another result is well warranted. The courts will no doubt be faced with considerable difficulties when judging whether exceptions should be made from the main rule, but CORBIN intimates that the task of the courts would be facilitated if they were aware of the "true character" of their reasoning without being bewildered by unclear concepts and definitions. "In determining who bears the risk . . ., the court should try to look at the transaction as it is customarily looked upon in the community. It is thus that the court should determine the fair distribution of the risk, rather than by trying to make some scientific analysis of the groups of relations. Indeed, a court can not determine what these legal relations are except by giving those effects to the transaction that the surrounding community commonly gives it. No other method is either scientific or just."[15] CORBIN looks upon the whole problem of adjustment of the contract on account of changed conditions as a problem of the distribution of the risk between the contracting parties; not only when the situations entail "frustration of purpose" but also with regard to cases traditionally covered by the doctrine of impossibility.[16]

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[13] See CORBIN § 1322 at note 19, §§ 1353, 1355 and id., J.C.L. Vol. 29, Parts 3 and 4, p. 4 et seq.; SMIT, Frustration p. 287; SCRUTTON p. 100; and cf. from Scandinavian law KARLGREN, SvJT 1952 p. 262 and supra p. 154.

[14] See CORBIN, J.C.L. Vol. 29, Parts 3 and 4, pp. 5, 7.

[15] CORBIN § 1358 (p. 482). See also id., J.C.L. Vol. 29, Parts 3 and 4, p. 8.

[16] See CORBIN §§ 1321, 1322 (at note 9), 1346 (p. 434), 1347, 1350, 1351, 1355–6, 1358.

§ 9.4.4. Impossibility

It may seem peculiar that, in Restatement Contracts, the doctrine of impossibility appears in the sections dealing with "failure of consideration" (§§ 281, 282), since the wide scope of the latter doctrine would seem to make an additional use of the doctrine of impossibility entirely superfluous. However, the technique used in Restatement Contracts of basing the rules on the case-law explains why the doctrine of impossibility has been referred to not only with regard to hindrances *excusing the promisor* but also as a remedy *to excuse the promisee* from his duty to tender the counter-performance when the promisor is prevented from fulfilling his part of the bargain on account of impossibility. Nevertheless, it is in the former case that the doctrine of impossibility has its main practical importance.

In the same manner as in Continental and Scandinavian law,[17] impossibility is subjected to a number of qualifications. Distinctions are made between absolute and relative, subjective and objective, initial and subsequent, permanent and temporary, total and partial impossibility.[18] On the basis of these distinctions some general principles have been adopted. Hence, it is not required that there be an absolute impossibility in a logical sense; "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved" provides a sufficient excuse (§ 454). However, subjective impossibility, as distinguished from objective impossibility, does not suffice (§ 455). In the case of initial impossibility it becomes of importance to ascertain what the promisor "knows" or "has reason to know" at the time of the conclusion of the contract (§ 456), while, in the case of subsequent impossibility, the test concerns what he "has reason to anticipate" at such time (§ 457). When the impossibility is not permanent or total but temporary and partial it may still suffice as an excuse, provided the performance of the contract should subject the promisor to a "substantially greater burden" (§ 462) or become "difficult or disadvantageous" (§ 463). In principle, *anticipated*

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[17] See supra p. 142 et seq.

[18] In § 454 relative impossibility is recognized under the term "impracticability". In § 455 the distinction is made between subjective and objective impossibility; the former referring to situations when the promisor may say "I cannot do it" as distinguished from the latter when he is in a position to say "the thing cannot be done". Initial and subsequent impossibility is treated in § 456 and § 457 respectively, while temporary and partial impossibility is regulated in § 462 and § 463.

impossibility is recognized as an excuse as well, subject to the same test of reasonableness as practised in the preceding sections (§§ 465–6).

In order to exemplify the cases when impossibility operates as an excuse, Restatement Contracts expressly mentions some typical situations recognized in the case-law, such as the "non-existence or injury of specific thing or person necessary for performance" (§ 460) and the extension of this principle in the case of the "non-existence of essential facts other than specific things or persons" (§ 461).[19] While "impracticability" in principle is accepted as an excuse, a mere "unanticipated difficulty" does not suffice; it is not enough that performance has become "more difficult or expensive than the parties anticipate" (§ 467). In the passage "unless a contrary intention is manifested (appears)", it is observed that the contract may have placed the risk of the contingency preventing or affecting performance on the one or the other of the contracting parties.[20] Furthermore, a rule corresponding to the English principle of "self-induced frustration"[21] is adopted in that "contributing fault" from the promisor deprives him of his remedy of using impossibility as a defence.[22]

§ 9.5. *The Application of the Legal Remedies*

§ 9.5.1. "Impracticability"

In American law, the evolution from the strict adherence to *pacta sunt servanda* to a more diversified attitude towards the problem of the legal effect of changed conditions has followed the same path as in English law. Thus, in *Dermott* v. *Jones*,[1] the Supreme Court of the United States in 1864, referring to *Paradine* v. *Jane*,[2] stressed the absolute

[19] Cf. the English cases of *Taylor* v. *Caldwell* and *Nickoll* v. *Ashton* supra pp. 163, 164; and from American law WILLISTON § 1935; and CORBIN §§ 1334–7. See also UCC, Sales, 2–613 freeing the seller of specific goods from his obligation in the case of the loss of the sold object; and cf. the same principle in the English Sale of Goods Act, 1893, art. 7. See for a commentary of English law, CHALMERS, Sale of Goods Act, 1893 (London 1963) p. 35 et seq.

[20] See §§ 456–61 and 465.

[21] See supra p. 185 et seq.

[22] See §§ 450–61 and 465; POOR § 72 at note 6; *Ocean S.S. Co.* v. *Gosho Co.* (*The Theseus*) 1925 AMC 1069 SDNY; and *The Louise* 1945 AMC 363 DC Md.

[1] (1864) 69 U.S. 1.

[2] Supra p. 162.

character of the contractual promise and the same attitude is taken in a number of subsequent cases.[3] But the courts have apparently been influenced by the general opinion in commerce and, in ascertaining what is understood as normal practice, the courts have to some extent been led by the current contract clauses.[4]

While the doctrine of impossibility works to the benefit of the promisor who has been affected by a hindrance considerably increasing his contractual burden, the promisee, who finds the value of the performance less than he expected, must seek comfort in other remedies, often without much success. "Variations in the value of a promised performance, caused by the constantly varying factors that affect the bargaining appetites of men, are the rule rather than the exception. Bargainers know this and swallow their losses and disappointments, meantime keeping their promises."[5] Furthermore, the doctrine of impossibility ordinarily does not help a promisor who has undertaken an obligation of a *generic* character (*genera non pereunt*). Nevertheless, a certain lenience appears from UCC, Sales, 2–615 which enables the court to consider the dilemma of the seller of generic goods, provided "performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made". And it is considered that this principle may be applied *ex analogia* in other fields than sales law as well.[6]

§ 9.5.2. Vis major

The concept of *vis major* has not had any great practical importance in American law, at least not so far as the legal effect of changed conditions is concerned. The concept is mainly used in the law of carriers for the purpose of modifying the strict liability of the "common carrier".[7]

[3] See, e.g., *Columbus Railway, Power Light Co.* v. *City of Columbus* (1919) 249 U.S. 399; *Hellenic Transport S.S. Co.* v. *Archibald Mc Neil & Sons Co.* (1921) 273 Fed 290 DC Md.; CORBIN § 1320 at note 1, § 1328 in fine, § 1333 at notes 72, 80; and WILLISTON § 1931 (p. 5411), § 1963 at note 1 (cf. note 9).

[4] See CORBIN § 1350 at notes 65, 66, 68, and § 1360 (p. 488); and WILLISTON § 1952 (p. 5470).

[5] CORBIN § 1355 (p. 467).

[6] See CORBIN § 1354 (p. 460).

[7] See CORBIN § 1324 (p. 336); WILLISTON § 1936; Restatement Contracts § 457, comment c; and ROBINSON p. 653: "It is obvious that the vis major doctrine shades off into frustration."

CORBIN considers the terms of *vis major*, force majeure and Act of God as "catchwords that may occasionally be convenient to describe the facts that lead a court to decide in favour of the promisor",[8] while WILLISTON even thinks that the terms are misleading when used "with reference to ordinary contractual duties".[9] In American law, *vis major* is not used for the purpose of qualifying impossibility; mere impossibility is sufficient, provided the requirements mentioned above are fulfilled.[10]

A problem related to *vis major* arises in contractual clauses excusing the promisor in the case of hindrances "beyond control". In American law, this expression seems to be understood more or less in the same way as the concept of negligence, the promisor may only invoke the hindrance as an excuse if it has arisen in spite of skill, diligence and good faith on his part.[11] CORBIN professes the view that the existence of such clauses should influence the application of the principle of "commercial impracticability" which must be adapted to the general commercial practices, i.a. as such practices are evidenced by the current clauses.[12]

§ 9.5.3. The legal effect of an increase of danger

American law has not adopted a general principle to the effect that an increase of danger constitutes an excuse from performance. However, in Restatement Contracts §§ 465–6, dealing with the effect of anticipated and permanent impossibility, situations where "performance will seriously jeopardize [the promisor's] own life or health or that of others" are mentioned as examples of valid excuses. And war hindrances may very well fall within these cases.[13] It will be seen that another remedy

[8] CORBIN § 1324.

[9] WILLISTON § 1936.

[10] But cf. the discussion in Scandinavian law with regard to the interpretation of § 24 of the Uniform Scandinavian Sales Acts p. 145 et seq.

[11] Cf. with regard to the interpretation of *vis major Joseph Resnick Co.* v. *Nippon Yusen Kaisha and Universal Terminal & Stevedoring Corp.* 1963 AMC 2002 Civil Court of NYC; the relevant test is "whether there was any intervention or foreseeability or control on the part of the defendant". If not, there is *damnum fatale* and no liability arises.

[12] CORBIN § 1342. In Scandinavian law, the same view is taken by LJUNGHOLM, SvJT 1936 p. 577. But cf. KARLGREN, SvJT 1963 p. 110 note 6.

[13] See CORBIN § 1336 at notes 29, 33; WILLISTON §§ 1940, 1951; and Restatement Contracts § 465, comments d, f, g and illustration 2.

is offered by a liberal interpretation of the "restraint of princes" clauses in the contracts of affreightment[14] and that a principle has been developed whereby, even in the absence of a clause, the shipowner and the charterer could be excused from performance in case of dangers threatening the vessel and the cargo; the principle has been "swallowed up in this doctrine of frustration" as expressed by ROBINSON referring to *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*[15]

§ 9.5.4. Requisition

While war risks may amount to anticipated "restraint" and thus provide a sufficient excuse from performance, a requisition of the specific vessel implies an absolute hindrance during the period of requisition. Hence, the main problem becomes a matter of assessing the probable period and the length of time required to cause the dissolution of the contract rather than the suspension of the contracted performance.[16] However, it must also be observed that the question of who is entitled to the amount paid as compensation for the requisition becomes of paramount importance. In American law, it has been considered that, in case of frustration of the time charter party, the shipowner may keep the requisition amount while the charterer is freed from his obligation to pay the charter hire. In *The Isle of Mull*,[17] it is acknowledged that this may cause hardship to the charterer but the rule clarifies the position and relieves the court from "the confusing, if not impossible, task of adjusting the equities between the owner and the charterer".[18] Hence, where the requisition amount exceeds the charter hire, the shipowner usually maintains that the contract is dissolved on account of frustra-

[14] See infra p. 279 et seq.

[15] 248 U.S. 377; See ROBINSON p. 656 and further infra p. 287 et seq.

[16] See *Earn Line S.S. Co.* v. *Sutherland S.S. Co.* (*The Claveresk*) (1920) 264 Fed 276 CCA 2nd, where reference is made to the dictum of Lord HALDANE in the *Tamplin* case and where it is suggested that the question of suspension or dissolution is a "question of degree" (at p. 281). See also *Isles Steamshipping Co.* v. *Gans S.S. Line* (*The Isle of Mull*) (1921) 278 Fed 131 CCA 4th.

[17] 278 Fed 131.

[18] 278 Fed 131 at p. 135. But cf. WILLISTON § 1978 at notes 9–10 referring to the German BGB § 281 and suggesting that the shipowner should be "liable on principles of quasi contract for any benefit which he may receive from the dissolution of the contract, that is, for any excess of the government payment over the hire reserved in the charter-party".

tion, while the charterer adopts the different view. The decisive factor becomes whether the requisition may be expected to outlast the period of the charter party.[19] If so, there is an "inavailability of the thing" excusing the promisor from further performance.[20] In American law, the "enormous expenditure of writing", preceding the acceptance of the principle that the doctrine of frustration applied to time charters as well has been considered quite unnecessary.[21] There is, in this respect, no difference between voyage charters and time charters; "the only substantial distinction between a voyage charter and a charter for years, on the issue of frustration, is that in the former the embargo or requisition in most cases is certain to continue beyond the expected termination of the voyage, while in the latter there is difficulty in ascertaining whether the requisition would probably extend beyond the period of the charter".[22]

§ 9.5.5. Foreseeability

Restatement Contracts stresses the importance of foreseeability; a contracting party may not invoke as excuses hindrances which he "knows or had reason to know" (§§ 456, 465) or had "reason to anticipate" (§ 457) at the time of the conclusion of the contract.[23] Nevertheless, it is sometimes pointed out that practically everything is foreseeable; the question is one of degree.[24] The standpoint taken in the Uniform Commercial Code seems to represent the better view; the hindrance may not be invoked as an excuse if it is "sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances".[25]

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[19] *The Isle of Mull* 278 Fed 131 at p. 134; POOR § 14 note 5; and ROBINSON p. 658 note 138.

[20] See Restatement Contracts § 460 and *The Baron Ogilvy* (1921) 256 U.S. 619 at p. 629 et seq., where the Supreme Court found such "inavailability" grounded on an "implied term" in the contract. See also *The Glidden Co.* v. *Hellenic Lines Ltd* (*The Hellenic Sailor*) 1960 AMC 810 CCA 2nd infra p. 348; and ROBINSON p. 660.

[21] See *The Claveresk* 264 Fed 276 at p. 283.

[22] *The Isle of Mull* 278 Fed 131 at p. 138.

[23] See CORBIN § 1333 at note 2, § 1354 note 4; and infra p. 389 et seq.

[24] See, e.g., WILLISTON § 1953 note 7, § 1964 and § 1972 A.

[25] See UCC, Sales, 2–615, comment 8.

§ 9.5.6. Legal effect of frustration

In American law, the legal effect of frustration and the position of the contracting parties after the cessation of the contract is different than that of English law. The principle of *Chandler* v. *Webster* that "the loss lies where it falls"[26] has not been favourably accepted in American law. A party who, at the time of the occurrence of the frustrating event, has already performed his part of the bargain, wholly or partly, is usually in a position to recover what he has performed or compensation for its value.[27]

Another difference compared with English law seems to lie in the attitude towards substituted performance.[28] According to Restatement Contracts § 469 a contracting party who has obtained different options may not insist on the option which is prevented by a frustrating event if the other is still possible to perform. But if, at the time of the occurrence of the frustrating event, he has already exercised his option and chosen the alternative which has become prevented, the contract is off.[29] Similarly, English law, as distinguished from American law, does not permit an adjustment of the contract by "prorating the supply" when the promisor is in a position to fulfil his promises under some, but not all, contracts which he has entered into at the time of the frustrating event.[30] In Uniform Commercial Code, it is even stipulated that the promisor, when prorating his supply, may satisfy "regular customers not then under contract as well as his own requirements for further manufacture".[31] However, the supply must be prorated according to what is "fair and reasonable" and the promisor must not take the benefit of rising prices by entering into new contracts with his "regular customers" to the detriment of such parties with whom he is already under contract.[32]

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[26] See supra p. 169 et seq.

[27] See Restatement Contracts § 468; CORBIN § 1370 (p. 527); and WILLISTON §§ 1969, 1972, 1972 A, 1973–5.

[28] See Restatement Contracts § 463; and UCC, Sales, 2–614.

[29] See CORBIN § 1330 at note 53 and § 1339 note 57. Cf. from English law *The Teutonia* (1872) L.R. 4 P.C. 171, where substituted performance was permitted; and *Reardon Smith Line* v. *Ministry of Agriculture* [1963] 1 Lloyd's Rep. 12 H.L., where it was not.

[30] See Restatement Contracts § 464.

[31] UCC, Sales, 2–615 (b).

[32] See UCC, Sales, 2–615 (b), comment 11; CORBIN § 1342 at note 76; and WILLISTON § 1962.

The difference between American and English general principles of contract law are also reflected in the maritime law principles. While, in English law, the shipowner may retain prepaid freight when the contract ceases on account of frustration, American law upholds the principle that, failing agreement to the contrary, the freight can be recovered by the charterer.[33] However, the practical importance of the difference between English and American law is reduced by the current "freight prepaid non-returnable ship and/or cargo lost or not lost" clauses in the contracts of affreightment.[34] Even when the shipowner has no protection from a clause in the contract of affreightment he may nevertheless earn his freight by carrying the cargo to its destination by a substituted vessel or by some other means. This principle should be regarded against the background of the theory that the delivery of the cargo at the destination is a "condition precedent" for the shipowner's right to the freight.[35] However, this right does not subsist if the vessel and her cargo have been *abandoned*, even if the cargo is subsequently salvaged or else brought to the agreed destination.[36] The principle of Scandinavian law relating to freight *pro rata itineris peracti* is not recognized in American law although such freight, or even full freight, may be recovered if the charterer *agrees* to take delivery of the cargo at another place than the destination originally agreed upon, or if he behaves in such a manner that the shipowner is deprived of his possi-

[33] See *Burn Line* v. *U.S. & Aust. S.S. Co.* (1908) 162 Fed 298 CCA 2nd; *Nat. Steam Nav. Co. of Greece* v. *International Paper Co.* (*The Athenai*) (1917) 241 Fed 861 CCA 2nd; and *The Cataluna* (1918) 262 Fed 212 SDNY, where the different attitude of English law, as expressed in *Byrne* v. *Schiller* (1871) 1 Asp. M.C. 111, is pointed out.

[34] In *Mitsubishi Shoji Kaisha Ltd.* v. *Société Purfina Maritime* (*The Laurent Meus*) 1943 AMC 415 CCA 9th, the charterer's proposition that the clause "freight to be considered as earned and not returnable ship and/or cargo lost or not lost" would lead to unjust enrichment of the shipowner was rejected by reference to "the established and continuing practice of the maritime world for at least the last one hundred and twenty-five years" and to the custom to insure the freight risk. See for further commentaries ROBINSON p. 5 et seq.; and POOR § 29.

[35] See, e.g., ROBINSON p. 584 et seq. referring to *Jordan* v. *Warren Insurance Co.* Fed Cas No. 7-524, 1 Story 342 at p. 353; *The Tornado* (1883) 108 U.S. 342 at p. 347; POOR § 28; and 80 C.J.S. 1064 et seq.

[36] See *The Eliza Lines* (1905) 199 U.S. 119, where the Supreme Court (four judges dissenting) accepted this principle emanating from English law; see *The Arno* (1895) 8 Asp. M.C. 5 C.A.; and *The Leptir* (1885) 5 Asp. M.C. 411 Adm.

bility of earning the freight by carrying the cargo to its destination.[37] While it is clear that the shipowner may recover the freight by substituting another vessel, it is not clear whether he has a *duty* to substitute other tonnage in order to perform the contract. In Illustration 3 to Restatement Contracts § 463 it is mentioned that an embargo on a *sailing* vessel during the time agreed for the performance of the contract does not require the shipowner to substitute a *steamship* "the variation in performance being too great". If this illustration is read *e contrario* it would seem that the shipowner, if possible, would have a duty to substitute a vessel of a *similar* type. And there is some support for such a principle in the case-law and the jurisprudential writing.[38]

§ 9.6. *Illegality and Trading with the Enemy*

The rules relating to illegality and trading with the enemy in American law correspond to those of English law. The same distinction is made between "bargains"[1] which are illegal under common law and bargains which have expressly been declared illegal in statute law. The former category contains a number of acts enumerated in Restatement Contracts §§ 513–89.

The introductory § 512 in Restatement Contracts explains that there is an "illegal bargain" when "its formation or its performance is criminal, tortious, or otherwise opposed to public policy". In American law, it is often stressed that, ordinarily, the *bargain itself* has no "object" which may be considered illegal; the real issue is whether the promises or the

[37] It is sometimes difficult to ascertain whether the charterer, expressly or impliedly, has agreed to accept the cargo at a substitute destination. See ROBINSON p. 588; POOR § 30 at note 7; *Linea Sud-Americana Inc.* v. *7295.40 Tons of Linseed* (*The Motomar*) 1939 AMC 757 SDNY; *The Saca* 1937 AMC 1153 SDNY; and *Barrell* v. *Mohawk* (1868) 75 U.S. 153.

[38] See POOR § 30 at note 3; WILLISTON § 1961; and *The Maggie Hammond* (1869) 76 U.S. 435. But cf. *The Benjamin A. van Brunt* 1928 AMC 1340; and FALKANGER, Konsekutive Reiser p. 59. However, in *The Maggie Hammond*, the shipowner was "entitled to charge the goods with the increased freight arising from the hire of the substitute vessel". The case is therefore compatible with the theory that the shipowner's duties under the original contract are transformed to duties resembling those of a forwarding agent.

[1] In American law, the term "bargain" is preferred to "contract", since "illegal contract" is considered a contradiction. See Restatement Contracts § 512, comment c; and CORBIN § 1373.

performance of the promises would constitute illegal acts.[2] Furthermore, it may be that neither the promises nor the performance of the promises are illegal *per se* but that one party, or both parties, have made the contract for an illegal purpose.[3] In such cases, it may be difficult to determine whether *both* parties shall be deprived of the possibility of invoking the contract or demanding restitution of, or compensation for, the performance which has been made under the relevant contract. The situation may be different if the party concerned merely has had some "knowledge" of the other party's intention as compared with the situation when he has actively taken part in order to attain the other party's illegal purpose behind the contract.[4] If he has merely had "knowledge" he may invoke the contract, provided the other party's intention with the contract does not entail severe crimes or highly immoral acts. In this regard, distinction is made between *malum prohibitum* and *malum in se*; the former expression refers to acts which have been prohibited in order to force the citizens of a society to behave in a manner which for some reason or another is considered desirable, while the latter refers to acts which are considered highly immoral *per se*. Although this distinction may be criticized,[5] it serves to show that it may be warranted to adopt a restrictive attitude towards the invalidation of contracts under the doctrine of illegality as soon as one or another prohibition flowing from the voluminous statutory legislation in modern society has been infringed.[6] Furthermore, it may be warranted to treat one of the parties more generously than the other when his behaviour has been less blameworthy; when he has not been *in pari delicto*.[7]

In American jurisprudential writing, the principle that a party must not "rely upon his own illegal act" to support his contractual claim[8] has been considered too rigid. According to CORBIN the decisive factor should not be the manner in which an "illegal element" is brought to

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[2] See Restatement Contracts § 512, comment d–e.

[3] See CORBIN § 1518.

[4] See CORBIN § 1519; and WILLISTON § 1756.

[5] See for a critical attitude to this distinction CORBIN § 1378.

[6] See, e.g., CORBIN § 1378 (p. 27): "The words of the statute must be interpreted, the purpose of the legislature weighed, and the social effect of giving or refusing a remedy considered."

[7] See CORBIN §§ 1378, 1534; and WILLISTON § 1789 (p. 5085).

[8] Restatement Contracts § 597.

the court's knowledge but rather the character of the relevant act seen in relation to the purpose of the prohibition.[9]

The principle that illegality renders the contract "null and void" does not seem to be upheld as stringently in American law as in English law. The main principle is the same[10] but American law seems more ready to allow exceptions from the rule.[11] In the words of CORBIN: "It is far from correct to say that an illegal bargain is necessarily 'void', or that the law will grant no remedy and will always leave the parties to such a bargain where it finds them[12] . . . few such bargains are utterly void of legal effect—in spite of numerous dicta to the contrary".[13] He asserts that the American "legal system provides a good variety of legal remedies and that they are applied by the courts with a high degree of flexibility".[14] The theory that the courts should not be required to interfere in immoral or dubious affairs is often criticized, since "it is not the part of either wisdom or justice for the representatives of the state to assume a 'holier then thou' attitude and to refuse a remedy in pious fear that the 'judicial ermine' might otherwise be soiled".[15]

The principles relating to trading with the enemy are basically the same in American law as in English law. Thus, there is a prohibition against trading with the enemy under common law[16] and, when determining the enemy character, the domicile is the decisive factor. A certain regard is paid to the nationality in determining who is an "alien enemy", since trading with a citizen belonging to an enemy state is prohibited even if he is a resident of the United States or a neutral state, provided the contract would strengthen the enemy's resources or diminish the military strength of the United States.[17] By special legislation the concept of "enemy national" has been introduced in order to classify such U.S. citizens who have been entered into the "black list".[18] In the same manner as in English law, the prohibition against trading

[9] CORBIN § 1533 (pp. 807-9); and cf. *St. John Shipping Co.* v. *Rank* supra p. 187.
[10] See Restatement Contracts § 598.
[11] See Restatement Contracts §§ 599, 602–4.
[12] CORBIN § 1534 (p. 816).
[13] CORBIN § 1535 (p. 821).
[14] CORBIN § 1373 (at p. 4). See also WILLISTON § 1762 (pp. 5002–3).
[15] See CORBIN § 1534 (p. 819).
[16] Restatement Contracts § 593.
[17] Restatement Contracts § 595.
[18] See DOMKE p. 445 et seq.

with the enemy is taken in the widest possible sense and applies if the contract in any way would confer benefits on the enemy.[19] This general, sweeping principle is usually considerably modified by special licenses.[20] The United States has also enacted a Trading with the Enemy Act of a more enumerative character than its English counterpart.[21] It is particularly interesting to note that the Act determines the exact time when there is a "war" in the sense of the Act and when the provisions apply: "The words 'beginning of the war', as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war."[22]

According to Restatement Contracts § 592 effect is given to foreign prohibitions as well, provided they emanate from a "friendly nation": "A bargain, the performance of which involves a violation of the law of a friendly nation, is illegal."[23]

There seems to be a difference compared with English law in determining the enemy character of corporations. American law seems to prefer the formal test, and to apply the law, where the "artifical person" concerned has been incorporated; the "control test", as applied in the *Daimler* case, is not adopted as a general principle.[24] Nevertheless, the "control test" is applied when the circumstances warrant such a procedure.[25] Furthermore, consideration is sometimes paid to the place where the corporation exercises its activity.[26]

[19] See Restatement Contracts §§ 594–5; and DOMKE p. 154 et seq.

[20] See DOMKE p. 296.

[21] Public Law No. 91, 65th Congress, October 6, 1917. See DOMKE p. 385 et seq.

[22] Section 2 of the Act.

[23] See for further explanations CORBIN, § 1518 at note 19, who invokes "comity and national welfare" as a support for this principle. The principle is supplemented by the rule *lex loci solutionis*, which makes the foreign law directly applicable when the contract shall be performed in a place where the bargain is considered illegal under the local law, and the rule *lex loci contractus*, upholding the law where the contract was entered into. See CORBIN § 1374 (p. 9); and WILLISTON § 1749 at note 4. Cf. HJERNER, p. 509, who questions the validity of the general statement in Restatement Contracts § 592.

[24] See supra p. 196; and for a critical attitude to this case WILLISTON § 1747 at note 11; and DOMKE p. 130, both referring to *Belin, Meyer & Co.* v. *Miller* (1925) 266 U.S. 457; and *Hamburg-American Line Terminal and Navigation Co.* v. *United States* (1928) 277 U.S. 138. See also DOMKE, Control p. 100 et seq.; and ROBINSON p. 657.

[25] See, e.g., the "freezing regulations", purporting to block foreign property during the war, commented upon by DOMKE p. 135.

[26] See DOMKE p. 445.

While English law has adopted the principle that a contract involving trading with the enemy is null and void and not merely suspended during the war, Restatement Contracts § 596 (c) declares that, in principle, the contract is only dissolved if the "prolonged delay in performance is likely to change the burden or nature of the performance promised".[27] However, this main rule is considerably modified by § 594 declaring that the contract will be dissolved, and not merely suspended, if performance after the war would confer benefits on the enemy already *during* the war, i.e. the same principle as in the English cases of *Clapham S.S. Co.* v. *Vulcaan*,[28] *Ertel Bieber* v. *Rio Tinto Co.*[29] and *Esposito* v. *Bowden*.[30]

[27] See WILLISTON § 1748 at notes 2–3.

[28] [1917] 2 K.B. 639 supra p. 198.

[29] [1918] A.C. 260 supra p. 198.

[30] (1857) 7 E. & B. 763 [110 R.R. 816] supra p. 198.

Chapter 4

CANCELLATION OF CONTRACTS OF AFFREIGHTMENT

§ 10. *Introduction*

§ 10.1. *Allocation of the Risk between Shipowner and Charterer*

The contract of affreightment is a complex contract type involving several obligations of the contracting parties, often protracted during a considerable period of time necessitating a co-operation between the parties in order to have the contract performed as intended. Whereas in sales law the risk of contingencies affecting performance can be more readily allocated to the seller or the buyer—the seller having to tender the object of sale and the buyer to pay the price—it is more difficult to determine which of the parties to a contract of affreightment shall bear the risk of contingencies preventing performance. As pointed out by SELVIG such contingencies "generally *materialize at a time when the carrier alone is in control of the actual execution of the contract*, no co-operation being required of the freighter at that stage".[1]

The Scandinavian Maritime Codes endeavour to solve this problem by distinguishing between "hindrances on the shipowner's side" (Sw. "hinder å bortfraktarens sida", §§ 126–30; "omständighet som beror av bortfraktaren", § 144; "dröjsmål å bortfraktarens sida", § 146) and "hindrances on the charterer's side" (Sw. "hinder å hans [befraktarens] sida", §§ 131–34).[2] However, it has not been possible to allocate hindrances caused by war and similar contingencies to the one side or the other and, therefore, the legal effects of such hindrances are treated separately under the heading "mutual right of cancellation" (Sw. "Om ömsesidig hävningsrätt", §§ 135–36). In Anglo-American law, no such distinction is made; the attention is focused on the contingency preventing performance of the "marine adventure" and directly on the very question of the allocation of the risk of it without first attributing the contingency to the one side or the other. SELVIG suggests that the distinction between hindrances affecting the shipowner and hindrances affecting the freighter

[1] SELVIG § 8.3 at note 35.

[2] The same method is used for the determination of the lay-time, SMC §§ 83–4.

should be abandoned. "Instead, one should emphasize that the marine adventure as such has been threatened by the occurrence of hindrances inherent in the performance of the carriage, the effect of which for the parties should probably not differ according to which of the two main components (ship or cargo) of that venture the contingency in question primarily affected."[3]

Although strong reasons speak for the method of concentrating *directly* on the relevant question—the allocation of the risk of the contingency and its legal effect—the distinction made in the Scandinavian Maritime Codes will be followed to the extent that it is necessary in order to explain the approach of Scandinavian law. Thus, after these introductory remarks concerning "the allocation of the risk between the shipowner and the charterer" (§ 10.1), some brief observations will be made on "statutory law and general principles" (§ 10.2), "hindrances affecting the vessel" (§ 10.3) and "hindrances affecting the cargo" (§ 10.4). The analysis of the typical situations will first concentrate on the statutory provisions of the Scandinavian Maritime Codes with regard to the legal effect of an increase of risk due to war and similar contingencies (§ 11.1). Subsequently, an account is given of the approach and case-law of Scandinavian and Anglo-American law relating to "loss or requisition of the vessel" (§ 11.2), "prohibitions and government directions" (§ 11.3), and "impracticability" (§ 11.4). Since, in Anglo-American law, there is no comparison to the extensive discussion in Scandinavian law predating the introduction of the statutory provisions regarding the charterer's excuse from performance in case of loss of the goods contracted for shipment, the position of Scandinavian and Anglo-American law with regard to "hindrances affecting the charterer" will be treated under separate headings in § 11.5.1. and § 11.5.2.

Chapter 4 concludes with some observations regarding the general questions of foreseeability (§ 12) and cessation of contract (§ 13).

§ 10.2. *Statutory Law and General Principles*

It seems that the principles that have developed in general contract law may suffice to solve the situations when the parties to a maritime contract claim that changed conditions have made their position under the contract unduly burdensome or perhaps even made their promises impossible to perform. In Anglo-American law, the doctrine of frustration

[3] SELVIG § 8.33 in fine.

which presently dominates general contract law, at least in England, originated within the field of maritime law. The elastic concept of frustration makes it possible to consider widely different situations, but at the same time only vague guidance is offered the courts as to how the concept shall be applied. The case-law provides, however, by now several precedents which give at least some support in the solving of typical problems that arise when the performance of a maritime contract is disturbed in one way or another. The principle that the court has no power to free a promisor from his contractual obligation, unless support can be found in the intention of the contracting parties, has induced the courts to decide each case strictly according to its own particular facts. Nevertheless, it is possible to establish some principles for typical situations that may serve as a guidance for the solution of future cases. It is true that the reference to the intention of the parties often—or even as a rule—is purely fictional, but the inductive method used in Anglo-American law seems to have resulted in a fuller consideration of all the relevant facts than has been possible in Scandinavian and Continental law.

It will be seen that the Scandinavian and Continental maritime codifications contain more or less exhaustive provisions intended to solve certain typical situations when the performance of the maritime contract has been disturbed by hindrances of various types.

The casuistic provisions of the German HGB (§§ 628–636) are followed by a general provision in § 637 to the effect that no other contingencies than those specifically enumerated shall have any effect on the rights and obligations of the contracting parties "es sei denn, dass der erkennbare Zweck des Vertrages durch einen solchen Aufenthalt vereitelt wird". The cited passage corresponds to the Anglo-American "frustration of purpose" and amounts to nothing more or less than a concession on the part of the legislator that the casuistic method simply does not suffice to cover the constantly varying circumstances. Also *within* the specific sections the same technique is sometimes used; e.g. in § 629 which deals with requisition of the vessel, blockade of the port of loading or discharge, prohibition of trading with the citizens in the port of destination, prohibition of export or import. This enumeration is concluded with "durch eine andere Verfügung von hoher Hand das Schiff am Auslaufen oder die Reise oder die Versendung der nach dem Frachtvertrage zu liefernden Güter verhindert wird".[1] At the CMI London conference in 1922, where a draft to an

[1] The same technique was used in § 159 of the SMC 1891/93 but was relinquished—or at least considerably modified—in connection with the amendment of the 1930 s. See infra p. 240·

International Code on Affreightment was presented, it was suggested that temporary hindrances causing frustration of purpose to one of the parties should give him a right of cancellation provided such purpose had been known to the other party. This suggestion was not contested during the conference but the very idea of an all-embracing Code was rejected as a much too far-reaching project.[2] The French Code de Commerce Art. 277[3] even expressly rejects the right of the parties to cancel the contract on account of only temporary hindrances but the strict attitude of the Code is considerably modified in practice by the device of a reference to the fictitious intention of the contracting parties.[4] It seems that modern French law opens the possibility of giving the suffering contract party a relief by using the same principles as have developed in the Anglo-American countries and corresponding rules in other countries.[5] In the Italian Maritime Code of 1942, the principle that either party may cancel the contract in the case of a *vis major* occurrence, preventing the performance during a substantial period of time, has been codified in art. 427 (hindrances before the vessel has sailed) and arts. 429, 430 (hindrances after the beginning of the voyage).

Although the provisions of HGB are more explicit than the corresponding provisions of other countries, it is admitted that they are *not* exhaustive.[6] The method of solving the cases which are not covered by the Code is to apply the provisions *ex analogia* and such a method is recommended in Scandinavian law also where the Codes, although similar to HGB, do not deal with the different situations quite so thoroughly. To the Scandinavian lawyer, an analogous application of the provisions may seem quite natural, since they are clearly an offspring of the general principles of impossibility, *vis major*, the doctrine of "presupposed conditions", adjustment on account of undue hardship etc., prevailing within contract law. And when the situation is too different to allow an application of the provisions *ex analogia*, there seems to be no reason to reject the possibility of supplementing the provisions by using the general principles.[7] Such a method has been expressly

[2] See CMI Bulletin No. 57, Antwerp 1923, pp. 12, 33, 59.

[3] The same provision appears in the Belgian Code de commerce art. 129.

[4] See BRUNET, La guerre et les contrats (Marseille 1917), p. 53; WAHL, Précis théorique et pratique de Droit Maritime (Paris 1924), p. 194 et seq.; and FIATTE, Les effets de la Force Majeure dans les Contrats (Thése, Paris 1932), pp. 58, 60, 62.

[5] See, e.g., RIPERT II § 1417.2; LE CLÈRE, Les chartes-parties et l'affrètement maritime (Paris 1962), pp. 58, 61; and RODIÈRE I § 131 at note 4.

[6] See, e.g., PAPPENHEIM II p. 516; CAPELLE p. 496 et seq., p. 508 et seq.; WÜSTENDÖRFER p. 352; and SCHAPS-ABRAHAM vorbemerkung zu §§ 628–641.

[7] See, e.g., KNOPH p. 188 et seq.; PLATOU p. 301; BRÆKHUS, Ishindringer p. 16; JANTZEN, Godsbefordring p. 324; LANG p. 381 et seq.; but cf. GRUNDTVIG p. 57, who

acknowledged in a case by the Supreme Court of Denmark, ND 1918. 319 *The Nordkap*, where both parties were considered entitled to cancel a contract concerning a round trip from England through the Panama canal to Chile, when the canal became blocked for a considerable period of time on account of a landslide. As will be seen below legislative history also provides support for the possibility of supplementing the Codes by using general principles.

The *travaux préparatoires* to ADHGB are especially enlightening on this point. In Preuss. Entw.[8] the technique of enumeration is used[9] but the first draft of ADHGB suggested that the relevant section should consist of a reference to the general principles of impossibility and illegality followed by an enumeration intended as a guidance for the courts.[10] In the second draft, however, the reference to the general principles was thoroughly discussed, whereby the advocates of the codification of the general principles strongly warned of "Die nachteiligen Folgen dieser Unterdrückung des Prinzips, wodurch man zu einer irreführenden Kasuistik gelange", but it was decided, by 6 votes to 5, that the reference should be deleted.[11]

If the method of regarding the provisions of the Codes as conclusive is rejected, it seems that there are two alternatives available for the under-

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concludes *e contrario* from the enumeration in the SMC §§ 159–161 (before the amendment in the 1930s) that other contingencies than those specifically mentioned, such as strikes, floods, blockades of harbours on account of ice, do not entitle the parties to cancel the contract.

[8] See p. 279 et seq.

[9] Following the traditional pattern of the Allgemeines Landrecht für die Preussischen Staaten §§ 1650, 1651, 1677, 1679.

[10] See Prot. HGB pp. 2370, 2390 et seq.

[11] See Prot. HGB p. 3949 et seq. Consequently, it is not surprising that the present German law allows analogous application of the codified provisions. See, e.g., the statement in HansGZ 1922 Nr. 84 (OLG Bremen): "Es handelt sich bei dieser Gesetzbestimmung nicht um einen Ausnahmefall, der eine ausdehnende Auslegung der analoge Anwendung nicht zuliesse, sondern um der grundsätzlichen Gesichtspunkt, dass eine derartige von hoher Hand oder durch Krieg drohende, wie höhere Gewalt wirkende Gefahr zum Rücktritt resp. das Schiff zum Aufsuchen eines Schutzhafens auf Kosten aller Intressenten berechtigt". Cf. the *travaux préparatoires* to SMC § 135, where the general reference to *vis major*, appearing in § 159, was not inserted, SOU 1936:17 p. 204: "I stället för det till sin innebörd något svävande och, vad angår påbud av vederbörande regering, som det vill synas mindre nödiga stadgandet om åtgärd av högre hand omnämnas vidare, i viss anslutning till bestämmelserna i konossementskonventionen art. 4 § 2, uppror, oroligheter och sjöröveri. Med den omformulering av stadgandet, som i övrigt härutinnan företagits, har åsyftats allenast att göra dess innebörd mera lättfattlig."

standing of the provisions; the one being to read them only as a *guidance* for the courts in the solving of typical cases, the other to see the enumeration—partly or wholly—as *special rules* enabling the courts to reach results which, in the absence of the provisions, would not have followed by the application of general principles.[12] No matter which of these alternatives is chosen, it is clear that a correct application of the statutory provisions or the supplementary general principles can only be performed when the special factual circumstances of the "maritime milieu" are closely considered and understood.

§ 10.3. *Hindrances Affecting the Vessel*

For commercial reasons it is desirable that the shipowner to a certain extent be free to avoid hindrances and dangers of various types threatening the vessel and that he have the right to disengage the vessel—if possible—when it has been caught in a trap where delay ensues or risk of damage to the vessel might arise. On the other hand, it is equally clear that he shall not be given the opportunity to extricate himself from the contract too easily for the purpose of taking advantage of a fluctuation in the shipping market or for some other purpose which deserves no consideration. Evidently the situation is widely different according to the type of maritime contract involved.

In *liner trade* it would be absurd to force the shipowner to proceed with his vessel to ports where serious risks or delay could be expected for some reason or another. When such contingencies occur while the vessel is *en route* to the port or already lying there, it seems reasonable to allow the vessel to discharge her cargo at a substitute port and to have the cargo transshipped therefrom by a suitable means of transport on to the destination. It must be borne in mind that, ordinarily, there

[12] The latter alternative is suggested by HAMBRO p. 148: "Civillagstiftningens allmänna föreskrifter om den verkan händelser av högre hand utöva på redan ingångna förbindelser skulle icke på långt när vara *tillräckliga* [my italics] att lösa de många invecklade rättsfrågor, som i detta avseende kunna uppstå med anledning av avslutade fraktavtal.... Sjölagen har därför måst meddela särskilda stadganden till närmare vägledning härvid, ehuru dessa väl torde i flera fall finnas nog knapphändiga för det praktiska behovet"; and DAHLSTRÖM, p. 189, who submits that maritime contracts usually warrant a more generous application of the general principles as it is often difficult to determine whether a particular contingency has affected only one of the contracting parties rather than the contract itself. Cf. also SELVIG § 8.33 in fine.

are numerous parties on the cargo side and that the shipowner owes the obligation to all of them not to let their assets be stuck in the vessel for a considerable period of time while the vessel is waiting for a temporary hindrance to disappear. And it appears from the usual clauses in the bills of lading that the shipowner is anxious to retain as wide a margin as possible to avoid delay or disadvantages affecting the vessel.[1]

Basically, the position of the shipowner will be the same in tramp shipping under *voyage charters*; also in this case he wants, of course, to avoid the risk of delay and to have his vessel free as soon as possible to meet other engagements. However, the position is different compared with liner trade in that there is usually only one party on the cargo side; the nature of the cargo often does not easily allow a transshipment, it may be necessary to have it discharged by the special equipment which the charterer possesses at the port of discharge, etc. The various clauses in the charterparties often provide that the shipowner has to follow the charterer's orders to proceed but only if the charterer assumes the risk of delay and other disadvantages, sometimes including damages to the vessel, which might follow from his orders.[2]

In *time charters* the position is quite different. Firstly, the charterer is the one to be suffering from delay as the vessel continues to be on hire with the exception of certain contingencies, either specified in an "off hire" clause or admitted at law.[3] Consequently, the situation will often arise where the charterer wants to cancel the contract, while the shipowner contests his right to do so. Furthermore, the time charters often cover a considerable period of time and if the market situation changes in one direction or the other, it is natural that the party ad-

[1] See supra p. 77 and infra p. 441. In a much-debated case by the Supreme Court of Sweden, NJA 1962.159 *The Gudur*, the vessel, bound for Malmö, discharged the cargo at Hälsingborg, a port five Swedish miles north of Malmö, and had the cargo transshipped to Malmö by rail. The case concerned the question whether the shipowner was subjected to the compulsory Hague Rules liability while the cargo was so transshipped, which was denied by the Supreme Court. The parties agreed, however, that the deviation, which was committed purely for the economical benefit of the shipowner, was not unlawful.

[2] See further RAMBERG, Unsafe ports and berths.

[3] See SMC § 144 where the obligation to pay hire is suspended on account of "circumstances attributable to the shipowner" (Sw. "omständighet som beror av bortfraktaren"). Cf. the more liberal attitude of HGB § 637, where the charterer escapes the obligation to pay hire when the vessel is out of service on account of "eine Verfügung von Hoher Hand".

versely affected by such a change seeks every opportunity available to withdraw from his engagement. The character of a "forward contract" will be even more accentuated if the parties have agreed that performance shall be *suspended* as long as a hindrance of a certain type makes it impossible or dangerous to perform the voyages prescribed in the charterparty and *postponed* until such time when the hindrance has ceased. Such suspension clauses were common in time charterparties concluded prior to the World Wars, and the courts subsequently had to decide whether the parties should still be bound by the contract, in spite of the changed conditions prevailing after the war. The contracts of affreightment where the shipowner has agreed to carry a certain quantity of cargo over a certain period of time (Eng. "general carrying contract"; Sw. "transportkontrakt") give rise to precisely the same kind of problems.[4] The character of the time charterparty raised the question in English law whether the doctrine of frustration could be applied to such charters at all, but, as mentioned above, any remaining doubts whether this could be done were eventually settled by the decision in *Bank Line* v. *Capel & Co.*[5] The duration of the charter in that case was considerably shorter than in *Tamplin (F.A.) S.S. Co.* v. *Anglo-Mexican Co.*[6], where the *charterer* was not awarded the relief of the doctrine of frustration which the *owner* obtained in *Bank Line* v. *Capel & Co.* The impression of a "common adventure" and thus a common sharing of the risks, to which the adventure may give rise, is more predominant in voyage charters than in time charters. There is no comparison in the chapter of the SMC, dealing with time charters, to the "mutual right of cancellation" expressed in § 135 regarding voyage charters. The shipowner is instead protected by the provisions in § 142 to the effect that he does not have to perform voyages under the charter which would give rise to dangers unforeseeable at the time of the conclusion of the contract.[7] A right of cancellation for the shipowner is prescribed in § 148, when the charterer fails to pay the freight in time, and the

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[4] See Lord SUMNER in *Larrinaga & Co.* v. *Soc. Franco-Americaine des Phosphates de Medulla* (1923) 16 Asp. M.C. 133 at p. 140 et seq.

[5] Supra p. 166.

[6] Supra p. 166.

[7] A provision to the same effect appears in the Italian Maritime Code art. 388 and also follows from the usual safe port clauses. See further RAMBERG pp. 32 et seq., 38 et seq.

charterer is in § 146 given the opportunity of cancelling the contract—under the same stringent requirements as provided for in § 126 with respect to voyage charters[8]—in case the vessel is put too late at his disposal. With the exception of these contingencies the chapter dealing with time charters does not contain any express provisions allowing the cancellation of the contract, but the provisions in §§ 145 and 147 seem to presuppose that the parties shall be awarded a right of cancellation if the vessel becomes an actual or constructive total loss.[9] Nevertheless, it seems that the sparse provisions of the Code could be supplemented by general principles with regard to time charters also, but it is evident that they may only be applied in exceptional cases.[10]

§ 10.4. *Hindrances Affecting the Cargo*

The circumstances preventing and endangering the voyage may sometimes affect the vessel and the cargo at the same time and almost to the same degree; e.g. the danger of destruction or confiscation on account of war, blockade of the ports, etc. In such cases it is, of course, natural that both parties shall be awarded the possibility of cancelling the contract. This principle of mutual right of cancellation appears clearly in SMC § 135. However, when the hindrance affects the vessel or the cargo only, it is no longer necessary to apply the principle of reciprocity. Nevertheless, the charterer has in the present SMC been given a rather extensive right to withdraw from the contract, without paying any freight, in case his purpose is frustrated on account of the prohibition of export or import or the perishing of the specific goods agreed to be carried (or the perishing of the entire *genus*) and similar contingencies, provided, however, that they could not or should not have been taken into account at the time of the conclusion of the contract (§ 131.2). On the other hand, in SMC § 126, governing the charterer's possibility of cancelling the contract in case the vessel's arrival in the port is delayed, the same general idea is expressed that only such delay which would frustrate his purpose gives him the right of cancellation, and under the further requirement that the *shipowner* could have or should have foreseen such a frustration ensuing from the delay. If, however, the charterparty determines a fixed time when the vessel is to be ready, *any* delay entitles the

[8] See infra p. 264.

[9] Cf. GRAM pp. 192, 195; and JANTZEN, Tidsbefragtning p. 25.

[10] See, e.g., SOU 1936:17 p. 220.

charterer to cancel the contract (§ 126.2). The possibilities for the charterer of cancelling in case of the vessel's late arrival in the port of loading have been considered too restricted by GRÖNFORS, who stresses the charterer's dilemma when, as seller, he has concluded a c.i.f.-contract and the buyer cancels this contract on account of the delay.[1] This is bad enough, since the charterer, as a rule, has no right to compensation from the shipowner.[2] But the charterer's position becomes even worse if he also must pay the whole freight to the shipowner for a transport which has become completely useless for him. The shipowner's argument is, of course, that it is impossible to determine exactly when the vessel arrives at the port and that delays often happen on account of adverse weather conditions (fog, storms, etc.). Therefore, it is a better solution if the charterer informs the shipowner that the vessel has to be ready by a certain specific time thereby giving the shipowner the opportunity of deciding if he wants to assume such a fixed time obligation.[3] The c.i.f.-seller may also, of course, protect himself by a suitable stipulation in the contract of sale.

Prior to the amendment of the SMC in the 1930s, the Codes did not contain any provision which entitled the charterer to cancel the contract and escape the obligation to pay the freight in case the specific goods perished before loading. On the other hand, the charterer could free himself from the contract by paying a reduced freight (usually half freight; so-called "fautefrakt"). The question whether the charterer should be allowed the benefit of withdrawing from the contract, in case of the perishing of the goods before loading, was discussed at length in the *travaux préparatoires* to the SMC of 1891/93 but it was considered premature at this time to follow the example of ADHGB, where the charterer had been awarded such a right.[4]

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[1] Befraktarens hävningsrätt p. 23.

[2] See SMC § 130; the shipowner is not liable if he can prove that no negligence on the part of himself or his servants has caused the delay. In addition, the contracts of affreightment usually contain clauses whereby the shipowner exempts himself from any liability for delay (with the exception of his own gross negligence).

[3] See RISKA p. 238; and JANTZEN, Skibsforsinkelser før reisen, ND 1935 pp. 337–53 (at p. 347).

[4] See Swedish Betänkande 1887 p. 119; Danish Forslag 1891 til Sølov p. 83; and Norwegian Udkast 1890 til Sølov p. 188. It deserves mentioning that the *travaux préparatoires* to ADHGB show a considerable hesitation on this point. See Prot. HGB p. 3947 et seq.

In Scandinavia, the charterer's right of cancellation in case of the perishing of the goods was first codified in the Finnish Code of 1873. In the extensive discussion concerning the charterer's right of cancellation in case of the perishing of the goods, the maxim *impossibilium nulla est obligatio* has often been invoked, but for this purpose one has had to resort to the strained argument that the charterer's principal duty was the tendering of the cargo rather than the paying of the freight.[5] Another argument often used was the theory that the shipowner lost his opportunity of earning the freight by the perishing of the goods, but this reasoning seems to amount to a *petitio principii*; the freight risk when the cargo perishes before loading is precisely the question to be decided, and there is nothing to prevent the conclusion that the failure of the charterer to tender the goods for shipment must always be at his own risk.[6] In Swedish jurisprudential writing, KÔERSNER has tried to solve the question by the application of the doctrine of presupposed conditions,[7] but even this famous doctrine leaves the question of the distribution of risk entirely open. There is, however, a case by the Supreme Court of Sweden, NJA 1906.124, where the charterer was relieved from his obligation to pay the freight when the cargo intended for shipment perished in a fire before loading, and this case was decided *prior* to the codification of a charterer's right of cancellation in such instances. The Supreme Court, however, referred to a specific force majeure clause in the charterparty and it is therefore uncertain whether the case should be understood as an expression of a general principle.

Summing up, it seems that the charterer's right of cancellation in case of the perishing of the specific goods before loading cannot be satisfactorily explained by reference to some general principle or as a parallel to the shipowner's right of cancellation when the vessel is lost. As pointed out by RODHE, the discussion in jurisprudential writing tends to obscure the plain explanation that it has been considered *reasonable* to allow the charterer to cancel the contract when, in a specific case, it has become less profitable, or not profitable at all—a standpoint which, compared with the stringent adherence to *pacta sunt servanda* prevailing at all events at the time of the introduction of the principle in ADHGB, must

[5] See Prot. HGB p. 433.

[6] Strongly argued by HALLAGER p. 133.

[7] See KÔERSNER, De nordiska sjölagarna, TfR 1919 p. 59.

have been considered rather unorthodox.[8] It appears from the *travaux préparatoires* to the 1936 amendments of the Swedish Maritime Code that the new rule was the result of an evaluation of the conflicting interests based on right and reason; the theoretical explanations were left aside.[9]

In Anglo-American law, the charterer has been allowed the benefit of withdrawing from the contract *in some instances* when his purpose has become frustrated. The origin of the doctrine stems from cases where the charterer did not want to accept a delay in the performance of the voyage upsetting his arrangements and, although restrictively applied, the principle has been accepted ever since.

The proper placing of the risk of contingencies affecting the position of the contracting parties may, however, warrant a different attitude in cases where the contingency only affects the cargo and not the marine adventure as such[10], e.g. in cases of the perishing of the cargo, refused import- or export licences, difficulties in providing the cargo and getting it ready for loading, etc. In these instances, the risk primarily rests with the charterer, who ordinarily seeks to protect himself by protective clauses in the contract. But the case law shows that the principle of accepting "the perishing of the thing" as an excuse[11] has been acknowledged when the *specific* cargo to which the contract refers has perished or become struck by a hindrance before shipment.[12]

It is sometimes stressed that the doctrine of frustration only comes into operation when there is a frustration of the "common intention" of the contracting parties. And when no "common intention" could be said to have existed, the courts have sometimes refused the charterer the benefit of the doctrine of frustration, e.g. in cases of failure to get the necessary licence[13] or prevention from procuring the cargo on account of strike.[14]

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[8] See RODHE, Jämkning p. 28 note 5.

[9] See SOU 1936:17 p. 190.

[10] Cf. SELVIG § 8.33 in fine.

[11] See *Taylor* v. *Caldwell* supra p. 163.

[12] See *Aaby's Rederi A/S* v. *Lep Transport* (1948) 81 Ll.L.Rep. 465 and infra p. 382.

[13] See, e.g., *Hellenic Lines, Ltd.* v. *Maple Leaf Milling Co.* 1951 AMC 1692 Canada, Province of Nova Scotia. Reference was made to *Blackburn Bobbin Co.* v. *Allen (T.W.) & Sons* [1918] 2 K.B. 467.

[14] See, e.g., *United States of America* v. *Columbus Marine Corporation (The Schroon)* 1926 AMC 178 SDNY and infra p. 383.

When there is a contingency acting *directly upon the cargo* or an unusual or extraordinary interruption or prevention of the *act of loading or discharging*, the charterer has sometimes succeeded to invoke the doctrine of *vis major* and impossibility as alternatives to the doctrine of frustration. This is particularly true in American law where the doctrine of impossibility is not embraced by the doctrine of frustration in the same manner as in English law.[15]

§ 11. *The Type of the Change of Circumstances*

The dangers and obstruction to merchant shipping created by war have already been dealt with in chapter 2. In Scandinavian law, the risk of damage to the vessel and her cargo has been considered to deserve special attention in the Codes (§§ 135, 142) and it is therefore natural to start with an analysis of the "increase of danger" prerequisite appearing in those sections of the Codes (§ 11.1-6). As similar results may be arrived at under the Anglo-American principles of law, an account is given in § 11.1.7 of some cases and opinions expressed in the jurisprudential writing with regard to the possibility of releasing the parties in cases of anticipated risks of damage to the vessel or the cargo. War also gives rise to loss or requisition of vessels, and the particular legal problems arising under the contract of affreightment in such instances will be treated in § 11.2. Modern warfare will no doubt also result in an almost total governmental control of commerce and therefore frequent prohibitions and interferences by authorities are to be expected, which in a considerable degree will affect the position of the parties to contracts of affreightment. These problems will be discussed in § 11.3. Under the heading "Impracticability" (§ 11.4) situations when delay or other hindrances make the contract unprofitable will be treated. Hindrances affecting the cargo are treated separately in § 11.5.

§ 11.1. *Increase of Danger*

§ 11.1.1. The legislative history in Scandinavian law

A brief historical review is necessary in order to explain the relevant sections, §§ 135 and 142 of the present Scandinavian Maritime Codes. In connection with the amendments in the 1930s § 135 replaced a part

[15] See supra p. 208 and infra p. 385.

of § 159, and § 142 was inserted at the same time in the new chapter on time charters. By § 159 the Scandinavian countries had earlier adopted the same rule with regard to cancellation of charterparties on account of war and similar contingencies.[1]

While Danish law earlier did not have any provision corresponding to § 159, there existed provisions in § 51 of the Norwegian Maritime Code of 1860 and § 118 of the Swedish Maritime Code of 1864 which could serve as a basis for the drafting of § 159. The wording of § 159 is primarily based on § 118 of the Swedish Code which, in turn, resembled art. 631 of ADHGB (1861), subsequently appearing in HGB (1897) § 629.

A provision relating to hindrances on account of war is also to be found in the Swedish Maritime Code of 1667, Skiplegobalk (Book on Affreightment), Chapter 9, which, undoubtedly, constituted the legislative background of § 118 of the Code of 1864, although the text of ADHGB has exercised a greater influence than the text of the Swedish Code of 1667.[2] It might also be worthwhile mentioning that the provisions of the Swedish Code of 1667 have been influenced by Dutch Ordinances of 1551 and 1563.[3] It appears from marginal notes in the draft of the Swedish Code that art. 37 of the Ordinance of 1551 and

[1] The Finnish Code of 1873 § 99 expressed the same general idea but had a different wording, similar to § 118 of the Swedish Maritime Code of 1864.

[2] Cf. ASK, p. 40, who maintains that art. 631 undoubtedly constitutes a *source* of § 118 of the Swedish Code of 1864 and § 159 of the Swedish Code of 1891. See also DAHLSTRÖM p. 194 et seq.

[3] Provisions entitling the shipowner to withdraw from the contract also appear in Consolato del Mare. They reflect the typical instances when the shipowner in the Middle Ages desired to be free from the bonds of the contract in order to attend to other more important affairs. See especially chapter cxlix (How the managing owner ought to go on the voyage, except in certain cases): "The managing owner of a ship or vessel who has let his ship or vessel to merchants or to others cannot decline to go on the voyage in person, unless he has so stipulated at the commencement when he let his ship to the merchants. And if he remains behind on the voyage without the consent of the merchants, he is bound to compensate and restore all the loss which the said merchants shall sustain in that voyage, and which they shall have sustained through the default of the managing owner, who has remained behind. And if the managing owner remains behind on that voyage with the consent of the merchants, he is not liable for any damage which they may sustain. But he is bound to substitute in his place a person on board the ship, who shall be liable to the said merchants for all the arrangements which he shall have made with them, and the master whom he shall substitute for himself shall be known to the mate, and the mate is bound to the merchants by the oath which he has taken to say the truth, whether that person is competent

Titre II, art. IV, of the Ordinance of 1563 have been considered by the Swedish legislator.[4] In order to simplify a comparison between the various texts, which apparently have played a more or less significant role in the legislative process, a short tableau will be given:

The Dutch Ordinance of 1551 art. 37

S'il arrivoit qu'un patron se fût engagé à transporter des marchandises hors de nos ports pour l'étranger, en un lieu déterminé, qu'ensuite il s'élevât une guerre, ou que l'autorité supérieure de ce pays mît le navire en interdiction, qu'en conséquence le patron fût obligé de renoncer à son voyage, chaque intéressé sera délié de son engagement, sauf son action en dommages intérêts contre qui de droit.[5]

The Dutch Ordinance of 1563 Titre II art. IV

Lorsqu'un navire étant chargé dans nos ports pour l'étranger, le patron, avant de commencer son voyage, sera requis par l'autorité supérieure de servir avec son navire, moyennant un salaire ou autrement, ou lorsque, par suite d'une guerre ou d'autres obstacles majeurs, on ne pourra faire le voyage convenu, le patron et les négocians seront réciproquement dégagés les uns envers les autres.[6]

The Swedish Maritime Code of 1667 Skiplegobalk, Chapter 9; Om hinder i skiplego, de av högre hand komma.

Nu är frakt inrikes sluten och certeparti gjort, kommer sedan fejd och örlog upp, eller skepp tages i Kronans tjänst, eller häftas eljest med beslag för Kronans skuld, eller något annat fel händer, därav resan åtras, skepparens och

to fill the place of the managing owner. And if he be not a competent person, the managing owner is bound to substitute another person, who shall be competent, in his place. Nevertheless, the managing owner may decline to go on the voyage for four things, that is, from illness, or in order to take a wife or in order to go on a pilgrimage, which he has made a vow to perform before he let his ship or vessel, or owing to an embargo of the local authorities. And whichever it may be of these four things, it must be without fraud, and no managing owner is excused for any of the above reasons from finding a substitute in his place in the manner above said. And this chapter was made, for many a merchant freights his goods to a certain managing owner of a ship from friendship which he has towards him, or from the good character which men have given of him, and if the merchant knew that the managing owner would remain behind on the voyage, he would not have freighted his goods or put them on board the ship, if he does it more than once, he ought not to pay any freight." Cf. also chapters xxxv, cxlvi, cxlvii, clxxxiv, clxxxv, clxxxvi, clxxvii, ccxxxvii, cclii. (Black Book of the Admirality III p. 109 et seq.)

[4] I am indebted to SELVIG for his observations with regard to the marginal notes in the respective drafts to the Code. See SELVIG § 5.2.; and id., Forarbeidene til den svenske sjøloven av 1667, SvJT 1963 pp. 284–5.

[5] PARDESSUS IV p. 58.

[6] PARDESSUS IV p. 65.

befraktarens fel förutan, vare då de båda skilda från varandra, allenast den ena hjälper den andre draga hälften av den kostnad som i dylikt fall gjord är. — Nu är skepp fraktat å en ort och vill lasta å en annan, timar där någon sådan händelse köpmannens vållande förutan, det vare sig före eller sedan godset lastat är, have då skepparen hälften av den frakt han tingat hade. — Nu fraktas skepp utrikes till någon ort under Sveriges Krona, och å den samma främmande ort sedan förbjudes att föra ut sådana varor, då är fjärdedelen av frakten förtjänt. — Nu tages samma skepp i tjänst hos överheten på den främmande orten, för viss lön; vare då befraktaren fri från hela frakten, och give intet därav ut. (Free transl. When the vessel has been chartered for a domestic voyage and war or hostilities arise or the vessel is requisitioned or else restrained by the government, or some other contingency prevents the performance of the voyage, without the fault of the shipowner or the charterer, in such case the contract is off although the parties shall each assume half of the costs incurred. When the vessel has been chartered in one place and is to load the cargo in another, and a contingency of the same kind as the aforementioned occurs without the fault of the merchant, the shipowner is entitled to half the freight irrespective of whether the cargo has been loaded or not.— When the vessel has been chartered to a place abroad under the Swedish sovereign, and the vessel is prohibited from exporting the relevant merchandise, the shipowner is entitled to one fourth of the freight.—When the vessel is requisitioned by the government in the foreign place for a sum of money, the charterer is relieved from paying any part of the freight.)

See for a case decided according to this provision, *The Sophia Ulrica*; decision of the Supreme Court of 25 January 1808 (Riksarkivet, reg. 1808 Del I), where the master refused to perform the contract on account of hostilities between Sweden and France. The Supreme Court, affirming the decision of Svea Court of Appeal, held the shipowner liable for non-performance, mainly because the war risks were foreseeable at the time of the conclusion of the contract: "Likväl och emedan den emellan Saton [skepparen] och Westin [befraktaren] genom berörda certepartiet ingångna frakthandling blivit slutit den 3 oktober 1805 då efter vad allmänt var kunnigt, samt berörda nådiga varning och kungörelse jämväl innehöll, svenska handelsskepp redan längre tid blivit oroade och även uppbringade av franska kapare samt osäkerheten och äventyret för svenska sjöfarten desto hellre varit enahanda när fraktslutet upprättades och resan av Saton inställdes, som nämnda på Kungl. Maj:ts nådiga befallning de handlande meddelade underrättelser icke innehöll något formligt avrådande för svenska skeppare att gå till Frankrike utan endast en varning, som muntligen och med försiktighet borde lämnas för oförutsedda och då ännu tvivelaktiga händelser, samt Kungl. Maj:t genom berörda dess nådiga kungörelse blott givit tillkänna att Kungl. Maj:t av flera skäl var missnöjd med franska regeringens förhållande beslutit att med en del av dess armé övergå till Pommern för att där agera med det eftertryck och på det sätt, omständigheterna medgåve, varigenom politiska ställningen emellan Sverige och Frankrike ej kunde anses hava förändring undergått, helst något sådant förklarande från Sverige till Franska regeringen, eller tvärtom,

varmedelst någondera av dessa makter tillsagt den andra krig, icke blivit gjort, i följd varav och då några fientligheter emellan Sverige och Frankrike icke heller förrän det sistlidna året blivit utövade och det i sjölagen 9 kapitlet skeppslegobalken stadgas, om fraktsluts hävande när uppenbar fejd eller örlog utbruste, i förevarande fall, enär ifrågavarande fartyg dessutom icke till fransk eller till holländsk utan till neutral hamn varit bestämt, icke tillämpas kan . . ."

The Norwegian Code of 1860 § 51

Indtræffer det, efterat en Befragtning er afsluttet, men dog forinden Skibet er afseilet fra Ladningsstedet, at Reisen formedelst Udbrud af Krig enten aldeles ikke eller kun med øiensynlig Fare kan foretages, have begge Parter Ret til at forlange Befragtningen ophævet, om endog Ladningen allerede er indtaget, uden at Erstatning fra nogen af Siderne kan fordres. Bliver Reisen derimod forhindret ved nogen anden uventet Begivenhed, saasom Forbud mod Varers Udførsel eller Indførsel, forholdes efter de almindelige Regler, som ovenfor i dette Kapitel ere givne.

(Free transl. "If, after the vessel has been chartered but before the vessel has sailed from the place of loading, it appears that the voyage on account of the outbreak of war cannot be performed at all or only be performed with apparent danger, both parties shall have the right to cancel the contract without compensation to the other even if the cargo has already been loaded. However, if the voyage is prevented from being performed by some other contingency, such as prohibitions of export or import, the matter shall be decided according to the general rules laid down above in this chapter".)[7]

The Swedish Code of 1864 § 118

Om, före fartygets avresa från befraktningsorten, (1) fartyg och gods, eller ettdera, genom utbrott av krig bliva ofria; (2) den hamn, från vilken resan skall börja, eller till vilken den är ställd, genom blockad blivit stängd från all handelgemenskap, eller det gods, som skall inlastas eller redan är inlastat, blivit till utförsel i befraktningsort eller till införsel i bestämmelseort förbjudet; (3) fartyget tages i kronans tjänst, då äge vardera kontrahenten rätt att fraktslutet häva och drage var sin kostnad och skada, som därav tima kan. I det fall, som i mom. 3 omförmäles, njute dock rederiet och befraktaren efter omständigheterna ersättning av allmänna medel.

(Free transl. "If, before the vessel has left the place where it has been chartered (1) the vessel and/or the cargo become unfree owing to the outbreak of war; (2) the port where the voyage is to begin or the port of destination has been closed to all commerce by blockade, or the goods which are to be loaded or

[7] The origin of this section is difficult to trace with certainty; perhaps the provisions of the Swedish Code of 1667 constitute the main background. The solution does not correspond to art. 276 of the French Code de Commerce (1808), which, however, in other respects has had an influence on the Norwegian Code.

already have been loaded are affected by a prohibition of export or import; (3) the vessel is requisitioned, then both parties shall have the right to cancel the contract without compensation to the other. However, in the case of the requisition of the vessel the shipowner and the charterer are entitled to such compensation by the authorities as may be reasonable under the circumstances".)

The Scandinavian Maritime Codes of 1891/93 § 159.1

Om före fartygets avgång från den hamn, där resan skall börja, fartyget eller godset genom utbrott av krig bliver ofritt, fartyget belägges med embargo, den hamn, där resan skall börja, eller den, dit den är ställd, genom blockad stänges, det gods, befraktningen angår, förbjudes till utförsel i avlastningsorten eller till införsel i bestämmelseorten, eller fartygets resa eller godsets försändning genom annan åtgärd av högre hand hindras; då äge såväl befälhavaren som befraktaren rätt att häva fraktslutet; och drage var sin kostnad och skada.

(Free transl. "If, before the vessel sails from the port where the voyage is to begin, the vessel or the cargo through outbreak of war become unfree, the vessel is requisitioned, the port where the voyage is to begin or the port of destination are closed through blockade, the cargo to which the contract relates is prohibited from being exported from the port of discharge or from being imported into the port of destination or the voyage or the conveyance of the cargo is prevented by another *vis major* contingency, then the master as well as the charterer shall have the right to cancel the contract and each party shall carry his own loss resulting therefrom".)

The Scandinavian Maritime Codes § 135 (after the amendment of the 1930s)

Finnes efter fraktavtalets ingående att genom resans företagande fartyg eller last skulle utsättas för att, genom uppbringande eller eljest, drabbas av skada i följd av krig, blockad, uppror, oroligheter eller sjöröveri eller att sådan fara väsentligen ökats, äge såväl bortfraktaren som befraktaren häva avtalet; och drage var sin kostnad och skada.

Kan faran avvärjas genom att en del av godset kvarlämnas eller lossas, må avtalet allenast beträffande denna del hävas. Bortfraktaren äge dock, där det kan ske utan skada för annan befraktare, häva avtalet i dess helhet, såvida ej, på anmaning, ersättning för fraktförlust och annan skada gäldas eller säkerhet därför ställes.

Stadgandena i 129 § och 134 § andra stycket skola äga motsvarande tillämpning.

(Transl. "The shipowner as well as the charterer shall have the right to cancel the contract of affreightment provided, after the time of the conclusion of the contract, it appears that the performance of the voyage will expose the vessel or the goods, through seizure or otherwise, to the risk of being damaged on account of war, blockade, riots, civil commotion or piracy, or that such risks have substantially increased, in which case each party shall bear his cost or damage.

If the danger can be averted by discharging or leaving a part of the goods behind, the contract may only be cancelled with respect to such goods. The

shipowner may, however, where so can be done without damage to other charterers, cancel the entire contract provided he does not get requested compensation for loss of freight or other damage or security therefore.

The provisions of § 129 and § 134.2 shall be correspondingly applied." It should be observed that the Norwegian text of § 135 is different from the Danish, Finnish and Swedish texts; see infra p. 406.)

A comparison between the texts leaves the impression that § 135 is patterned on the model of § 51 of the Norwegian Code rather than on § 159, but it must be borne in mind that in connection with the amendments in the 1930s § 159 was split in two parts and that the part dealing with hindrances affecting the cargo was inserted in § 131.2 so reading:

"Befraktaren vare dock från ersättningsskyldighet fri, där möjligheten att avlämna, fortskaffa eller i bestämmelseorten införa godset må anses utesluten i följd av omständighet, som ej bort av befraktaren vid avtalets ingående tagas i beräkning, såsom utförselförbud, införselförbud eller annan åtgärd av myndighet, undergång av allt gods av det slag avtalet avser eller därmed jämförlig händelse, eller där det bestämda gods avtalet avser gått under genom olyckshändelse. Skulle godsets befordran medföra väsentlig olägenhet för bortfraktaren, äge jämväl han frånträda avtalet utan ersättningsskyldighet. Den som vill åberopa omständighet som nu är sagd give därom meddelande utan oskäligt uppehåll.

Är vid lastningstidens utgång icke något gods avlämnat, anses befraktaren hava frånträtt avtalet."

(Transl. "The charterer shall be free from his duty to pay compensation if the possibility of delivering or carrying the goods or entering them at their destination may be deemed prevented by circumstances which the charterer should not have taken into account at the time of the conclusion of the contract, such as prohibitions of export or import or other measure of authorities, accidental destruction of all goods of the kind to which the contract relates, or similar circumstances, or if the specific goods to which the contract relates have been destroyed by accident. If the carriage of the goods should be materially inconvenient to the shipowner he may also cancel the contract without having to pay compensation. The party who wishes to invoke circumstances as aforesaid shall give notice to the other without unreasonable delay.

If no goods have been delivered by the end of the time allowed for loading, the charterer shall be deemed to have cancelled the contract." The Norwegian text is different from the texts of the other Scandinavian Codes; see infra p. 406.)

Nevertheless, it is clear that the special increase of danger prerequisite prior to § 135 in its reading after the amendments in the 1930s only existed in § 51 of the Norwegian Code of 1860 ("aldeles ikke eller kun

med øiensynlig Fare[8] kan foretages"). And it appears clearly from a decision of the Supreme Court of Norway, Rt. 1880.782, that an *increase* of danger, as compared with the situation at the time of the conclusion of the contract, is necessary in order to bring § 51 into operation. The circumstances in that case were as follows.

The Fox, The Glimt and The Minion, all Norwegian vessels, should according to charterparties dated 13 and 15 August, 1873, proceed with cargo consisting of wood products from Sundsvall, Söderhamn and Umeå to Bilbao. Referring to an official consular report of the conditions prevailing in Bilbao, the *charterer* demanded the cancellation of the charterparties owing to the dangers created by the civil war at that time raging in Spain. This war, however, had been going on since 1872, and the court had to decide whether § 51 of the Norwegian Code of 1860 was applicable. The shipowner maintained that § 51 required an *outbreak of war*, whereas, in the actual case, the war existed already at the time of the conclusion of the charterparties. The Supreme Court held that § 51 could be applied and that the charterer was entitled to cancel the contracts owing to the considerable change of circumstances subsequent to the conclusion of the contract. However, it was stressed that, in any event, such a broad application of § 51 was warranted in the case of a *civil war* and the question of how the matter should be decided in the event of a *regular war* was left open.[9] Two dissenting judges saw themselves unable to exchange the words "outbreak of war" for "evolution of a state of war".[10]

Although the text of § 135 is quite different from the relevant part of § 159, it cannot be seen from the *travaux préparatoires* that any change of the law was intended.

§ 11.1.2. SMC § 159 and § 135—a comparison

As compared with the text of § 159, before the amendment in the 1930s, the text of § 135 on the one hand *limits* and on the other *increases* the right of the parties to cancel the contract. The prerequisite that the parties may cancel the contract in cases of *vis major* hindrances (Sw. "far-

[8] "*apparent danger*".

[9] At p. 782 in fine. Cf., however, the dictum of BRANDT J: "I understand the first part of § 51 of the Maritime Code in such a manner that *the total state of affairs* must have occurred subsequent to the conclusion of the contract, but not that the war necessarily must have *broken out* afterwards" (Norw. "Jeg forstaar Søfartsl.s § 51 første Passus saaledes, *at den samlede Situation* maa være indtruffet efter Befragtningens Afslutning, men ikke just at Krigen nødvendigvis skal være *udbrudt* efter").

[10] See the dictum by LØVENSKJOLD J. at p. 785 and the concurring views by LAMBRECHTS J. at p. 791.

tygets resa eller godsets försändning genom annan åtgärd av högre hand hindras") has not been inserted in § 135, although it appears in § 131.2 with regard to hindrances affecting the charterer. Under the present Scandinavian law, the shipowner is not in a position to argue the support of any other explicit provision in the SMC for his right to cancel, except in cases of the charterer's breach of contract, than § 128 providing that the contract ceases *ipso jure* when the vessel is lost or declared a constructive total loss. However, as already mentioned, the possibility of arguing the provisions of the Code *ex analogia* and the application of the general principles, allowing cancellation or adjustment of contracts in cases of changed conditions, will no doubt be available to the shipowner when he is faced with a contingency not expressly regulated in the Code.[11] Furthermore, the text of § 159 allowed a cancellation of the contract when the vessel or cargo had become "unfree" through the outbreak of war, i.e. could be confiscated according to the rules of international law relating to contraband of war.[12] The Code did not expressly provide that there must also be a real *risk* of the confiscation of the vessel or the cargo.[13] On this latter point § 135 is clear enough; only when the vessel or the cargo through the performance of the voyage would be subjected to a risk of being damaged may the parties cancel the contract. The reference to the concepts of international law (contraband and blockade) have in § 135 lost their character of prerequisites for the right of cancellation, they are now only mentioned among the examples of the risks ("uppbringande" and "blockad", i.e. "seizure" and "blockade").

The text of § 135 only concerns the situation when the vessel or cargo be subjected to the risk of *being damaged* due to the circumstances mentioned as examples or similar contingencies.[14] The introduction of such a prerequisite seems, in fact, to be something entirely new in the legislation relating to contracts of affreightment. It should be observed that the provision of the Norwegian Code of 1860, mentioning a "danger-" prerequisite, simply states that a right of cancellation is available when "the voyage, through the outbreak of war, cannot be performed at all or only with an apparent danger" (Norw. "Reisen formedelst Udbrud

[11] See supra p. 224 and cf. the cases infra p. 250.

[12] See supra p. 132.

[13] But cf. HGB § 629 "und der Gefahr der Aufbringung ausgesetzt würden".

[14] See infra p. 256.

af Krig enten aldeles ikke eller kun med øiensynlig Fare kan foretages"), but it does not state what *kind* of danger. While § 51 of the Norwegian Code might include danger of unreasonable delay and other inconveniences, the text of § 135 of the present SMC only refers to physical damage to the vessel or the cargo. This being so, it seems surprising that § 135 mentions *seizure* (Sw. "uppbringning") as an example of a case when the vessel or the cargo is subjected to the risk of being damaged, since, according to international law, a seizure in principle must be performed in such a manner as not to cause damage to the prize.[15] Nevertheless, the deplorable warfare during the World Wars has proved that the rules of international law provided a most unsatisfactory protection for merchant shipping. The risks, however, did not arise on account of the seizure of the vessels but rather because the belligerents did *not* care to seize them but preferred to destroy them instead, thereby violating the rules of international law.[16] When the vessel or the cargo is seized, the owner will risk losing his property if a prize court renders an award of confiscation, but this seems to be something else than physical damage to the property.

It seems reasonable to suggest that a person shall not be obligated to subject himself, his servants or his property to such risks of being injured through the performance of the contract as could not or should not reasonably have been foreseen at the time of the conclusion of the contract, provided, of course, that the very purpose of the contract does not concern hazardous activities.[17] In other words, such risk of physical damage to persons or property might perhaps give rise to a *special ground* for a cancellation of the contract in addition to the remedies under the general principles of impossibility, *vis major*, the doctrine of presupposed conditions, etc., which mainly consider the economy of the contract and not the "non-economical" aspects. Especially in case of risks of personal injuries such a special ground for cancellation may be warranted and, in fact, it has been expressly mentioned in the comments to Restatement Contracts § 465.[18]

The present Scandinavian Codes relating to seamen contain in § 36 a rule, closely corresponding to § 135, so reading: "Råder i hamn, till vilken fartyget är bestämt, elakartad farsot, äger sjöman, såframt detta kommit till hans kännedom först efter det han antagits, rätt att erhålla entledigande, omedelbart om resan ej börjat, men eljest i första hamn, som fartyget anlöper, efter det han erhållit kunskap om förhållandet.

[15] See supra p. 133.

[16] See supra p. 134.

[17] Such as, for example, circus acrobatics or the flying of space-crafts.

[18] Comments d, f, and g and illustration 2. See supra p. 211.

Detsamma gäller, där fara föreligger för att fartyget skall uppbringas av krigförande eller utsättas för krigsskada eller där fara, som nu sagts, väsentligt ökats." (Transl. "If a pestilence prevails in the port of destination, the seaman, provided this fact came to his knowledge after the signing on, has a right to sign off immediately if the voyage has not already begun or in other cases in the first port at which the vessel calls after the seaman became aware of the condition prevailing in the port of destination. The same rule shall apply if there is danger that the vessel will be seized by belligerents or subjected to the risk of damage on account of war or where such danger as afore-said has materially increased").[19]

The rule existed in the Norwegian Maritime Code of 1893 (§§ 82.2 and 85), and the passage relating to risks created by war can be found in the Swedish Maritime Codes of 1891 (§ 85.2) and 1864 (§ 70.1, first paragraph). The principle is of ancient origin and appears also in Consolato del Mare, chapter cii: "Further, the managing owner of a ship ought not to carry the mariner into any dangerous place; if the mariner is unwilling to go there, the managing owner may not force him."[20]

Another difference between the texts of § 135 and § 159 lies in the fact that § 159 only concerns pre-war contracts ("fartyget eller godset *genom utbrott av krig* bliver ofritt", etc.) while § 135 contains a general rule to the effect that increase of danger of sufficient magnitude, occurring after the conclusion of the contract, may free the parties from their contractual obligations. Thus, § 135 may also be applied to contracts entered into *during* the war, provided there has been such an increase of risk owing to changed methods of warfare or intensified actions against merchant shipping. During the World Wars there were frequent examples of such an increase of risk; e.g. the notification of warzones covering large areas, intensified submarine activity, invention of new devices such as magnetic mines, extension of the category of goods considered as contraband, etc.[21] In fact, the outbreak of the World Wars did not cause any immediate, serious risks to merchant shipping; the risks grew as the wars proceeded. Since an increase of risk affecting the performance of a contract concluded during the war did not come

[19] See from the case-law ND 1902.99; 1914.317; 1914.398; 1915.123; 1918.155; 1939.264; 1939.295; 1939.465; 1941.521; and 1942.262. See for commentaries to § 36 BACHE, Sømandsloven af 1952 (Copenhagen 1966) p. 370 et seq.; NORMAN MEYER, Sjømannsloven av 1953 (Oslo 1958), p. 75 et seq.; and ALSÉN, Sjömanslagen (Stockholm 1956), pp. 88–9.

[20] See Black Book of the Admiralty III p. 213, Cf. also chapter cxi (op. cit. p. 219) and chapter cclii (p. 651).

[21] See supra p. 127 and the cases mentioned infra p. 263.

within the words of § 159, such contingencies could only free the parties if the section was applied *ex analogia*. It is not surprising that the legislator, owing to the experiences made during the first World War, considered that express legislative support should be given in § 135 for the solution of such cases. It may, perhaps, seem surprising that the legislator by way of the new text of § 135 has chosen to make considerable changes, as compared with the text of § 159, without expressing any intention of changing the law.[22] But a comparison between the texts of § 159 and § 135 gives a somewhat false impression, since the courts did not apply § 159 according to its literal wording, and since both § 159 and the present § 135 can be supplemented by the application of general principles of contract law.[23] Thus, the application of § 159 has in some cases been rejected when the fact that the vessel or the cargo became "unfree" on account of the outbreak of war did not result in any risk of sufficient magnitude, while, on the other hand, the parties, in some cases, have been given a right of cancellation even when the words of § 159 have been clearly insufficient. The older cases are therefore of a considerable interest and may still be referred to as precedents in spite of the amendment of the law in the 1930s.[24] The following cases may be cited as examples of a *restrictive* application of § 159.

In ND 1916.337 SCN, a Norwegian shipowner in a charterparty dated 23 October 1913, had contracted to perform four voyages for the carriage of coal for the account of a Swedish merchant. The coal was to be loaded in certain English ports and carried to the port of Gothenburg. Three of these voyages were performed before the outbreak of the World War, which caused the shipowner to cancel the contract on 14 September 1914. The merchant had to engage another vessel for the transport at an increased freight rate and claimed the difference from the shipowner as damages for non-performance, while the shipowner contended that he had been entitled to cancel the contract on account of unforeseen circumstances endangering the voyage; reference was made to § 159 and a special clause in the charterparty.

[22] At least so far as can be ascertained from the *travaux préparatoires*. Cf., however, the assumption of the arbitrators in ND 1944.241 *The Hop*: "Det synes oss klart at § 135 gir en *videre* [my italics] adgang til å heve avtalen på grunn av fareöking enn den gamle § 159".

[23] The impact of the doctrine of impossibility on Scandinavian contract law was strongly felt during the latter part of the 19th century. See HELLNER, op. cit. supra § 7.2 note 1 p. 706 et seq.

[24] It must, of course, be observed that the *general attitude* to the question of adjustment of contracts on account of changed conditions now may be different compared with the situation in the beginning of the century.

The Supreme Court, affirming the decision of the lower court, held that the shipowner had not been entitled to cancel the contract and awarded the merchant damages for non-performance. It was stressed that the voyage had not become *impossible* to perform and that § 159 could not be applied, since neither the vessel nor the cargo had become "unfree" through the war (a transport in a neutral vessel to a neutral receiver; cf. supra p. 121) and there was no blockade of the ports and no interferences by the authorities preventing the performance (p. 339). The clause was held inapplicable, since the voyage was not prevented. The Supreme Court stressed the fact that shipping was not inhibited by the war; after a certain hesitation during the first days after the outbreak of the war, the transports were resumed in the same manner as earlier, and the shipowner, in fact, was also prepared to perform the remaining voyage under the charterparty, but only at an increased rate. The lower court admitted that the doctrine of presupposed conditions might be invoked in exceptional cases, but the present war between foreign powers could not entitle one of the parties to cancel the contract thereby transferring his increase of costs to the other party (at. p. 342). The Supreme Court also seems to acknowledge the possibility of a cancellation of the contract under general principles but shared the view of the lower court that sufficient reasons were not at hand (cf. at p. 339).

The same restrictive attitude was adopted by the Norwegian Supreme Court in ND 1917.359 *The Gerona*, which also concerned the legal effect of the outbreak of the First World War on a charterparty concerning a voyage for the carriage of coal from an English port (from Tyne to Kristiania). The City Court referred to the confused situation arisen immediately after the outbreak of the war, the impossibility of obtaining war risk insurance, and the dangers created by the minefields on the North Sea. The Supreme Court thought, however, that the shipowner's cancellation of the contract had been premature; subsequent events proved that the coal trade from English ports was resumed and that war risk insurance could be obtained.

The Supreme Court of Sweden has in three cases from the same period taken a standpoint closely corresponding to that of the Norwegian Supreme Court. The facts of these cases were as follows.

In NJA 1919.118 *The Porjus* a Swedish shipowner in a charterparty dated 3 November 1913, had agreed to perform as many voyages as could be completed or begun during the year of 1914. The voyages concerned transports of coal from English ports to Stockholm for the account of a Swedish importer. After the completion of a voyage during the early part of September the shipowner cancelled the contract on 10 September referring to the dangers for neutral vessels in the North Sea arisen on account of the World War. Several neutral vessels had been sunk by mines and torpedoes and the fact that the English lighthouses were put out and the belligerent warships sailed without lights made the voyages more hazardous than before the war. Reference was made to a clause in the charterparty making exceptions for Acts of God, the King's enemies, restraint of princes, and marine casualties.

The charterer contended that the shipowner erroneously tried to exchange the prerequisite "hindrance" for "danger"; the possibility of obtaining an insurance for the dangers would, according to the charterer, constitute a sufficient comfort for the shipowner. The shipowner stressed the point that § 159 did not refer to absolute hindrances only, since the fact that the vessel or cargo became "unfree" did not constitute an absolute hindrance but only subjected the property to a *risk* of being captured and confiscated in prize proceedings (see supra p. 129). The reason why the dangers arising from mines were not regulated in § 159 was due to the fact that such dangers were unknown at the time the Code was drafted. It was therefore natural that such dangers should allow the parties to cancel the contract and a legislative support was at hand in the general reference in § 159 to *vis major* occurrences.

The lower courts adopted the shipowner's view and rejected the charterer's claim for compensation on account of the shipowner's non-performance, while the Supreme Court, reversing the decision of the lower courts, stated that the difficulties and dangers facing the vessels in the relevant trade during the relevant period of time were not of sufficient magnitude (Sw. "icke kunna anses hava varit av sådan betydenhet"; N. Rev. approved by the Supreme Court) to allow the shipowner to cancel the contract. It seems to follow from the wording of the decision that the right of cancellation might be awarded on account of difficulties and dangers; it is only a question of degree. Nevertheless, the test seems to have been applied strictly against the shipowner; two dissenting judges stated that the creation of minefields, which constituted an act so far prohibited by international law,[25] undoubtedly had given rise to serious dangers for the merchant vessels and the people onboard (Sw. "uppenbarligen medfört de största faror för i sagda farvatten gående handelsfartyg och deras besättningar") and that this came within the *vis major* prerequisite of § 159.

The same question as in the previous case was decided in NJA 1919.127 *The Avena* concerning a transport of coke in a Swedish vessel from East Greenwich Wharf in England to a Swedish merchant in Gothenburg during any of the months September–December 1914 (charterparty dated 30 March 1913). The City Court of Gothenburg adopted the same strict view as the Supreme Court in the previous case, but added that shipping had continued in the trade during the relevant period and notably also by the shipowner's own vessels. The decision was affirmed by the Göta Court of Appeal and by the Supreme Court (with the same dissenting judges as in the previous case).

The charterparty had been provided with a clause reading: "Penalty for non-performance of this agreement, proved damages not exceeding estimated amount of freight". This clause was considered to limit the merchant's possibilities of recovering damages in excess of the estimated amount of the freight; i.e. interpreted according to its literal wording and not set aside because of its character of a penalty clause.[26]

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[25] See supra p. 110.

[26] See for the position in English law SCRUTTON Art. 166 Note 1.

In NJA 1919.387, which concerned a case where the shipowner had agreed to carry 6,000 standards of wood products (props, sleepers and splits) during each of the years of 1914–1918 (charterparty dated 16 May 1913), the shipowner on 22 August gave notice that he did not want to carry props in his vessels and that, consequently, he was not in a position to perform the contract for the time being. The charterer sued the shipowner for non-performance and the courts had to form an opinion on the same question as in the previous cases (NJA 1919.118 and 1919.127). However, the shipowner argued that the cargo intended for transport had become "unfree" in the sense of § 159, since it constituted conditional contraband (see supra p. 121) and that this fact alone was sufficient for his right to refuse to carry out the contract during the war. The charterer, however, contested that the fact that the goods were conditional contraband could make them "unfree", since this word must be taken to refer to the *risk of confiscation* arising when the goods were intended for the armed forces or a government department of the belligerent state.[27] The shipowner maintained that the fact that the goods were conditional contraband was sufficient as, in any event, the vessel was subjected to the risk of being seized and condemned in prize proceedings on account of the failure to prove the innocent destination of the goods. And even if it would be possible to prove that the vessel and the goods were not subject to confiscation, the shipowner had no right to compensation for the delay and costs arising as result of the seizure.[28]

The City Court of Gothenburg acknowledged that conditional contraband under certain requirements could be considered "unfree" in the sense of § 159, but held in the favour of the charterer, since the shipowner had failed to prove that such requirements were fulfilled and the decision was affirmed by the Göta Court of Appeal. The Supreme Court, affirming the decisions of the lower courts, added that the shipowner had been entitled to request satisfactory evidence from the charterer which could be used for the purpose of proving that the goods were not intended for the armed forces or a government department of a state in war with Germany. Since the shipowner could not maintain that the charterer had breached his duty in this regard, the decision must go in the charterer's favour (N. Rev. approved by the Supreme Court).

In ND 1920.378 *The Enon* SCS, the charterparty was entered into *during* the war (dated 18 August 1915) and concerned a transport of about 650 standards of wood products from a Swedish port to London. It was prescribed in the charterparty that the shipowner was not allowed to let the vessel sail without a certain Custom's certificate requested by the conditions of the State War Insurance Board (Statens Krigsförsäkringsnämnd). At the time of the

[27] Reference was made to arts. 24, 25 and 33–35 of the Declaration of London and to the German Prize Ordinance of 30 September 1909, in effect from 3 August 1914, §§ 22, 23 and 32–38. See supra p. 122.

[28] Reference was made to the seizure of the Danish vessel The Alfred Hage and stress was laid upon the fact that it is ordinarily impossible to convince the officers on a warship that conditional contraband has an innocent destination; See supra p. 123.

loading it was discovered that about 17 standards of the cargo was marked in a way which proved that it was intended for the British armed forces. The said part of the consignment was discharged. The shipowner claimed compensation for the costs of discharge and for the delay arising therefrom, while the charterer counter-claimed compensation for non-performance. The City Court of Stockholm held in the charterer's favour, since the shipowner failed to prove that the marking of the 17 standards of the cargo had prevented him from obtaining the necessary Custom's Certificate and its decision was affirmed by the Svea Court of Appeal and the Supreme Court. It is submitted that this case must be considered to have been decided on the theory that the contract, having been entered into during the war, meant that the shipowner was *obligated* to perform it provided the mentioned certificate could be obtained. Supposedly, the parties might have thought, with or without reason, that such a certificate would be sufficient to prevent a seizure of the vessel. There can be no question that the cargo in the actual case must be considered "unfree" owing to its character of conditional contraband and its enemy destination.[29] But apparently the contract has been thought to put upon the shipowner the obligation to carry such cargo also, provided the mentioned certificate could be obtained.

Another contract concluded during the war was considered by the Supreme Court of Norway in ND 1921.309 *The Raylton Dixon*. Here, the charterparty had been entered into between a Norwegian shipowner and a Norwegian merchant on November 1914 for a period of six months. The vessel was to be delivered in a British port on the east or west coast. A clause in the charterparty stipulated that the vessel must not be sent to a port where hostilities were in progress or on any voyage where she was subjected to the risk of being captured. When Germany on 4 February 1915 proclaimed the waters round Great Britain and Ireland as war zones (Kriegsgebiete), and warned the neutral states that the sinking of neutral vessels could not be avoided in the mentioned zones (see supra p. 127), the shipowner cancelled the contract. The City Court as well as the Supreme Court acknowledged the possibility of cancelling the contract on account of an increase of risk during the war,[30] but they reached different results in the appreciation of the increase of risk. The City Court considered the increase of risk sufficient, while the Supreme Court (three judges dissenting) reversed its decision and held the shipowner liable for non-performance.

In none of the above cases is an analogous application of § 159 clearly rejected, but the courts have nevertheless adopted a strict attitude in the evaluation of the risk created by the outbreak of war or by the intensified warfare during wars. To a certain extent the attitude of the courts

[29] See supra p. 121.

[30] It should be observed that the contract concerned a timecharter and that it was uncertain whether § 159 before the amendments in the 1930s could be applied to such charters. See infra p. 264.

may, however, be explained by the fact that, at the relevant time, people had not yet lost their faith in decent warfare, adequately protecting neutral merchant shipping in conformance with international law.[31] In the arguments presented by the parties before the courts, however, it is often contended that § 159, as a special rule giving a relief which could not be obtained under general principles of contract law, should be given a narrow application strictly according to its literal wording. And such a view sometimes appears from dicta in the decisions as well.[32]

The evolution of warfare, especially during the World Wars, was not envisaged by the legislator when § 159 was drafted. Consequently, the courts were frequently requested to apply § 159 *ex analogia* or to free the parties from their obligations by supplementing § 159 by general principles. And the courts were generally prepared to give the requested relief when a change of circumstances of sufficient degree had occurred after the conclusion of the contract. The requirements that the vessel or the cargo should have become "unfree" in the sense of the international rules relating to contraband, and that the concept of "blockade" should be interpreted in accordance with the definitions of the Declaration of Paris 1856,[33] were not upheld. There are frequent examples where the courts have made a broad interpretation of the prerequisites of § 159; in some cases the risks created by the belligerents were thought to come within the concepts mentioned in § 159, even though the acts did not conform with the international rules at all,[34] in other cases reference was made to the *vis major* prerequisite of § 159 or to general principles supplementing the provision, such as, for example, the doctrine of presupposed conditions. Furthermore, the fact that the contract had been entered into after the outbreak of the war, in some instances,

[31] Cf. supra p. 65.

[32] See, e.g., ND 1923.215 *The Takma* SCN by the City Court at p. 222: "Sjølovens § 159 der er en undtagelsesbestemmelse, maa som saadan forstaas strengt efter ordene. Paragraffen gjør under visse forhold brud paa indgaaede kontrakter, og partene maa ha krav paa at de opstaaede forhold helt falder ind under de av loven nævnte tilfælder". (Transl. "Section 159 of the Maritime Code is a special rule and must as such be construed strictly according to its literal wording. The provision breaks under certain circumstances the contractual obligations, and the parties must be entitled to contend that the contingencies that may have arisen completely fall within the words of the provision.")

[33] See supra pp. 112, 125.

[34] This was probably the reason why the direct reference to those concepts was abandoned in § 135.

did not prevent the possibilities of cancelling the contract owing to an unexpected increase of risk.

A generous interpretation of the prerequisite "blockade" can be noted in the following cases, all concerning the legal effect of the German war zone proclamation of 31 January 1917 that preceded the so-called unrestricted submarine warfare (Sw. "oinskränkta ubåtskriget").[35]

In ND 1921.196 *The Castor II* SCN, the charterparty had been entered into between a Norwegian shipowner and a Norwegian merchant *during the war* on 19 October, 1916. The contract concerned the transport of a shipment of cut wood from Norway to Tynedock, England. The shipowner cancelled the contract in January 1917 when the cargo was declared conditional contraband, but it was agreed that the shipowner nevertheless should perform the contract at an increase of the freight by 30 shillings per standard (i.e. an increase of about 50%). The loading was to start on 1 February. On this very day the German proclamation became known and the shipowner cancelled the contract again. The charterer claimed damages for non-performance but his claim was rejected by the City Court and by a unanimous Supreme Court. The German proclamation was thought to imply risks for neutral shipping of quite another character than experienced during the war so far. Although, admittedly, there was no "blockade" in the sense of the international rules relating thereto, § 159 was applied *ex analogia*, since the risks created by the German warfare could be expected to equal—or even surpass—the risks entailed by the breaking of a traditional blockade (at p. 199). The sharp rise of the war insurance premiums was also taken as evidence of the risks to be expected as a result of the German proclamation.

In ND 1921.497 *The Finse* SCN, a Norwegian shipowner had chartered his vessel for a period of 5 months for trade in a range between Norway–United Kingdom–Dieppe/Gibraltar (charterparty dated 20 January 1917). Before the service under the charterparty had started, the shipowner cancelled the contract when Germany gave notice of its famous proclamation of 31 January. The City Court considered that there had not been a sufficient increase of risk, since the time charter provided for the carriage of contraband of war to England and France and thus already from the beginning implied considerable risks of the vessel being captured or sunk. The Supreme Court, however, reversed the decision of the City Court stating i.a. that an agreement to carry contraband does not imply that the shipowner renounced his right to cancel the contract owing to new and unexpected risks of the nature mentioned in § 159. Reference was made to the prerequisite "blockade" and the *vis major* principle of § 159; even if there was no "blockade" in the sense of the rules of international law, the provision of § 159 relating to blockade could be applied *ex analogia*.[36]

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[35] See supra p. 128.

[36] In ND 1921.17 *The Gijones* SCN, the Court preferred, however, to base the decision on the *vis major* prerequisite instead of an extensive interpretation of "blockade".

In ND 1923.517 the Supreme Court of Sweden considered a contract concluded on 21 January 1915 between a Swedish shipowner and a Swedish merchant concerning the shipment of the merchant's wood pulp from Sweden to Preston and Manchester during 1915–1918. The shipowner let the vessel continue the transports until, on 3 October 1917, he refused to perform the transports during the period when the dangers and difficulties created by the German warfare, especially the submarine blockade of the coasts of England, prevailed. The City Court of Stockholm considered that the blockade was a contingency of the type mentioned in § 159 and that, consequently, the shipowner did not have to perform the contract during the time when the hindrance was in effect, while the Svea Court of Appeal reversed its decision, since the circumstances urged by the shipowner could not free him from his contractual obligations during the relevant period, neither according to § 159 nor according to the clauses of the charterparty. The Supreme Court, however, restored the decision of the City Court.

There is, however, a case by the Supreme Court of Norway ND 1918.625 *The Kong Helge* where the German proclamation of 31 January 1917 did *not* give the shipowner the right to cancel the contract, but it is stressed that the court reached its conclusion owing to the fact that the shipowner had given a statement, which the charterer had reason to understand as an advice that the voyage would be performed, if the shipowner succeeded in persuading the crew to remain in service. The City Court, however, had held in the shipowner's favour and there were three dissenting judges in the Supreme Court. It appears from their dicta that the words of § 159 did not exclude its application to contracts concluded *during* the war and that the German submarine blockade of the entire North Sea must meet the requirements of the prerequisite "blockade" in § 159 (at p. 630).

As ADHGB and HGB in § 631 and § 629 respectively contained provisions corresponding to SMC § 159, it is interesting to learn that the German courts also acknowledged the possibility of an extensive application of the provisions of the Code and that they have adopted the same view with regard to the interpretation of the words "unfree" and "blockade".

In HansGZ 1878 nr. 33 and nr. 65 (O.G. Hamburg), it was pointed out that on the one hand the notification of a blockade is insufficient, and, on the other hand that the courts, when applying the relevant provisions relating to the cancellation of contracts of affreightment, are not bound by the meaning which the concept of blockade has been given in international law. The relevant test should be a reasonable evaluation of the blockade as a hindrance for the performance of the contract and the risk of the vessel being captured.

The concept of contraband is discussed in RGZ (1917) 90.391 *The Takma.* Here, a Norwegian ship had been chartered for the transport of salted hides for the account of a German charterer from Rio Grande to English ports or to a port on the continent between Le Havre and Hamburg or to Gothenburg

or Copenhagen (charterparty dated 30 May 1914). The outbreak of the World War intervened before the beginning of the voyage. The charterer cancelled the contract on 22 August, but the shipowner insisted on being paid full freight and sued the charterer for non-performance. The Reichsgericht, affirming the decisions of the lower courts, held in the favour of the charterer. It was acknowledged that, perhaps, the cargo could not be considered as contraband according to the rules of international law practised until the time of the charterer's cancellation of the contract. The vessel was neutral and, in addition, salted hides belonged to the category of goods inserted in the so-called free-list of the London Declaration of 1909.[37] It was pointed out, however, that the London Declaration was never ratified and that England by Orders in Council changed the concept of contraband as expressed in the London Declaration.[38] This evolution proved that the rules of international law gave insufficient guidance. It was considered that "die zu verschiffenden Güter auch dann nicht mehr als frei zu betrachten seien, vielmehr als der Gefahr der Aufbringung ausgesetzt anzusehen, wenn verständige Erwägung den Befrachter mit der Möglichkeit rechnen lassen müsse, dass die Güter im Laufe der Reise als Konterbande erklärt und alsdann der Gefahr der Aufbringung durch die feindliche Kriegsmacht ausgesetzt sein würden". A further essential question was also decided in the case, viz. the charterer's obligation to use his option in such a manner as to enable the contract to be carried out. The shipowner urged that the charterer should have nominated e.g. Gothenburg or Copenhagen and referred in this connection to BGB § 265. The Reichsgericht considered, however, that "die Wahl des Hafens für den Charterer durchaus frei bleiben muss". (See infra p. 385).

In some cases the courts have used the *vis major* prerequisite in § 159, while in other cases the result seems to have been based on the doctrines of impossibility or presupposed conditions.

In ND 1918.529 *The Ternø*, *The Ada* and *The Tholma*, the Supreme Court of Norway had to consider the shipowner's position under charterparties concluded 16, 19 September and 10 October 1914 concerning transports by Norwegian vessels for the account of a Swedish merchant. The vessels were to take pitprops from Swedish ports to English ports in the middle of October. According to the German contraband lists pitprops were considered *conditional* contraband at the time of the conclusion of the contract, and the contracts contained clauses to the effect that the charterers guaranteed that the cargo was not intended for the British government or a government agent.[39] It appeared that German warships could visit and search, and also take vessels carrying condi-

[37] Art. 28, paragraph 4. See supra p. 121.

[38] Salted hides were declared conditional contraband by Order in Council 21 September 1914.

[39] See supra p. 121.

tional contraband to German ports, for the purpose of checking the destination of the goods, but that, up to the time of the conclusion of the contracts, this had been done only occasionally. A sudden change was experienced in this regard about the middle of October, when a number of Norwegian and Danish vessels carrying props to England were brought to Svinemünde. The vessels and the cargo had been considered good prize by the German prize court, but the award had been reversed by the higher court. Nevertheless, the cargo was not released, since in April 1915 pitprops were declared *absolute* contraband.[40] The shipowners' claim of compensation for their losses on account of the wrongful capture of their vessels was rejected by the prize courts, since the naval officers on board the warships could not be considered to have acted incorrectly when capturing the vessels and bringing them to Svinemünde for control.[41] On account of the German change of attitude the shipowner cancelled the contracts and the charterer sued for non-performance.

The City Court of Kristiania, as well as the Supreme Court, held in the shipowner's favour. The chances for these vessels of passing through the Öresund were very small, and the risk of the vessels being captured was so great that *the enterprise must be considered impossible* (Norw. "at foretagendet fornuftigvis burde anses som en umulighet"; quoted from the decision of the City Court, but the reasons supporting the decision were approved by the Supreme Court. See ND 1916.421 and cf. ND 1918.529 at p. 530). The decision does not contain any reference to § 159 and might therefore also be understood as an application of the doctrine of impossibility, as modified by the rules of relative impossibility.

In two cases, one by the Supreme Court of Denmark and the other by the Supreme Court of Norway, the shipowner was prevented from fulfilling the contract owing to the refusal of the British authorities to provide the vessels with the necessary bunkers.[42] In ND 1920.143 *The Brosund*, the charterparty had been entered into on 9 October 1916, while the vessel was proceeding on a voyage for the same charterer from America to Rotterdam. The charterparty concerned a new voyage on the same conditions as the previous one. The charterparty did not have a clause regulating the position of the parties if no bunkers could be obtained. When the shipowner in England negotiated for the purpose of getting a shipment for the voyage to America and the necessary bunkers, the British authorities adviced that they would only give permission to provide the vessel with bunkers if the shipowner agreed to take a shipment on the return trip from America to Great Britain, its allies, Norway or Denmark. The shipowner tried to reach an agreement with the charterer to postpone the voyage from America to Rotterdam, until the voyage requested by the British authorities had been performed, but the charterer would not give up their right to compensation for non-performance in exchange for such an agreement. Consequently, the shipowner cancelled the contract.

[40] See supra p. 121.

[41] See supra p. 132.

[42] See supra p. 131.

The Maritime and Commercial Court of Copenhagen held in the shipowner's favour and its decision was affirmed by the Supreme Court. The charterer stressed the point that the shipowner could not be excused in the absence of a *specific bunker clause* in the charterparty, which usually was inserted in corresponding charterparties, but the court considered that the shipowner had had no reason to expect that bunkers would be refused by the British authorities. This being so, the attitute taken by the British authorities was considered a *vis major* occurrence entitling the shipowner to cancel the contract. Reference was made to § 159.

The same question came before the Supreme Court of Norway in ND 1922. 193 *The Vikholmen* but here the refusal of the British authorities was due to the fact that the vessel had become blacklisted. For this reason, the vessel could not be used in the trade prescribed by the charterparty (Iceland, Great Britain, Sweden and Denmark), and the *charterer* cancelled the contract and claimed damages. The shipowner maintained that he did not know or ought not to have known that the vessel had become blacklisted, the vessel had earlier performed two voyages to England without any difficulties. The reason why the British authorities had not reacted was due to the fact that the vessel had changed its name and that, therefore, the earlier name appeared in the black list. The court held in the shipowner's favour, since he did not know or did not ought to have known that the vessel was blacklisted. This being so, the shipowner could not be considered to have given an implied warranty to the effect that the ship was not blacklisted. Reference was not made to § 159 and it appears that the court did not require an excuse from the shipowner for his inability to fulfil the agreed performance but rather considered that the vessel fulfilled the requirements of the contract, since the shipowner had not given an express or implied promise that the vessel was not blacklisted.

In NJA 1919.124, a charterparty between a Swedish shipowner and a Finnish merchant, concerning a transport of a shipment of sulphur from Gävle or Stockholm to the Finnish ports Raumo or Mäntylouto, had been entered into on 3 December 1914. Only a few days later several Swedish vessels were sunk by mines in the relevant trade and as a result thereof shipping was inhibited and insurance could not be obtained from the Swedish War Insurance Board for voyages in the trade in question. The shipowner, therefore, cancelled the contract and was sued by the charterer for non-performance. It appeared that during the period from 9 December 1914 until the beginning of January 1915 no vessel had entered Mäntyluoto and only one vessel had entered Raumo. Shipping to the mentioned ports was resumed in February and the possibilities of obtaining insurance improved. The charterer urged that the shipowner at the time of the conclusion of the charterparty must have realized that difficulties could arise, since the merchant belonged to one of the belligerents. It was argued that war insurance could have been covered by other insurers than the Swedish War Insurance Board. The City Court rejected the charterer's claim stressing the fact that the voyage could only have been performed at the greatest peril for the vessel and the people onboard, and its decision was affirmed by the

Court of Appeal and the Supreme Court. Reference was made to the *vis major* prerequisite of § 159.

In ND 1919.118 *The Henry Brooke* SCN, a Norwegian merchant chartered the Danish sailing-ship Henry Brooke for a voyage from Norway to France (Dieppe or Treport) for the carriage of ice. The charterparty was dated 17 July 1914. A part of the consignment had already been loaded when, after the outbreak of the World War, the shipowner cancelled the contract. At this time several neutral merchant vessels had been sunk by mines in the North Sea, including a vessel belonging to the same shipowner. The conditions were even worse for a sailing-ship, which owing to the weather and the wind could not follow the routes recommended by the authorities in the same manner as steamships. It was not possible to obtain war risk insurance for such a voyage in Denmark. Consequently, the shipowner discharged the cargo which already had been loaded and cancelled the contract. The charterer sued him for non-performance. The City Court rejected the charterer's claim, but the chairman of the court dissented and stressed the point that § 159 did not contain any rule which could be applied to the case at hand. And the general principles of contract law did not suffice to give the shipowner a right of cancellation; the voyage had not become impossible and the contract was not based on the condition that a war should not interfere with the performance of the voyage. In addition, he indicated that the vessel could have sailed with the cargo north of Scotland.

The Supreme Court seems to base the decision on the doctrine of presupposed conditions stating that the charterparty rested on the basis that, in any event, the vessel could be insured against the risks of the voyage.[43] The shipowner could not be considered to have the obligation to sail north of Scotland which would have been quite a different voyage than the one agreed on in the charterparty. The cases mentioned above, ND 1916.337 and ND 1917.359, were distinguished, i.a. on account of the fact that they concerned shipments by steamships and that the route was less dangerous.

§ 11.1.3. SMC § 135—a vis major rule?

The case-law that developed while § 159 was still in effect provides, no doubt, an explanation to the present text of § 135 and to the fact that the same results may be obtained under the different texts. The greater the possibilities are to apply the provision *ex analogia*, and to supplement the provision with general principles of law, the less important the exact wording of the text becomes.

The basic element of § 135 is the *increase of danger prerequisite* ("Finnes efter fraktavtalets ingående att genom resans företagande fartyg eller last skulle utsättas för att . . . drabbas av skada . . . eller att sådan fara väsentligen ökats . . .") but there is no statement in general words as to

[43] See SELVIG § 8.52.

the *degree* of risk required for the right of cancellation awarded the shipowner and the charterer. Instead, the provision deals with the *kind* of contingencies giving rise to the increase of danger and some of these contingencies are expressly enumerated ("... genom uppbringning eller eljest drabbas av skada i följd av krig, blockad, uppror, oroligheter eller sjöröveri...". Transl. "to be damaged through seizure or otherwise on account of war, blockade, riots, civil commotion or piracy..."). Thus the degree of risk is *indicated indirectly*, since normally a considerable danger for the vessel and her cargo will result as a consequence of the enumerated contingencies. It is clear that there must be a *reasonably unforeseeable* change of circumstances compared with the situation when the contract was made and that such change amounts to a risk of sufficient magnitude and probability of the vessel being damaged.[44] This is clearly stated in § 135 with regard to dangers occurring *during* a state of war, blockade, riot, civil commotion etc.; a change of circumstances may give rise to a mutual right of cancellation in such cases also, but the increase of risk must be considerable (Sw. "väsentlig").

There is no general statement in § 135 to the effect that an increase of risk *of any kind* suffices for the right of cancellation; the risk must follow from war, blockade, riots, civil commotion or piracy or similar contingencies.[45] And, as previously mentioned, § 135 does not, apart from the "danger situations", deal with situations when the performance becomes more or less impossible or burdensome. This is perhaps the most important change as compared with § 159 in its reading before the amendment in the 1930s.[46] The casuistic drafting of § 135 is somewhat unusual in modern Scandinavian legislative technique but the phenomenon is partly due to historical tradition[47] and partly to the current clauses[48] which may have influenced the legislator.[49] The character of § 135 as a *vis major* rule appears from the fact that only certain "classical" *vis major* contingencies are expressly acknowledged as a ground for

[44] See SOU 1936:17 p. 204 and cf. infra p. 426 from the discussion concerning the interpretation of war clauses.

[45] See supra p. 86.

[46] See supra p. 241.

[47] See supra p. 233.

[48] In the *travaux préparatoires* reference is made to the Hague Rules art. 4, Rule 2, which in turn originates from clausal law. See SOU 1936:17 p. 204; and BRÆKHUS, Hague Rules p. 21.

[49] See supra p. 70.

the cancellation. No doubt, it will be possible to award the parties a right of cancellation in other cases as well by the application of general principles of impossibility, failure of presupposed conditions and undue hardship,[50] but the risk of physical damage to the vessel caused by other events than those expressly referred to in § 135 falls outside the scope of the provision. Otherwise the enumeration in § 135 would be completely meaningless.[51] Thus, § 135 must be understood as a *vis major* rule, although with a restricted field of application and with some peculiar features.

§ 11.1.4. SMC § 135 and the degree of risk required

As previously mentioned the right of cancellation requires a *change of circumstances*. Furthermore, dangers which reasonably could have been foreseen and appreciated at the time of the conclusion of the contract cannot serve as a ground for cancellation.[52] The same principle is expressed in § 142 ("fara . . ., som bortfraktaren ej skäligen kunnat taga i beräkning vid avtalets ingående." Transl. "a danger . . ., which the shipowner could not reasonably have taken into account at the time of the conclusion of the contract"). The principle of foreseeability does not appear from the wording of § 159 before the amendments of the 1930s but was nevertheless recognized by the courts.[53]

Although the provision is clear enough in principle, its application in practice creates considerable difficulties. Firstly, one must examine the possibilities of the contracting parties of evaluating the situation at the time of the conclusion of the contract. Secondly, it is necessary to determine whether, at the time for the cancellation, the cancelling party has correctly evaluated the risk threatening his property. Thirdly, one must ask oneself whether the *degree* of the increase of risk is sufficient to warrant a cancellation of the contract. Since § 135 regards war and similar contingencies it is necessary to evaluate the risks on the basis of international law relating to marine warfare and on a speculation of the probable risks for physical damage to the vessel and/or cargo in the

[50] See supra p. 141 et seq.

[51] See, e.g., with regard to ice hindrances BRÆKHUS, Ishindringer p. 16.

[52] See the introductory words in § 135: "Finnes efter fraktavtalets ingående . . ." Transl. "If it appears subsequently to the conclusion of the contract of affreightment. . ."

[53] See Rt. 1880.782; ND 1918.529; ND 1920.143; ND 1921.196; ND 1921.497; ND 1922.193; ND 1923.517; and NJA 1919.124 supra pp. 240, 250 et seq..

situation that has arisen. The question whether the belligerent powers will act in accordance with international law must be considered as well as the dangers arising from the side-effects of war such as rerouting, darkened lighthouses, vessels sailing without lights, etc. causing risks of stranding and collisions. The difficulty of appreciating such risks on the occurrence of war and similar events is apparent, but it becomes somewhat easier when the war is fully developed. It is then possible to take guidance from the acts earlier performed by the belligerents and from casualties occurred during the war so far. The difficulty for "the reasonable man" who tries to make a proper evaluation of the risks is well demonstrated by the evolution of marine warfare during the World Wars which has been briefly summarized in chapter 2.[54]

Risks of damage to property may be converted into a sum of money in the form of an insurance premium and the shipowner and the charterer usually provide themselves with such insurance, including special insurance for war risks (see supra p. 61). The premiums charged by the insurance companies for war risks are, of course, low when there is no reason to expect that the vessel and/or cargo will encounter war risks of any kind. In the case of an outbreak of war affecting the vessel and/or the cargo, the premium will sharply rise and the same result might also follow from the initiating of warlike operations or even from a threatening attitude of some States making the peril of war imminent. Thus, the rise of war insurance premiums indicates at any particular time how the war risk is appreciated by the war insurance companies. In the case of a sudden change of the political situation the appreciation of the risk must, of course, be rather unreliable and does not necessarily correspond to the *real* risk involved. However, as the war progresses an extensive statistical material becomes available to the insurers and their appreciation of the risks is less uncertain. In any event, when we are seeking for the opinion of "a reasonable man", there is usually no better yardstick available than the opinion of the insurers. Therefore, the rise of war insurance premiums may have legal relevancy in two respects; firstly as an indication of the real risk involved, secondly as an extra burden on the respective parties which was not contemplated at the time of the conclusion of the contract.

The fact that the contract becomes more burdensome or less profitable for a contracting party seldom entitles him at law to refuse the

[54] Cf. also infra p. 396.

performance of it. It is therefore of utmost importance to ascertain whether SMC § 135 entitles the parties to cancel the contract on the basis of a proper estimation of a sufficient risk of damage to the vessel and/or cargo only, or whether such increase of risk shall only be given relevancy in connection with an evaluation of *all* the consequences following from the event giving rise to the risk. In the latter case also, the risk of damage to the vessel and/or cargo becomes no doubt of prime importance, but there might be other circumstances which demand consideration, such as increased costs, probable delay, violent fluctuations of the shipping market, etc. And if the latter alternative is chosen, § 135 is only to be regarded as an example of the general principles of impossibility and force majeure[55] which, with regard to the practical results, come fairly close to the Anglo-American doctrine of frustration.[56] It would therefore, at first sight, seem that, in war risk situations, an interpretation of SMC § 135 to the effect that a relevant change of the risk of physical damage to the vessel is the *only* criterion to be considered would give the parties *better possibilities* of cancelling the contract than would follow under general principles of contract law.[57]

An incentive for the parties, and notably the shipowner, to cancel the contract may also be at hand where the costs and burdens resulting from an increase of risk are comparatively slight. The true reason for the desire to cancel is often the market fluctuations caused by the war.[58] There are many cases where the shipowner, in spite of the risk, has been prepared to carry out the performance but where, nevertheless, he has claimed the right to cancel on account of the increase of risk, since the cancellation would give him the opportunity to earn additional freight by a new contract concluded with the same party or other parties. Thus, examples may be found, where the shipowner, in spite of the risk, has offered to perform the contract but at an increased freight and where, on the charterer's refusal to accept such an offer, the voyage has been performed subject to the decision of a court with regard to the right of cancellation. And it is sometimes agreed between the parties that the shipowner is entitled to the additional freight should the court decide

[55] See supra p. 149.

[56] See supra pp. 162 et seq., 206 et seq.

[57] See supra p. 226.

[58] See supra p. 91. Cf. ND 1939.376. *The Egon* Maritime and Commercial Court of Copenhagen; and ND 1940.135 *The Marianne* Vestre Court of Appeal.

in his favour. The charterer may, of course, refuse to enter any agreement whatever and, if the shipowner in such a case cancels the contract, he must assume the risk of having to pay damages to the charterer for non-performance should it prove to be that he had no right of cancellation. On the other hand, the charterer's refusal to enter into a new agreement with the same shipowner at an additional freight may, under the circumstances, preclude him from claiming damages exceeding the difference between the freight under the charter party and the higher rate of freight requested by the shipowner. Thus, by the application of the doctrine of mitigation, the result may be the same even when the charterer refuses to enter into any agreement with the shipowner concerning additional freight.[59]

The wording of SMC § 135 seems clear enough; a relevant increase of risk of physical damage to the vessel and/or cargo, provided the risk is caused by the enumerated or similar contingencies, is sufficient for the right of cancellation. The *travaux préparatoires* do not contain any statements which could modify a literal interpretation of § 135. And, indeed, several reasons could be invoked for the solution adopted in § 135. It is true that merchant shipping has been going on during the World Wars in spite of the grave perils to vessels, cargo and people on board, but this has only been possible by a deliberate assumption of the risks by people engaged in shipping.[60] The American Restatement Contracts §§ 465, 466 contain the principle that none of the parties should have the duty to risk his own life or the lives of others, if such risks do not follow from the nature of the contract itself. The same view is also to be found in Scandinavian law, where the principle appears in the Scandinavian Seamens' Code § 36, which regards the right of the seaman to cancel the contract of employment on account of peril of life or health.[61] It seems natural to assume that § 135 rests on the same principle, although

[59] See ND 1916.337 SCN at p. 339 in fine (supra p. 244); ND 1921.309 *The Raylton Dixon* SCN supra p. 248; ND 1940.135 *The Marianne* Vestre Court of Appeal; ND 1940.410 *The Atlas* The Maritime and Commercial Court of Copenhagen; and ND 1944.241 *The Hop* Norw. Arb. infra p. 398. But cf. RODHE, Obligationsrätt § 46 note 4.

[60] Cf. the statement in *M.A. Quina Export Co.* v. *Seebold (The Maria Lorenza)* (1922) 280 Fed 147 DC SD Fla.: "That there were men found to take the risk on vessels, steam and sail, is a monument to the men whose patriotism and heroism, or in some instances it might have been cupidity, made it impossible for Germany to carry out her avowed intentions."

[61] See supra p. 242.

extended to cover cases of risk of damage to property as well. Even though the possibilities of insuring against the risks could be argued in support of a different attitude, it must be borne in mind that the insurance coverage is incomplete and that, in time of war, a sum of money is not equivalent to a lost object.[62] The loss of one or more vessels may, provided no substitutes are available, result in difficulties in using efficiently the land organisation, in organizing a proper plan for the economic activity and, in addition, a number of other inconveniences which are difficult, or even impossible, to assess in sums of money.

The method of applying the test under general principles of contract law,[63] as distinguished from the application of the special increase of danger prerequisite in SMC 135, does not necessarily lead to different results in practice.[64] The respective tests are clearly different in principle, but they leave such a wide discretion to the courts that, under both methods, results may be attained which are considered just and reasonable.[65] Even though the application of § 135 does not seem to require the judge to perform an evaluation of *all* the circumstances affecting the respective contracting parties, *there is nothing to prevent him from considering all the surrounding circumstances when he assesses the degree of increase of risk necessary to permit the contract to be cancelled.* Needless to say, it is impossible to determine the relevant degree of increase of risk in percentage or else in a manner which could be regarded by the judges as a fix standard for the application of § 135. And, indeed, this state of affairs should not be considered as altogether unfortunate. The elasticity of the increase of danger prerequisite may be used in order to reduce the difference between Scandinavian and Anglo-American law.[66]

Even if it is impossible to ascertain a specific point where an increase of risk becomes sufficient to warrant a cancellation of the contract according to § 135, the enumeration in § 135 itself and the cases indicate certain *typical situations* where the increase of risk has been considered sufficient (e.g. unexpected outbreak of a major war, proclamation of extended lists of contraband, war zones, blockades, etc.). However, the cases also show that, according to the circumstances, one and the same

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[62] See supra p. 67.

[63] See supra p. 141 et seq.

[64] See supra p. 183.

[65] See generally supra p. 183.

[66] German law rests on the same principles as Scandinavian law. See HGB § 628 et seq.

type of event sometimes gives rise to a right of cancellation and sometimes not. The popular phrase that each case must be decided according to its own particular facts considering all the relevant circumstances is highly appropriate. The cases do not permit a "listing" of typical situations where a right of cancellation is always available.

As already mentioned, an outbreak of war may or may not cause such changed conditions as entitle the contracting parties to cancel the contract of affreightment. See for cases where a cancellation has been permitted on the outbreak of war ND 1919.118 *The Henry Brooke* SCN supra p. 255; ND 1915. 78 Maritime and Commercial Court of Copenhagen infra p. 429; and ND 1945.369 SCS infra p. 412. Cf. also RGZ (1917) 90.391 *The Takma* supra p. 251. However, a cancellation of the contract was *not* permitted in ND 1916.337 SCN supra p. 244; ND 1917.359 *The Gerona* SCN supra p. 245; ND 1919.203 (NJA 1919.118) *The Porjus* SCS supra p. 245; ND 1947.267 *The Rigmor* SCN infra p. 394; NJA 1919.127 *The Avena* supra p. 246; and NJA 1919.387 supra p. 247.

In ND 1940.254 *The Clytia* Østre Court of Appeal, a charterparty had been entered into on 7 August 1939 for the carriage of porcelain clay from Cornwall to Copenhagen and the contract was cancelled on 4 September owing to the outbreak of the Second World War. The charterer claimed that the risk was insufficient, since the hostilities had not really begun (Dan. "da Krigen knap var begyndt"; at p. 255), while the shipowner invoked as an additional reason for the cancellation that the crew refused to participate in the performance of the voyage (cf. § 36 of the Seamens' Act supra p. 242). The court considered that the shipowner had been entitled to cancel the charter party according to SMC § 135.

Similarly, in ND 1943.92 *The Bjørnvik* Eidsivating Court of Appeal, where three charterparties had been concluded on 11 August 1939 and the charter parties were cancelled on 1 September upon the German attack against Poland while the vessel was lying in the port of Gdynia, the court stated that the outbreak of war caused a risk which was hard to appreciate exactly and it was held that SMC § 135 entitled the shipowner to cancel immediately a contract which was concluded at a time when it was impossible to foresee if there would be a war. Minefields and the risk of seizure—at least for control—had to be considered in this connection. In this case, the charterers claimed that the shipowner had breached the charterparties by performing an intermediate voyage to Gdynia but the court held that even so the shipowner did not have to carry the burden arising from consequences brought about by the war which were wholly unforeseeable at the time when the intermediate voyage was performed. See also ND 1949.407 SCF.

However, in ND 1939.376 *The Egon* Maritime and Commercial Court of Copenhagen, which concerned a charter party of 1 March 1939 for four consecutive voyages for the carriage of wood from Finnish to Danish ports, the shipowner, after having performed the second voyage on 13 September cancelled the remaining two on 16 September invoking SMC § 135 and the diffi-

culties with the crew on account of the war risks, the danger of seizure, mines and torpedoes as well as the considerably increased costs. But here the court considered that the charter party had been wrongly repudiated and awarded compensation to the charterer. The court considered the increase of danger insufficient and did not find that the contract could be cancelled according to general principles supplementing SMC § 135.

While the above cases demonstrate that a *pre-war* contract, in some instances, may be cancelled on account of the outbreak of war, there are also situations where contracts entered into *during* the war are affected by a change of circumstances to a degree where cancellation should be permitted. And this may result from changed methods of warfare, proclamation of war zones, extended contraband lists, etc. Thus, the laying of extensive mine-fields and the accentuated submarine warfare have often permitted the contracting parties to cancel the contract. See NJA 1919.124 supra p. 254; ND 1923.517 SCS supra p. 251; and ND 1944.241 *The Hop* Norwegian Arbitration infra p. 398. While, in some cases, the proclamation of war zones and the accentuated submarine warfare during the first stages of the First World War were not considered sufficiently serious to warrant the cancellation of the contract (see ND 1921.309 *The Raylton Dixon* SCN supra p. 248; ND 1921.19 *The Bob* SCN; and cf. also ND 1943.63 *The Arusa* SCD), the famous German Proclamation of the so-called unrestricted submarine warfare (31 January 1917), as a rule, entitled the contracting parties to cancel the contract. See ND 1920.142 *The Leif* SCD infra p. 397; ND 1921.17 *The Gijones* SCN supra p. 250; ND 1921.196 *The Castor II* SCN supra p. 250; ND 1921.497 *The Finse* SCN supra p. 250; and ND 1939.289 *The Gevalia* SCN. Similarly, the proclamations of the belligerents during the Second World War, in some instances, also provided sufficient excuses for non-performance of the contracts of affreightment. See ND 1945.291 *The Hasting* SCS infra p. 397 concerning the blockade of the Skagerack. But cf. ND 1918.625 *The Kong Helge* SCN supra p. 251, where the shipowner was not entitled to cancel the contract owing to the fact that he was considered to have expressly promised to perform the contract in spite of the dangers resulting from the German Proclamation of the unrestricted submarine warfare, provided he succeeded in getting the necessary crew.

The fact that the nature of the cargo encompassed by the contract of affreightment has been changed owing to the extension of the belligerent powers' contraband lists as well as changes in the system of control—search in port instead of visit and search on the high seas—have also provided sufficient grounds for the cancellation of the contracts. See ND 1918.529 *The Ada* SCN supra p. 252; ND 1920.49 *The Bretagne* SCS infra p. 409; and ND 1945.373 *The Fagervik* SCS. But cf. ND 1920.469 *The Hermod* SCS, where the change of the nature of the cargo in the German Prize Ordinance of 18 April 1915 from conditional contraband to absolute contraband had been made three days prior to the conclusion of the charter party. The court found that there had existed a substantial risk already at the time of the conclusion of the charter party and that this risk had not materially increased by the change in the Prize Ordinance.

§ 11.1.5. SMC § 135 and § 142 compared

While, before the amendments in the 1930s, it was uncertain whether § 159 was applicable to time charters also,[67] the problem is now regulated by express provisions in § 142 to the effect that the shipowner has no obligation to perform such voyages as would subject the vessel or people on board to dangers not reasonably foreseeable at the time of the conclusion of the contract. Consequently, if the vessel or the people on board are subjected to such dangers during the entire currency of the charter party, the shipowner becomes totally free from his obligations.[68]

There are, however, important differences between § 135 and § 142. Firstly, the right of cancellation is *mutual* in § 135, whereas § 142 does not give the charterer any right of cancellation at all. As a matter of fact, the Scandinavian Maritime Codes only contain one single provision which entitles the time charterer to cancel the contract and that is delay on the part of the shipowner (§ 146 corresponding to § 126 in the chapter dealing with voyage charters). Secondly, there is no enumeration of certain "classical" force majeure contingencies in § 142 which therefore on the face of it appears to be an off-spring of the doctrine of presupposed conditions rather than the doctrine of force majeure. It has been possible to assume as a typical "presupposed condition" that the vessel must not be exposed to the risk of being damaged through the performance of the charter party and there is, indeed, adequate support for such an assumption in various clauses in the current charter party forms ("lawful trade"-, "lawful merchandise"-, "safe port"-, war- and ice-clauses).[69] It should be observed that § 142 has a more general scope than § 135 which is limited to dangers arising from certain *vis major* occurrences. This difference is emphasized in the *travaux préparatoires* in connection with the discussion of the 1919 preliminary Norwegian draft which resembled the drafting of § 135.[70] Furthermore, § 135 deals with dangers for vessel and cargo (Sw. "fartyg och last"), while the danger prerequisite in § 142 concerns the vessel and people on board

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[67] See JANTZEN, Certepartier p. 324; Tidsbefragtning pp. 2, 5; Godsbefordring pp. 334, 404 et seq.; ND 1920.69; ND 1920.86; ND 1921.309; and ND 1921.497.

[68] The question whether the shipowner may cancel the contract in cases where it is *anticipated* that the dangers will prevail during the entire period of the charter party will be considered below. See p. 314.

[69] See for further comments RAMBERG pp. 38 et seq., 114–8; and supra p. 86.

[70] See SOU 1936:17 p. 213.

(Sw. "fartyg eller ombordvarande"). The reason why danger for the cargo has been omitted in § 142 lies in the fact that the provision does not regulate the possibility for the time charterer to cancel the contract. Since, under all types of affreightment, dangers to people on board must be at least as relevant as dangers to property, it is certainly a pure coincidence that the expression "people on board" (Sw. "ombordvarande") is not expressly mentioned in § 135.[71]

It seems beyond dispute that the time charterer, under general principles of law, may also be given a right of cancellation in other situations than such involving delay, e.g., when the vessel does not correspond to the description in the charter party with regard to loading capacity, speed or oil consumption[72] but under the requirement that the deviation from the agreed standard is substantial (Sw. "väsentlig").[73] And the question whether the deviation is substantial must be decided in relation to the duration of the charter party.[74] Furthermore, the time charterer has not expressly been given the right to cancel the contract in the case the vessel becomes an actual or a constructive total loss but, as previously mentioned,[75] such a right of cancellation seems to be presupposed in §§ 145, 147.

In voyage charters the risk of delay affecting the operation of the vessel rests principally with the shipowner, whereas in time charters such risk is principally the time charterer's concern. Therefore, it is perhaps not a surprising discovery to find that the chapter on voyage charters gives the *charterer* the right to cancel the contract in certain cases of delay and other hindrances affecting his business transactions (§§ 126, 131.2, 135), whereas the provisions protecting the *shipowner* (§§ 128, 135) are far from being complete, while in the chapter on time charters the situation is the reverse; in § 142 the shipowner has been given the right, ex-

[71] See, e.g., ND 1921.196 at pp. 198–9.

[72] See, e.g., MICHELET, Beskrivelsen av skipet p. 404.

[73] See, e.g., FALKANGER, Konsekutive Reiser p. 135 et seq.; MICHELET, op. cit. p. 405; and cf. concerning the corresponding problems in the case of voyage charters RØRDAM pp. 31, 117.

[74] If the breach is not considered to warrant a cancellation, the suffering party can be satisfied with damages instead. See, e.g., ND 1949.312. Basically, the same results seem to follow under Anglo-American law where a breach of *condition* entitles the suffering party to cancel, whereas a breach of *warranty* only gives rise to an action in damages against the party in breach. See, e.g., *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478.

[75] See supra p. 229.

pressed in general words, to withdraw from the performance in cases of unexpected risks, but the right of the time charterer to cancel in cases where he cannot use the vessel as presupposed when the contract was made is not treated at all. Still the problem cannot be left then and there. It must first be examined whether a right of cancellation can be awarded the respective parties under general principles of law in addition to the remedies expressly regulated in the Scandinavian Maritime Codes.

JANTZEN seeks an answer to the question by performing an analysis of the principal duty of the charterer under various types of charter parties. According to JANTZEN the reason why the voyage charterer has been given a right of cancellation in § 131.2 and § 135 lies in the fact that his principal duty is to tender the cargo, whereas in the case of a time charter his principal duty is to pay the freight.[76] This being so, an analogous application of § 135 to time charters must be excluded. With all respect, I cannot find this reasoning convincing. It must be borne in mind that neither the chapter on voyage charters nor the chapter on time charters of the Scandinavian Maritime Codes treat the problem of the influence of changed circumstances on the legal position of the contracting parties systematically[77] or exhaustively. The casuistic drafting of § 135 as well as § 142 is apparent and both provisions seem to have been influenced by clausal law.[78] Therefore, there seems to be no reason to exclude *a priori* the possibility of giving the time charterer a right of cancellation when sufficient reasons speak for such a solution.[79]

Some typical situations, when a right of cancellation might be awarded the time charterer, will be considered below,[80] but some general remarks shall be given already at this stage. There are two basically different situations which should be distinguished; the one that arises when *the vessel is detained* in ports, canals or at sea owing to blockades, sanctions,

[76] See JANTZEN, Tidsbefragtning pp. 2, 5; and Godsbefordring pp. 334, 404 et seq. But cf. id., Certepartier p. 324.

[77] See supra p. 95.

[78] See supra pp. 256, 264.

[79] See SOU 1936:17 p. 220 where, however, it is stressed that due regard must be paid to the duration of the time charters. And, as pointed out above (p. 103), the different distribution of risks in time charters as compared with voyage charters must be observed.

[80] See infra p. 300 et seq.

directions, hindrances or dangers of various kinds, or becomes requisitioned, the other when *the vessel's trade* under the time charter party is more or less affected by dangers or hindrances.

In the first-mentioned situation it is important to ascertain how the risk of the respective contingencies is distributed between the parties at law or according to the terms of the charter party. The risk of delay rests principally with the charterer but the rules modifying this basic principle vary under different systems of law.[81] As far as Scandinavian law is concerned, the charterer has to carry the risk, unless the circumstances preventing the use of the vessel "are attributable to the shipowner" (Sw. "beror på bortfraktaren"). If so, the vessel comes off hire during the period of the charter party which is lost for the charterer. The expression "are attributable to the shipowner" must be construed in relation to the distribution of functions between the parties and does not presuppose that the shipowner has been at fault.[82]

The prerequisite in the Scandinavian Maritime Codes must imply that *vis major* occurrences are at the charterer's risk, since there must have been at least some intervention or control on the part of the shipowner in order to fulfil the prerequisitie "are attributable to the shipowner". Two Norwegian arbitrations, ND 1940.353 and ND 1950.398, illustrate, however, that difficulties may arise in determining the exact meaning of the expression. In the former case, two vessels had been requisitioned for the purpose of performing military transports for the account of the German forces in Norway during one and two weeks respectively. The arbitrators, referring to the *travaux préparatoires* to § 144, where it is stated that the blockading of the vessel on account of ice or for various reasons in port does not come within the expression "attributable to the shipowner",[83] considered that the vessel did *not* come off hire. The fact that the shipowner obtains compensation for the requisition did not prevent their conclusion, since the amount received by the shipowner must be deducted from the time charter party hire.[84] Nevertheless, this decision has been criticized by JANTZEN, ND 1940 p. VII, who thinks that the time charter should have been suspended during the period of requisition. It should be borne in mind that the charterer may benefit from the fact that the vessel remains on hire, viz. when the compensation for the requisition *exceeds* the

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[81] See supra p. 227.

[82] In this regard there is a difference between Scandinavian and English law. See supra p. 26.

[83] See SOU 1936:17 p. 215; and cf. JANTZEN, Tidsbefragtning p. 80 et seq.

[84] Cf., however, infra p. 302 concerning Anglo-American law where the principle of deduction is not considered self-evident. In England the matter has required special legislation, Compensation (Defence) Act, 1939.

charter hire, provided, of course that he becomes entitled to receive such compensation.[85] In ND 1950.398, the shipowner was ordered by the German forces to provide the vessel with a special equipment for German soldiers (Norw. "flakmannskap") and the shipowner claimed that the vessel should not be considered off hire during the time (approximately 40 days) necessary for such installations, but this contention was rejected by the arbitrators. They held that the vessel could not be considered in an "efficient state" before the installation had been completed and referred in this regard to the provisions in the off hire clause (Baltime clause 11).[86]

The off hire clause in the current time charter party forms reduces, of course, the different standpoints to the distribution of risk under the various national systems of law, but nevertheless the interpretation of the off hire clauses is strongly influenced by the general solution which governs the question in the absence of clauses.[87] Furthermore, the matter is not disposed of by simply stating that the risk, according to the off hire clause or at law, rests with the charterer. Under Anglo-American law the doctrine of frustration may come to the rescue of the charterer, since the doctrine may be invoked in cases of "inordinate delay"[88] even when such delay is caused by a circumstance which, according to the express terms of the charter party, does not take the vessel off hire. Frustration "kills the contract" and the off hire clause shares the fate of the contract as a whole.[89] Under Anglo-American law, therefore, circumstances which do not *per se* take the vessel off hire may still place the risk of delay on the shipowner, provided they give rise to such inordinate delay as entitles the time charterer to invoke the doctrine of frustration. It is not certain that such a solution is desirable from a commercial viewpoint, since the placing of the risk of the *same type of event* on the one party or the other, according to the degree of delay caused by such an event, must lead to practical difficulties in assessing the risks assumed by the respective parties under the charter party.

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[85] Cf. the situation in the well-known *Tamplin S.S. Co.* v. *Anglo-Mexican Petroleum Products Co.* infra p. 301.

[86] The solution adopted by the arbitrators in this case is in accordance with German law but not with English law. This is, of course, unfortunate for the sake of international uniformity, but the decision seems natural from the standpoint of Scandinavian law. See MICHELET, "Off hire" p. 186 et seq.

[87] See, e.g., ND 1950.398 supra.

[88] See supra p. 165.

[89] See supra p. 169.

The Anglo-American principle implies, however, a modification of the harsh principle at law to the effect that the vessel only comes off hire when the shipowner has been at fault.[90] German law gives the charterer the right to cancel (Germ. "Rücktrittsrecht") under practically the same requirements as Anglo-American law. It is considered that HGB § 637 gives him such right when "der erkennbare Zweck des Vertrages durch einen solchen Aufenthalt vereitelt wird".[91] However, this principle leads to the result that *vis major* occurrences are treated *alike*, irrespective of the period of delay, since in German law the vessel comes off hire in cases of "Verfügung von hoher Hand".[92]

It is difficult, in the absence of guiding cases, to venture an opinion as to the position of Scandinavian law with regard to the distribution of risk between the parties in cases of hindrances causing inordinate delay. The *travaux préparatoires* presuppose that the time charterer, under general principles, could be freed from his obligation to pay the freight when, in certain instances, he cannot use the vessel as intended by the contract, but it is stressed that utmost care must be taken when this question is decided.[93] It must be borne in mind that not even the express provisions in SMC § 131.2 would suffice to free the charterer from his obligation to pay the freight had they been applicable to time charters. § 131.2 can only be invoked by the charterer when the hindrance concerns cargo referred to in the contract of affreightment itself (Sw. "som avtalet avser") and time charters, with the exception of tanker time charter parties, do not ordinarily refer to any specific cargo, or kind of cargo, at all.[94] But even when the time charter concerns one voyage with specific cargo[95] it is uncertain whether § 131.2 should be applied *ex analogia*, since the distribution of risk between the parties is widely different under the two types of charter.

Finally, it should be mentioned that the shipowner may obtain compensation from the charterer even for a period *after* the currency of the charter party, viz. if the charterer has breached the charter party by ordering the vessel to unsafe ports, berths or places where she is de-

[90] See supra p. 26.

[91] See, e.g., SCHAPS-ABRAHAM § 637 Anm. 4 (p. 544).

[92] See supra p. 227.

[93] See SOU 1936:17 p. 218 et seq.

[94] Expressions like "lawful merchandise" are used instead.

[95] It is not unusual that such contracts are concluded on time charter party forms. See supra p. 52.

tained.[96] Since such safe port clauses are common in the current standard charter party forms, it is perhaps fair to say that the time charterer, as a rule, stands the risk of the delay following from the vessel being detained in ports on account of dangers and hindrances.[97]

Problems of another character arise when the vessel is not detained or requisitioned but *the trade of the vessel* is more or less affected by various contingencies. In this case also, the charterer is the one to suffer from the situation, since he cannot use the vessel according to the terms of the charter party. But this position is often somewhat better as compared with the situation when the vessel is detained, since he can—at least to a certain extent—avoid the loss by declaring that he does not want to use the ship according to the terms of the charter party or at all. The shipowner cannot insist on specific performance, i.e. to hold the vessel at the disposal of the charterer and claim the whole freight irrespective of his declaration, but he must mitigate the damages by trying to charter the vessel to other parties or to the same party but on other terms.

Needless to say, there can be no obligation on the part of the time charterer to use the vessel during the period of the charter party. However, it is not self-evident that the shipowner, as in the case of voyage charters (see SMC § 134), must deduct from the charter hire such amounts as could have been earned by chartering the vessel to other parties subsequent to the time charterer's declaration that he does not intend to use his rights under the charter party. It seems, however, that the principle in SMC § 134 could very well be applied to time charters and this seems to follow already from the general principle that the suffering party cannot recover damages in excess of the amount that is a natural consequence of the breach. It is quite in accordance with the principle of mitigation of damages that the shipowner minimizes the loss by chartering the vessel to other parties—or to the same party on other more suitable terms—if he can.[98] However, the situation becomes more complicated under a time

[96] See RAMBERG p. 116 et seq.; *Ocean Tramp Tankers Corporation* v. *Sovfracht* (*The Eugenia*) [1963] 2 Lloyd's Rep. 381 C.A.; and cf. *The African Glen* 1969 AMC 1465 ASBCA.

[97] It is not possible to invoke the doctrine of frustration to free the charterer from the heavy liability that would follow if the vessel is detained a considerable period of time, since, in cases of breach of contract on the part of the charterer, the frustration is self-induced. See, e.g., *Constantine (Joseph) S.S. Line* v. *Imperial Smelting Corporation* [1942] A.C. 154; and *Ocean Tramp Tankers Corporation* v. *Sovfracht* [1963] 2 Lloyd's Rep. 381 C.A. Cf. from liner trade the usual "Government Directions"—or similar clauses.

[98] An analogous application of § 134 to time charters is suggested in the *travaux préparatoires*. See SOU 1936:17 p. 219. But cf. SELVIG, Naturaloppfyllelse p. 562, who

charter party, where the contract usually covers a considerable period of time and the market situation may undergo rapid changes and a substituted charter may involve different costs and obligations for the respective parties. But this is not sufficient reason for giving the shipowner the right to claim the whole freight without any reduction whatever, should the charterer wish to withdraw before the period of the charter has elapsed.[99] The same problem arises when the charterer cannot use the vessel for a new voyage owing to the fact that the vessel cannot be redelivered after such a voyage without an unreasonable "overlap" of the time charter period.[100] If the shipowner can use the vessel and earn freight during the period of "underlap", i.e. when the vessel is redelivered before the agreed date, he is considered to have the duty to deduct an amount corresponding to his net profit from the time charter hire.[101] However, it seems reasonable to suggest that the assessment of the reduction of the hire should be performed so as to give any benefit of doubt to the shipowner and not to the charterer who made it necessary to consider a reduction.[102]

In view of the possibilities of obtaining a reduction of the hire, when the vessel can be engaged in other trade than that prescribed by the time charter party, it becomes of vital importance for the charterer to make up his mind *before* the vessel is caught in a position where she becomes detained at his risk. The hindrance might then perhaps be avoided and the charterer can benefit from the fact that the vessel could be used in other activities.

It is a well-known fact that wars, closure of canals (Panama, Suez) and similar contingencies often cause a considerable rise of ocean freights. Provided the vessel can be used without being struck by dangers and hindrances, the charterer wants, of course, to use the vessel at the freight

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thinks that the Norwegian Law Revision Committee has wrongly considered that the charterer's position is the same in time charters as in voyage charters, since the possibilities of assessing the damages are much more uncertain with regard to time charters. See generally BRUNSVIG, Avbestillingsrett; and RAMBERG, Avbeställningsrätt.

[99] The problem of the assessment of damages has been considered especially by FALKANGER, Konsekutive Reiser p. 167 et seq.

[100] According to SMC § 143 the charterer is entitled to a reasonable "overlap", which also may cause disputes between the shipowner and the charterer if the freights have risen during the currency of the charter party. The charter parties often provide that the shipowner in case of "overlap" shall have the right to claim the market freight if this is higher than the freight under the charter party. See Baltime clause 7.

[101] See SOU 1936:17 p. 218. But the clauses in the time charter may give the shipowner the right to claim the whole freight without deduction. See LORENZ-MEYER p. 54.

[102] See JANTZEN, Hvori bestaar befrakternes forpliktelser?, ND 1923 pp. 385–403 (at p. 399 et seq.); and WvK Book 2, Chapter 5, § 458. See, generally, RAMBERG, Avbeställningsrätt p. 30; and VAHLÉN, Avtal p. 233.

stipulated in the charter party, while the shipowner wants to be free to claim the higher freight current in the shipping market. This might influence the decision of the charterer in cases of *temporary* delay and hindrances; if he declares that the contract is off he loses the advantage of having the vessel at a low freight when the hindrance has ceased to operate. Conversely, the shipowner will be prepared to take the disadvantage of having the vessel detained at his risk during a shorter period, if he can expect to fix the vessel at a higher freight for the period of the charter party remaining when the hindrance has disappeared. The key to the position of the respective parties lies in the expected duration of the hindrance seen in relation to the period covered by the charter party. The longer the period of time covered by the charter party, the stronger is the temptation of the shipowner to declare the contract frustrated for the purpose of taking advantage of a rise in the freight market, whereas a charterer, of course, does not want to assume the risk of delay during a long period when the vessel is detained in exchange for the uncertain possibility of using the vessel at a profitable freight during a short remaining period of the charter party.

There can be no doubt that the shipowner should only be awarded the possibility of invoking the doctrine of frustration in exceptional cases. The time charter party is a "forward" contract of a speculative nature and the shipowner must not be given the possibility of withdrawing from the contract, if it should turn out that the freight market would have allowed him to earn higher freight if he had not fixed the vessel for a longer period of time. We have seen that through the time charter party some serious risks fall upon the charterer and it seems reasonable to maintain that he, and not the shipowner, should be the one to take full advantage of the fact that the current market freight exceeds the time charter party hire. It was, in earlier English law, uncertain whether the doctrine of frustration could be applied to time charter parties at all,[103] and the "requisition cases" show that the doctrine could, indeed, only be used exceptionally.[104] There are no Scandinavian cases dealing with the time charters that could enlighten us on this subject, but in view of the admonition in the *travaux préparatoires* to adopt a restrictive attitude, it seems possible to maintain that under Scandinavian law also, the shipowner should only be given the opportunity to withdraw from

[103] See supra p. 186 and infra p. 311.

[104] See infra p. 314.

the contract entirely in exceptional cases, e.g. when it is more or less certain that the situation described in § 142 will free him from rendering the services during the entire period of the charter party.[105] But in such cases there seem to be ample possibilities for the parties to reach agreements satisfactory to both of them; the charterer benefits from being released from paying hire for a vessel which he cannot use, the shipowner benefits from freeing himself from a contract running at a freight lower than the current freight, provided, of course, that he is prepared to use the vessel in spite of the dangers or has the possibility of using it in other trade which is not struck by dangers and hindrances.

§ 11.1.6. An analogous application of SMC §§ 135 and 142?

The Scandinavian Maritime Codes have no provisions specially covering contracts where the shipowner has agreed to carry a certain amount of cargo continuously over a certain period of time (Sw. "transportkontrakt"). And it is not quite clear to which extent the provisions with regard to voyage and time charters could be applied to contracts where the vessel has been concluded for a number of consecutive voyages.[106]

With regard to contracts concerning a transport of a certain amount of cargo over a certain period of time as well as consecutive voyages, it is necessary to determine the legal effect of a danger or a hindrance affecting one or some—but not all—voyages under the contract.[107] Furthermore, in the first-mentioned type of contract, the shipowner usually does not promise to perform the transport by a *specific vessel* or even by his own vessels; his obligation is *generic* and he cannot excuse himself by referring to the fact that the vessel(s) which he intended for the transports has (have) been struck by hindrances of various kinds.[108] It should be observed that a promise of a generic character generally imposes a heavier burden on the promisor. This does not mean, however, that the promisor must always perform regardless of the extra burdens resulting from changed conditions.

A contract to carry an amount of cargo over a certain period of time

[105] The clauses in the time charter parties usually give the shipowner much better possibilities to withdraw from the contract than he has at law. See supra p. 88.

[106] See supra p. 49.

[107] See supra p. 50.

[108] Supra p. 50 et seq.

may sometimes cover several years and, therefore, it may happen that the performance of the contract is only prevented during a part of the time involved. In addition, the contract may provide that the performance shall be *suspended* as long as the hindrance prevents it. Since the contract regards the carriage of a certain amount of cargo, this might sometimes imply that the major part of the performance has to be effected several years later than was originally contemplated by the contracting parties. It is clear that SMC §§ 135 and 142 do not concern situations of this kind. Possibly, it might be argued that the contract must be considered *indivisible* and that the fact that it becomes impossible or dangerous to perform *a part of it* must imply that the *entire* contract may be cancelled according to either § 135 or § 142 or the general principles underlying those sections in the SMC.[109] It is submitted, however, that such an attitude is far too rigid to be recommended.

Another possibility would be to consider the contract as consisting of separate parts, in other words a *divisible* contract, and to free the parties from their respective obligations with regard to such parts as are struck by hindrances or dangers. But this approach may lead to unwarranted results also, since the respective rights and obligations of the parties usually are more or less influenced by the fact that the contract covers a longer period of time; it is not as simple as adding a number of separate contracts and arriving at a total sum of rights and obligations.

It has already been indicated that the parties in exceptional cases may be freed from their obligations by the application of general principles. And the same results which in Anglo-American law may be reached under the doctrine of frustration, may in Scandinavian law follow from the principles of force majeure and failure of presupposed conditions.[110] The freight market, the business relations of the charterer, the shipowner's possibilities of procuring the required tonnage, etc. may be completely changed in a situation existing after a major war. While it is clear that the speculative nature of contracts of this type requires the utmost caution in the application of the general principles permitting contracts to be modified or cancelled, the situation may have changed to such a degree that it would be unreasonable to uphold the contract.

[109] This line of reasoning was tried by the shipowner in ND 1920.86 but without success. See infra p. 275.

[110] See supra p. 141 et seq.

There are only few Scandinavian cases which contain any guidance on the subject. In ND 1959.333 Sw. Arb., which concerned a shipbuilding contract, the arbitrators did not permit the cancellation of the contract on the ground that the prices in the shipbuilding industry, after the boom in connection with the 1956 Suez crisis, had sunk in a manner previously unknown in commerce. An application of the doctrine of economic force majeure was rejected on account of the speculative character of the contract.

In ND 1920.86 SCN, a contract concerning carriage of stone from Norway to England during 20 years was concluded in March 1914. The transports started in January 1914 but when one voyage had been performed the shipowner, referring to SMC § 159, cancelled the contract in February 1915 on account of the war. One year after the cancellation a prohibition of import was enacted and therefore the plaintiff's claim concerned damages for non-performance from February 1915 to February 1916. The generic character of the contract was stressed by the City Court as well as by the Supreme Court. The contract was not considered absolutely impossible to perform and sufficient grounds were not at hand to permit a cancellation of the contract on account of changed circumstances resulting from the war. Consequently, decision was given in favour of the plaintiff.

In ND 1923.517 SCS, the contract concerned transport of wood pulp from Sweden for the account of Mo & Domsjö to Preston and Manchester during 1915–1918. The shipowner cancelled the contract 3 October 1917 referring to the German submarine blockade of the coasts of England, which he thought came within SMC § 159. This view was upheld by the Supreme Court, reversing the decision of Svea Court of Appeal.

There are a number of German decisions which might be of interest also, since the legislative background and the general approach in German law is quite similar to Scandinavian law.

In HansGZ 1916 nr. 35 Arb., the contract, which concerned transport of saltpeter from the west-coast of South America to Hamburg, contained a clause that in the event of war the performance should be suspended "nach Wiederherstellung geordneter Verhältnisse". In view of this clause, HGB § 629 was considered inapplicable.

In HansGZ 1918 nr. 55 HansOLG, the parties agreed that the vessel, at the time lying in a port of refuge on account of the outbreak of the World War, should remain there with cargo on board until the cessation of the war and a certain sum was agreed as compensation to the shipowner. When it turned out to be that the war became much longer than expected, the shipowner wanted to cancel the agreement which, according to his view, did not refer to a war of such kind as the present one. The Court considered, however, that by the agreement the shipowner had assumed the risk that the war might become of long duration.

There are some cases where the courts have freed the shipowner from the contract. In HansGZ 1918 nr. 69 HansOLG, the parties agreed subsequently to the outbreak of the World War (which was thought to give the shipowner the

right to cancel according to HGB § 629) that the portion of the cargo which remained to be carried under the contract should be transported after the war. The shipowner wanted to insert a provision in the agreement to protect himself in case of an unexpected turn of events, but the charterer did not agree to this. In spite hereof, the Court considered that the circumstances had changed to a degree where it would be unreasonable to force the shipowner to perform the contract, which had become "wirtschaftliche ein anderer . . . als derjenige, welchen sie im Oktober 1914 versprochen hat".

Similarly, in HansGZ 1919 nr. 36 RG, an agreement to the same effect as in HansGZ 1918 nr. 69 was held ineffective on account of the changed conditions resulting from the war. The Reichsgericht stated "dass die Leistung nach Kriegsende im Vergleich zu der Zeit, wo sie vereinbart wurde, als eine gänzlich andere anzusehen ist, und dass demzufolge Unmöglichkeit der Erfüllung der letzteren Vereinbarung angenommen werden kann". The same attitude of mind appears in HansGZ 1916 nr. 16 Arb. concerning seven pre-war contracts for the transport of saltpeter. In each of these contracts the shipowner had promised to carry 500 tons monthly over a period of 12 months by own or chartered vessels from the west-coast of America to Antwerp, Rotterdam or Bremen. The contracts covered a period until the end of 1916. The arbitrators stressed that a change of the market situation as such is insufficient. "Aber die Veränderung der Verhältnisse kann und muss—und darum allein handelt es sich hier—in Betracht gezogen werden für die Beantwortung der Frage, ob aus dem Wesen des Vertrages der Wille der Parteien herzuleiten ist, ihn weit über seine ursprüngliche Zeit hinaus auf diese veränderte Verhältnisse zu verlängern." It was considered that neither during the war, nor after the war, did the shipowner have the duty to perform the contract. BGB § 275 and HGB § 629.1.2. were referred to in support of the decision.[111]

§ 11.1.7. Increase of danger in Anglo-American law

The legal approach to the solution of various problems in contractual relations, when the parties have not provided their contract with appropriate clauses, is widely different in Scandinavian and Anglo-American law. The Scandinavian system of law relies to a great extent on statutory legislation where normative solutions are given for various typical situations, while, in Anglo-American law, a vast majority of the cases have to be decided by an inductive method based on the "implied" intention of the contracting parties.[112] Thus, there are in Anglo-American

[111] See also RGZ (1920) 99.115 and the following cases dealing with the obligations under contracts of sale RGZ (1916) 88.71; RGZ (1917) 90.102; RGZ (1918) 92.87; RGZ (1918) 93.341; RGZ (1918) 94.45; and RGZ (1923) 107.156.

[112] See supra p. 94 et seq.

law no statutory provisions corresponding to SMC §§ 135 and 142 which, in certain instances, permit contracts of affreightment to be cancelled on account of an increase of danger. Nevertheless, it is apparent that an increase of danger is considered an important circumstance in deciding, under the present Anglo-American principles of law, whether a promisor may be freed from his obligation on account of changed conditions.

Since the problem has not been regulated by statutory provisions, the legal effect of an increase of danger must be established by a study of the case-law. In the Anglo-American systems of law the technique of developing legal principles by precedents is generally preferred to the legislative method on account of its greater elasticity.[113] And there can be no doubt that the attitude, or in the words of SCHMITTHOFF[114] "the judicial climate of opinion", has changed in Anglo-American law. Therefore it becomes important to observe *when* the relevant cases have been decided, since it is by no means certain that "the judicial climate of opinion" conveyed by earlier precedents is compatible with the present legal opinion.

The impact of the *obiter dictum* in *Paradine* v. *Jane*[115] in English law and of *Dermott* v. *Jones*[116] in American law seems to have influenced the earlier decisions. Thus, in one of the leading English cases the danger for a neutral British ship on account of the outbreak of war between Russia and Turkey in 1854 has been considered insufficient in *Avery* v. *Bowden* in a dictum by CAMPBELL C.J. in Q.B.: "The danger might, no doubt, be increased from the right of search for contraband of war, the right of blockade, and other belligerent rights which may be exercised by either of the two nations [Russia and Turkey] at war; but English ships enjoyed all the rights of neutrality . . .".[117] And a well-grounded apprehension of a hostile embargo being laid on British ships by the Russian Government, and which in fact was imposed on British ships six weeks afterwards, was considered insufficient to entitle the master to leave the port of St. Petersburg before the entire cargo had

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[113] See supra p. 104 and DIPLOCK, Breach of Contract pp. 6–7.

[114] See SCHMITTHOFF, Some Problems p. 149.

[115] See supra p. 162.

[116] See supra p. 209.

[117] (1855) 5 E. & B. 714 [119 E.R. 647] at p. 725 [651].

been loaded.[118] It is pointed out in that case that a danger might free the parties from performing the contract on the ground that a master deliberately subjecting the vessel and her cargo to the risk of being damaged on account of war might act against "the public interests of his own country". But in such a case the risk must be "clear, immediate and certain".[119] In the words of ELLENBOROUGH C.J.: "Indeed to allow a man to withdraw himself from the performance of a distinct positive contract, upon the ground of some speculative inconvenience suggested as likely to result from such performance to the general interest of the State, would afford great encouragement to disingenious subtleties and refinements upon subjects of this kind, and would render all reliance upon the solemn stipulations of parties in commercial matters precarious and insecure . . .".[120] Consequently, the following statement of the law appears in ABBOTT's Law of Merchant Ships and Seamen by the turn of the century:[121] "But if war or hostilities break out between the place, to which the ship or cargo belongs, and any other nation, to which they are not destined, although performance of the contract is thereby rendered more hazardous, yet is not the contract itself dissolved, and each of the parties must submit to the extraordinary peril, unless they mutually agree to abandon the adventure".[122]

However, it is recognized already in *The Teutonia*[123] that the master should not be required to subject the vessel and her cargo to the risk of being captured when such a peril is imminent and in that case a refusal to let the Prussian vessel proceed to the nominated port of Dunkirk on the verge of the outbreak of the war between Prussia and France was

[118] *Atkinson* v. *Ritchie* (1809) 10 East 530 K.B. [103 E.R. 877]. It was stressed by ELLENBOROUGH C. J., who referred to *Paradine* v. *Jane*, that the restraint must be "an actual and operative restraint, and not a merely contingent one" (at p. 534 [878]).

[119] At p. 535 [879].

[120] At pp. 535–6 [879].

[121] 14th ed. (1901).

[122] At note q p. 867. Reference is made to i.a. *Avery* v. *Bowden*. Cf. Ordonnance de la marine art. VII and the comment by VALIN p. 626. MCELROY, p. 58 et seq., acknowledges that "anticipated impossibility" may excuse the shipowner from further performance but only when it is *certain* that the vessel would be lost if the voyage was performed. And "nothing short of this certain knowledge will suffice". See also *Watts, Watts & Co.* v. *Mitsui & Co.* [1917] A.C. 227 (infra p. 285) and the American cases *The Eros* (1916) 241 Fed 186, affirmed (1918) 251 Fed 45 CCA 2nd; *Graves* v. *Miami S.S. Co.* (1899) 61 NYS 115; and *Piaggio* v. *Somerville* (1919) 119 Miss. 6.

[123] (1872) L.R. 4 P.C. 171 [17 E.R. 366].

held justified: "It seems obvious that, if a Master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril as, for instance, that there are Pirates in his course, or Icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger". On the other hand the shipper was in *De La Rama S.S. Co.* v. *Ellis*[124] not successful in arguing that the master did not act correctly when he continued loading the cargo on board the Philippine motor ship Dona Aniceta in New York bound for the eastern ports Manila, Cebu and Hong Kong in spite of the fact that the Japanese attack on Pearl Harbour had intervened. It was considered that the attack "did not constitute automatically a restraint on shipping" and that the shipper "had the right to demand of the carrier after receiving the news of the Pearl Harbour attack not infallibility, but exercise of a reasoned judgment of the situation as it appeared at the moment having regard to rights of all concerned". As pointed out above the situation ordinarily becomes different when contracts under bills of lading, as distinguished from charter parties, are concerned, since in such cases the manner of performing the contract rather than the cancellation of it comes into the focus of attention.[125]

By the devices of a more generous interpretation of "restraint of princes" clauses and corresponding clauses,[126] and the doctrines of impossibility and frustration, the uncompromising attitude appearing in some of the earlier cases and statements of law has been considerably modified. Thus, it is clearly recognized by McNair that dangers resulting from war might free the parties from the performance under the contract not only when the vessel belongs to a belligerent state but also when the vessel and her cargo enjoy the protection of the rules of neutrality. He states: "War undoubtedly aggravates the perils of maritime transport to an increasing extent, as insurance rates bear witness; but it is submitted that, apart from special provision in the contract, the mere outbreak of war will not affect the contractual obligations . . . On the other hand, if it is shown that one of the belligerents, whether after declaring a particular area to be a war zone or not, is sinking, at sight and regard-

[124] (1945) 149 F 2nd 61 CCA 9th.

[125] See supra p. 26 et seq.

[126] See infra p. 283.

less of the flag and the character of the voyage, all ships proceeding upon the agreed voyage, then it might be maintained that the character of the voyage has been changed and the contract dissolved."[127] This result is reached on the basis of the doctrine of frustration; the war risks may turn the promised performance into a "different obligation".[128] The reasoning in American law comes close to this[129] but, in American law, Restatement Contracts expresses the more general principle that the promisor may be excused when "performance will seriously jeopardize his own life or health or that of others"[130] and in the illustrations to this principle there is also mentioned a case when after the conclusion of the contract the ship is subjected to war risks.[131]

The principle appears clearly in *Associated Metals & Minerals Corp.* v. *Swedish America Mexico Line, Ltd. (The Svaneholm)* 1944 AMC 362 CCA 2nd, affirming 1942 AMC 1528 SDNY. The case concerned the question whether a war clause in a conference shipping contract reading "in the event of the ... existence of war ... affecting the operations of the Carriers, or any of them in the trade covered by this agreement, the Carriers or any one more of them shall at their option have the right to cancel this agreement" applied to a booking made 14 August 1939 for the transport of 1000 tons pig iron from Cleveland, Ohio, to a Swedish port. The lower court stated: "The court indisputably knows that the war has definitely affected the operations of the defendant's ships over the routes embraced in the shipping contract. Due particularly to modern conditions and to current methods of warfare, the danger of injury by mines or torpedoes or of delay and expense accompanying searches or seizures or even confiscation of cargoes or ships or of increases in the costs of hull or cargo insurance and other additional costs of or incidental to transportation is and from the inception of the conflict has been great, and inescapable, if the ships ply or undertook to ply in the war zone or anywhere within the neighborhood where contests at sea between the warring nations are or have been in progress .... All that has been said would effect even though the transportation with which we are concerned had occurred between a neutral port in the United States and a neutral port in Sweden .... It follows, obviously as I think, that the existence of war was a complete warrant for terminating the shipping contract" (per CAFFEY D. J. in 1942 AMC 1528, 1538). The shipper maintained that the shipowner's cancellation "constituted a mere

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[127] See MCNAIR pp. 214–5.

[128] See supra p. 174.

[129] See, e.g., ROBINSON p. 656 referring to *Allanwilde Transport Corp.* v. *Vacuum Oil Co.* (1918) 248 U.S. 377 and supra p. 212.

[130] §§ 465, 466.

[131] See § 465, illustration 2.

device to get . . . an increased freight rate and were not taken in good faith . . ." but the judge stated: "I fail to see how its effort through cancellation to avoid a prospective loss can properly be denominated bad faith" (at p. 1541).

In the following some English and American cases relating to the influence of war risks on contracts of affreightment shall be mentioned for the purpose of examining whether any difference in result is likely under Anglo-American law as compared with Scandinavian law. The case-law shows that an increase of danger, with regard to pre-war as well as war contracts, is recognized as a fact which may entitle the parties to cancel the contract, but exactly as in Scandinavian law it is necessary that there be an *increase* of the risk of sufficient magnitude as compared with the situation existing at the time of the conclusion of the contract. And this requirement has been upheld even under "restraint of princes" clauses.

In *Amtorg Trading Corp.* v. *American Foreign S.S. Corp. (The Wildwood)* 1943 AMC 320 CCA 9th, reversing 1941 AMC 1717, the contract had been concluded in February 1940 for the transport of general cargo from New Jersey to Vladivostok. The vessel sailed 19 February, left Honolulu 21 March and was ordered by the shipowner to return to Seattle 28 March. The District Court found that "there were no spectacular developments which materially altered general world conditions after the booking agreements and departure of the Wildwood on February 19" (at p. 1730). The bill of lading contained an "excusatory clause" of the usual type,[132] but the court stated that this clause is not "optional with the ship" (at p. 1735). The contract must be held to be made in the light of the known war conditions. The Court of Appeals had the same opinion as the District Court as regards the legal questions and stated that the danger must "become substantially greater" and that deviation clauses must "be given a reasonable interpretation". But, since changed conditions had appeared after the conclusion of the contract (the allied forces had taken a Russian vessel engaged in United States—Russian trade as a prize and extended their control to encompass the northern waters of the Pacific), the decision of the District Court was reversed.[133]

The necessity of a change of the risks is even more clearly stressed in case of contracts concluded *during* the war. In *Rio Tinto Co.* v. *Det Dansk-Franske Dampskibsselskab (The Normandiet)* (1919) 1 Ll.L.Rep. 111 K.B., a charterparty had been concluded for the transport of coal from Port Talbot, Cardiff or Newport to Huelva. The charterparty had a "restraint of princes" clause. The shipowner refused to perform the contract on the Proclamation of the

[132] Cf. the "Government Directions" clause in Conlinebill.

[133] See also *Balfour Guthrie & Co.* v. *A/S Rudolf and Fjell Line* 1941 AMC 869 SDNY.

German unrestricted submarine warfare on 1 February 1917 and referred to the "restraint of princes" clause and to the fact that the "basis of contract" had gone (cf. the Coronation cases supra p. 174). ROCHE J. did not find any substantial increase of risk between 24 January and 1 February and formed his opinion on the basis of the statistics of the number of neutral vessels sunk. He did not think that the "basis of contract" was gone, nor that the "restraint of princes" clause could be invoked, since the "threat . . . was contrary to all the laws of nations and of humanity . . . and all mariners of some nations virtually disregarded the threat". At all events trade went on through the United Kingdom in an uninterrupted stream. There were losses after the Proclamation as before it. The true reason for the shipowner's cancellation was considered to be the rise of freight and the charterer was awarded compensation.

In *Balfour, Guthrie & Co.* v. *Portland & Asiatic S.S. Co. (The Nicomedia)* (1909) 167 Fed 1010 DC Ore., the contract had been concluded on 30 July 1904 during the Russian-Japanese war. At this time Russia had already declared the cargo (flour) contraband of war and given notice of a blockade of Japanese ports. It was not proved that the blockade was effective,[134] but a Russian squadron had made some seizures of vessels of neutrals as prizes of war. The shipowner contended that a blockade, in the sense of the rules of international law, had been effected after the contract had been concluded and that it was illegal to perform the voyage, since it required the shipowner to disregard the blockade and to carry contraband. The court did not agree to this, since it was very well possible to enter a valid agreement during the war to perform a voyage of such kind.[135] If the contract had been entered into *before* the outbreak of war, the cancellation might have been approved under the principle in *The Styria*.[136] But "it can hardly be disputed that the respondent entered into the contract with full knowledge of the existence of war conditions . . .. The contract was one, in purpose and effect, to carry contraband of war (at pp. 1018–9). The "restraint of princes" clause could not be understood as "an option to carry or not". It is not to be supposed that contracts are entered into to be avoided at the will and pleasure of either of the parties, unless such a purpose be so expressed by clear enunciation" (at p. 1019).[137]

It might be contended that a comparison between Scandinavian and Anglo-American law should not concern cases where the court has based its decison *on a specific clause* rather than on some legal principle.

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[134] See supra p. 125.

[135] At pp. 1017–8. See supra p. 129 and infra p. 289.

[136] Cf. infra p. 399.

[137] See also *O/Y Wasa S.S. Co.* v. *Newspaper Pulp & Wood Export Ltd. (The Hannah)* (1949) 82 Ll.L.Rep. 936 K.B.; *Government of the Republic of Spain* v. *North of England S.S. Co.* (1938) 61 Ll.L.Rep. 44 K.B.; *Rotterdamsche Lloyd* v. *Gosho Co. Inc.* 1924 AMC 938 CCA 9th.

However, it must be borne in mind that under Anglo-American law the courts, using the technique of basing the result on the intention of the contracting parties, feel more "at ease" if the decision could be based on a specific clause. Therefore, the courts have presumably, in several cases, preferred to "interpret" the clause in a liberal manner instead of admitting cancellation at law under the doctrines of impossibility or frustration. Thus, the "restraint of princes" clause, in some instances, has been considered to allow cancellation in spite of the fact that there has been no physical restraint of the subject-matter but merely a *risk* of future restraint or no risk of restraint in the literal sense of the word at all but only a risk of *physical damage* to the vessel or her cargo. On the other hand, there are also cases where the courts have given "restraint of princes" and similar clauses a restricted application. This being so, it seems appropriate to compare cases where the contract has contained a "restraint of princes" or similar clause with cases where there has been no clause in the contract,[138] but it must be borne in mind that the clause, depending on its exact wording, may very well have had the effect of reducing the requirements demanded for cancellation in the absence of a clause.[139] The summary of the following cases may give a general idea of the reasoning practised by the courts.

In *Rodoconachi* v. *Elliot* (1874) L.R. 9 C.P. 518 Ex., the cargo was to be transported from Japan and/or Shanghai to London among other places. It was customary and well known to the insurers that the goods went by rail through France via Lyon-Paris-Boulogne and from there by ship to London. The cargo arrived in Paris 13 September 1870, when the German army was approaching and already had taken parts of the railway connecting Paris and Boulogne. Paris was seiged 19 September and the communications blocked. On 7 October when these conditions still prevailed the cargo-owner gave notice of abandonment under his policy of insurance. Since there was "not a mere temporary retardation of the voyage, but a breaking up of the whole adventure", the court held that there was a "constructive total loss of the goods by restraint of kings and princes within the terms of the policy". And this result was reached although "there has been no specific action on the goods themselves".[140]

In *Furness, Withy & Co.* v. *Rederiaktiebolaget Banco (The Zamora)* [1917] 2 K.B. 873, a Swedish vessel had been fixed 13 November 1916 on a time charter (Baltime) for a period of six months for transports between "safe ports"

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[138] See PATTERSON, Constructive Conditions in Contracts, 42 Col. L.Rev. (1942) 903 at p. 950; and infra p. 413.

[139] See further infra p. 431.

[140] See the dictum by BRAMWELL J. at p. 522.

within a range "United Kingdom, Continent (Dunkirk/Sicily limits), Africa, North and South America, including Canada". One round trip was performed (England–Italy), but the shipowner thereafter cancelled the contract referring to the perils of war and to the fact that the Swedish authorities had forbidden any further performance under the charter. It was considered that English law applied to the contract and that, therefore, the owners "could not possibly rely upon the fact that this charter is illegal according to Swedish law" (at p. 876). But after some hesitation as to whether the "restraint of princes" clause is applicable even when the restraint does not operate on the subject-matter itself but only upon the parties having custody of the subject-matter, it was considered that the shipowner was excused under the clause (per BAILHACHE J. at p. 877).

In *British Iron and Steel Corp* v. *Goulandris Bros. (The George J. Goulandris)* 1941 AMC 1804 DC Maine, a Greek vessel had been chartered to a British company in July 1939 for the transport of scrap iron from the United States to "one safe port in the United Kingdom". A part of the cargo was loaded 2 September 1939. The shipowner was considered to have the right to cancel the contract but he did not get compensation for the costs of discharging the cargo. It appeared that during September–October 92 vessels had been sunk, and out of these 32 neutral vessels. Scrap iron was introduced on the German contraband list on 13 September. The freights and insurance premiums were greatly advanced immediately upon the breaking out of the war. And it was considered that the shipowner "by the restraint of princes provision and other more or less similar clauses in the charter party . . . is not obliged to enter the zone of danger after war is declared" (at p. 1815).

In *M.A. Quina Export Co.* v. *Seebold (The Maria Lorenza)* (1922) 280 Fed 147 DC SD Fla., the "restraint of princes" clause contained the words "extraordinary occurrence beyond control of either party . . . mutually excepted". The contract, which was concluded 16 February 1916, concerned the transport of timber on an Uruguayan vessel from Pensacola (Gulf of Mexico) to the United Kingdom. The cancelling date was originally 15 June 1916 but on 24 January 1917 was postponed to 15 April 1917. Subsequently to the German Proclamation of unrestricted submarine warfare on 31 January 1917 the shipowner cancelled the contract. It was considered that the German blockade of English ports amounted to a "restraint" within the meaning of the clause and furthermore that the German Proclamation was an "extraordinary occurrence". The shipowner's cancellation was approved but it was stressed that he could only be given such right "when change is so great no reasonable man would contract under the circumstances" (at p. 150). And this was not the case "unless the freight reserved was in such an amount as would fully repay the value of the vessel so risked, and this leaving out of consideration the lives of the crew endangered".[141]

In *Nobel's Explosives Co.* v. *Jenkins (The Denbighshire)* (1896) L.R. 2 Q.B. 326, the vessel accepted a shipment of dynamite and other explosives in London for carriage to Yokohama. The bill of lading had a "restraint of princes"

[141] The sinking of the Lusitania (see supra p. 109) was referred to in the case.

clause as well as a special war clause allowing the master to discharge the cargo "in the nearest safe and convenient port at the expense and risk of the owners of the goods" in case of "war or disturbances" making it "unsafe" to reach the destination. The cargo was discharged in Hongkong 1 August 1894 on the outbreak of war between China and Japan which made the cargo contraband of war. The charterer claimed compensation for the transhipment costs for the transport of the cargo from Hongkong to Yokohama but the court held in the shipowner's favour. It was considered that the master had acted in the best interests of all parties concerned and, in fact, that, in view of the risk of seizure of the vessel and her cargo, he would have acted "recklessly" if he had continued the voyage. Furthermore, it was considered that the risk of seizure came within the word "restraint" in the meaning of the clause and, in addition, that the safe port clause could be invoked, since the war risks made the entering of or discharging in the port "unsafe".[142]

While the above cases show that the courts have been prepared to interpret the "restraint of princes" clauses liberally, presumably for the purpose of arriving at the same reasonable results which otherwise would have been reached under general principles of law or, as in Scandinavian law, under statutory provisions, it is also clear that they have hesitated to invoke the clause when this would give the shipowner an unreasonable benefit.[143] Firstly, it has been stressed that the "restraint of princes" clause only regards future restraints and not restraints existing at the time of the conclusion of the contract (see supra p. 282). Secondly, since the "restraint of princes" clause does not specify the *character* of the restraint and its *effect* on the performance of the contract, the courts have had the possibility of narrowing its application considerably thereby reaching results similar to those which, in Scandinavian law, would have been reached in the absence of a clause.

In *Watts, Watts & Co.* v. *Mitsui & Co.* [1917] A.C. 227, a charter party, which had been concluded in June 1914, contained a promise to provide a steamer to be named and to proceed to Marioupol, on the Sea of Azov, and there load a cargo of sulphate of ammonia and to carry it to Japan. Cancellation date was fixed at 20 September 1914 and the charter party contained a "restraint of princes" clause. The defendants declined on 1 September 1914 to name a steamer on the reasonable apprehension of Turkey becoming involved in the European War and on the ground that the British Government had prohibited steamers from going to the Black Sea to load, but in fact no such prohibition had been issued. It was held that the exception afforded no defence

[142] See also *Geipel* v. *Smith*, supra p. 165; the restraint of princes clause was held applicable to blockade.

[143] Cf. the statement by PATTERSON infra p. 413.

to the action, inasmuch as a reasonable apprehension of the closing up of the Dardanelles, though justified by the event, did not constitute a restraint of princes (per Lord FINLAY L. C. at p. 233; and Lord DUNEDIN at p. 238, where he states, referring to *Atkinson* v. *Ritchie*: "The more recent cases cited by the appellants, such as *Geipel* and *Nobel's Explosives*, do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, thought it does not affect him at the moment, will do so if he continue the adventure." Accord, Lord SUMNER at p. 245).

In *Government of the Republic of Spain* v. *North of England S.S.Co.* (1938) 61 Ll.L. Rep. 44, the charter party had been entered into during the Spanish Civil War. The charterer had the right to require the vessel to proceed to one of six named ports on the southeast coast of Spain. The freight was prepaid and the charter party contained the Chamber of Shipping war clauses.[144] The six ports mentioned in the charter party were occupied by the Republican Government, but the Nationalist Government declared its intention of instituting a blockade of such ports on the east coast of Spain as were occupied by the Republican Government. As a consequence hereof the shipowner's insurance company increased the premiums for trade on these ports. The shipowner then declared that he could not accept any of the ports mentioned in the charter party as ports of discharge and requested a nomination of a "danger free port outside the range" and the charterer nominated under protest the port of Oran and claimed damages for non-performance. It appeared that the "blockade" did not result in any increase of danger and, indeed, the Nationalist Government did not maintain that the operations performed by its naval forces were "legally or technically equivalent to a blockade". LEWIS J. did not think that there was a "blockade" within the meaning of the war clause, since "blockaded" meant blockade "in its legal sense".[145] Award was given in the charterer's favour.[146]

A restrictive interpretation of a war clause also appears in *Westralian Farmers* v. *D/S Orient A/S* (1939) 65 Ll.L.Rep. 105 K.B. Here, a timechartered vessel had been subchartered for a voyage from Australia to a port in the United Kingdom. The timecharter prescribed the "steamer not to be sent on any voyage exposing her to attacks of submarines or aircrafts or to the risk of being sunk by mines or otherwise". The Second World War was declared after the vessel had sailed on the voyage. The vessel arrived at Cape Town and was ordered to Dakar for bunkering. At this time the shipowner invoked the clause and refused to proceed. However, the clause was considered inapplicable, since the words "sent on any voyage" regarded the beginning of the voyage and not cases where the vessel after bunkering leaves intermediate ports. Consequently, the shipowner's refusal to proceed constituted a breach of contract.

[144] See supra p. 69.

[145] See supra p. 125.

[146] Cf. *De La Rama S.S. Co.* v. *Ellis*, supra p. 279; an act of war (the Pearl Harbour attack) does not automatically constitute a "restraint".

Since the standard forms of contracts of affreightment always contain a "restraint of princes" or similar clause, it is seldom that the court will have to decide the question of cancellation or deviation *without the support of any clause at all.* However, in *North German Lloyd* v. *Guaranty Trust Company of New York* (*The Kronprinzessin Cecilie*),[147] the Supreme Court of the United States did not want to stretch the phrase "arrest and restraint of princes, rulers, or people" beyond its literal intent but preferred to *imply* an exception in the contract to the effect that, owing to the outbreak of the First World War, the master of a German vessel was justified in abandoning on 31 July a voyage from New York with destination Bremerhaven via Plymouth and Cherbourg (war was declared the next day between Germany and Russia, on 3 August with France, and on 4 August with England).[148] And the fact that the exception was *implied* amounts to no more and no less than the application of a legal principle.[149]

A rather unusual approach to the question of solving the legal issue in the absence of a clause can be noted from *L.N. Jackson & Co.* v. *The Royal Norwegian Government (The Tropic Star)*.[150] A booking agreement had been entered into in November 1941 for the transport of copra from Beira (South Africa) to New York. Prior to this the Norwegian government in exile and the Norwegian Shipping and Trade Mission, which administered the vessel, had concluded a so-called "ship warrants-agreement"[151] with the U.S. Maritime Commission for the purpose of getting "priorities" in connection with loading, discharge, etc., necessary for trade on U.S. ports. By this agreement the shipowner obligated himself to follow the directions of the U.S. Maritime Commission which subsequently to the Japanese attack on Pearl Harbour (7 December 1941) prohibited the voyage for the carriage of copra from Beira to New York. The shipowner complied with this direction and the charterers claimed damages for non-performance. The Court of Appeals, which held in the shipowner's favour, considered that both parties to the agreement were well aware of the agreement between the U.S. Maritime Commission and shipowners of allied or friendly powers (a dissenting judge did not find that this was proved in the case). This being so, the operation of the doctrine of frustration was not

[147] (1917) 244 U.S. 12.

[148] See the dictum by HOLMES J. at p. 22 and the comments to the case by HALL, The Effect of War on Contracts, 18 Col.L. Rev. (1918) 325 at pp. 340–1; ROBINSON p. 656 and the further cases mentioned supra p. 281 et seq.

[149] See supra pp. 179, 204. Cf. also *Pope & Talbot Inc.* v. *Blanchard Lumber Company of Seattle (The Absaroka)* 1947 AMC 325 CCA 9th (at p. 331).

[150] 1950 AMC 80 CCA 2nd reversing 1949 AMC 1564.

[151] Cf. 1941 AMC 1511 (Ship Warrant Act).

prevented on account of the fact that the hindrance had been foreseeable. It was stressed that the Pearl Harbour incident had *caused* the direction of the U.S. Maritime Commission and that this cause had been clearly unforeseeable (at p. 90). It was stated that the shipowner in such a case could be relieved from the performance of the contract *in spite of the absence of a specific clause to this effect*, "unless the fault in not providing against it seems clear and unilateral" (at p. 88). The custom of introducing clauses in the contracts of affreightment, regulating what is going to happen under various circumstances, had apparently become so well developed that the concept of negligence could be applied with regard to the technique used in drafting the agreement.

As demonstrated by the above-mentioned cases, the fact that a major war breaks out does not *ipso facto* dissolve the contract of affreightment, apart from situations when the doctrine of illegality on account of trading with the enemy could be invoked.[152] It is necessary to examine closely the *effect* of the war,[153] taking into consideration the dangers existing in the areas which the vessel has to pass in order to perform the contract. Thus, in *Luckenbach S.S. Co.* v. *W. R. Grace & Co.*,[154] where the shipowner in a contract dated 25 October 1916 had agreed to carry a shipment of nitrate and/or ores from Chilean ports to U.S. ports Savannah/Boston range, he was held liable for non-performance when he cancelled the contract on the outbreak of war between the U.S. and Germany 6 April 1917.[155] The same result followed in *Amritlal Ojha & Co.* v. *Embiricos*.[156] A Greek vessel had, prior to the outbreak of the Second World War, been chartered for voyages in the Far East and the charter party expressly provided that no voyages "that would involve risk of seizure, capture, repatriation or penalty by rulers or governments" had to be performed. The vessel was engaged in trade between Indian ports until the middle of November 1939 when the master, upon the instructions of the shipowner, refused to perform a voyage for the carriage of coal from Calcutta to Port Okha (Bombay) owing to the presence of a German raider in the waters. The risk was not considered sufficient to "change the character of the voyage".

On the other hand, the situation might become entirely different

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[152] See supra p. 198.

[153] But cf. concerning the interpretation of war clauses infra p. 426 et seq.

[154] (1920) 267 Fed 676 CCA 4th.

[155] The contract contained the usual "restraint of princes" clause and both the shipowner and the charterer were domiciled in the U.S.

[156] (1943) 76 Ll.L.Rep. 175 K.B.

when the actual zone of war has to be entered and this is evidenced by *The George J. Goulandris* (supra p. 284), where the vessel after the outbreak of the Second World War did not have to proceed to "one safe port in the United Kingdom" i.e. to a port belonging to one of the belligerent powers. However, in *Balfour Guthrie & Co.* v. *A/S Rudolf and Fjell Line (The Harpefjell)*,[157] where the charter party, dated 26 August 1939, concerned the transport of soyameal from Detroit and Toledo to Antwerp or Rotterdam, the shipowner was not entitled to cancel the contract under a war clause in the bill of lading. The court did not find that the ports of destination were blockaded, or that the cargo constituted contraband, or that any danger prevented the performance of the voyage, although an increase of the insurance premiums could be noted.[158]

Evidently, the chances for the shipowner to escape from the performance when the contract has been concluded *during an existing war*, and thus with knowledge of the dangers affecting shipping, are even less. Nevertheless, experience shows that at particular times there might be a marked increase of the risks owing to the acts of the belligerents. The German Proclamation of the unrestricted submarine warfare on 31 January 1917 undoubtedly increased the risk for neutral vessels sailing in the vast "war zone" encompassed by the Proclamation[159] and this provides an example where, in Scandinavian law (see supra p. 263) as well as Anglo-American law (see supra p. 284), the shipowner has been entitled to withdraw from a contract entered into during the war.

In several cases the shipowner has tried to maintain that he cannot be required to perform a voyage for the carriage of contraband, or to break a blockade, since such acts would constitute "unlawful" acts, but the courts have always observed the well acknowledged principle of international law that the carriage of contraband and the breaking of a blockade are not *per se* unlawful.[160] However, an *order* from the govern-

[157] 1941 AMC 869 SDNY.

[158] This provides an example of the effect of "The Twilight War" during the first stage of the Second World War. See supra p. 138.

[159] See supra p. 128.

[160] See, e.g., *Ex p. Chavasse, re Grazebrook* (1865) 4 D.J. & S. 655 [46 E.R. 1072] per WESTBURY L. C. at pp. 658–61 [1074–5]; *Balfour, Guthrie & Co.* v. *Portland & Asiatic S.S. Co. (The Nicomedia)* (1909) 167 Fed 1010 DC Ore. at pp. 1017–8; *Luckenbach S.S. Co.* v. *W. R. Grace & Co.* (1920) 267 Fed 676 CCA 4th at p. 679; *Atlantic Fruit Co.* v. *Solari;* and the further references mentioned supra p. 129 note 1.

ment of the country where the vessel is registered might change the situation.

In *Atlantic Fruit Co.* v. *Solari* (1916) 238 Fed 217 SDNY, a Dutch vessel, at the time on time charter was subchartered on one charter party dated 24 May 1915 for ten months and on another dated 4 August 1915 for eight months. These charter parties were concluded on the usual Government Form for the transport of "lawful merchandise" between "safe ports" and contained a customary "restraint of princes" clause. Owing to the fact that the charterers on two occasions tendered cargoes of frozen meat which was delivered to the Italian military authorities, and therefore came within the concept of contraband (see supra p. 121), the German ambassador and the Austrian consul at Montevideo threatened that the vessel would be destroyed by submarines because she carried contraband. Therefore, the master refused to follow the orders of the charterers to sail to Montevideo subsequently to the discharge of the cargo at Genoa 23 September 1915. In addition, the government of Holland intervened and ordered the Dutch consul at Genoa not to permit the crew to sign "for any voyage while the vessel was under charter to the respondents or libelant" and she was thus prevented from sailing. However, after negotiations the Dutch government withdrew the order but on the condition that the shipowners and the time charterers sign an agreement to the effect that the vessel should not during the present war trade with any country involved or thereafter becoming involved as a belligerent in the war. But when the charterers were requested to give sailing orders, they declared that they had no further use of the vessel. The shipowner tried to recover time charter hire for the period after the declaration of the Dutch government as well as additional expenses resulting from the charterer's tendering contraband of war for shipment but his claim failed. The court considered contraband of war as "lawful merchandise" in the sense of the charter party clause. Furthermore, it was considered that the charter parties became frustrated upon the order of the Dutch government. It should be noted that the doctrine of frustration in this case came to the rescue of the charterer, who otherwise would in any event have had to pay the agreed time charter party hire—subject to any deduction corresponding to hire earned by the chartering of the vessel to other parties—throughout the charter party periods.

While it seems clear that an act of a foreign government may amount to frustration of the contract, or as in *Furness, Withy & Co.* v. *Rederiaktiebolaget Banco* (supra p. 283) bring a "restraint of princes" clause into operation, it should be observed that a release from the contract does not follow from the doctrine of illegality, owing to the prohibition of trading with the enemy or otherwise, when the prohibition is enacted according to *another law than the law applicable to the relevant dispute.* This is expressly stated in the *Furness, Withy* case by BAILHACHE J.:

"It is . . . I think, clear law, that the mere fact that a contract is illegal by the law of a foreign state of which one of the contracting parties is a subject will not make the contract unenforceable here if it is an English contract and is to be construed according to English law. Therefore if it were not for the exception of restraints of princes the owners could not possibly rely upon the fact that this charter is illegal according to Swedish law" (at p. 876).

See also *Trinidad Shipping & Trading Co.* v. *Alston & Co.* [1920] A.C. 888, where the House of Lords refused to hold the contract unenforceable on the ground that payment of rebates according to the rules of the shipping conference would subject the shipowners to penalties under the provisions of an Act of Congress of the U.S. The contracts under which the rebates were claimed were contracts between British subjects, made in British territory, and therefore governed by British law.

However, the question of the legal effect of foreign legislation affecting the performance of the contractual promises is a difficult subject which does not lend itself to general statements. Thus, in *Esposito* v. *Bowden*,[161] it appears from an *obiter dictum* that a shipowner can be freed from his obligation to carry the cargo to a destination in a country which subsequently to the conclusion of the contract becomes involved in war with the shipowner's country.[162]

SMC § 135 contains the principle that the charterer has the same right as the shipowner to withdraw from the agreement in case of an increase of danger for the cargo becoming damaged owing to the contingencies enumerated in the section; the right of cancellation is *mutual* with regard to voyage charters. However, neither Scandinavian nor Anglo-American case-law contains any definite guidance as to the precise circumstances allowing *the charterer* to cancel the contract on account of such an increase of risk. The initiative is practically always taken by the shipowner, the reason being that a danger for damage to the cargo on account of war ordinarily will affect the vessel in the same degree.[163] And the shipowner will, as a rule, be more keen than the charterer on cancelling the contract and having the vessel free for other

[161] (1857) 7 E. & B. 763 [119 E.R. 1430].

[162] (1857) 7 E. & B. 763, 792 [119 E.R. 1430, 1440]. See for further references as to the effect of foreign legislation in general supra pp. 191-2, 219.

[163] The carriage of contraband of war will, for example, often subject the vessel to the risk of confiscation or in any event serious disadvantages. See supra p. 132.

commitments thus enjoying the benefit of a rising freight market (see supra p. 91). In addition, the bills of lading often deprive the charterer of the right of cancellation which under Scandinavian law he enjoys according to § 135 SMC.[164] Nevertheless, it is probable that the charterer, under Anglo-American principles of law also, might be given a right of cancellation on the ground that the performance of the contract would make the losing of the cargo quite probable[165] or constitute a frustration of the charterer's commercial object.[166] The problem is raised in *Essex S.S. Co.* v. *Langbehn*,[167] where it was stated: "If the owner was released by the state of war from performance of his part of the charter party, it follows that the charterer was released from the obligation resting upon him. The release must be mutual and not optional with the owner alone."[168] Furthermore, the "restraint of princes" clauses, as well as war clauses in voyage and time charters,[169] often provide that the right to invoke the relevant exceptions shall be *mutual.* The fact that the charterer has such right may be important for the purpose of preventing the shipowner from misusing his liberties to load and transport the cargo in spite of the charterer's interests to the contrary. In the *De La Rama* case (supra p. 279), it is thus pointed out that the shipper did not react or protest against the loading of the cargo immediately after the Pearl Harbour attack and it is indicated that contrary instructions from the shipper might have deprived the carrier of his discretion to complete the loading of the cargo without awaiting future developments.[170]

The situation arising under *time charters* will be considered below, when the legal effect of requisition is examined (see infra p. 298), but it should be pointed out already at this stage that, while the shipowner, by the operation of the doctrine of frustration, in some instances may be freed from his obligation to take the vessel into dangerous zones or places, or even be given the possibility to use the vessel in more lucrative business than under the current charter, the doctrine of frustration may

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[164] See, e.g., Conlinebill clause 16.

[165] See concerning "the perishing of the thing" supra p. 164 and infra p. 298.

[166] See supra p. 206 and infra p. 379 et seq.

[167] (1918) 250 Fed 98.

[168] At p. 100. See also ROBINSON pp. 654–5.

[169] See supra p. 69 et seq.

[170] See 149 F 2nd 61 at pp. 63–5.

also operate to place the risk of delay upon the shipowner when the vessel is detained through a frustrating event such as the seizure by belligerents or the closing up of canals.[171]

In *Tatem* v. *Gamboa* [1939] 1 K.B. 132, the charter party (dated 25 June 1937), covering a period of 30 days, contained the following provision: "steamer to be employed . . . within the following limits: North Spain (Government ports) and French Bay ports for the evacuation of civil population from North Spain." The charter began on 1 July and hire for 30 days was prepaid. When one voyage had been performed the vessel was seized by a Nationalist ship on 14 July, taken to Bilbao, and kept in custody until 7 September when she was released. The vessel was redelivered to the shipowner on 11 September, who claimed hire until such date. The charterer maintained that the seizure of the vessel constituted frustration of the adventure and declined any obligation to pay hire in excess of the amount prepaid.[172] It was held that the contract was frustrated. Even if the incident had been foreseeable the doctrine of frustration applied, since "once the subject-matter of the contract is destroyed, or the existence of a certain state of facts has come to an end, the contract is at an end, that result follows whether or not the event causing it was contemplated by the parties".[173]

However, the charterer may incur the risk even of an indefinite period of delay, and for that matter the risk of physical damage to the vessel also,[174] if he orders the vessel, or causes the vessel to proceed, to dangerous zones, ports or places in violation of the contract of affreightment. This is well illustrated by *Ocean Tramp Tankers Corp.* v. *V/O Sovfracht* (*The Eugenia*).[175]

The Eugenia was chartered on the Baltime charter party on September 1956 "for a trip out to India via Black Sea" from Genoa. The war clause prescribed that the vessel was "not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone which is dangerous as the result of any actual or threatened act of war, hostilities, warlike operations . . ." The clause specifically provided that the shipowner should be entitled from time to time to take out insurance at the charterer's expense against any risks of such kind likely to be involved and that hire should be paid, in spite of the provisions in the off hire clause, if the Master, officers or

[171] See the general observations regarding Scandinavian law supra p. 55 et seq.

[172] He did not claim repayment of a part of the hire prepaid, since this would have been clearly impossible under the principles of English law. See supra p. 169.

[173] Per GODDARD J. at p. 138. Cf. the observations, supra p. 183, concerning the legal relevancy of the fact that the frustrating event has been foreseeable. See further infra p. 389.

[174] See RAMBERG, Unsafe ports and berths.

[175] [1963] 2 Lloyd's Rep. 381 C.A.

crew were lost or injured or refused to proceed. The Eugenia, sailing from Odessa 25 October 1956, arrived at Port Said on 30 October. In spite of the fact that the shipowner's London agents asked the charterer's London agents to ensure that the Eugenia did not enter Port Said or the Suez Canal, she did enter the Canal on 31 October (the orders to the master from the shipowner not to enter the Canal did not reach him until 1 November). When the Eugenia had proceeded 58 kilometres south of Port Said the Canal was blocked on the evening 31 October and she remained stuck in the Canal until 6 January 1957 when she could start moving northwards, the Canal still being blocked for passage southwards until April 1957. She arrived at Port Said on 8 January and Alexandria on 12 January. The charterer claimed on 4 January that the charter party was frustrated as from 31 October. A new charter party was concluded on 15 January. The shipowner claimed i.a. hire for the period the vessel was stuck in the Canal as well as damages for wrongful repudiation. The court held in the shipowner's favour; the charterer was in breach of the charter party in ordering, or allowing the vessel to continue, into a dangerous zone and, quite apart from this, the fact that the voyage owing to the blocking of the Canal would have had to be performed by taking the vessel round the Cape of Good Hope did not amount to frustration of the adventure.

In view of the fact that the usual time charter party forms contain clauses to the same effect as in *The Eugenia*,[176] the risk of delay run by the charterer, following from the fact that the vessel enters "dangerous zones", will ordinarily not be modified by the doctrine of frustration, although the doctrine might still come into operation if the event causing the delay strikes the vessel in a place to which she has not been ordered by the charterer.[177] In the latter case, the doctrine of frustration will, under time charters, benefit the charterer and, under voyage charters, the shipowner.[178]

The legal effect of war on shipping is also considered in other contractual relations and in some instances it is clearly recognized that an

[176] See RAMBERG pp. 114–8.

[177] See, e.g., the decision by MEGAW J. In *The Eugenia* at p. 156; *Scottish Navigation Co.* v. *Souter* and *Admiral S.S. Co.* v. *Weidner, Hopkins & Co.* both reported in [1917] 1 K.B. 222; and *Lloyd Royal Belge* v. *Stathatos* (1917) 34 T.L.R. 70.

[178] See, e.g., *A/S August Freuchen* v. *Steen Hansen* (1919) 1 Ll.L.Rep. 393 K.B.; the total change as a result of the intensified German submarine campaign in February 1917 caused Great Britain to delay the vessel for a considerable period of time. The charterer claimed a declaration from the court that the charter party remained valid but the court held that by March 15—loading had finished on 5 February and if nothing had happened the vessel would have reached her destination on 9 February—the delay by *force majeure* had lasted so long that the shipowner was entitled to put an end to the adventure (at p. 396 per GREER J.).

increase of danger may entitle the affected party to withdraw from the agreement. However, the special features of the contract may warrant another solution, and this is particularly true with contracts of a generic character, such as contracts concerning the transport of goods over a certain period of time with the shipowner's own or chartered tonnage.[179]

The principle of the Scandinavian Seamens' Act § 36 has been acknowledged in some cases. In *Palace Shipping Co.* v. *Caine (The Franklyn)* [1907] A.C. 386, British seamen had signed on for a voyage from Cardiff to ports within a certain range including Hong Kong. They knew of the war between Russia and Japan raging at the time and that the vessel was to take coal to Hong Kong and that coal was considered contraband of war by the belligerents. But in Hong Kong the master required the seamen to sail to a naval base in Japan (Sasebo) with coal and, when they refused to do so, he had them imprisoned and deprived of their salaries. It was held that the seamens' contracts regarded "a peaceful commercial voyage" and that, in view of the risk of war capture, they were right in refusing to remain onboard on the vessel's voyage to Japan. Lord LOREBURN L. C. stated: "It is nothing short of preposterous to expect that seamen in a strange port shall speculate on the movements of belligerent war vessels, and nicely weigh the chances of capture" (at p. 391), and Lord ATKINSON stressed the point that a voyage for the carriage of contraband to a belligerent power "is prima facie not an ordinary commercial voyage of a peaceful nature" (at p. 396).[180]

On the other hand, when the increase of risk is insufficient the seamen are held to their contracts and this appears clearly from the American case *The Austward* 1940 AMC 1192, DC Md. In that case Norwegian seamen had signed articles in Norway on 28 December 1939 for 18 months without restrictions as to voyages. In Baltimore on 6 August 1940 they claimed to be discharged on the ground that the war risk had materially increased within the meaning of Norwegian law (i.e. owing to the German occupation of Norway). The court did not find that such a material increase had taken place and, since no Norwegian cases were furnished to prove the correctness of the seamens' understanding of the Norwegian law, the court assumed "that a 'material increase' in the war risk implies something more than a mere fluctuation from time to time of the intensity of an already existing warfare". It was undisputed that at the time of the signing on "there had been much war damage by Germany to neutral shipping in and about the British Isles" (at p. 1199).

The legal relevancy of an increase of risk is also acknowledged in contracts concerning the transport of passengers. See *Schostal* v. *Compagnie Generale Transatlantique (The Normandie)* 1941 AMC 778 N.Y. Supreme Court,

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[179] See supra p. 50.

[180] See also *O'Niel* v. *Armstrong, Mitchell & Co.* [1895] 2 Q.B. 418 C.A., *Liston* v. *S.S. Carpathian* [1915] 2 K.B. 42 at pp. 47, 48; and *The Epsom* (1915) 227 Fed 158 DC Wash., at pp. 162–4.

reversing 1940 AMC 1207: It would be "most unreasonable to hold that the defendant breached its contract, even if the contract had contained no provision excusing non-performance in the event of war". See also *Ornstein* v. *Compagnie Generale Transatlantique* 1941 AMC 1593 Municipal Court N.Y.; and *Foster* v. *Compagnie Française de Navigation à Vapeur* (1916) 237 Fed 858 EDNY.

In contracts of insurance special considerations may arise. Thus, in *Calmar Steamship Corp* v. *Scott (The Portmar)* 1953 AMC 952 U.S. Sup. Ct., reversing 1952 AMC 861, the increase of danger was no doubt recognized as a relevant circumstance under the contract of affreightment but it was held that the marine and war risk voyage hull insurance policy coverage still applied, since otherwise "a significant part of the coverage of war risk insurance, which is purchased separately, over and above ordinary insurance and at great expense, is rendered nugatory". Therefore, "coverage cannot be said to have ended before an unambiguous, objectively provable decision has been made by the requisitioning sovereign to cause abandonment of the voyage" (at pp. 963–5). Four dissenting judges considered, however, that the war risks in the Pacific subsequently to the Pearl Harbour attack had put an end to "the purposes of the venture, commercially speaking . . .. The ship was now engaged in an enterprise far beyond the voyage contemplated by the parties" (at p. 966).

§ 11.1.8. Scandinavian and Anglo-American law compared

Is there then, with regard to the question whether an increase of danger *in casu* should be allowed as a ground for cancellation, any *fundamental* difference between Scandinavian and Anglo-American law?

In Anglo-American law, the legal principles permitting excuses from contractual promises in the absence of clauses have developed slowly and after considerable hesitation. Thus, in earlier cases, reference is frequently made to the dictum in *Paradine* v. *Jane* (supra p. 162) and to the unconditional binding effect of absolute contracts.

See *Atkinson* v. *Ritchie* (1809) 10 East 530 K.B. [103 E.R. 877]: "No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance (at p. 533 [878]); *Spence* v. *Chodwick* (1847) 10 Q.B. 517; *The Harriman* (1870) 9 Wall. 161 [76 U.S. 629]: "The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts—not to make or modify them"; Cf. *Northern Pacific Railway Co.* v. *American Trading Co.* (1904) 195 U.S. 439; a contract concerning carriage of contraband of war was prevented by an erroneous refusal of a deputy collector to grant the clearance of the vessel and this did not come under the "restraint of princes" clause of the bill of lading.

However, it appears clearly from later cases that excuses have been permitted in the absence of clauses by the device of implied terms or by the application of legal remedies.[181] A *dictum* by L. HAND J. in *The Tropic Star* seems well fitted to describe the present approach: "The course of law away from an unyielding adherence to the literal meaning of the words, is different in the case of contracts from its course in other legal transactions. As courts become increasingly sure of themselves, interpretation more and more involves an imaginative projection of the expressed purpose upon situations later, for which the parties did not provide and which they did not have in mind. Out of the rivers of ink that have been spilled upon that subject I know nothing that has emerged which enlightens us beyond the caution that departure from the text—necessary as it is—must always be made with circumspection."[182]

A comparison between Scandinavian and Anglo-American law clearly shows a different legal approach. But the summaries of the relevant cases, which have been given for the purpose of establishing whether the outcome of the cases can be expected to be different under Scandinavian law as compared with Anglo-American law, *does not show* that the different approach leads to different results.[183] Under both systems, an increase of danger *in casu* may permit the parties to cancel the contract. Furthermore, owing to the difficulty of comparing the factual circumstances in different war risk situations, under both legal systems it is always possible to adopt a more restrictive or liberal attitude without deviating from the generally accepted legal doctrines and principles and, with regard to Scandinavian law, the express provisions of statutory law. And, under none of the respective legal systems, is it possible to establish with mathematical precision a certain *degree* of increase of risk, or change of circumstances, necessary to permit the parties to cancel the agreement.

Although the legal approach is different, there is no evidence that

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[181] See, e.g., *Taylor* v. *Caldwell*, supra p. 163; *North German Lloyd* v. *Guaranty Trust Company of New York (The Kronprinzessin Cecilie)*, supra p. 287; *Texas Co.* v. *Hogarth Shipping Co. (The Baron Ogilvy)* infra p. 315; and *Allanwilde Transport Corporation* v. *Vacuum Oil Co.*, infra p. 321.

[182] 1950 AMC 80 CCA 2nd (at p. 94).

[183] But see GRAM p. 78; in the absence of a clause, performance cannot be excused as easily under the doctrine of frustration as according to SMC § 135 ("Til dette kreves langt mer enn efter § 135"). Cf. also FALKANGER, Sammenligning p. 564.

this has led to different results *in casu*. Those who maintain that there is such a difference will have some difficulties in supporting their opinion by referring to the *decisions* rendered by the courts of the respective countries so far.

§ 11.2. *The Loss or Requisition of the Vessel*

The doctrine of impossibility—*impossibilium nulla est obligatio*—may subject to certain requirements, under Scandinavian as well as Anglo-American law, excuse the promisor from performance in case of the perishing of the thing required for the performance, although in English law (see supra p. 164) and to a certain extent in American law (see supra p. 203) the result is ordinarily reached by the *implication* of a term to this effect. Thus, the continued existence of the ship has been deemed necessary for the performance of all contracts of affreightment and there are several cases where the above-mentioned principle has excused the shipowner from performance in case of total or constructive total loss of the ship.[1] This result may seem more or less self-evident in cases of time and voyage charters, where the existence of a specific vessel is necessary for the performance of the contract, but in liner trade this is not necessarily so. On the one hand, the shipowner, by appropriate clauses in the bills of lading, ordinarily retains the right to substitute another vessel—or even another means of transport—should this prove to be necessary, while, on the other hand, it is usually unimportant for the bill of lading holder if the shipowner performs his obligation with a specific ship as long as the cargo arrives at its destination in proper time and in proper condition. Therefore, it must be examined whether the courts in liner trade impose upon the shipowner a *duty* to substitute another ship if the ship originally intended for the carriage is lost.

A distinction between liner trade and voyage charters with regard to the shipowner's duty to substitute another vessel is made in the Dutch WvK art. 517 g and r ("Vaste lijnen") and art. 519 d ("Reisbevrachting"). In liner trade, the shipowner is not obligated to perform the voyage with a specified vessel (art. 517 g) and his duty to forward the cargo to the destination does not cease if the vessel on which the cargo has been loaded cannot continue the voyage within a reasonable time (art. 517 r).

[1] A "constructive total loss" is at hand when, from a commercial viewpoint, it is clearly unwarranted to repair the vessel.

In such a case, he has the duty to substitute another vessel and forward the goods on to the destination at his own expense. In voyage charters, the contract of affreightment terminates if the vessel is lost or damaged to such an extent that she cannot be repaired within a reasonable time, or is not worth repairing, unless the shipowner is prepared to have the cargo conveyed to its destination by other means at his expense and states his intention in this regard within a reasonable time (art. 519 d). This distinction seems well warranted by commercial practice but it has not so far been adopted in Scandinavian or Anglo-American law.[2]

In Anglo-American law, there is adequate support for the principle that the shipowner has no duty to substitute another vessel for the vessel named in the contract of affreightment and the usual "substitution of vessel" clauses are understood as options solely in the shipowner's favour[3].

SMC § 128 expresses the principle that a voyage charter ceases *ipso facto* when the ship becomes a total loss or a constructive total loss,[4] whereas, for some undisclosed reason, it has not been deemed necessary to insert a corresponding provision in the chapter regarding time charters. However, it is considered that this principle, although not expressed, has been presupposed by the legislator.[5] Since the chapter regarding voyage charters applies to contracts of affreightment in liner trade also, the provision means that the shipowner has no obligation to substitute

[2] Cf. the observations by GRÖNFORS, Successiva transporter pp. 13, 117, 129.

[3] See FALKANGER, Konsekutive Reiser p. 53 et seq. and cf. NC 3572, where this view is confirmed although recommendations are given to expressly mention the words "at owner's option" in the charter parties. But cf. *The Maggie Hammond* (1869) 76 U.S. 435 at pp. 458–61; and *The Plow City* 1938 AMC 1265 ED Pa. where it was stated that the master, if the vessel is disabled in the course of the voyage, has the duty to tranship the cargo by another vessel if it is available and the repairs cannot be completed within a reasonable time. If the freight has been paid in advance he is entitled to charge the cargo with the excess, if any, of the freight payable to the forwarding vessel over the freight already received by him. It would seem that these cases are compatible with the theory that the rights and obligations of the parties under the original contract of affreightment have been replaced by a new forwarding agency contract entitling the shipowner to recover the *actual* freight paid to the forwarding vessel. It should be observed that, under American law, advance freight must be returned to the charterer in case of frustration unless the contract contains provisions to the contrary (see supra p. 24).

[4] Cf. HGB § 628, where the same principle is expressed.

[5] See supra p. 102.

another vessel for the purpose of carrying out the promised performance.[6] On the other hand, he cannot leave the cargo then and there, since his general duty to take care of the cargo applies in contingencies of this kind also.[7] But if, in the pursuance of this general duty, the shipowner carries the cargo, or causes the cargo to be carried, by a substituted vessel he is considered to act on the cargo-owner's behalf in a similar way as a forwarding agent.[8]

As already mentioned, Anglo-American law, following the famous *Taylor* v. *Caldwell* case (see supra p. 163), accepted in *Moss* v. *Smith* the principle that the shipowner is excused from further performance in case of a *constructive* total loss[9] and the decisions in *Geipel* v. *Smith*[10] and *Jackson* v. *Union Marine Insurance Co.*,[11] where the inavailability of the vessel for a considerable period of time was deemed sufficient to permit the operation of the doctrine of frustration, were soon to be followed by the principle that a *requisition* of the vessel may amount to frustration of the contract, provided the delay expected is so long as to warrant a dissolution of the contract. And it has not been considered necessary that the contract contain a "restraint of princes" or similar clause which could serve as a basis for the decision.[12] The question of suspension or dissolution is discussed at length in the famous cases

[6] See FALKANGER, Konsekutive Reiser p. 53 at note 4. The same principle applies in German law. See RGZ (1885) 14.34 *The Graf Bismarck* (at pp. 44–5); and SCHAPS-ABRAHAM Anm. 5 to § 628; NEBIOLOU p. 15; HANSA 1961.247. In German law, the shipowner's obligation, as modified by the substitution clause, is termed a "hinkende Speziesschuld". See LORENZ-MEYER p. 53 with references; and FALKANGER, op. cit. p. 60.

[7] See SMC § 101.

[8] This implies that the shipowner may retain freight prepaid and irrecoverable and charge the freight for the substituted vessel to the cargo-owner. See infra pp. 341-2.

[9] 9 C.B. 94 [137 E.R. 827]. Per MAULE J. at pp. 102, 103 [830, 831]: ". . . it may be physically possible to repair the ship, but at an enormous cost, and there also the loss would be total, for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost." Cf. the recognition of the principle in *Assicurazioni* v. *Bessie Morris* [1892] 2 Q.B. 652 where, however, the vessel was not considered a constructive total loss. See from American law *Ellis* v. *Atlantic Mutual Insurance Co. (The Tornado)* (1883) 108 U.S. 342.

[10] (1872) L.R. 7 Q.B. 404.

[11] (1874) L.R. 10 C.P. 125.

[12] See, e.g., *Texas Co.* v. *Hogarth Shipping Co. (The Baron Ogilvy)* (1921) 256 U.S. 619: and *Allanwilde Transport Corporation* v. *Vacuum Oil Co.* (1918) 248 U.S. 377 and supra p. 287.

Tamplin (F.A.) S.S. Co. v. *Anglo-Mexican Co.*[13] and *Bank Line* v. *Capel & Co.*[14] and it seems that the appropriate test is whether the requisition is expected to extend beyond the period of the charter. But there is one important circumstance which deserves to be closely observed; *viz.* the fact that the requisitioning government pays compensation for the use of the vessel. Ordinarily, this compensation is paid to the *shipowner* even though the effect of the requisition, depriving the parties of the *use*—and not the *ownership*—of the vessel, primarily concerns the *charterer* who has secured himself such use under the terms of the charter party. The reason why the compensation is paid to the owner lies, of course, in the fact that the vessel is taken from the owner who has possession by its master and crew. It is understandable that the requisitioning government does not want to investigate into the legal relationship between the shipowner and other parties.[15] The fact that the vessel is requisitioned does not according to the current off hire clauses or, in the absence of clauses, according to the Scandinavian and Anglo-American principles of law, take the vessel off hire.[16] However, it seems out of the question to let the shipowner keep the requisition compensation *in addition to* the charter party hire,[17] and therefore some adjustment between the rights of the respective parties has to be made. There seem to be three basic alternatives;

(1) to consider that the shipowner, wholly or partly, has received the compensation on behalf of the person really affected by the requisition, *viz.* the charterer, and to oblige him to pay the amount, wholly or partly, to the charterer,

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[13] [1916] 2 A.C. 397.

[14] [1919] A.C. 435.

[15] See the observations in *The Isle of Mull* (1921) 278 Fed 131 CCA 4th at p. 133.

[16] See supra p. 267 and *Modern Transport Co.* v. *Duneric* [1917] 1 K.B. 370 per SWINFEN EADY L. J. at p. 377: "... the defendants did not agree to give the use of the ship absolutely and unconditionally, but only unless prevented (amongst other things) by the restraint of princes. Again, there was not an entire failure of consideration if the charter-party was subsisting, as the plaintiffs would become entitled to the hire payable by the Admiralty". See also *Radcliffe* v. *Compagnie Generale* (1918) 24 Com. Cas. 40 C.A.; *Clyde Commercial S.S. Co.* v. *West India S.S. Co.* (1909) 169 Fed 275 CCA 2nd; *The Santona* (1907) 152 Fed 516 SDNY; and *The Hackney* (1903) 152 Fed 520 Arb.

[17] See, e.g., the observations by MCCARDIE J. in *Dominion Coal Co.* v. *Maskinonge S.S. Co.* [1922] 2 K.B. 132 at p. 139.

(2) to *suspend* the charter during the period of requisition and free the charterer from his obligation to pay the hire but on the other hand entitle the shipowner to keep the requisition compensation,

(3) to *dissolve* the contract altogether whereby the effect becomes the same as in (2) not only during a limited period but during the entire currency of the charter.[18]

The *first alternative* proceeds upon the ground that the contract subsists and is not dissolved by the operation of the doctrine of frustration. Even though the requisition deprives the shipowner of his possession of the vessel and compensation therefore is paid to him, it must be said that the charterer is the one that is primarily affected by the requisition, since the use of the vessel that he has secured himself under the terms of the charter is usurped by the requisitioning government. If the terms of the requisition are *identical* with the terms of the charter it may very well be argued that the situation should be the same as if the charterer had subchartered the vessel to the requisitioning government. Consequently, the amount received by the shipowner should be paid to the charterer. This solution implies that the charterer reaps the benefit if the compensation exceeds the charter hire but has to suffer the loss if it is less or if no compensation is paid at all. The first consequence would in fact amount to no more than a *status quo ante*, since the charterer, by the requisition being deprived of the use of the vessel, has to pay the current market freight—probably more or less corresponding to the requisition compensation—if he needs another vessel to meet his commitments. The second consequence is compatible with the fact that *the risk* of the contingency falls upon the charterer under the current charter party forms which do not allow the vessel to be considered off hire during the period of requisition (see supra p. 267). Even though this solution has to be based on equitable remedies,[19] it seems to be quite natural from the respective parties' point of view.

However, it is seldom—if ever—that the terms of the requisition are identical with the terms of the charter. Very often the shipowner will be subjected to heavier burdens as a consequence of the requisition and

[18] If the requisition should prove to cease before the period of the charter, the owner does not, of course, get any compensation for such remaining period but has instead the vessel free for other activities.

[19] See *Dominion Coal Co.* v. *Maskinonge S.S. Co.* [1922] 2 K.B. 132 per McCardie J. at p. 139. Cf. the critical attitude in Scrutton pp. 101–2.

perhaps be required to carry contraband or to take the vessel into war zones or even to convert the vessel to suit the needs of the government.[20] This calls for other solutions; either the requisition compensation has to be *apportioned* between the parties or the contract has to be *suspended* during the period of requisition or *dissolved* altogether.

In ND 1944.28 SCD, the vessel was ordered by the Danish authorities to perform a voyage which was beyond the scope of the current time charter. The charterer claimed a part of the freight paid by the authorities to the owner alleging that the compensation was due to the charterer for the usurpation of the use of the vessel and, alternatively, according to general principles of unjust enrichment (Sw. "obehörig vinst"). The Danish Supreme Court, affirming the decision of the lower court, held that the clauses of the charter party precluded the time-charterer from claiming any part of the freight in compensation. It should be added that the owner did not claim any freight from the charterer during the period of the voyage ordered by the authorities.

Sometimes the statutory provisions relating to the power of the government to requisition the vessel against compensation may contain support for an apportionment, but even in the absence of such legislative support it seems that the compensation could be apportioned according to general principles of contract law regarding unjust enrichment. It seems only fair to allow the shipowner to keep, in addition to the charter hire, such part of the requisition compensation as corresponds to the additional burdens and obligations imposed upon him by the requisition. The principle of apportionment has been suggested and applied in some English cases relating to requisitions during the First World War.

The evolution of the principle of apportionment starts with a *dictum* in the *Tamplin* case, where Lord PARKER stated that the word "owners" in the Royal Proclamation of August 3, 1914, authorizing the Lords Commissioners of the Admiralty to requisition British ships against compensation to the owners, must "include all parties interested. It cannot in the present case mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests".[21]

[20] See, e.g., the *Tamplin* case; and ND 1940.353.

[21] [1916] 2 A.C. 397 at p. 428. See also Lord LOREBURN at p. 405; the owners must account to the charterers for any requisition compensation received by them for the use of the vessel.

In *Chinese Mining & Engineering Co.* v. *Sale & Co.* [1917] 2 K.B. 599, three charter parties had been concluded on 29 July 1913, 11 July 1914 and 24 December 1913 respectively each being for five years. The charter parties contained "restraint of princes" clauses. On 6 July, 1915, one of the vessels was requisitioned but it was returned to the shipowners 22 September the same year. However, it was again requisitioned 18 December 1916. The two other vessels were requisitioned in January 1916 and were thereafter continuously employed by the Admiralty. One of them was sunk in the Mediterranean 12 May 1917. The shipowners claimed that the charter parties were frustrated but the charterer opposed this view. The court adopted a restrictive attitude and held that none of the charter parties had come to an end by the operation of the doctrine of frustration.[22] The court found that the conditions of the Admiralty charter were more onerous to the owner than the conditions of the plaintiff's charters and gave some guidance as to the proper apportionment of the compensation paid by the Admiralty: "This proportion must be found by ascertaining as fairly as possible, first, what the owners could properly demand monthly for altering the charter to the Admiralty form, and, secondly, what the charterers could properly demand monthly for the loss of the benefit of the charter . . .. The ratio between the two sums will be the ratio in which the Admiralty hire will be divided" (per ROWLATT J. at p. 605).[23]

It should be observed that the above cases proceed on the basis of the expression "owners" in the legislation prevailing at the time[24] and that the new legislation, Compensation (Defence) Act, 1939, Sect. 4 (3) may warrant other solutions.[25] An analysis of statutory enactments in various countries, which may appear as requisitioning powers in future conflicts, falls outside the scope of this study, but it seems as if Scandinavian as well as Anglo-American law, in the absence of adequate support from such provisions, could very well reach the same solution on the basis of general principles of law such as the principle of unjust enrichment.[26]

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[22] Reference was made to the statement of Lord LOREBURN in the *Tamplin* case that it must be "established" that the interference would last substantially to the end of the charter period; per ROWLATT J. at p. 604.

[23] See also *Elliot Steam Tug Co.* v. *John Payne & Co.* [1920] 2 K.B. 693; *Dominion Coal Co.* v. *Roberts* (1920) 36 T.L.R. 837; *Dominion Coal Co.* v. *Maskinonge S.S. Co.* [1922] 2 K.B. 132; *The Isle of Mull* (1921) 278 Fed 131 CCA 4th; GILMORE & BLACK p. 213 et seq.; and ROBINSON pp. 662–3.

[24] The Royal Proclamation of 3 August 1914.

[25] See SCRUTTON p. 101 note a, where it is submitted that the wording of the Act does not permit an apportionment.

[26] Incidentally, the support found in the word "owners" contained in the earlier Royal Proclamation seems, indeed, rather artificial.

The Compensation (Defence) Act, 1939, Sect. 4 (3) reads as follows: "Where, on the day on which any compensation accrues due by virtue of paragraph (a) of subsection (1) of this section, a person other than the owner of the vessel . . . is, by virtue of a subsisting charter or contract of hiring, the person who would be entitled to possession of, or to use, the vessel . . . but for the requisition, the person to whom compensation is paid shall be deemed to receive it as a trustee for the first mentioned person." The application of the cited text was considered in a rather special case following from the requisitioning of the vessel during the 1956 Suez crisis, *viz. Port Line, Ltd.* v. *Ben Line Steamers Ltd.* [1958] 1 Lloyd's Rep. 290 Q.B. Here, the vessel, while still under time charter to Port Line, had been sold by Silver Line to Ben Line, but at the same time it was let to Silver Line on a demise charter party during the remainder of the time charter, the idea presumably being that the time charterer should not be affected by the transfer. However, the demise charter, but not the time charter, contained a clause reading: "If the ship be requisitioned, this charter shall thereupon expire . . .". The time charterers claimed from Ben Line the compensation received from the government maintaining that Ben Line had received the amount, wholly or in any event partly, as "trustee" on their behalf in the meaning of the word in the Compensation Act. This raised a complicated question, since the time charter was not considered frustrated but the demise charter was expired in view of the cited clause. This being so, the connecting link—the demise charter—between the time charterer and the owner was severed.[27] There was no contractual relationship between them and the owner was not considered a "constructive trustee". Therefore, the time charterers' claim failed.[28]

While the courts undoubtedly have been prepared to nicely balance the interests of the respective contracting parties, the desire to avoid "the confusing, if not impossible, task of adjusting the equities between the owner and the charterer" is sometimes expressed.[29] This tendency of a socalled "black and white"-jurisprudence is a wellknown phenomenon

[27] If the demise charter had been in effect, the compensation would probably have been paid by the government directly to the demise charterer from whom in such a case the possession of the vessel would have been taken.

[28] The time charterers tried in vain to invoke the principle in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* (1926) 16 Asp. M.C. 585 P.C. to the effect that the owner, who has knowledge of the time charter must be bound by its terms, but the court considered the *Strathcona* case "wrongly decided" and in any event inapplicable to the circumstances of the present case. See concerning the time charterer's protection against a buyer of the vessel generally TIBERG, Bailees' and Lessees' Protection against Third Parties under Swedish Law, S.S.L. Vol. 9 (1965) pp. 217–242.

[29] *The Isle of Mull* (1921) 278 Fed 131 CCA 4th at p. 135; and cf. JANTZEN, ND 1940 p. VII, in criticising ND 1940.353.

under most systems of law[30] and, if adopted, would lead to the application of some of the other alternatives, the suspension or the dissolution of the contract.

The *second alternative* does not only mean that the shipowner's *performance* under the charter is suspended—which is an inevitable consequence following from the requisition—but that the *contract itself* together with mutual rights and obligations of the respective contracting parties is suspended. This would, however, constitute a deviation from the express provisions in the charter party, i.e. from the usual off hire clauses, or, as the case may be, from the legal principles in Anglo-American and Scandinavian law relating to off hire.[31] On the other hand, it may be maintained that those principles only apply when the shipowner does not receive full compensation from other sources for the fact which prevents the use of the vessel according to the terms of the charter party. And the "vacuum" of the contract which then would arise could perhaps by a "gapfilling" method[32]—implied terms or reasonable solutions at law—allow the principle of suspension. However, it seems somewhat arbitrary to permit suspension or not depending upon the economic consequences of the event. And, indeed, the results for the charterer would be most unfortunate if he would have to carry the risk when compensation is paid insufficiently or not all[33] but not be given the benefit of the difference between the requisition compensation and the charter hire or, in other words, the benefit of a rise in the shipping market.[34] Quite apart from this, it seems that if some compensation—although insufficient—is paid, the application of the principle of appor-

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[30] See SCHMITTHOFF, Some Problems p. 144. The Swedish case-law shows, however, that the courts in some instances do not hesitate to rearrange the relationship between the parties. See, e.g., NJA 1924.372; and HELLNER, Obehörig vinst p. 397 et seq.

[31] See supra p. 56. Cf. CARVER § 403 at note 90, where he finds the observations by Lord FINLAY in *French Marine* v. *Compagnie Napolitaine* [1921] 2 A.C. 494 at pp. 506–7 quite incomprehensible.

[32] The term is taken from SMIT, Frustration pp. 306–7.

[33] Although the risk could be modified in cases of "inordinate delay" by the operation of the doctrine of frustration. See supra p. 56 and infra p. 311.

[34] See *Earn Line S.S. Co.* v. *Sutherland S.S. Co. (The Claveresk)* (1920) 264 Fed 276 CCA 2nd: "It is impossible to imagine such men even wishing to agree that if government pays a high price, the advance goes all to one, while if a low price is paid, the burden falls only on the other. 'Heads I win, tails you lose' as a bargain is beyond the pale of implication" (at p. 284).

tionment is required; the terms of the requisition may very well impose extra burdens upon the shipowner in such cases also. It is submitted that such a *combination* of the principles of apportionment and suspension, apart from being unreasonable to the charterer, is far too complicated to deserve attention. It happens, however, that the parties expressly provide for a suspension but in such cases the charterer's duty to pay hire is ordinarily suspended regardless of whether compensation is paid for the requisition or not.[35]

The *third alternative* requires the court to consider the legal relevancy of an *anticipated* hindrance and, if such a hindrance is relevant at all, to determine whether the party urging the dissolution of the contract by the doctrine of frustration has correctly evaluated the probable duration of the requisition. The attitude of the court may, of course, be influenced by the remedies available *instead* of dissolution on account of frustration. Thus, if requisition compensation is paid, and the effect of the requisition thereby modified to the benefit of *both parties*, one might ask whether the doctrine of frustration should be applied at all.[36] However, when risks of economical losses or other disadvantages follow from the requisition, the position becomes different, since the very function of the doctrine of frustration is to modify and alleviate the burden of parties affected by the frustrating event. Thus, if the requisition com-

[35] Thus in *Omnium d'Entreprises* v. *Sutherland* [1919] 1 K.B. 618, it was stipulated that the charterer's duty to pay hire should cease for the period of requisition and this was thought to exclude a dissolution of the contract. However, such a suspension clause does not always prevent the dissolution of the contract by the operation of the doctrine of frustration. See supra p. 276 and cf. the observations by BLAIR, Breach of Contract due to War 20 Col.L. Rev. (1920) 413–37, who thinks that this case is difficult to reconcile with the *Bank Line* case (at p. 430). See for "suspension clauses" in time charters supra p. 91.

[36] See, e.g., GILMORE & BLACK p. 214, where it is pointed out that the fact that a "restraint of princes" does not even suspend the payment of hire but on the other hand excuses the owner from not having the vessel at the full disposition of the charterer "would lead unquestionably to the conclusion that governmental requisition does not end the time charter, but that, on the contrary, the obligation to pay hire continues through the charter term ... obviously, on equitable principles, the corollary would be that the hire paid by the government would belong to the charterer. But the courts have declined to take this logic to its conclusion; the distinction made is one of degree". It should be added that a "restraint" may free the charterer from his duty to pay hire during the charter term if it causes an "inordinate delay" which amounts to frustration. See supra p. 165 and infra p. 311.

pensation is less than the charter party hire, or if no compensation is awarded at all, the doctrine of frustration seems to operate exactly in the same manner as in cases where the operation of the vessel is prevented owing to seizure by belligerents,[37] closing-up of canals[38] or similar contingencies. Is it then possible to *restrict* the application of the doctrine of frustration to such cases and not to apply it when the event, such as a requisition, leads to full compensation? Some statements seem to indicate such an approach. Thus, in *Metropolitan Water Board* v. *Dick, Kerr & Co.*,[39] Lord DUNEDIN said, in distinguishing the case from the *Tamplin* case:[40] "No one was hurt by the continuance of the charter, and if the Government relinquished the ship there was no reason why the charter should not be effective for the remaining period of its duration, which might be considerable. But suppose the facts had been slightly different. Suppose the Government had taken the ship, and had said they would pay nothing—a proceeding within their powers—and then suppose that the owner had sued the charterer for the hire during the period while the Government kept the ship. What then? I may be wrong, but it seems to me it would have fallen within the lines of *Horlock* v. *Beal*."[41] This statement seems to indicate that, provided full compensation is paid for the requisition, and the shipowner is accountable to the charterer, wholly or partly, for such compensation, the contract subsists *even though the period of the requisition equals or exceeds the period of the charter*.[42] However, if the charterer reaps the benefits of the fact that the charter subsists in spite of the requisition, but nevertheless retains the possibility of invoking the doctrine of frustration in order to transfer the burden to the shipowner if compensation is paid insufficiently or not at all, we seem to have arrived at the same lack of balance between the interests of the respective parties that caused us to discard the alternative of suspending the contract when compensation is paid (see supra p. 306)—the only difference being that the position of the parties is now reversed.[43]

[37] *Tatem* v. *Gamboa* supra p. 293.

[38] *The Eugenia* infra p. 346.

[39] [1918] A.C. 119 at p. 129.

[40] Supra p. 166.

[41] [1916] 1 A.C. 486; a hostile detention of a British ship at Hamburg dissolved seamen's contracts. See also BLAIR, op.cit. supra note 35 p. 429 at note 75.

[42] Cf. BGB § 281 and the observations in 1926 Harv. L. Rev. pp. 305, 309.

[43] See infra p. 311 et seq.

The discussion concerning the question whether the doctrine of frustration should apply in cases of requisition is sometimes blurred by the fact that it only concerns the *precise circumstances* at hand. If, as an experiment, we choose two reasonable men before entering into the charter discussing the possibility of a requisition of the vessel,[44] it may very well be that the owner would agree to let the charter subsist in case of a requisition and let the charterer have any compensation paid by the government, but a prudent shipowner would have added: "If compensation is paid insufficiently or not at all you must not invoke the doctrine of frustration to transfer the risk to me. This would mean a bargain to the effect 'heads you win, tails I lose' and surely I cannot agree to that" (see supra p. 308). If the charterer does not want to take this risk we seem to have arrived at a situation, where the parties are prepared to accept a clause of the following reading: "If the ship be requisitioned, this charter shall thereupon expire or be suspended during the period of requisition any compensation to be accountable to owners" (cf. p. 91).[45] But they might equally well have agreed that the charter should remain in full effect throughout the period of the charter in spite of a requisition and that the hire should be paid but any requisition compensation be awarded to the charterer, wholly or partly depending on the terms of the requisition as compared with the terms of the charter. This experiment serves another purpose, *viz.* to show the inadequacy of the hypothetical test; both the suggested solutions are equally reasonable and likely to have been agreed upon. And in such a case it may be submitted that we should not, in case of a requisition, imply any term at all.[46] When the charter party does not provide that the hire shall cease to be payable in cases of requisition, we seem to have arrived at the first alternative; i.e. to let the time charter subsist throughout the period and to let the owner account to the charterer for any requisition compensation.[47] But it must be borne in mind that the charterer's risk

[44] The so-called hypothetical test should concern what the parties would have agreed to if they had considered the *possibility* of the occurrence of the event, not a discussion of the placing of the risk for an event which they know has already occurred. See SMIT, Frustration pp. 306–7.

[45] See the *Port Line* case supra p. 305.

[46] See *The Moorcock* (1889) 14 P.D. 64; a term should only be implied if it is necessary for the purpose of giving the contract "business efficacy".

[47] See GILMORE & BLACK p. 214.

may be considerable if the time charter covers a long period and the vessel is requisitioned for a long period without compensation or with insufficient compensation.[48] In case of voyage charters, where the risk of delay principally rests with the shipowner the situation is entirely different; here the doctrine of frustration should be allowed to play its role, since a requisition may last for a period of time greatly exceeding the normal duration of the voyage charter at hand. The requisition compensation should remain with the shipowner and it would be unwise—or to use the expression of COCKBURN C. J. in *Geipel* v. *Smith* (see supra p. 165) "monstrous"—to let the parties resume the voyage when the vessel eventually becomes released.

In following up the above reasoning with regard to time charters it seems that we may either exclude the operation of the doctrine of frustration altogether or we may use it but with due regard to the mutual interests and risks of the parties. In view of the fact that the doctrine by now in several cases has been applied to time charters, it seems that a change of the law in this respect is improbable. This being so, we can only be fair to the respective parties if the test as to the probable duration of the requisition and as to the legal effect of it, considering the length of the time charter, is exactly the same regardless of the economic consequences resulting from the operation of the doctrine of frustration in the case at hand. If, in one case, the doctrine is not applied for the purpose of giving the charterer the *benefit* of the difference between the requisition compensation and the charter hire, and, in another case, is applied for the purpose of *protecting* him against economic losses, the balance between the mutual interests of the parties is upset. Consequently, the doctrine should not be more restrictively applied if it is considered that "no one is hurt by the event",[49] 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"[50] or in order to alleviate an economic loss for one of the parties to the detriment of the other.

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[48] On the other hand, it is seldom that the charterer can use the defence of frustration in cases of such protracted time charters. See, e.g., the *Tamplin* case (supra p. 166); and *Chinese Mining & Engineering Co.* v. *Sale & Co.* (supra p. 304), but cf. the American cases *The Isle of Mull* and *The Frankmere*, (infra p. 315).

[49] See the dictum by Lord DUNEDIN in the *Metropolitan* case supra p. 308.

[50] See *The Isle of Mull* supra p. 305.

At one time it was, in English law, uncertain whether the doctrine of frustration could be applied to time charters at all, but any remaining doubts were settled by a number of decisions dealing with requisitions during the First World War.[51] In the American case *Earn Line S.S. Co.* v. *Sutherland S.S. Co.* (*The Claveresk*),[52] the Court of Appeals for the Second Circuit expressed some surprise over the "enormous expenditure of writing" concerning this principle "for it is elementary that among the ways in which any contract ends and is dissolved is the cessation of existence of some thing, condition, or state of things, upon the continued existence of which the contract was known to depend, provided such cessation of existence arises without fault by either contracting party".[53] And in *The Isle of Mull*[54] the Court of Appeals for the Fourth Circuit expressed the view that "the only substantial distinction between a voyage charter and a charter for years, on the issue of frustration, is that in the former the embargo or requisition in most cases is certain to continue beyond the expected termination of the voyage, while in the latter there is difficulty in ascertaining whether the requisition would probably extend beyond the period of the charter".[55] However, it may be doubted whether this is the "only substantial distinction".

While it is clear that the risk of delay in voyage charters primarily rests upon the shipowner and in time charters upon the charterer, and that the doctrine of frustration under both charters under certain circumstances should be permitted to operate for the purpose of modifying this risk, it is obvious that the doctrine is not equally warranted under the two types of charter. In voyage charters the duration of the voyage is not fixed at all; if the vessel is detained for some reason or another the duration of the voyage might be stretched out indefinitely if we did not free the respective parties from their contractual obligations in cases

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[51] See *Anglo-Northern Trading Co.* v. *Emlyn Jones & Williams* [1917] 2 K.B. 78; *Heilgers & Co.* v. *Cambrian S.N. Co.* (1917) 34 T.L.R. 72; *Countess of Warwick S.S. Co.* v. *Le Nickel Société Anonyme* [1918] 1 K.B. 372; and *Bank Line* v. *Capel* [1919] A.C. 435. Cf. also *Scottish Navigation Co.* v. *Souter* and *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* both reported in [1917] 1 K.B. 222; and *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (1917) 34 T.L.R. 70 C.A.

[52] (1920) 264 Fed 276 CCA 2nd.

[53] At p. 283.

[54] (1921) 278 Fed 131 CCA 4th.

[55] At p. 138.

of "inordinate delay". On the other hand, in regular time charters[56] there is always a time limit prescribed in the charter itself. In addition, the time charter party forms usually contain an allocation of the risk to the effect that only certain enumerated contingencies shall take the vessel off hire.[57] Admittedly, this allocation of risk embodied in the charter party may very well be deemed not to relate to hindrances of more than a "temporary" duration, but is such an interpretation necessary in order to give the contract "business efficacy"?[58] Why should the charterer have to carry the risk of the hindrance when it operates for a considerable period of the charter but not *any part of the risk at all* when it is probable that it will operate somewhat longer and for a period not "substantially less" than the remainder of the charter? Indeed, it may seem somewhat arbitrary that the allocation of the risk for one and the same kind of event all of a sudden shifts from the one party to the other depending upon an evaluation as to the probable duration of the hindrance as compared with the remainder of the charter. If it is expected that it will last for the greater part of the period of the charter, but still for a period "substantially less" than the remainder, the entire risk is the charterer's. If it is expected that it will last just a little bit more, the risk is entirely the shipowner's. In spite of all the views to the contrary, it is not obvious that the doctrine of frustration ought to be permitted to operate in the same manner in time charter party relations. Indeed, it would be strange if, from a commercial viewpoint, this shifting of the risk were considered a satisfactory solution, not to mention the practical difficulties and considerable uncertainty in the evaluation of the probable duration of a requisition or similar contingencies. It is submitted that it would be the better solution to let the charterer carry *the whole risk* of such contingencies which have not been expressly excepted in the time charter or else excepted at law[59] and, in return, give him the *full benefit* of a rise in the shipping market, often reflected in the amount of requisition compensation. After all, the essence of a regular

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[56] There are hybrids between voyage and time charters to the effect that the charter concerns one voyage but hire is to be paid for the time spent in performing the voyage. See supra p. 52.

[57] See supra p. 56.

[58] See *The Moorcock*, supra p. 309.

[59] See concerning the Scandinavian and Anglo-American legal principles supra pp. 26, 56, 267 et seq.

time charter ordinarily lies in the fact that the vessel is used for the carrying out of the charterer's commercial activities, while the essence of the shipowner's obligation is to put a seaworthy, properly manned and equipped vessel at the charterer's disposition and to be responsible for the "nautical" operations.[60] Therefore, it seems to be a natural solution to impose upon the charterer the whole risk of delay resulting when the vessel is used for the carrying out of his commercial activities, except for delay caused by the shipowner's failure in fulfilling his obligations under the charter.

The Anglo-American principle to let the hire continue to run unless excepted hindrances or *negligent* acts on the part of the shipowner intervene is probably, from a practical viewpoint, to be preferred to the Scandinavian exception for "circumstances attributable to the shipowner" (Sw. "omständighet som beror av bortfraktaren") although, from a theoretical viewpoint, it may seem more correct to let the parties be responsible absolutely, irrespective of negligence, for the performance of their primary contractual obligations. However, Scandinavian law makes it necessary to draw the difficult line between delays emanating from the shipowner's "sphere of risk" and delays attributable to extraneous causes.[61] The principle that delay affecting the vessel shall be the charterer's risk is often expressed not only in off hire clauses but also in special "ice"-, "strike"- and "safe port" clauses.[62]

While the chapter on time charters in the SMC does not deal with the question of the legal effects of a requisition—and the rule in § 159 of the chapter relating to voyage charters has been omitted in connection with the amendments of the SMC in the 1930s[63]—and insufficient guidance is given in the Scandinavian case-law,[64] the Anglo-American case-law is fairly well settled. The appropriate test is well put by BAILHACHE J. in *Anglo-Northern Trading Co.* v. *Emlyn Jones & Williams*:[65] "Whether

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[60] See, e.g., WILLNER p. 106 et seq.; TIBERG, Skada på fartyg p. 36; and SOU 1936:17 p. 209. Cf. SCHAPS-ABRAHAM § 510 Anm. 6; and LORENZ-MEYER p. 65 et seq.

[61] See supra p. 267.

[62] Cf. RAMBERG p. 38 et seq.

[63] See supra p. 240 et seq.

[64] The only case which, to my knowledge, could enlighten us on the subject is ND 1940.353 which, in any event, is compatible with the *Tamplin* case in so far as the requisition did not dissolve or suspend the contractual obligations. Cf. also ND 1944.28 SCD, supra p. 303.

[65] [1917] 2 K.B. 78 at pp. 84–5.

in a given case the doctrine of frustration of adventure is to be applied to a particular time charterparty depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charterparty . . .. The question will then be what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service with such materials as are before him, including, of course, the cause of withdrawal and it will be immaterial whether his anticipation is justified or falsified by the event." If this test gives the result that the requisition will operate during a time "substantially less" than the remainder of the charter the contract stands, if it is considered probable that it will last longer, the contract is dissolved by frustration.[66] Evidently it is most important how the evaluation of the probable duration of the requisition is performed.[67] If a strict attitude is taken towards the legal relevancy of *anticipated* hindrances the doctrine of frustration could only be applied to time charters when they cover a rather short period. In the *Tamplin* case it was acknowledged by Lord LOREBURN as well as Viscount HALDANE that the duration of the requisition was impossible to foresee[68] but Lord LOREBURN apparently placed the burden of proof upon the party alleging frustration, while Viscount HALDANE applied the *presumtion* that the requisition would outlast the charterparty.[69] Consequently, Viscount HALDANE considered the contract frustrated while Lord LOREBURN did not. The stricter view of Lord LOREBURN was relied upon by ROWLATT J. in *Chinese Mining & Engineering Co.* v. *Sale & Co.*[70] It must be "established" that the requisition will outlast the period of the charter[71] and it seems that, in English law, the doctrine of frustration has only been applied in cases where, at the time of the requisition, the remainder of the period has been less than about

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[66] See for a summing-up of the present law CARVER §§ 450–5; SCRUTTON pp. 100–4; GILMORE & BLACK pp. 211–5; POOR § 14 at note 15; and ROBINSON p. 658 note 138.

[67] This subject will be treated further infra p. 395.

[68] At pp. 405 and 411 respectively.

[69] He stated: "It is impossible for any Court to speculate as to the duration of the war, on which the Admiralty requirements may depend" and supposedly relied on *Geipel* v. *Smith* where it was *presumed* that a war will last a sufficient period of time to frustrate the contract. See infra p. 400.

[70] See supra p. 304.

[71] [1917] 2 K.B. 599 at p. 604.

one year,[72] while the American courts in *The Isle of Mull*[73] and *The Frankmere*[74] have applied the doctrine when the vessel had still about 3½ years to perform under the charter. But, evidently, the court desired to avoid "the confusing, if not impossible, task of adjusting the equities between the owner and the charterer", which would have been inevitable if the charters had remained in effect in spite of the requisition,[75] and with reference to *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*,[76] it was presumed that the requisition would last as long as the war.[77]

Although the American decisions may appear more liberal than the English decisions, the American courts have apparently been slow to free parties from their contractual obligations on account of economic hardship or "impracticability"[78] and this is evidenced by a case concerning a general carrying contract (Sw. "transportkontrakt").

Thus, in *Société Anonyme des Sucreries de Sain Jean* v. *Bull Insular Line Inc.* (1921) 276 Fed 783 CCA 1st, the shipowner had contracted to transport sugar from Puerto Rico to New York during five years starting 1917. At this time all his vessels became requisitioned, but they were restored after two years.

[72] See *Anglo-Northern Trading Co.* v. *Emlyn Jones & Williams*, supra (about 4 months left); *Heilgers & Co.* v. *Cambrian S.N. Co.* supra (about 4½ months left); *Countess of Warwick S.S. Co.* v. *Le Nickel Société Anonyme*, supra (about 4 months left); and *Bank Line* v. *Capel*, supra (the requisition occurred *before* delivery of the vessel on a 12 months charter).

[73] See supra p. 311.

[74] (1921) 278 Fed 139 CCA 4th.

[75] See supra p. 302.

[76] (1918) 248 U.S. 377.

[77] That is the same view which was taken by Viscount HALDANE in the *Tamplin* case. In the *Allanwilde* case the court stated: "Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation" (at p. 386). In view hereof, the shipowner did not have to perform the voyage when the U.S. Government denied clearance to sailing vessels destined to the war zone. The shipowner was also considered entitled to keep prepaid freight according to a clause in the bill of lading. See for further American requisition cases where the doctrine of frustration has been applied *Texas Co.* v. *Hogarth Shipping Co.* (*The Baron Ogilvy*) (1921) 256 U.S. 619 (voyage charter); *Vacuum Oil Co.* v. *Luckenbach S.S. Co.* (1921) 275 Fed 998 ED Va. (voyage charter); *Earn Line S.S. Co.* v. *Sutherland S.S. Co.* (*The Claveresk*) (1920) 264 Fed 276 CCA 2nd (time charter); *Henjes Marine Inc.* v. *White Construction Co.* 1945 AMC 1241 Sup. Ct. N.Y. (demise charter); and *Permanente S.S. Co.* v. *Hawaiian Dredging Co.* 1945 AMC 1447 ND Cal. (demise charter).

[78] See supra p. 209.

The contract contained a *force majeure* clause excepting the shipowner from liability to pay damages if he should become "unable" to carry out the agreement in whole or in part, but the court did not consider that he was relieved from his duty to perform the contract during the remainder of the term. It was stressed that the shipowner could use chartered vessels to perform the contract and that therefore it was not impossible to carry it out (at p. 784). In addition, the contract had been made during the war and in contemplation of changing war conditions. This being so, the effect of the force majeure clause could only be to suspend the contract not to dissolve it.

§ 11.3. *Prohibitions and Government Directions*

It is evident, under Scandinavian as well as Anglo-American law, that the court seized of the case will give full effect to the prohibitions enacted in its own country in so far as the legislation concerns the parties to the dispute. Thus, in Anglo-American law, contracts may be dissolved *ipso facto* on the occurrence of the war in the very moment that contracting parties become nationals of states in war with eachother or when the performance of the contract would involve intercourse with the enemy. This result, which in Anglo-American law follows from the general common law principle prohibiting trading with the enemy and special legislation in Trading with the Enemy Acts, will undoubtedly be attained by special legislation in Scandinavian law also.[1] The problems relating hereto have been treated above and shall not be further dealt with here. However, some further observations shall be made on the difficult question of the legal effect of a prohibition enacted under another law than the law applicable to the dispute. Would, in the absence of excusatory clauses, such a prohibition be given any effect at all on the relationship between the contracting parties? Even though the court in applying *lex fori*, or another law than the law under which the prohibition is enacted, does not ordinarily see any reason to contribute to the achievement of the purposes behind the foreign legislation[2] it must be examined whether the *fact* that such legislation affects the position of the contracting parties is considered a relevant circumstance under the doctrine of frustration and impossibility.[3]

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[1] See supra p. 191.

[2] See HJERNER pp. 186, 214, 223, 419, 465 et seq., 598 et seq. and 614-5.

[3] See the general observations supra pp. 148, 191.

In the earlier cases it was considered that in the absence of excusatory clauses, the parties should be held absolutely bound by their contracts and the excuses admitted at law—under the theories of frustration and impossibility—developed in stages for particular contingencies.[4] Thus, it is not surprising to find in earlier cases a marked reluctance to recognize the impact of foreign legislation as an excuse in the absence of an appropriate clause. And this attitude has apparently been fortified by considerations as to public policy and the national interests of the country where the dispute has been taken to trial.

In *Touteng* v. *Hubbard* (1802) 3 B. & P. 291 [127 E.R. 161], where a British embargo imposed on Swedish vessels freed the British charterer from a contract concluded with a Swedish shipowner, it was hinted that the result might have been different if the "embargo had been laid on by a foreign prince" (per Lord ALVANLEY C. J. at p. 299 [165]). It was stated that the object of the embargo "must have been to make a species of reprisal on the state of Sweden; which we sitting here, and every good British subject, must consider as an act justified by the conduct of the Court of Sweden towards this country . . .". Furthermore, it was considered that the master of the Swedish vessel must bear the consequences of the blameworthy behaviour of his sovereign (at p. 302 [167]). This case shows that considerations as to national policy have had a bearing on the outcome, since at the time of the decision (1802) it is probable that the courts were not prepared to excuse a contracting party in the absence of a specific clause.[5] This is evidenced by the earlier case *Blight* v. *Page* (1801) 3 B. & P. 295 [127 E.R. 163], where a Russian prohibition of export did not free the charterer from his obligation in spite of a "restraint of princes" clause which was not considered applicable in the favour of the charterer. See also the subsequent case *Barker* v. *Hodgson* (1814) 3 M. & S. 267 [105 E.R. 612], where the charterers were not excused in spite of the fact that they were prevented from loading the cargo when all public intercourse at the port became prohibited by the law of the port in consequence of an infectious disorder.[6] It is not surprising that this restrictive attitude towards the legal relevancy of prohibitions enacted under foreign law was still maintained in later cases. In *Jacobs* v. *Crédit Lyonnais* (1884) 12 Q.B.D. 589, a seller who had promised to deliver 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port, was prevented from shipping 11,000 tons of the cargo on account of a prohibition by the constituted authorities of the export of esparto from Algeria, by reason of an insurrection and consequent hostilities in that country. This fact was not considered an excuse. And in *Furness, Withy & Co.* v. *Rederiaktiebolaget*

[4] See supra p. 162 et seq.

[5] At least not in a case where the hindrance affected the *charterer*. Cf. infra p. 379 et seq.

[6] Cf. the critical remarks by PAGE, The Development of the Doctrine of Impossibility of Performance, 18 Mich. L. Rev. (1920) 589 at pp. 596–7.

Banco [1917] 2 K.B. 873, the "restraint of princes" clause operated to excuse the shipowner from a performance prohibited by Swedish authorities but it was clearly pointed out that the clause was necessary for the result.[7]

On the basis of the present case-law in England and the United States it has been considered that impossibility or frustration caused by a prohibition enacted under *foreign* law is only relevant if the foreign power is "friendly"[8] and this conclusion seems to be well supported by e.g. the *dictum* in *Touteng* v. *Hubbard* (supra) compared with the *dictum* in *Esposito* v. *Bowden* (supra p. 192), but nevertheless it tends, perhaps, to simplify the issue. On the one hand, it must be recognized that there has been an evolution of the law towards an increased recognition of excuses from absolute promises even in the absence of clauses[9] and therefore it seems to be natural to apply the doctrine of frustration and impossibility to hindrances caused by foreign prohibitions also. On the other hand, in cases of war and crises, commerce is nowadays ordinarily strictly controlled by governmental authorities and it may be that the courts will still consider it proper to protect the citizens and interests of their own country by adopting a restrictive attitude towards the legal relevancy of foreign prohibitions conveyed by earlier precedents.

The requisition cases show that, as a rule, the shipowner was not deprived of the possession of the vessel in the sense that governmental officials took command over the vessel. The same master and crew ordinarily remained onboard and the requisitioning power took the position of an ordinary time-charterer. Therefore, it may be argued that, in the case of a requisition by a foreign power, the principle of "the perishing of the thing" (see supra p. 164) or "the cessation of a certain contemplated state of affairs" (see supra p. 167) could not be invoked, since such a requisition was no more than a mere direction by the foreign power concerned—a direction to use the vessel in a way conforming with the terms of the requisition and, in particular, a direction not to carry out the contractual obligations under the charter current at the time of the requisition. True, the shipowner's refusal to comply would entail a *risk of sanctions*, but this has not been fully recognized as a relevant circumstance in the cases dealing with the legal effect of foreign prohibi-

[7] See supra p. 291. Cf. also *Trinidad Shipping & Trading Co.* v. *Alston & Co.* [1920] A.C. 888.

[8] See Restatement Contracts § 592 and supra p. 219.

[9] See supra p. 297.

tions. Nevertheless, in the requisition cases, the promisor has been treated somewhat more generously than in other cases of governmental directions.[10]

In *The Adriatic* (1918) 253 Fed 489 ED Pa., the charterparty contained not only the usual "restraint of princes" clause but also a clause where it was expressly stated that the charter should be "null and void" if the vessel be requisitioned by the British Admiralty. Upon the requisition of the vessel the shipowner was released from the charter but, in addition, it was considered that the court could not question *the legality of the requisition* which took place in the vessel's "home waters".[11] The question whether such a procedure amounts to a requisition under British law was discussed in *The Isle of Mull* (1921) 278 Fed 131 CCA 4th (cert. den. 257 U.S. 662), but the court did not consider it necessary to decide this. In the District Court ROSE J. stated: "In the case at bar, the Admiralty did not in the most literal sense take the ship out of the hands of the owner.[12] What it did was to require the owner to operate its property as the Admiralty directed .... Was it [the owner] required to go further, and refuse to obey the orders of its government? It would not have seemed to it that such a course would have profited the charterer, for the first British man-of-war which would have encountered the Isle of Mull would have taken possession of her. To have assumed an attitude, which to the overwhelming majority of Englishmen would have seemed highly unpatriotic, might well have cost the owner much. The law does not impose such an obligation upon it. Its freedom to leave the ship in the charterer's service was in fact effectively restrained by the action of its government, however much lawyers may now or then dispute as to whether such restraint was of right" (257 Fed 798 at pp. 801–2). However, as pointed out by SCRUTTON[13] it may still be necessary to distinguish "requisitions" from "mere directions" and, it might be added, the more so if the relevant clauses use the express term "requisition".[14]

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[10] See supra p. 301 et seq.

[11] See also *The Athanasios* (1915) 228 Fed 558 SDNY; and *The Claveresk* (1920) 264 Fed 276 CCA 2nd at p. 281.

[12] That requisition need not be performed in a physical sense was acknowledged already in *The Styria* (1901) 186 U.S. 1. See also *British & Foreign Marine Insurance Co.* v. *Samuel Sanday & Co.* [1916] 1 A.C. 650 at p. 659, "... I am not pressed by the circumstance that force was neither executed nor present, for force is in the reserve behind every State command. And it would be a strange law which deprived the assured, if otherwise entitled to his indemnity, upon the ground that he had not resisted, till the hand of power was laid upon him, an order which it was his duty to obey" (per Earl LOREBURN at p. 659). Accord, *Capel* v. *Soulidi* [1916] 2 K.B. 365.

[13] P. 100 at note o.

[14] See, e.g., *Stella S.S. Co.* v. *Sutherland* (1920) 36 T.L.R. 724; and cf. concerning the meaning of "requisition" in the respective Compensation Acts *Nicolaou* v. *Minister of War Transport* (1944) 77 Ll.L.Rep. 495; *France, Fenwick & Co.* v. *R.* [1927] 1 K.B. 458; *Bombay & Persia S.N. Co.* v. *Shipping Controller* (1921) 7 Ll.L.Rep. 226 C.A.

It appears from several cases that the risk of a penalty or commercial disadvantages resulting from a refusal to follow government directions may excuse the promisor and this practice seems, in fact, well in line with the reasoning behind the requisition cases—the supervening hindrance, if it has sufficient preventing effect and duration, is considered to have been outside the contemplation of the parties and, provided the risk should not reasonably be imposed upon the promisor, he is excused from his promise.

Interferences by governmental authorities during war show a great variety but the basic idea behind them all is to make sure that the vessel is used in a manner which satisfies the needs and policy of the interfering country—the owner's own country or other belligerent or neutral country. The measures adopted by the vessel's home country may range from specific directions to seek protection in safe, neutral harbours or not to expose the vessel and her cargo to war risks by taking her to enemy ports, through dangerous war zones or by carrying contraband of war. In these instances, a sufficient increase of risk may *per se* excuse the shipowner from performance or permit a reasonable deviation, while the intervention of governmental authorities in some cases may have been necessary to free the shipowner from his obligation, *viz.* in such cases where the increase of risk alone would not have been sufficient. However, this is difficult to ascertain from the reports, since the courts often prefer to base their decisions on the fact that a governmental direction has intervened.

In *De La Rama S.S. Co. Inc.* v. *Ellis (The Dona Aniceta)* (see supra p. 279), the Pearl Harbour attack caused the authorities to refuse the vessel clearance and to order the shipowner to abandon the voyage but the increase of danger may, perhaps, *per se* have been sufficient to permit the shipowner to withdraw from the performance of the contract.

In *Furness, Withy & Co.* v. *Rederiaktiebolaget Banco (The Zamora)* 1917 2 K.B. 873, the shipowner first invoked the increase of danger as a ground for his refusal to perform (see at p. 876), but in the subsequent trial he preferred to rely on the prohibition of the Swedish authorities which was considered sufficient to free him from performance in view of the "restraint of princes" clause. In that case also, the increase of danger which caused the intervention of the authorities might, perhaps, have been sufficient.

In *M. Cook & Son, Ltd.* v. *Saglietto, master of The San Guiseppe* 1941 AMC 1301 CCA 4th, the outbreak of war between Great Britain and Italy caused the Italian government to order all Italian vessels to proceed to neutral ports. The vessel, which prior to the governmental order had proceeded to Norfolk for

bunkering, discharged the cargo there. The cargo-owner claimed damages for non-performance, alleging i.a. that the vessel had committed an unlawful deviation by proceeding to Norfolk for bunkering purposes. In view of the "liberty to call"-clause and the prevailing war conditions it was not considered an unlawful deviation to proceed to Norfolk.[15]

In *Allanwilde Transport Corporation* v. *Vacuum Oil Company* (1918) 248 U.S. 377, which is one of the cases where the court has freed the shipowner from performance even in the absence of a clause, the governmental prohibition to proceed to the war zone seems to have been the ground for the decision. Since the prohibition was declared by the U.S. authorities and the case was decided by the Supreme Court of the United States, it is natural that the court did not bother to resolve whether there was a sufficient increase of risk to free the shipowner from performance.

In *Atlantic Fruit Co.* v. *Solari* (1916) 238 Fed 217 SDNY, the increase of risk caused by the vessel's previous carriage of contraband to belligerent countries resulted in the interference of the Dutch authorities and it seems that the interference alone constituted the basis of the decision to declare the contract dissolved on account of frustration.

The position is not entirely clear in *Essex S.S. Co.* v. *Langbehn* (1918) 250 Fed 98 CCA 5th, where a British ship had been chartered by an American company on 9 July 1914. Shortly after the outbreak of the First World War, 4 August 1914, the British government prohibited British vessels "from trading with enemy ports, and from carrying contraband, until the master had satisfied himself that they had not an ultimate enemy destination." The charterer had the option to nominate Rotterdam, Antwerp or Hamburg. On the vessel's arrival in Galveston, after the outbreak of the war, the charterer asked the master whether he was prepared to take the cargo to Hamburg and, upon his refusal to do so, cancelled the contract. The court stated: "If the charterer had the right to select Hamburg as the port of discharge, it is manifest that the charter party was cancelled by operation of law by the declaration of war (at p. 99). The words "by operation of law" indicate, perhaps, that the doctrine of illegality was invoked in spite of the fact that the case concerned a *foreign* prohibition (see supra p. 219) but it may also be understood as an application of the doctrine of impossibility or frustration.[16] It should be observed that the danger—at least to a certain extent—might have been avoided if the charterer had been required to nominate the alternative ports (Rotterdam or Antwerp), but the court did not think that he had such a duty. The essential fact was

[15] Cf. *Colonialgrossisternes Forening* v. *Moore-McCormack Lines* 1950 AMC 253 CCA 2nd.

[16] "That the shipowner could not have been required to take his vessel to the enemy port, in violation of the law of his own country *and* [my italics] with the certainty that it would be seized by the enemy upon the arrival there unless war had then ceased, has been determined by the Supreme Court in the case of *Kronprinzessin Cecilie* 244 U.S. 12..." (at pp. 99, 100).

considered to be whether he exercised his option "in good faith, and without any purpose to evade performance of the charter party" (at p. 100).[17]

In some cases the governmental directions are not dictated by the increase of war risk but rather by the necessity of controlling and direct commerce in a manner corresponding to the needs and policy of the country during the conflict, and this is particularly the case when the intervention comes from another country than the vessel's home country. Behind the direction there will always be some kind of threat against non-conforming parties. The home-country, of course, ordinarily has the possibilities of forcing its nationals to obey by adequate sanctions[18] but severe sanctions may also follow if the shipowner should refuse to comply with directions given by foreign countries. Scandinavian shipowners were, especially during the First World War, dependant upon the supply of bunkers from the belligerents[19] and a failure to comply would have resulted in severe consequences for the shipowner. The sanctions against non-conforming shipowners may vary from a refusal to give them the use of any necessaries in port[20] to a refusal to give the vessel the benefit of certain "priorities" awarded loyal and obedient owners. In order to distinguish the obedient shipowners from the non-conforming, a system of black-listing[21] is normally introduced and it appears that such a black listing under the circumstances may be fatal to the shipowner.[22] Of course, it may be said that the shipowner should

[17] Cf. the different view in *The Innerton* 1944 AMC 570 CCA 5th, where the charterer was required to exercise his option in such a manner so as to make performance of the contract possible. See from English law *The Teutonia* (1872) L.R. 4 P.C. 171; but cf. *Reardon Smith Line Ltd.* v. *Ministry of Agriculture* [1963] A.C. 691. The subject is treated further infra p. 385 et seq.

[18] It is natural that the courts of the home country are inclined to assume that the contract is concluded *provided* due permission is given by the authorities. See, e.g., ND 1943.566 SCS, where the charterer was not awarded damages for non-performance when the shipowner did not get the necessary permission from the authorities (Sw. "sjöfartsnämnden").

[19] See ND 1919.72 Maritime Court of Kristiania, where the shipowner, who unexpectedly did not get bunker coal from Germany, was excused from performance.

[20] See, e.g., ND 1963.27 *The Netta* SCD, where the shipowner was refused necessary supplies owing to prior voyages to Israeli ports.

[21] See supra p. 124.

[22] It happens that the parties exchange mutual warranties that neither of them is black-listed by certain specified countries. In case of breach of such a warranty, damages are awarded in accordance with general principles of contract law. See, e.g., ND 1920.415 SCD.

in the first instance carry out his promise under his current contracts and that he cannot invoke as an excuse for non-performance the fact that he has chosen to comply with directions given by various governmental authorities—at least not by authorities in other countries than the vessel's home country. In line with the stricter attitude towards excuses from contractual performance, some earlier cases express the view that a voluntary conduct of the owner, however strong are the motives of the owner for so acting, cannot be said to be the act of the sovereign and thus amount to a restraint of princes[23] but it seems that the present law adopts another standpoint. Perhaps, the words of the court in *The Tropic Star* (see supra p. 297) may adequately describe the present position: "With every succeeding war in which this nation has engaged, the impact of conflict upon the civilian populace has been more demanding and more complex. The 'total war' now affecting all citizens, even upon what is now significantly termed the 'home front', is now quite different from the far-distant battles of the Army and Navy in the Spanish American War, or even the substantially greater effort at war production of the First World War. Now it has become a recognized function of government to regulate industry, business, and even the personal lives of all to advance war effort; and necessarily courts must interpret, supervise and enforce these controls . . . there is high authority for the view that the precedents from former wars are inadequate guides for the mammoth conflicts of the present era." And the court cited the recommendations of DODD to the effect that the courts should be free "to regard the problems arising out of governmental interference in wartime as to a large degree *sui generis*" and that they should not "need to adhere strictly in cases of this sort to the precedents which have been established in the law of impossibility of performance in general" but be "at liberty to reach the results most consistent with justice and public policy, as long as these results could be attained with due regard to the more fundamental principles of the law of contracts".[24] And one of these fundamental principles is no doubt that the party affected by the governmental direction must not have had knowledge of it at the time of the conclusion of the contract without telling his counter party.[25]

[23] See, e.g., *AB Malareprovinsernas Bank* v. *American Merchant Marine Ins. Co.* (1925) 241 N.Y. 197.

[24] 1950 AMC 80 at pp. 84–5. See DODD, Impossibility of Performance of Contracts Due to War-Time Regulations 32 Harv. L. Rev. (1919) 789 at p. 791.

[25] See *Rotterdamsche Lloyd* v. *Gosho Co.* 1924 AMC 938: "The appellants had full

In *American President Lines* v. *China Mutual Trading Co. (The Mount Davis)* 1953 AMC 1510, Supreme Court of Hong Kong, the U.S. government prohibited the shipowner to deliver the cargo in Hong Kong to the consignee who was considered an agent of the Chinese Communist regime. It was held that the cargo was already discharged and that the applicable law did not deal with anything whatsoever subsequent to transport and discharge. But the court stated: ". . . it is not essential that the physical force of the state should be actually present, it is sufficient if the State concerned can enforce the restraint by penalties against the persons having the custody of the subject matter, being its subjects or persons otherwise within its jurisdiction" (at p. 1520).

In ND 1919.257 *The Barfond*, the Supreme Court of Norway held that a shipowner, who had conformed with the request of the British consul not to deliver the cargo to the bill of lading holder, could not be held responsible for non-performance. And in UfR 1918.45, the Supreme Court of Denmark considered that the shipowner had no duty to deliver the cargo to the receiver in Copenhagen when, for the purpose of avoiding delay to the vessel's passengers and to her non-contraband cargo, he had given a promise to the inspecting British authorities in the port of Kirkwall to redeliver the particular consignment later to the British authorities for prize proceedings.[26]

Summing up, it seems that an unexpected interference by authorities, in the vessel's home country or other country, exposing the shipowner to severe sanctions in case of non-compliance with the directions given, would, under the present Scandinavian and Anglo-American law, excuse the shipowner if he follows such directions.[27]

§ 11.4. "*Impracticability*"

If the shipowner's promise implies that he may only perform the contract by using a named vessel, it is self-evident that specific performance of the

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knowledge of the restraints imposed, and the space available, the appellee had no such knowledge. With such knowledge, the appellants solicited the freight and undertook to transport it to the destination . . . . Furthermore, the Restraint of Princes clause relates to future restraints, not to restraints already existing" (at pp. 940–1).

[26] Accord, *The Hellig Olav* (1922) 282 Fed 534 CCA 2nd, where the Danish decision was expressly referred to. In the Danish case it was considered that the master had properly exercised his authority under SMC § 54 to act in the best interest of all parties concerned and in the American case it was considered that the master in the port of Copenhagen held the cargo as "agent of the belligerent government".

[27] Clauses expressly excusing the shipowner from performance in such instances are almost invariably to be found in the current bill of lading forms. See, e.g., Conlinebill's "Government Directions" clause supra p. 78.

contract becomes physically impossible when the vessel is lost.[1] In cases of requisition, the question of delay becomes relevant and the appreciation of the legal situation is often complex and uncertain.[2] Dangers threatening the vessel on the contracted route, as well as prohibitions and government directions, also give rise to neat calculations and anticipations as to future developments.[3] In a broad sense, most situations, apart from the actual loss of the vessel, belong to a category where the courts must nicely balance the interests of the contracting parties.[4] The term "impracticability" of performance, taken in its widest sense, may very well be used to cover all cases which do not strictly involve physical impossibility of performance. However, the term is used here to denote situations which have not been especially treated above under "Increase of Danger" (§ 11.1), "The Loss or Requisition of the Vessel" (§ 11.2) or "Prohibitions and Government Directions" (§ 11.3).

The vessel may be prevented from proceeding on the contracted route, or from reaching the port or berth. In so far as such hindrances regard war risks or government directions they have been treated above. There are, however, other reasons such as closure of canals,[5] landslides, objects sunk on the bottom, etc. Furthermore, labour disturbances may effectively prevent the shipowner from performing the functions resting upon him under the terms of the contract. Finally, there are many situations where unexpected fluctuations in the shipping market, devaluation of foreign exchange, increase of costs or other changes may strongly affect the position of the contracting parties. The aim of this study is not to treat the whole problem of the influence of changed conditions on the complex contractual relations arising under various contracts of affreightment. Since war as a rule will accentuate difficulties of the type referred

[1] There is, however, no logical necessity that the shipowner should be freed from the obligation to preserve the value of the contract for the charterer by paying damages for non-performance. See supra p. 142.

[2] See supra p. 314.

[3] See infra p. 395 et seq.

[4] The reason why the shipowner is freed from his obligation in case of a *constructive* total loss depends on an appreciation of the economic feasibility of repairing the vessel. See *Moss* v. *Smith* (1850) 9 C.B. 94 C.P. [137 E.R. 827] at p. 103 [831]; and supra p. 147.

[5] Sometimes for purely political reasons. The delay in clearing the Suez canal in connection with the conflicts between the Arab countries and Israel in 1956–57 and 1967– was certainly based on political considerations.

to and upset the economical balance between the contracting parties, some brief observations shall, however, be given on the blocking of the intended route (§ 11.4.1), labour disturbances (§ 11.4.2) and some other kinds of economic unprofitableness (§ 11.4.3). Since the *charterer's* right of cancellation is a complicated question with its own peculiar features, the section on "impracticability" (§ 11.4) primarily deals with hindrances and disadvantages affecting the *shipowner*, while the general problems relating to the position of the charterer are treated separately in the subsequent section (§ 11.5).

The approach in Anglo-American and Scandinavian law to the difficult question of the influence of changed conditions on the position of the contracting parties under general contract law has been treated above (see supra p. 162 et seq. and p. 141 et seq.) and shall not be repeated here. The subsequent part of the study is only intended to indicate how such general principles may be applied to contracts of affreightment in some other situations than war risks, requisitions and government directions but still typically resulting from war and similar contingencies.

§ 11.4.1. Blocking of intended route

Before standpoint is taken concerning the legal effect of the inaccessibility of the intended route, port or berth, it must be examined where the risk for such contingencies lies according to the respective contracts of affreightment.

In *time charters*, the risk of delay lies primarily on the charterer unless the shipowner has warranted that the vessel shall be capable of proceeding through specified routes or to specified ports, berths or places.[6] And ordinarily no such warranty is given; the problem of using the vessel effectively under the time charter party is entirely the charterer's concern. In addition, the shipowner customarily accepts only a limited risk in the

[6] A warranty of such character was alleged in a Swedish arbitration (1962) between the owners of the East German passenger vessel M/S Völkerfreundschaft (ex the Swedish American Line's M/S Stockholm) and a Danish charterer caused by the refusal of the U.S. authorities to admit the vessel into U.S. ports in the West Indies. The ports were specified in the time charter party. The case draw considerable attention in German and Danish newspapers but was settled during the arbitration proceedings.

current off-hire clauses. The charterer's obligation to pay hire is only suspended in certain enumerated situations, such as drydocking in order to maintain the efficiency of the vessel, deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident either hindering or preventing the working of the vessel and continuing for more than twentyfour consecutive hours (Baltime 11 A). However, the shipowner always has the obligation to *deliver* the vessel according to the terms of the time charter party and in such instances he will have to suffer the risk of delay, which also might cause the charterer to exercise his right to cancel the contract according to a cancellation clause which is normally to be found in the current time charter parties.

The charterer's right of cancellation at law is rather restricted in Anglo-American as well as Scandinavian law. In Anglo-American law, the charterer may only cancel at law if the delay results in a frustration of his purpose with the contract of affreightment and a similar approach is taken in SMC §§ 126, 146. See further GRÖNFORS, Befraktarens hävningsrätt; supra p. 269 and infra p. 374.

If the right of cancellation is optional with the time charterer, the shipowner might in addition suffer the serious disadvantage of having to tender the vessel to the charterer after the cessation of the hindrance causing the delay.[7] The doctrine of frustration will only come to the shipowner's rescue in exceptional cases.[8]

In *voyage charters*, the situation is entirely different, since the shipowner principally bears the risk of delay not only prior to delivery but during the currency of the charter as well. He must take the responsibility for the burdens of carrying out "the adventure" and the time spent in so doing is principally his affair. It should be observed, however, that the contract of affreightment may be made a hybrid between a voyage and a time charter party by using a time charter party form for a specified voyage. By such means the risk of delay may be transferred to the char-

[7] If the delay is probable or anticipated the shipowner, according to SMC §§ 126 and 146, has the possibility of requesting the charterer to inform him within a reasonable period of time whether he intends to use his right of cancellation or not. And if the charterer fails to give the requested answer he loses his right of cancellation. However, in Anglo-American law the shipowner has no such remedy in the absence of a specific clause to this effect. See infra p. 410.

[8] See *Bank Line* v. *Capel* [1919] A.C. 435 supra p. 166.

terer.[9] The shipowner's risk in voyage charters is, however, modified when the charterer is given the right of directing the vessel to certain specified places. The shipowner wants, of course, to safe-guard himself from delay, physical damage to the vessel and other inconveniences resulting from the charterer's use of his right to direct the vessel to places where such contingencies might occur. Therefore, the voyage charters are often provided with special clauses protecting the owner in this regard.[10] When the vessel is threatened by hindrances in places nominated by the charterer, the owner may refuse to comply and furthermore, if he does comply, it is considered—at least in Anglo-American law—that the charterer must assume the resulting consequences. The charterer's order is considered a breach of contract and therefore he has the obligation to pay for all damage flowing from the breach in the natural course of events, provided the master has not acted "unreasonably" in following the order. The same result might follow even in the absence of a clause owing to the general principle that the charterer must use his right of nomination in a reasonable manner and that he is impliedly representing that the nominated places are safe and suitable for the vessel.[11]

A warranty concerning the safe condition of ports and berths is considered to regard *the route* to the place as well, provided there is no possibility of reaching or leaving the place except by such route.[12] If, for example, the charterer appoints the port of Hamburg, the shipowner might refuse to comply if it is impossible or dangerous to proceed through the river Elbe or, if he proceeds, hold the charterer liable for the ensuing damage, provided the master did not act "unreasonably" in following

[9] See *Admiral S.S. Co.* v. *Weidner, Hopkins & Co.* [1917] 1 K.B. 222; *Ocean Tramp Tankers Corporation* v. *V/O Sovfracht, (The Eugenia)* [1963] 2 Lloyd's Rep. 381; DREYER, Hansa 1958 p. 2362; JANTZEN, Godsbefordring p. 334; LORENZ-MEYER p. 54; SCHAPS-ABRAHAM § 622 Einleitung; and WILLNER p. 32.

[10] Safe port-, Near- and Ice-clauses. See for further comments BRÆKHUS, Ishindringer; CAPELLE p. 172 et seq; JANTZEN, Godsbefordring p. 95 et seq; MARSTON, The "Near" Clause in Charter parties, J.B.L. 1966 pp. 42–54; RAMBERG, Unsafe ports and berths; SELVIG § 15.41 et seq.; TIBERG p. 225 et seq.; RØRDAM p. 110 et seq.; and id. Hansa 1957 p. 2442 et seq.

[11] See further the comparative analysis by RAMBERG, Unsafe ports and berths.

[12] See the statement of SELLERS L. J. in *Leeds Shipping Co.* v. *Société Francaise Bunge (The Eastern City)* [1958] 2 Lloyd's Rep. 127 C.A.; ". . . a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship."

the order.[13] However, if there are no well-defined routes leading to the nominated place, or if alternative routes are available, the choice of alternatives becomes entirely the shipowner's concern.[14]

The "Near" Clause

Much confusion exists concerning the meaning of the "Near" clause and the debate shall not be repeated here. It is probable that much of this confusion is explained by the many purposes that the clause allegedly should serve.[15] The clause is often argued for the purpose of supporting the shipowner's contention that the vessel has "arrived" and that the lay-time is running even though the vessel has not reached the port or berth or, alternatively, for the purpose of giving the shipowner the right to proceed to substituted ports or places or, if the cargo has not been taken onboard, cancel the contract. In addition, the "Near" clause at the same time serves as a "safe port"-clause, since the words "so near thereto as she may safely get and lie always afloat" in Anglo-American law are understood as a warranty on the part of the charterer that the nominated places are safe for the vessel, not only with regard to physical hindrances but political risks also.[16] In Scandinavian law, the "Near" clause has been given a restricted geographical application and deemed to refer to hindrances in the vicinity of the port only.[17] The same approach has been taken to ice-clauses where the words "should ice prevent the vessel from *entering* the port" have been understood to apply to hindrances in the vicinity of the port,[18] while the words "should ice prevent

[13] See *Grace (G.W.) & Co.* v. *General S.N. Co. (The Sussex Oak)* (1950) 83 Ll.L. Rep. 297 K.B.

[14] See *Limerick S.S. Co.* v. *Stott (The Innisboffin)* (1921) 15 Asp. M.C. 323 C.A.; and the comments by CARVER § 373 at note 44. The case concerned damage to the vessel by ice while she was proceeding through the Baltic to the nominated port of Åbo.

[15] See RAMBERG p. 95; SELVIG § 15.41 et seq.; and cf. TIBERG p. 226 et seq.

[16] See *Ogden* v. *Graham (The Respigadera)* (1861) 1 B. & S. 773 (124 R.R. 739); CARVER § 980; TIBERG p. 227; SCRUTTON p. 112 at note o; and JANTZEN, Godsbefordring p. 99.

[17] See ND 1939.251 SCN and the comments by JANTZEN, ND 1939 p. V et seq.; and SELVIG § 15 at notes 37–38. Cf. also ND 1939.289 SCN.

[18] See BRÆKHUS Ishindringer p. 29 et seq.; ND 1929.312 Maritime and Commercial Court of Copenhagen; ND 1930.145 Vestre Court of Appeal; ND 1922.344 Maritime and Commercial Court of Copenhagen; and ND 1912.188 Copenhagen Court of Appeal; but cf. the Dutch arbitration by CLEVERINGA reported in Hansa 1962 p. 1398. See for a summing up RØRDAM p. 101; and id., Hansa 1957 p. 2444 note 12.

vessel from *reaching* port" have been considered to protect the vessel from the obligation to proceed to the destination even if the hindrance is located at a distance from the port.[19] English law does not seem to make such a distinction in applying the "Near" clause to various hindrances. Thus, in a recent case regarding insufficient depth of water the shipowner was entitled to fulfil his obligation by discharging the cargo in Saigon instead of the destination Pnom-Penh which was 250 miles away.[20]

In Scandinavian law, the risk of the inaccessibility of the nominated *berth* is placed on the charterer at law not only when the hindrance is attributable to him (Sw. "beror av avlastaren"; SMC § 83.1) but also if the hindrance constitutes congestion or similar circumstances which the shipowner could not reasonably foresee at the time of the conclusion of the contract (Sw. "där hindret utgöres av trafikanhopning eller annan dylik omständighet och bortfraktaren ej skäligen kunnat taga denna i beräkning vid avtalets ingående"; SMC § 83.2).[21] The rule does not apply when the berth has been agreed on in the contract. The placing of the risk upon the charterer is often accentuated in the rules and clauses determining the running of the vessel's lay-time and thus the charterer's obligation to pay demurrage.[22] The risk, however, is often modified by exceptions, or words to the same effect, in the demurrage clauses.[23] The very purpose of demurrage clauses is to regulate the placing of the risk of *any* delay—and notably of such delay which frequently occurs in port. The risk of loss of time while the vessel is waiting for berth may be placed entirely on the charterer[24] or be divided between the parties[25] or placed

[19] See ND 1925.523 SCN.

[20] *The Athamas* [1963] 1 Lloyd's Rep. 287 C.A. Upon arrival in Saigon the vessel had sailed 3,500 miles which should be compared to the total sailing distance according to the charter party which was 3,700 miles. MARSTON, The "Near" Clause in Charterparties, J.B.L. 1966 p. 42 at pp. 48–51, considers that the word "near" hardly has any "objective meaning" after the decision in *The Athamas*; the courts will probably in the future apply "the test [if] the charter party has been substantially performed". See also SCRUTTON p. 117; SELVIG § 15 et seq; notes 35–36; and cf. TIBERG p. 231.

[21] See from the *travaux préparatoires* SOU 1936:17 p. 82 et seq.; and TIBERG p. 199 et seq.

[22] See TIBERG p. 238 et seq.

[23] E.g. exception for strikes or by determining the lay-time as "weather working days". See TIBERG p. 331 et seq.

[24] "Time lost in waiting for berth to count as loading (discharging time) time" in Gencon clause.

[25] In Baltcon clause 6, the lay-time runs if the vessel is prevented from reaching the

entirely on the shipowner by way of clauses obligating the vessel to wait her turn.[26]

In *liner trade*, the vessel usually uses one and the same loading (discharging) place in the various ports and from a commercial viewpoint it seems natural that the shipowner should carry the whole risk for disadvantages attributable to the condition or inavailability of these places. Ordinarily, the charterer has no right to nominate loading or discharging places in liner trade (see SMC §§ 79 and 105). Nevertheless, the shipowner sometimes tries to transfer such risk to the charterer by way of a standard clause in the bill of lading forms.[27]

The difficulty in interpreting the "Near" clause is due to the fact that the clause might be used, and presumably originally was devised, for the purpose of fixing the very spot in small, unknown ports or places to which the shipowner obligated himself to take the vessel.[28] However, in most cases the clause only fulfils the function of a standard protective to the benefit of the shipowner. This must be borne in mind when the cases dealing with the "Near" clause are examined. We are now faced with the difficult problem pertaining to interpretation of "clausal law" and the question is not only a matter of literal interpretation but also involves a test of reasonableness.

If the charterer has nominated the port, it seems natural to give the shipowner greater possibilities of protecting himself. On the other hand, if the port, berth or place is specified in the charter party, the shipowner must as a rule fulfil his obligation to ascertain the condition of the place before he promises to take the vessel there. In such cases, it is reasonable to maintain that the shipowner cannot invoke the clause with regard to

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loading place due to congestion of shipping but "during such prevention time only to be reckoned as half time".

[26] See TIBERG p. 250 et seq.

[27] See, e.g., Swedish American Line bill of lading clause (1966) 22f: "In the event of any detention to the vessel due to any of the aforementioned causes [including "any situation whatsoever and wheresoever occurring . . . likely to give rise to delay or difficulty in arriving, loading, discharging or leaving"], the Carrier shall be entitled to demurrage payable at the rate of U.S. $0.35 per gross register ton per day or pro rata for portion of a day". It is strange that the clause does not apportion the amount of demurrage between the bill of lading holders. Obviously, the clause must not be interpreted according to its literal wording.

[28] See TIBERG p. 228.

such hindrances which could have been ascertained or anticipated at the time of the conclusion of the contract.[29]

Another important circumstance is the character of the hindrance and the period of delay or extent of expenses to overcome it. If there is no intention to the contrary expressed in the contract, the shipowner is considered to assume the risk of delay caused by tidal waters and ice.[30] This is in fact only a consequence of the requirement that the hindrance shall be unexpected or difficult to ascertain at the time of the conclusion of the contract. It is reasonable to assume that the risk of delay on account of tide or ice has been within the contemplation of the parties and that this risk is included in the shipowner's risk undertaking if there are no words to the contrary in the charter party.

Even if the hindrance has been unexpected we must determine if the risk of *any* delay or *any* expense required to overcome the hindrance is transferred to the charterer by way of the "Near" clause. If the "Near" clause should be understood as a standard protective of the same type as *force majeure* clauses, it is natural that the shipowner is not relieved from the burden of suffering a reasonable degree of delay and sacrifices before he is considered to have fulfilled his obligation of taking the vessel to the agreed place. Although delay and expenses for the purpose of avoiding the hindrance, such as lightering expenses, from an economic viewpoint should be treated alike, it has apparently been easier to accept that the shipowner must wait a reasonable period of time than to place upon him the costs for lighterage. In German law, there is a recent decision explicitly stating that the "Near" clause does not free the shipowner from paying such lightering expenses which are necessary in order

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[29] See SOU 1936:17 p. 83; JANTZEN, Närklausulen p. 50 et seq. and Godsbefordring p. 95 et seq.; CARVER § 995 at notes 3 and 6; SCHAPS-ABRAHAM § 592 Anm. 5 and § 621 Anm. 4; SCHLEGELBERGER-LIESECKE, vorbemerkung 6 and 7 to §§ 592–602; WÜSTENDÖRFER § 21 III 2 (p. 259); LE CLÈRE p. 112 at note 20; WAROT, La clause "Aussi près que . . ." et les clauses de "Safe port" et de "Safe Berth" dans les charter-parties, D.M.F. 1960 p. 323 at p. 329; but cf. SCRUTTON p. 115 et seq.; MARSTON, op. cit. supra note 10 at pp. 42–54; HALSBURY, Shipping Vol. 35 § 630 at note m; RIPERT II § 1514 at notes 6 and 7; and the different view in some Swedish cases referred to by TIBERG p. 227 note 3.

[30] See SMC § 83.2. The words "congestion *or similar circumstances*" (Sw. "trafikanhopning *eller annan dylik omständighet*") do not cover such contingencies as tidal waters and ice. See JANTZEN, Godsbefordring p. 105 et seq.; SCRUTTON p. 115; and cf. the statement in *Bank Line* v. *Capel* infra p. 357.

to bring the vessel to the agreed destination[31] but the position in English law is still subject to dispute. It is clear that the shipowner must wait a reasonable time[32] before he takes the vessel to an alternative place, but recent cases show that he has no obligation to lighter the vessel at his own expense in order to reach the destination.[33] However, two earlier cases[34] did not allow the shipowner to invoke the "Near" clause for the purpose of placing the expense of lighterage on the charterer. The prevailing opinion seems to be that these cases are overruled[35] but CARVER tries to reconcile the older cases with the recent ones by distinguishing situations where the shipowner has accepted the place from cases where the charterer has a right of nomination.[36]

In Scandinavian law, TIBERG has suggested that the "Near" clause "should be applied according to its literal wording, since one would otherwise be faced with the necessity of drawing refined and arbitrary distinctions",[37] while SELVIG has underlined that the distribution of the risk of delay and additional expenses in port, such as lightering costs, should be separated from the test as to when the shipowner has substantially performed his obligation and earned his freight.[38] When deciding the latter question a restrictive approach is warranted.[39]

If the "Near" clause can only be invoked when the circumstances preventing the vessel from reaching the agreed place are not only unexpected but also impossible to avoid without considerable sacrifices, one might argue that the clause is given a very limited effect, since the shipowner, in Anglo-American as well as Scandinavian law, under similar circumstances may be freed from performance by the doctrines of impossibility,

[31] MDR 1960.1016; OLG Hamburg. See the comments by SELVIG § 15 at notes 43–45.

[32] See CARVER §§ 616-7; and SCRUTTON p. 115.

[33] See *The Alhambra* (1881) 6 P.D. 68; *Reynolds* v. *Tomlinson (The Antofagasta)* (1896) 8 Asp. M.C. 150 Q.B.; *Hall S.S. Co.* v. *Paul (The Peerless)* (1914) 12 Asp. M.C. 534 K.B.

[34] *Hillstrom* v. *Gibson* (1870) 8 Macph. 463; and the dictum by LUSH J. in *Capper* v. *Wallace* (1880) 5 Q.B.D. 163 (at p. 166).

[35] See in particular the statement in SCRUTTON p. 120 at note m; "In view of the repeated affirmation of the principle of *The Alhambra*, the elaboration of the point seems no longer necessary."

[36] CARVER § 995 at notes 3 and 6.

[37] TIBERG p. 228.

[38] SELVIG § 15.4. and § 15.5.

[39] See SELVIG § 15 note 62.

force majeure or frustration *even in the absence of a clause.*[40] And even if it is conceded that standard clauses of a general wording must not always be applied according to their literal wording—especially not when this causes surprises or undue hardship to the counterparty—one should not devoid the clause of practically all meaning.[41] However, it is unsatisfactory that the shipowner should be in a position to invoke the "Near" clause for the purpose of avoiding risks connected with hindrances which he—but perhaps not the charterer—actually appreciated, or in any event could have appreciated, at the time of the conclusion of the contract. Such foreseeable hindrances should either be explicitly regulated in the contract or reflected in the freight. Hence, the requirement that the hindrances affecting the navigation of the vessel must be reasonably unforseeable seems well warranted. But should the shipowner be required to suffer the disadvantage of delay or extra expenses even for *unforeseeable* hindrances occurring in the ports or in the vicinity thereof?

SMC § 83.2 stipulates that, if a specified place for loading has not been agreed, the charterer bears the risk of unforeseeable delay caused by congestion and similar circumstances. The same principle applies to the port of discharge.[42] This raises the question of what hindrances are included in the general words "similar circumstances". Should, for example, a vessel sunk in the harbour inlet immediately prior to the vessel's arrival be considered a "similar circumstance"? The statements in the *travaux préparatoires* indicate that the words "similar circumstances" (Sw. "liknande omständighet") should be interpreted strictly *ejusdem generis.* Only hindrances of such character where it is natural to place the risk on the charterer rather than on the shipowner are encompassed by the general words of § 83.2.[43] JANTZEN expressly answers the question whether delay caused by vessels sunk in the harbour comes within "similar circumstances" in the negative.[44] It therefore seems that, in Scandinavian law, only *some* unforeseeable hindrances in port are placed on the charterer at law in the absence of a clause.[45]

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[40] See supra p. 297 et seq. and p. 141 et seq.

[41] See RIPERT II § 1514 at notes 6 and 7.

[42] See SMC § 106 with a crossreference to § 83.

[43] See SOU 1936:17 p. 83.

[44] See JANTZEN, Godsbefordring, p. 105; See also TIBERG p. 200.

[45] See further JANTZEN, Godsbefording, p. 107; and TIBERG p. 202 et seq. with references to foreign law and to the influence of local customs.

In English law, the general principle has been adopted that the shipowner must wait a reasonable period of time before the "Near" clause can be invoked and this seems to be the prevailing opinion in Scandinavian law also.[46] However, the test of reasonableness must apparently be based on the time ordinarily used in modern transportation. It is not possible to use the period of delay referred to in earlier cases for a comparison in cases considered to-day.[47]

It seems strange, in case of unexpected hindrances, to require the shipowner to carry the burden of a reasonable period of delay, although he has no obligation to pay the cost of lighterage, even if the cost compared to the total amount of freight is negligible. Delay may easily be converted into money and a practical approach seems to require that the economy of the contract be considered in the same manner in cases of unforeseeable delay and unforeseeable extra expenses in port. On the other hand, as pointed out by SELVIG,[48] the shipowner should not be given too wide possibilities of using his "liberties" to deviate to a substitute port or to cancel the contract entirely. And the contract must not be treated as substantially performed if the hindrance prevents further passage at a place far away from the agreed destination.

Perhaps, the key to international uniformity lies in a distinction between (1) the *distribution of risk* for delay and costs resulting from hindrances in port (2) the question of the shipowner's *liberty* to take the vessel to a substituted place or to cancel the contract. Furthermore, it seems natural to distinguish between situations where the place is nominated by the charterer subsequent to the conclusion of the contract and cases where the place is specified in the contract. In the former case the "Near" clause should be interpreted more generously in the shipowner's favour.

If the suggested distinctions are made, the approach taken by Oberlandesgericht Hamburg in MDR 1960.1016 that the "Near" clause may only be applied in case of unexpected and reasonably insurmountable hindrances in port may perhaps be universally adopted and place the "normal" risk of delay as well as other disadvantages, such as lightering expenses, on the shipowner, provided the place has not been nominated by the charterer subsequent to the conclusion of the contract. The distinction between this situation and the case when the shipowner

[46] See JANTZEN, Godsbefordring, p. 99; and TIBERG p. 234 et seq.

[47] See TIBERG p. 234.

[48] See supra p. 333.

(master) has accepted the place is stressed by CARVER.[49] Nowadays, it is only in exceptional cases that the shipowner has no possibility of ascertaining beforehand the condition of the place and the risk of sailing there. And in exceptional cases where he has no such possibility—e.g. in distant, small, unknown ports—it seems that the parties should be required to regulate the division of risk by clauses more specific than the "Near" clause.[50] Owing to the development of the law with regard to the possibilities of excusing the shipowner—even in the absence of clauses—from performance in case of "inordinate delay" or a change of circumstances turning performance of the contract into a "different contract", he will always have a certain minimum protection in case of unexpected hindrances making the contract impossible or burdensome to perform. The determination of *the degree* of delay and disadvantages necessary to enable the shipowner to invoke the "Near" clause must, of course, always be adjusted to the situation at hand and the distinction suggested by SELVIG[51] is well worth considering.

The Suez and Panama Canal Cases

The legal effect of the inaccessibility of *the route* has been discussed particularly in connection with the closure of the Suez Canal in the conflict between the Arab States and Israel in 1956–1957.[52] In the leading cases, the hindrance occurred so far from the destination that the "Near" clause was inapplicable. The paramount questions were firstly the question of "inordinate delay", secondly the question whether the contract concerned a voyage via Suez and, if so, whether nevertheless the shipowner was obligated to take the vessel round the Cape of Good Hope instead of through the Canal. The first question caused no real difficulty, since, in the relevant cases, the time of the opening of the Canal was quite unpredictable and, consequently, an "inordinate delay" could be said to have arisen on account of the closure of the Canal. However, the question whether the voyage was via Suez and the question of sub-

[49] See CARVER § 995 at notes 3 and 6.

[50] It is certainly no coincidence that special clauses, such as ice clauses, are frequent in spite of the fact that ice hindrances in principle are covered by the general words of the "Near" clause.

[51] See supra p. 333.

[52] So far there are to my knowledge no "frustration" cases reported as a result of the Arab-Israeli war of 1967 —. But cf. *The African Glen* supra p. 270.

stituted performance raised considerable difficulties. Was there any obligation at all on the part of the shipowner to sail round the Cape of Good Hope? And, if so, without the possibility of claiming additional freight? Or could he claim freight in proportion to the longer sailing distance? And, if so, should the rate for such additional freight be based on the rate in the charterparty or on the market rate at the time of the substituted performance?

The closures of the Suez Canal have affected not only contracts of affreightment to be performed via the Canal but also the entire shipping industry. The shipowners who got their vessels trapped in the Canal, or had to proceed round the Cape of Good Hope, were, of course, adversely affected, while at the same time the shipowners generally profited from the rise of freights caused by the additional demand for tonnage and, perhaps, by the speculations as to future political developments.[53]

In the case of time charters, the restricted possibilities of using the vessel under the charter became the charterer's loss, while at the same time he gained from the fact that the charter hire was considerably less than the market rate after the closure of the Canal. In voyage charters, the shipowner faced not only the disadvantage of delay but also the prospect of having to perform the voyage by proceeding round the Cape at the contracted freight. In some instances, the shipowners sought and succeeded in obtaining protection against these calamities by special "Suezstop" clauses,[54] while in other cases they tried to invoke the doctrine of frustration or similar doctrines.

As we have experienced from the debate with regard to the interpretation of the Near Clause, the shipowner must always suffer the disadvantage of a "reasonable" period of delay, unless such risk has been transferred to the charterer by an explicit clause. The test of reasonableness must be performed with due regard to the economical consequences and, as suggested above,[55] it seems reasonable to demand a longer period of delay before the shipowner is permitted to deviate, or to cancel the

[53] The closure of the Canal had a strong impact on the shipbuilding industry as well. See ND 1959.333 (Sw. Arbitration).

[54] See, e.g., Baltic Conference Stoppage of Suez Canal Traffic Clause 1956 ("Suezstop") and Baltic Conference Stoppage of Panama Canal Traffic Clause ("Panstop") supra p. 80.

[55] Supra p. 336.

contract, than in situations where the Near Clause is invoked for the purpose of transferring to the charterer the risk of further delay or extra expenses in the various ports.[56] However, the respective closures of the Suez Canal could be expected to last—and did last—considerable periods of time.[57] The question of "inordinate delay" was therefore never subject to serious dispute in the Suez Canal cases.[58] Nevertheless, the doctrine of frustration could not be invoked without establishing that passage via the Canal was an express or implied condition under the charter party and this caused the real difficulties. Would a passage round the Cape turn the contracted voyage into a "fundamentally different" voyage? Or did the necessity of proceeding round the Cape amount to "a disappearance of the basis of the contract?[59] The charterer would probably approve of the statement of Lord RADCLIFFE in *Tsakiroglou & Co.* v. *Noblee Thorl G.m.b.H.* to the effect that "a man may habitually leave his house by the front door to keep his appointments, but, if the front door is stuck, he would hardly be excused for not leaving by the back".[60] The shipowner on the other hand would stress the point that he never promised to take the vessel round the Cape in the event the Canal became closed; "Non haec in foedera veni—it was not this that I promised to do."[61] He would maintain that it would be wholly unreasonable to require him to take the vessel round the Cape at the contracted freight. This being so, the original contract was defeated by frustration and a substitute voyage via the Cape a new contract which entitled the shipowner to a new freight based on the longer sailing distance and the higher market freight prevailing subsequent to the closure of the Canal.[62] The legal doctrines provide, of course, the necessary basis for the decisions of the courts in the respective countries but no existing legal doc-

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[56] See supra p. 333.

[57] From 31 October 1956 until 8 January 1957 and from June 1967 —.

[58] Cf. the dictum of Lord WRIGHT in *Denny, Mott & Dickson* v. *Fraser & Co.* [1944] A.C. 265 at p. 278.

[59] See supra p. 174.

[60] [1962] A.C. 93 at p. 119.

[61] See supra p. 175.

[62] If frustration applied while the vessel was proceeding on her voyage towards the Canal, the shipowner would, in the absence of any clause to the contrary, have to assume the risk for the freight for the frustrated voyage under Anglo-American law, while, under Scandinavian law he would be entitled to freight *pro rata itineris* (SMC § 129. Sw. "distansfrakt"). See supra p. 22 et seq.

trine—in England, the United States, the Scandinavian countries or elsewhere—could in this particular respect give any better guidance for the solution of the Suez Canal cases than a pure test of reasonableness. However, it is of paramount interest to examine *what results* could be achieved by the application of the respective doctrines. Has the original contract *vanished* entirely by frustration[63] or is the original contract only subject to an *adjustment* in view of the effect on the contract of the closure of the Canal? Ordinarily, the legal doctrines practised in Anglo-American and Scandinavian law prefer to avoid the "confusing, if not impossible, task of adjusting the equities between the owner and the charterer".[64] Although, especially in times of war and violent changes in economy, there are several examples when courts of law have been acting as "amiable compositeurs" and freely adjusted the relationship between the contracting parties,[65] the rule is ordinarily a "black and white jurisprudence";[66] the contract is either in full effect or completely swept away. The cases where the courts have awarded the shipowner compensation by increasing the *contracted* freight in proportion to the longer sailing distance may be understood as an adjustment of the existing contract[67] but they may also be compatible with the theory that the original contract has been substituted by a *new* (implied) contract where the court has deemed it *reasonable* to assess the new freight without allowing the shipowner any additional favour due to the rise of the market freight.[68] In Scandinavian law, it seems that the courts will have to make up their minds as to whether the original contract is abrogated or not. If the original contract has disappeared, there seems to be no room for a free assessment of a new freight on equitable principles, since SMC § 124 stipulates that the freight in the absence of any agreement between

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[63] See supra p. 169.

[64] *The Isle of Mull* (1921) 278 Fed 131 CCA 4th at p. 135.

[65] See, e.g., "Ausgleich", "Aufwertung" in Germany during the crisis in the 1920s LARENZ, Geschäftsgrundlage p. 84 et seq.; STOLL pp. 31, 78–9; la doctrine d'imprévision in French law PLANIOL-RIPERT §§ 391 et seq. and 398; and the observations by the arbitrators in ND 1959.333 at pp. 357-65. See further supra p. 160 et seq.

[66] See SCHMITTHOFF, FJFT 1957 p. 360.

[67] This method corresponds to the standard "Suezstop" and "Panstop" clauses. See supra p. 80.

[68] The latter method has been applied in *The Massalia*, infra p. 346, where the freight was assessed on a *quantum meruit* basis.

the parties as to the amount should correspond to the *market freight* (Sw. "Där fraktavtal slutits utan att frakten blivit bestämd, erlägges den frakt, som var gångbar vid tiden för inlastningen "). In the Danish Panama Canal case, ND 1918.319 *The Nordkap*, where the Supreme Court awarded the shipowner compensation for the additional time spent by the necessity to take the vessel round the Cape Horn both on the outward and the homeward voyage, the court did not agree to the shipowner's contention that compensation should be awarded as if the vessel had been free for other commitments. But it is expressly stated that the rejection of the shipowner's principal claim was based on the fact that the parties *had agreed* that the shipowner should only be compensated for the loss caused by the prolongation of the voyage (Dan. "at Rederiet for sit Vedkommende er gaaet ind paa kun at kræve Erstatning for det Tab, der opstaar ved, at Rejsen forlængedes udover dens normale Varighet"; ND 1917.292, 295).[69]

In English law the contract disappears on the occurrence of the frustrating event; the doctrine of frustration operates *ex nunc* and not *ex tunc* from the time of the conclusion of the contract. If, in a bilateral contract, one of the parties has already performed his part of the contract —completely or partially—the doctrine of frustration leaves him no remedy to recover the value of such performance when the contract is dissolved; the "loss lies where it falls".[70] This principle was subsequently modified in *Fibrosa* v. *Fairbairn*[71] by the doctrine of "total" failure of consideration but, in addition, special legislation, Law Reform (Frustrated Contracts) Act, 1943, was deemed necessary in order to enable the courts to adjust the relationship between the parties to a frustrated contract. However, in view of the ancient and well-established rules relating to the freight risk[72] *voyage* charters are expressly excepted from the Frustrated Contracts Act. The provisions of the Act have therefore only a limited importance with regard to the Suez Canal cases, since the

[69] See further concerning the facts in the Danish case infra p. 350.

[70] *Chandler* v. *Webster* [1904] 1 K.B. 493 supra p. 169.

[71] [1943] A.C. 32; see supra p. 170.

[72] See *Anonymous Case* (1684) 2 Show. 283 K.B. [89 E.R. 941]; *De Silvale* v. *Kendall* (1815) 4 M. & S. 37; *Byrne* v. *Schiller* (1871) L.R. 6 Ex. 319; and *Allison* v. *Bristol Marine Insurance Co.* (1876) 1 App. Cas. 209. Cf. from American law *The Laurent Meus* 1943 AMC 415 CCA 9th affirming 1942 AMC 484. See for an extensive comparative study SELVIG, The Freight Risk.

doctrine of frustration will seldom operate to free the parties from their obligations under a time charter.[73]

The question of the assessment of the freight for the new voyage substituted for the frustrated voyage must be separated from the question of the *freight risk* with regard to the frustrated voyage. In case of a closure of the Canal, the shipowner might, in the absence of a protective clause[74] lose the *whole* freight for the original, frustrated contract, since Anglo-American law does not recognize the Scandinavian principle of freight *pro rata itineris* (SMC § 129; Sw. "distansfrakt"),[75] but, under English as well as Scandinavian law, he will be entitled to recover freight for the substituted voyage which he performs in the interest of the charterer. In English law this result may follow even if there is no *express* contract with regard to the substituted voyage. The shipowner may, in English law, recover freight *quantum meruit* on the basis of an *implied* contract,[76] while, in Scandinavian law, SMC § 101 contains a direct admonition to the shipowner to act in the charterer's interests, which ordinarily implies that the shipowner should try to get the cargo on to the destination if he does not receive any instructions to the contrary.[77] It should be observed, however, that a strict application of the above-mentioned principles seemingly may lead to unreasonable results. If, for instance, the vessel after loading a cargo for Mediterranean ports has not yet left the loading port in the Far East when the Canal is closed and the freight risk is placed on the charterer by way of a freight risk clause,[78] the shipowner may in the event of frustration recover the freight for the frustrated

[73] See supra p. 314. The Act might, however, become relevant in case of a contract concerning a specific voyage but concluded on a time charter party form. The risk for delay is then transferred to the charterer and the special rules relating to the freight risk do not apply. In *The Eugenia*, the arbitrator MEGAW J., whose decision was overruled by the Court of Appeal with regard to the question of frustration, held that the charter was a time charter within Sect. 2 (5) of the Law Reform (Frustrated Contracts) Act, 1943, and that the rights of the parties were to be adjusted in accordance with Sect. 1 of the said Act. See further infra p. 347.

[74] Such as the frequent "freight earned upon shipment and irrecoverable ship and/or cargo lost or not lost". See supra p. 24.

[75] See supra p. 22.

[76] See, e.g., SCRUTTON arts. 141, 147; and *The Massalia*, infra p. 346.

[77] Needless to say, the shipowner should always try to contact the charterer and get his instructions. See further the *travaux préparatoires* to SMC § 101, SOU 1936:17 p. 122 et seq.

[78] See supra p. 24.

voyage *as well as* the freight for the substituted voyage. On the other hand, if the vessel has reached the southern inlet of the Canal when the closure intervenes and he has *not* protected himself by way of a freight risk clause, he will, under Anglo-American law, lose the contracted freight and recover only a reasonable freight for the voyage from the point where frustration occurred to the destination. And this may amount to only a small percentage of the total contracted freight.[79] In Scandinavian law, the unfortunate result in the second example is avoided owing to the principle of freight *pro rata itineris* (Sw. "distansfrakt")[80], but in the first example the outcome will be the same under Scandinavian law. It might be argued that the method of adjusting the *existing contract* is preferable to the method of *dissolving the original contract* and assessing a freight for the substituted voyage, since the latter method is too complicated and might lead to undue hardship to the shipowner or the charterer as the case may be. On the other hand, it must be borne in mind that the question of the freight risk is closely connected with a well developed system of insurance.[81] Furthermore, there is, in English law, no possibility of assessing a new reasonable freight under the *existing* contract and the principle of adjustment relating to frustrated contracts embodied in the Frustrated Contracts Act does not apply to voyage charters, notably because of the rules governing the question of the freight risk. An application of the general contract law principle of adjustment of contracts on account of changed conditions[82] should therefore, for the purpose of reaching international uniformity of the law, be avoided in these instances.

The cases where the parties themselves have adjusted the position under the contract by compromises of various kinds are, of course, numerous. It must be borne in mind that a "black and white jurisprudence" may constitute a valuable basis for the negotiations between the

[79] As a rule, the carriage of the cargo to the southern inlet of the Canal will not be considered a substantial performance of the contract entitling the shipowner to the contracted freight. Cf. supra p. 333.

[80] See supra p. 23.

[81] See, e.g., the statement in *The Laurent Meus* 1943 AMC 415 CCA 9th. The contention of the bill of lading holders that the shipowner would be unjustly enriched if he was awarded freight for the frustrated voyage was rejected in view of "the established and continuing practice of the maritime world for at least the last one hundred and twenty-five years".

[82] See infra p. 440.

parties which ordinarily result in amicable settlements. In fact, the guidance given by more rigid principles may often facilitate such settlements better than a case-law resting upon the principle of adjustment. Ordinarily, the parties will succeed in evaluating their respective risks in case of litigation and find a corresponding compromise. They will also easier learn from a strict judicial approach where the risk lies and appreciate, or adjust, their position already at the time of the conclusion of the contract and thus avoid lengthy and expensive negotiations on the occurrence of the event.

The difficulty of establishing the *degree* of prevention or inconvenience required to constitute a frustrating event is well evidenced by the Suez Canal cases. The fact that the courts have applied the doctrine in some cases and rejected it in other similar cases indicate that the Suez Canal cases touch the very point where frustration may become relevant.

The closure of the Suez Canal did not only affect charter parties but other types of contracts as well. This raises the important question whether the various Suez Canal cases could be compared with each other. Would a case excusing the *shipowner* from performance on account of frustration under the contract of affreightment be a guiding precedent when the position of a *c.i.f. seller* under a contract of sale is considered and vice versa? Evidently, it is unfortunate for the c.i.f. seller if the shipowner is in a position to invoke the doctrine of frustration and thus force the c.i.f. seller to assume the extra cost for the passage round the Cape. However, the shipowner's disadvantage of the longer sailing distance will normally be greater in relation to the total value of his obligation than the additional freight cost to the total value of the c.i.f. seller's obligation. Ordinarily, the increase of freight will only amount to a small percentage of the contracted sales price, while the extra cost for the shipowner may amount to a considerable percentage of the contracted amount of freight. This being so, it is essential to distinguish cases relating to different types of contracts and decide each case according to its own particular facts.

One of the first reported cases, *Carapanayoti & Co.* v. *E. T. Green, Ltd.* [1958] 2 Lloyd's Rep. 169 Q.B., concerned a c.i.f. contract and here McNair J. applied the doctrine of frustration in the c.i.f. seller's favour. The facts were as follows.

According to a contract dated 6 September 1956, 100 tons Sudanese expeller cotton-seed cake should be shipped from Port Sudan to Belfast between October

and November 1956. The sellers did not ship the cargo on account of the closure of the canal in November 1956. The contract contained a "prohibition" clause where "impossibility" on account of prohibitions, hostilities etc., was mentioned as an excuse from performance. Shipment round the Cape was not the customary route and the Canal did not open again until 9 April 1957.

McNAIR J. stated that the seller's obligation was not confined to shipping by a route which was customary at the time of the conclusion of the contract but, although the doctrine of frustration could only be applied on c.i.f. contracts in exceptional circumstances, the continued availability of the Suez route was a "fundamental assumption". To impose the obligation on the sellers to ship the cargo round the Cape would be to impose upon them a "fundamentally different obligation"[83] and if the parties had considered the possibility of the closure of the Canal at the time of the conclusion of the contract both "as reasonable men" would have accepted the freeing of the sellers from their obligation.[84] Consequently, the doctrine of frustration was applied. In addition, McNAIR J. considered in an *obiter dictum* that the "prohibition" clause was applicable as well.

In *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Olégineux Fluides Alimentaires* [1960] 2 Q.B. 334, ASHWORTH J. held on similar facts as in the previous case that two c.i.f. contracts were not frustrated and his view was approved in *Tsakiroglou & Co.* v. *Noblee Thorl G.m.b.H.* [1962] A.C. 93, where the House of Lords, affirming the decision of the Court of Appeal, held that the doctrine of frustration did not apply in the c.i.f. seller's favour.

Thus by the *Albert D. Gaon* and *Tsakiroglou* cases the principle was adopted that the doctrine of frustration seldom—if ever—applied to c.i.f. contracts affected by the closure of the Suez Canal. The longer sailing distance and the increased freight were not enough to bring about a fundamental change in the performance of the contract.[85]

In *Calmar S.S. Corp.* v. *Scott* (*The Portmar*) 1953 AMC 952 U.S. Sup. Ct., the doctrine of frustration was considered with regard to a war insurance policy.

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[83] See supra p. 174.

[84] See supra p. 172.

[85] The view adopted in the *Albert D. Gaon* and *Tsakiroglou* cases conforms with the general attitude in other sales contract cases. See *Blackburn Bobbin & Co.* v. *Allen & Sons* [1918] 2 K.B. 467; *Comptoir Commercial Anversois* v. *Power, Son & Co.* [1920] 1 K.B. 868; *Bassano Zuecotti & Co.* v. *Carruthers & Co.* (1920) 3 Ll.L.Rep. 2 C.A.; *Aktiebolaget Yettersfors Munksund* v. *Dixon & Son* (1922) 9 Ll.L.Rep. 558 K.B.; *Partabmull Rameshwar* v. *K.C. Sethia (1944), Ltd.* [1951] 2 Lloyd's Rep. 89 H.L.; and the American cases *Companhia De Navegacao Lloyd Brasileiro* v. *C. G. Blake Co.* (1929) 34 F 2nd 616 CCA 2nd; and *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.* (1945) 147 F 2nd 399 CCA 2nd; but cf. *Acetylene Corp. of G.B.* v. *Canada Carbide Co.* (1921) 8 Ll.L. Rep.456 C.A.

The Portmar was to perform a voyage from U.S. Pacific ports to the Philippines and return to U.S. Pacific or Atlantic ports through the Panama Canal. The vessel left San Francisco on 28 November 1941 for Manila. On the Pearl Harbour attack she went to Sydney via the Fiji Islands. At that time the Japanese had sunk the British warships the Repulse and the Prince of Wales and taken full battle fleet command of the Pacific. On 2 January 1942 the Portmar was ordered to Brisbane and from there to Port Darwin where she arrived on 19 January. Subsequently she sailed to Wyndham and returned to Port Darwin. On 15 February the Portmar was attacked by Japanese airplanes when proceeding to Koepang. She returned again to Port Darwin where she arrived on 18 February. The following day, while she was lying in the roads, she was so severely damaged that she became a constructive total loss[86] and the question arose whether this contingency was covered by the insurance. The insurance policy was described by the Court of Appeals as "a labyrinth of verbiage, within which lurks whatever contract was made",[87] but the Court of Appeals held that the risk did not materialize on the insured voyage, since the contract had ceased to operate on account of frustration already when the Portmar was ordered to Brisbane. The U.S. Supreme Court, by a bare majority, reversed the decision of the Court of Appeals. The reason for the decision seems to have been that the insurance company "did insure against risks of British requisition. They insured, in other words, against consequences of a forced interruption of the voyage, which must necessarily throw into doubt the chances of completing the voyage as planned" (at p. 962). If the interpretation of the Court of Appeals was accepted it would mean that "a significant part of the coverage of war risk insurance, which is purchased separately, over and above ordinary insurance, and at great expense, is rendered nugatory" (at pp. 963–4). For this reason "coverage cannot be said to have ended before an unambiguous, objectively provable decision has been made by the requisitioning sovereign to cause abandonment of the voyage" (at p. 965).[88] Four judges dissented and two of these considered the voyage in any event frustrated when the Portmar arrived at Port Darwin 12 February 1942 and sailed on "an exceedingly perilous expedition to Koepang". At such time the "purposes of the venture, commercially speaking, had ended. The ship was now engaged in an enterprise far beyond the voyage contemplated by the parties" (at p. 966).

Exactly as in the series of cases relating to c.i.f. contracts, a liberal attitude towards the suffering party was taken in the first English case relating to a contract of affreightment, *Société Franco-Tunisienne D'Armement* v. *Sidermar S.P.A* (*The Massalia*) [1960] 1 Lloyd's Rep. 594 Q.B. The facts were as follows.

[86] See supra p. 147.

[87] In 1952 AMC 861, 863.

[88] See the analysis by GILMORE & BLACK p. 201 et seq.

A voyage charter was entered into on 18 October 1956, to the effect that the Massalia should carry about 5000 tons of iron ore from Masulipatnam (India) to Genoa. The charter party also contained a clause reading: ". . . Captain also to telegraph 'Maritsider Genoa' on passing Suez Canal". The nationalization of the Suez Canal occurred on 26 July 1956, i.e. *before* the contract was concluded, and the Canal closed 2 November 1956, *before* the Massalia arrived at the port of loading on 9 November. She sailed on 19 November and the charterers were not informed until 20 November that the shipowners considered that the charter party had been terminated by the closing of the Canal. The Massalia arrived at Genoa on 16 February 1957 and the shipowner claimed that the charterers should pay a reasonable freight—209 s. per ton instead of 134 s. per ton for the voyage which the shipowner performed instead of the frustrated voyage. A voyage via Suez would have covered some 5000 miles, while the voyage round the Cape was some 11,000 miles and exposed the vessel to extra maritime hazards. There was no extra risk to the cargo (iron ore) as a result of the prolonged voyage. Since there was no express agreement that such a substitute voyage should be performed, the shipowner claimed that the agreement was to be inferred from the circumstances and the conduct of the parties.

The charterers claimed that the contract was not frustrated, since the voyage could not only be performed via the Suez Canal but also round the Cape. The latter alternative would only make the contract more onerous but this was no reason for excusing the shipowner from performance. In addition, the risk of a closure of the Canal was foreseeable already at the time of the conclusion of the contract and, in any event, the shipowner was estopped from alleging frustration, since he had loaded the cargo *subsequent to* the closure of the Canal.

PEARSON J. stated, ". . . having regard to the express provisions of the contract and the surrounding circumstances, the proper view is that it was a term of the contract (whether express or implied) that the vessel was to go by the Canal route" (p. 610). A voyage round the Cape would be a "fundamentally different voyage". The c.i.f. cases *Albert D. Gaon* and *Tsakiroglou* (supra pp. 177, 344 and 344 respectively) were distinguished on account of the difference between the position under a contract of sale and a contract of affreightment. The charterer's contention that the doctrine of frustration did not apply, since the closure of the Canal was a foreseeable risk, as well as his allegation that the shipowner was barred from invoking frustration on account of the doctrine of equitable estoppel, were rejected (pp. 606–7 and p. 612). With regard to the question of foreseeability reference was made to the *Bank Line* and *Tatem* v. *Gamboa* cases (see supra p. 166 and p. 293). Finally, PEARSON J. considered the shipowner entitled to a reasonable freight at 195 s. per ton instead of the charterparty freight 134 s. per ton on a *quantum meruit* basis.[89]

In *Ocean Tramp Tankers Corp.* v. *V/O Sovfracht (The Eugenia)* [1963] 2 Lloyd's Rep. 381 C.A. (see supra p. 293), the doctrine of frustration was invoked by the charterers in order to escape the payment of freight while the

[89] See concerning the *quantum meruit* principle in the general contract law, e.g., ANSON p. 560.

vessel was stuck in the Canal. She had been ordered into the Canal immediately before the outbreak of hostilities and in violation of the war clause in the Baltime charter party. The vessel, after some two months delay in the Canal, could not proceed southwards to India but had to move northwards and sail round the Cape. The charterer claimed that the charter party was frustrated when it was realized that the vessel could not within a reasonable period of time proceed southwards through the Canal. The shipowner maintained that the charterers could not rely on the defence of frustration at all, since the frustration was self-induced by the wrongful orders to the vessel to enter the Canal. MEGAW J. held that the charterers could not rely on the doctrine of frustration with regard to the delay caused by their wrongful order and that, therefore, the question of frustration had to be considered as if the Eugenia had been free to proceed via the Cape. He found that "the adventure, involving voyage round Cape, was fundamentally different from voyage via Suez Canal, and that, therefore, charter-party was frustrated". Furthermore, the charter party was, although it concerned "a trip out to India via Black Sea" from Genoa, a time charter, since the Baltime form had been used and thus the risk of delay rested on the charterers. The frustrated contract, therefore, came within the Frustrated Contracts Act, 1943, and the rights of the parties were to be adjusted in accordance with Sect. 1 of the Act (see supra p. 171). However, the Court of Appeal held that the contract was not frustrated, since "in the circumstances, blockage of Suez Canal did not bring about such a fundamentally different situation as to frustrate the venture in that (a) voyage via Suez would normally take 108 days and, via Cape, 138 days; (b) cargo would not be adversely affected by the longer voyage; (c) cargo was already loaded on board; and (d) voyage via Cape made no great difference, except it was longer and more expensive than voyage via Suez". *The Massalia* was thereby overruled. But the situation in *The Eugenia* was different from *The Massalia* in one important respect; the doctrine of frustration was invoked by the charterer for the purpose of avoiding a loss caused by his wrongful orders to the vessel and Lord DENNING found "it difficult to apply the doctrine of frustration to a hypothetical situation, that is, to treat this vessel as if she had never entered the Canal and then ask whether the charter was frustrated. The doctrine should be applied to the facts as they really are. But I will swallow this difficulty and ask myself what would have been the position if the vessel had never entered the Canal, but stayed at Port Said. Would the contract be frustrated?" (at p. 389). He found that it was not, since "the voyage round the Cape made no great difference, except that it took a good deal longer and was more expensive for the charterers than a voyage through the Canal". Furthermore, Lord DENNING did not find any difference between a voyage charter and a time charter except that under the former the burden fell on the owners and not the charterers. He therefore had to consider the decision of PEARSON J. in *The Massalia* which he found wrongly decided. He also stressed the point that subsequent to the decision in *The Massalia* the House of Lords had found no frustration in the *Tsakiroglou* case. He admitted that a contract of affreightment was different from a contract for the sale of goods but he found it strange "if, in the case of a ship loaded with

cargo, the contract of affreightment was frustrated by the closure of the Canal and the contract of sale was not frustrated. It would lead to endless complications" (at pp. 390–1). Lord DENNING also made some observations with regard to the question of foreseeability: "It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is this. If the parties did not foresee anything of the kind happening, you can readily infer they have made no provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated, see *W. J. Tatem, Ltd.* v. *Gamboa* [1939] 1 K.B. 132; (1938) 61 Ll.L.Rep. 149. So, here, the parties foresaw that the Canal might become impassable. It was the very thing they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it" (at pp. 389-90).[90] The views of Lord DENNING that a voyage round the Cape did not involve such a fundamental change that the contract was frustrated were shared by L.JJ. DONOVAN and DANCKWERTS.[91]

The decision in *The Eugenia* corresponds to some earlier American decisions, where the *shipowner* did not succeed, upon the blocking of the Suez Canal, in invoking the doctrine of frustration for the purpose of avoiding the taking of the vessel round the Cape of Good Hope at the same freight as was agreed in the respective charter parties.

In *The Glidden Co.* v. *Hellenic Lines, Ltd. (The Hellenic Sailor)* 1960 AMC 810 CCA 2nd, reversing 1959 AMC 2251, the charter, and three subsequent charters, concerned transport of ilmenite ore from India to a U.S. Atlantic port. The first charter was entered into on 7 September and the other three about 1 November 1956. When the Suez Canal became blocked in the Israeli-Egyptian war, the shipowner maintained that the contracts were frustrated and performance excused. Alternatively, he invoked a *force majeure* clause excepting "restraint of princes and rulers" and "other dangers and accidents of the Seas" or under sec. 4 of the Carriage of Goods by Sea Act, 46 U.S. Code, sec. 1304, incorporated by reference in the charter parties. A clause in the charter parties reading "for a voyage from Koilthottam, India, via Suez Canal *or Cape of Good Hope or Panama Canal, at Owner's option* declarable not later than on signing of Bills of Lading, to one safe U.S. Atlantic Port North of Cape Hatteras, port of Charterer's option, to be declared not later than *on*

[90] See further supra p. 184 and infra p. 389.

[91] See for a summing-up of the present position in English law MCNAIR pp. 197–9.

Vessel's Passing Gibraltar" [my italics], was interpreted to imply that the shipowner accepted to perform the transport via one of the alternative routes specifically mentioned, if one alternative became impossible.[92] On this ground the charters were not considered frustrated. The shipowner, of course, maintained that the option to sail via the Cape of Good Hope or the Panama Canal was solely for his benefit, but imposed upon him no obligation to choose either of these alternative routes if the Suez were closed, whereas the charterer took the view that, although the shipowner might choose whichever route he wanted, the unavailability of one of the three options was not grounds for refusing to perform. In view of the ambiguous clause the court permitted parol evidence (see supra p. 168) to be introduced in the case and this showed that the shipowner had tried, but in vain, to get a specific "Suez frustration clause" into the charter. This, of course, constituted a fact favouring the charterer's interpretation of the clause.[93]

In *The Giovanni Fassio* 1961 AMC 361, Arbitration New York, the shipowner and the charterer started negotiations regarding additional freight when, on the vessel's way from Genoa to the loading port of Kuwait, it appeared that the voyage could not be performed via Suez owing to the closure of the Canal. The charterers agreed to pay the same daily net return on a voyage via the Cape, that the ship would have earned in performing via Suez but the shipowner claimed additional days needed for current *market* rates.[94] No *consensus* appears to have been reached before the vessel on 4 November left Siracusa for the Persian Gulf via the Cape of Good Hope. Nevertheless, two arbitrators considered that a new agreement had been entered into and that therefore, the question of frustration needed not to be considered (at pp. 366–8) and the third arbitrator did not think that the doctrine of frustration applied (at p. 363). However, he seems to have found a support for his conclusion in the fact that the voyage was actually performed via the Cape (!) and as an additional argument he thinks that the "owners acquiesced in the charterer's proposal by actually performing the voyage via the Cape".[95]

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[92] The shipowner maintained that the option was already closed upon the signing of the charter party, since the words "via Suez Canal or Cape of Good Hope, or Panama Canal, at Owner's option" belonged to the text of the standard form ("Original Glidore"), while the words to be declared not later than on Vessel's passing Gibraltar had been added to the text. This showed that the agreed voyage should be performed via Suez.

[93] See the comments to this case by CORBIN § 1339 note 57 and the observations in *The Christos* 1966 AMC 1717 D.C. Cir. at pp. 1721–2.

[94] The freight market sharply rose after the Suez incident.

[95] He also referred to the decision of Tribunale di Genova of 8 April 1959 which upon similar circumstances held to the contrary, but since the matter should be decided according to American law the Italian decision was disregarded. It is reported in Il Dir. Mar. 1960.507 and concerned a transport from Naples to Mogadiscio. It was considered that the parties had contemplated transport via the Canal and that the

In *Transatlantic Financing Corp.* v. *United States of America (The Christos)* 1966 AMC 1717 D.C. Cir., the question of frustration owing to the closure of the Suez Canal in 1956 was discussed at length. The vessel had been chartered for a voyage from the U.S. to Iran and the route was not specified in the charter. While the vessel was at sea, but before she had entered the Mediterranean, the canal was closed. She sailed round the Cape of Good Hope whereby the voyage was some 13,000 miles instead of 10,000 miles and involved extra costs amounting to $44,000, which the shipowner claimed as compensation from the charterer. It was held that the continued availability of the Suez Canal was not a condition of performance, and that the charterer was not liable for the increased cost.

In Scandinavian law, there is no Suez Canal case but the same legal principle was considered by the Supreme Court of Denmark in a case resulting from a landslide blocking the Panama Canal, ND 1918.319 *The Nordkap*.[96] The facts were as follows.

A charter party was concluded on 14 August 1915 whereby the Nordkap, at the time lying in Manchester from where she was expected to sail on 25 September, should proceed in ballast to a port in the United States for bunkering and from there via the Panama Canal to one or two ports in Chile and load a cargo of soda to be carried to one safe port of the west-coast of Great Britain or to one or two Danish ports. The charterer had the right to cancel if the vessel was not ready for loading 5 December 1915. The vessel sailed from Manchester on 29 September 1915 and while proceeding to Norfolk for bunkering she received information that the Panama Canal was impassable, probably for a longer period of time. The shipowner maintained that he had the right to cancel the contract, while the charterer rejected his view and claimed that the vessel had to wait or proceed round Cape Horn. The parties agreed that the vessel should sail south of America instead of via the Panama Canal, the cancelling date was postponed 45 days and the minimum quantity of cargo was reduced due to the additional bunkers required for the longer voyage. Furthermore, the parties reserved their respective rights to have the matter subjected to the proper Danish Court and the agreement stipulated specifically that the shipowner would claim compensation for the increased cost and the loss caused by the prolongation of the voyage (Dan. "idet Rederiet for sit Vedkommende vil kræve Erstatning for de ved den forlængede Rejse opstaaede forøgede Udgifter og Tab") and this claim was rejected by the charterers.

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closure rendered performance impossible according to art. 1463 of Codice Civile. Furthermore, the hindrance could not be regarded as temporary. The shipowner had no obligation to perform "ad una data difficilmente accertabile" (i.e. at a date difficult to ascertain).

[96] Affirming the decision of the Maritime and Commercial Court of Copenhagen ND 1917.292.

The vessel discharged its cargo in Aarhus (Denmark) on 23 March 1916 after having proceeded round the Cape both on the outward and the homeward voyage. Passage through the Panama Canal did not become possible until 15 April 1916.

The shipowners claimed the amount which they could have earned if the vessel had been free for other commitments during the *entire* period of time occupied by the voyage, 177 days. Alternatively, they tried to recover additional freight for the *additional* time spent (47 days) due to the prolongation of the voyage and they claimed that this freight should be assessed according to the *market* rate prevailing those days whereby the voyage was prolonged.

The Maritime and Commercial Court of Copenhagen held that the charter party rested upon the assumption that the vessel should be capable of proceeding through the Panama Canal both on the outward and the homeward voyage, in spite of the fact that the words "via the Panama Canal" only were expressly mentioned in connection with the outward voyage. The Court stated: "A change of circumstances making the contracted voyage impossible or causing considerable difficulties of performance may—even in situations not expressly regulated by the provisions of the Maritime Code—entitle the respective parties to cancel the charter party. Since the landslide in the Panama Canal was of such serious nature that one had to expect a stoppage for a considerable period of time, the court thinks that both parties had a right of cancellation, which so far as the charterer was concerned followed already from his right to cancel if the vessel did not reach the port of loading before the cancelling date, 5 December (Dan. "Indtrufne Omstændigheder, der umuliggør eller dog lægger væsentlige Hindringer i Vejen for Fuldførelsen af den i et Certeparti vedtagne Rejse, maa — ogsaa udenfor de i Søloven udtrykkelig fastsatte Tilfælde — kunne bevirke, at Parterne faar Ret til at annullere Certepartiet. Da Skredet i Panamakanalen var af en saa alvorlig Natur, at det maatte forudsees, at Standsningen maatte blive meget langvarig, skønner Retten ikke bedre end, at hver af Parterne havde haft Ret til at annullere Certepartiet, noget der for de Indstævntes Vedkommende allerede fulgte af deres Ret til at annullere, hvis Skibet ikke var naaet frem til Indladningshavnen den 5 December"). However, in view of the agreement between the parties subsequent to the landslide the court did not award the shipowner compensation on the basis of a calculation as to the hypothetical gain if the vessel had been free for other commitments during the entire time (177 days) spent on the voyage. Furthermore, the proper freight rate was not the rate prevailing during the last 47 days of the 177 days needed for the voyage. The court did not think that the calculation of the compensation should be based on the assumption "that the shipowner would have waited to conclude a contract for such a substitute voyage until the very last moment when the freights had risen to such a high rate" (Dan. "at Citanterne havde ventet med at slutte Kontrakt om en saadan Rejse indtil sidste Øjeblik, hvor Fragterne var steget saa højt").

In conclusion, the freight under the charter party, D.Kr. 251.262:37, was increased by the round figure of D.Kr. 280.000 to D.Kr. 531.262:37. The

decision of the Maritime and Commercial Court of Copenhagen was in all respects confirmed by the Supreme Court.

In ND 1919.118 SCN (mentioned supra p. 255), where the shipowner was entitled to cancel the contract due to the war risks and dangers of mines in the southern part of the North Sea, it was considered that a voyage north of Scotland would have been a "different voyage" which the shipowner was not obligated to perform. However, this case should be distinguished from the Suez and Panama Canal cases, since the situation emerged from the war risks during the First World War and a voyage north of Scotland—apart from the war risks—would have involved the *sailing* ship in marine hazards.

The legal effect of the closure of the Panama Canal was also considered by an American court in *Gans S.S. Line* v. *Wilhelmsen (The Themis)* (1921) 275 Fed 254 CCA 2nd. The facts were rather special, since, in this case, the vessel could not be tendered to a subsequent charterer in due time owing to the failure of the first charterer to redeliver the vessel. And this failure, the first charterer maintained, was excused owing to the landslide in the Panama Canal. He submitted that he was under a duty to the bill of lading holders to perform the voyage by taking the vessel round Cape Horn, but the court considered that the cargo could have been transhipped subject to a transhipment clause in the bills of lading. True, transhipment "would have been difficult, dangerous, and enormously expensive" but this did not suffice to constitute "commercial impossibility" excusing the charterer from redelivering the vessel in time.

The *degree* of delay and inconvenience required under Anglo-American and Scandinavian law to free the shipowner from performance in case of inavailability of the route is, of course, impossible to determine exactly. There is no evidence that Scandinavian law is more lenient than Anglo-American law in this respect. *The Nordkap* decision seems perhaps to correspond to the decision in *The Massalia*, which was subsequently overruled by *The Eugenia*, but it must be borne in mind that a voyage round Cape Horn by a steamship in the 1910s is not exactly the same thing as a voyage round the Cape of Good Hope by a motor ship in the 1950s. Therefore, one should be careful to conclude from the *Nordkap* decision that there is, in this respect, any difference between Anglo-American and Scandinavian law. Would then, under the present Anglo-American and Scandinavian law, the contract, in the absence of a protective clause, always be upheld in spite of a closure of the Suez or Panama Canal? True, *The Eugenia* and *The Hellenic Sailor* herald a restrictive approach but supposedly the doctrine of frustration would apply if the closure, for example, prevented a voyage from the east coast of Africa to a Mediterranean port from being performed via the Suez

Canal. Here, the prolongation would seem to completely upset the contractual balance between the parties.[97]

There are several circumstances that need to be considered when the degree of prevention required for the abrogation of the contract is determined. One must, of course, set-off any advantages against the disadvantage of the longer route, such as the savings from fees for the passage of the Canal, etc. Needless to say, it is completely impossible to establish a certain percentage of prolongation required for the operation of the doctrines of frustration, impossibility, force majeure, presupposed conditions or undue hardship. Although, in Anglo-American law, the fact that the closure was foreseeable does not prevent the operation of the doctrine of frustration, it is certainly a fact which cannot be entirely overlooked.[98] For this reason, the comparison between the different cases is rendered extremely difficult, since the closure may be more or less imminent in the various cases. It may even, as in *The Hellenic Sailor*, have been the subject of discussions between the parties at the time of the conclusion of the contract.[99] Furthermore, the hardship to the shipowner may be more or less accentuated in the different cases. If the vessel has to proceed to the port of loading in ballast and from there via the Canal to the port of discharge, the prolongation of the voyage is less in relation to the *total* sailing distance than in relation to the distance which should have been covered by the laden ship. A substituted voyage may perhaps leave the vessel in a port which is more or less inconvenient to the shipowner in view of the vessel's future activities or to the charterer owing to delivery short of the destination necessitating on-carriage. And finally, the closure of the Canal could, owing to the rise of the freight market, result in a favour to the shipowner generally although one or a few of his vessels under contract involving a passage via the Canal are adversely affected. All these circumstances may call for a restrictive approach to the application of the doctrine of frustration generally but, apart from this, it seems that each individual contract should be considered as a separate "adventure" and that the general effect on the shipowner's disposition of the vessel before or subsequent to the performance of the contracted voyage, or *a fortiori* the effect of the closure of the Canal

[97] See concerning the general contract law supra p. 148 et seq. (Scandinavian law) and p. 180 et seq. (Anglo-American law).

[98] See supra p. 183.

[99] See supra p. 349.

on his general economy, should be considered wholly irrelevant. A different method would lead to endless complications. Nevertheless, there are indications in *The Eugenia* that the voyage in ballast should be taken into consideration: "The venture was the *whole* trip from delivery at Genoa, out to the Black Sea, there load cargo, thence to India, unload cargo, and redelivery. The time for this vessel from Odessa to Vizagapatam via the Suez Canal would be 26 days, and via the Cape 56 days. But that is not the right comparison. You have to take the whole venture from delivery at Genoa to redelivery at Madras. We were told that the time for the whole venture via the Suez Canal would be 108 days and via the Cape 138 days. The difference over the whole voyage is not so radical as to produce frustration" (per Lord DENNING at p. 390). But it must be borne in mind that the case concerned a *time* charter, although relating to one specific voyage. It is natural to treat the voyage in ballast and the voyage with cargo as one and the same venture provided the voyage in ballast *is encompassed by the contract* as it was in *The Eugenia.* But if the voyage in ballast is not a part of the contract it seems immaterial how the shipowner takes the vessel to the contracted port of loading.

The question whether the voyage in ballast should be considered as a part of the venture for the purpose of determining freight *pro rata itineris* has been the subject of some disagreement in earlier Scandinavian law. The prevailing opinion at that time favoured the view that the voyage in ballast should be taken into consideration. See ND 1918.375 Maritime and Commerical Court of Copenhagen; SCHIØRRING, in ND 1918 p. 177 et seq.; PLATOU p. 304; KNOPH p. 198. But cf. VINGE, in ND 1933 p. 273 et seq. After the amendments of the SMC in the 1930s the opposite view seems to have been taken. SMC § 131 contains no cross-reference to § 129 and in the *travaux préparatoires* it is stated that the expression "voyage" normally means the time from the departure from the port of loading until the arrival in the port of discharge (see SOU 1936:17 p. 61). See concerning the present opinion BRÆKHUS, Liber Amicorum to Algot Bagge p. 26 et seq. with further references. In German law it is expressly stated in HGB § 640 that the voyage in ballast should be taken into consideration, but it is pointed out by SCHAPS-ABRAHAM, Anm. 2 to § 640, that the voyage in ballast must be encompassed by the contract of affreightment which is normally not the case. This being so, the voyage in ballast is nowadays normally irrelevant for the purpose of calculating freight *pro rata intineris* and it seems that the situation would be the same when the degree of the prolongation of a voyage for the purpose of applying the doctrine of frustration is considered.[100]

[100] But cf. Shell's Suez Clause: "The rate of freight for any voyage which would normally involve transit of the Suez Canal is to be in accordance with the International

If the contract is abrogated in Scandinavian law there seems, in view of the express provisions of SMC § 124, to be no room for allowing the shipowner compensation for the substitute voyage at an amount less than the *market* freight.[101] The remedy of *quantum meruit* seems in this respect less rigid. The shipowner is awarded a "reasonable" freight for the substituted voyage and the test of reasonableness seems to allow a calculation of the freight wholly or partly based on the *contract* rate.

§ 11.4.2. Labour Disturbances

In the present situation in the world, labour disturbances caused by political tension plays an important role as a hindrance affecting merchant shipping. The labour unions may direct blockades or discriminatory actions against vessels belonging to states disliked for the conduct of their national or international affairs.[102] Local or general wars may often cause difficulties of recruiting the crew or men required for loading and discharge. In case of war risks, or an increase of such risks, § 36 of

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Tanker Nominal Freight Scale for voyages via the Suez Canal both laden and ballast minus a discount of 47½% plus 6/3d. per ton Suez Canal dues (subject to Clause 42).

Notwithstanding the foregoing, if the vessel *under Charterers' orders or with their consent* [my italics] performs by an alternative route the ballast and/or laden passages which would normally have entailed transit of the Suez Canal, the applicable freight payable shall be in accordance with the rate calculated on the basis given in Paragraph 2 (A) of the International Tanker Nominal Freight Scale minus a discount of 47½% except that for this purpose the routes actually followed on the outward ballast passage to the loading port and on the return laden passage respectively shall be the basis of the rate. If, however, the ballast passage to the loading port would not normally entail transit of the Suez Canal, or if the vessel, *otherwise than when ordered by Charterers or with Charterer's consent* [my italics], proceeds on the outward ballast passage via the Cape of Good Hope although such ballast passage could have been more quickly performed via the Suez Canal, the applicable freight rate payable shall be on the basis of the actual laden passage performed plus a theoretical ballast passage via the Suez Canal to the loading port."

[101] The *Nordkap* case is compatible with this proposition, since the court only objected against the hypothesis that the shipowner would have been wise enough to fix the vessel at the high rate of freight prevailing during the *last* 47 days out of the total period of 177 days spent on the voyage.

[102] Modern examples are the actions—or contemplated actions—against vessels belonging to South-Africa, Greece, or registered under flags of convenience in Panama, Liberia or Honduras. And the U.S. International Longshoremens' Association has on several occasions threatened to boycott Swedish vessels on account of Sweden's Vietnam policy.

the Scandinavian Seamens' Act gives the seamen the right to cancel the contract[103] and the same right exists under general principles of Anglo-American law also.[104] Nevertheless, during the World Wars it was usually possible to persuade the crew to remain onboard against extra war risk remuneration.[105] And if there was no possibility of getting any crew in view of the peril threatening the vessel on the contracted voyage, this was often an indication of an increase of risk sufficient to excuse the shipowner according to SMC § 135[106] or the doctrine of frustration.[107]

Labour disturbances affecting port operations can only seldom, in the absence of protective clauses, become relevant, the traditional reason being that strikes and similar contingencies seldom have a sufficient duration to constitute such "inordinate delay" as is required for the operation of the doctrines of frustration, force majeure or impossibility. In addition, it has also been suggested that the party affected by a strike may get rid of it by concessions to the striking men.[108] This standpoint, however, is hardly tenable in view of the modern organization of the labour market.[109] However, owing to the central control of the labour organizations and their financial strength, strikes may nowadays very well be expected to cause more than "inordinate delay" and the more so as the speed of modern ocean transportation reduces the period which it is reasonable to require the vessel to wait. On the other hand, strikes of more than temporary duration are often possible to foresee as they are usually signalled a considerable time ahead. The SMC are lacking in provisions giving the parties a right of cancellation in case of strikes and similar contingencies and the general principles of Scandinavian contract law are seldom applicable, since the period of the expected delay is either insufficient[110] or foreseeable at the time of the conclusion of the contract.[111]

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[103] See supra p. 243.

[104] See supra p. 295.

[105] See BEHRENS p. 172; and *M. A. Quina Export Co.* v. *Seebold* (1922) 280 Fed 147 DC, SD Fla.

[106] § 159 before the amendments in the 1930s.

[107] See supra p. 183 et seq.; and p. 279 et seq.

[108] See, e.g., ALMÉN p. 303, especially note 83.

[109] See, e.g., TIBERG p. 382.

[110] In particular in the case of so-called "wildcat" strikes.

[111] This is usually the situation in case of strikes directed by the head organizations of the labour market.

Thus, hindrances caused by strikes have certain features in common with ice-hindrances; they may sometimes occur unexpectedly but nevertheless they belong to the circumstances which are often within the contemplation of the parties at the time of the conclusion of the contract and consequently often the subject of express provisions.[112] It is natural that the question of the distribution of risk relating to the operations in the ports of loading and discharge are more in the focus of attention, since such risks are more generally known and expected than the risk of hindrances emerging from war and political disturbances. The risk of delay in ports is governed by the rules of demurrage and the clauses relating thereto are usually more specific and elaborate than the standard war clauses.

On the occurrence of hindrances affecting port operations one must first examine which is the party affected; the shipowner or the charterer. SMC § 89 provides that the charterer shall "deliver the cargo at the vessel's side" (Sw. "avlämna godset vid fartygets sida"), while the shipowner shall "take it onboard, provide dunnage and other material required for the stowage and perform the stowage" (Sw. "taga det ombord, sörja för underlag, garnering och annat som erfordras för stuvningen, samt utföra denna"). The corresponding division of functions applies to the discharge also. SMC § 107 provides that the shipowner shall "deliver and the cargo-owner receive the cargo at the vessel's side" (Sw. "avlämna och lastemottagaren taga emot godset vid fartygets sida"). However, the principle expressed in SMC §§ 89, 107 is often modified in various trades.

In *liner trade* the shipowner customarily takes care of the cargo before loading and even before the arrival of the ship. The traditional bills of lading usually provide that the shipowner, when receiving the cargo before loading, acts as *agent* for the merchant and that he does not accept any liability for the cargo before loading.[113] Consequently, the fact that the shipowner stores the cargo and brings it to the vessel's side by his own employees or by stevedores appointed by him does not change the division of functions expressed in the SMC. A strike affecting the labour ashore will therefore not constitute a "hindrance on the ship's side" in spite of the fact that the shipowner in practice arranges the work ashore.[114]

[112] See the observations by Lord SUMNER in *Bank Line* v. *Capel* [1919] A.C. 435, 458.

[113] See, e.g., Conlinebill clauses 4 and 8.

[114] See the observation by BRUUN, Om vårdplikt och den s.k. Himalayaklausulen (stencil, Gothenburg 1963), p. V 20.

However, the structural changes of maritime liner trade caused by container traffic have changed the traditional pattern; the shipowners are now inclined to take full responsibility for the handling of the cargo at their port terminals and even during precarriage to the terminal or oncarriage from there to the destination.[115] In such cases the rules of the SMC are clearly inapplicable; a strike affecting the operations at the port terminal will be entirely the shipowner's concern.

In cases where the functions relating to the loading or the discharge are distributed between the charterer and the shipowner a strike will usually affect *both* parties. In Scandinavian law, the fact that the hindrance affects the shipowner's function will be sufficient to prevent the running of the lay-time even if the same hindrance prevents the charterer from fulfilling his function.[116] In English law, the position is entirely different; the charterer who has assumed a fixed time obligation will have to carry the risk of delay even if the shipowner's function to receive the cargo onboard the vessel is prevented by a strike or other circumstance beyond his control.[117] The principle adopted in English law is often practised in Scandinavian law also by means of clauses to this effect in the bills of lading.[118]

In *voyage charters*, it is customary that the charterer assumes the entire function of loading and discharging the vessel and this is usually expressed in so-called F.I.O.- and F.O.B.-clauses (Free In and Out; Free On Board) and this principle is, of course, practically always used in *time charters* where the entire commercial function rests upon the charterer (see SMC § 139).

According to the rules relating to demurrage, the vessel is placed at the disposal of the charterer free of extra charge during a period of time described as the *lay-time* (Sw. "liggetiden") and during a further period of time against extra compensation, the so-called "over lay time" or "demurrage period", SMC § 80 (Sw. "överliggetid").[119] The SMC contain provisions fixing the lay-time at a certain number of days with regard to small vessels not exceeding 400 register tons (between two and six days); with regard to larger vessels the lay-time comprises a number of

[115] See supra p. 33.

[116] See TIBERG p. 399; but cf. NC 1649.

[117] See *Budgett* v. *Binnington* [1891] 1 Q.B. 35; and TIBERG p. 48 et seq.

[118] See, e.g., Conlinebill clause 16.

[119] See concerning the terminology TIBERG pp. 2, 3.

days which is reasonable according to the circumstances (SMC § 81). However, in contracts of affreightment the lay-time is usually fixed at a certain period of time or at a period of time to be calculated by the application of a certain formula, such as a certain number of tons per workable hatch each day. The clauses may, however, be less specific such as the FAC-clause, which only stipulates that the vessel shall be loaded or discharged "fast as can".

The system of the SMC implies that the lay-time is extended if hindrances "on the ship's side" (Sw. "å fartygets sida"; SMC § 84) intervene but apart from this, the charterer has to carry the risk of hindrances affecting loading and discharge even if they fall within the concept of force majeure.[120] The charterer can, however, always protect himself by using his right to cancel the contract according to SMC § 131, but in such a case he will have to pay the contracted freight unless he is prevented from delivering or receiving the cargo by force majeure hindrances of the kind enumerated in § 131.2.[121] If, at the time of the cancellation, the charterer has already incurred the liability to pay demurrage this obligation persists irrespective of the cancellation.[122] If the hindrance is attributable to the shipowner, the lay-time is prolonged during the period of prevention.

As the excuses from performance on account of frustration, impossibility or force majeure are only available in exceptional cases, the question arises whether the shipowner could be excused from specific performance and withdraw from the contract by paying the charterer damages for non-performance. It seems reasonable to award the shipowner the same possibilities of escaping specific performance as has been expressly granted the charterer in SMC § 131 and the prevailing opinion in Anglo-American as well as Scandinavian law favours the idea that the charterer is adequately compensated by damages for non-performance.[123]

Exactly as in contracts of other types, such as the contract of sale, the provisions of the Scandinavian Maritime Codes and the supplementing

[120] See TIBERG p. 404.

[121] See further infra p. 368.

[122] See TIBERG p. 405.

[123] See JANTZEN-HASSELROT p. 107; but cf. SELVIG, Naturaloppfyllelse p. 544 et seq., who considers that the shipowner should not be able to avoid specific performance in cases where this would cause hardship to the charterer, e.g. on account of scarcity of available tonnage. See also SUNDBERG, Air Charter p. 407; SOU 1936:17 p. 190 et seq.; and RAMBERG, Avbeställningsrätt at notes 33–52.

general principles of law offer only very limited protection to the party affected by hindrances of various kinds. It has been considered that the parties themselves should regulate the effect of such hindrances by appropriate provisions in their contracts.[124] The shipowner frequently retains the right to cancel if, due to hindrances of various kinds, he cannot have the vessel ready for loading within the contracted time, especially if the port of loading is strikebound. The charterer is sometimes given the right to avoid the cancellation by assuming the obligation to pay demurrage during the period of the hindrance.[125] The same result may be obtained by awarding the charterer the right of cancellation but at the price of paying strike demurrage if he fails to exercise his right.[126] If the strike should prevent the discharge, the shipowner often protects himself by provisions entitling him to discharge in a substituted port.

The charterer on the other hand usually tries to obtain a prolongation of the lay-time by exception clauses preventing the running of the lay-time. The same result may be achieved by using an appropriate formula for the determination of the lay-time and it is often difficult to distinguish between pure exceptions and such formulas. It would seem, however, that the expression "weather working days", which is frequently used in the formula for the determination of the lay-time, should lead to the same result as an "exception for unsuitable weather", but it is sometimes considered that the *actual* prevention of the work is immaterial under the expression "weather working day", while an exception must always relate to a circumstance preventing the performance of a specific obligation.[127] An exception clause may be less valuable for the charterer than a clause to the effect that time is not to count in the event it is considered that an excepted hindrance does not actually prevent the running of the lay-time but only causes a deduction from the *total* time used in the ports of loading and discharge. This may be of importance if the lay-time is exceeded in the port of loading and the vessel comes on demurrage.[128]

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[124] See the Uniform Scandinavian Sale of Goods Act § 24 and the observation by ALMÉN p. 285.

[125] See, e.g. Gencon Strike Clause supra p. 47.

[126] See, e.g., Baltcon Strike Rules supra p. 48; and RØRDAM p. 76 et seq.

[127] See NC p. 3917; but cf. TRAPPE, Hansa 1957 p. 2140, who considers that the hindrance must always have had an influence on the work in order to become relevant under the formula or the exception clause.

[128] This interpretation of exception clauses is advocated by JANTZEN, Baltconcertepartiet p. 98 et seq.; and DYBWAD, ND 1946 pp. VII-X. But cf. RØRDAM p. 68.

While, in Anglo-American law, the value of protective clauses is obvious for the charterer when he has assumed the obligation to load or discharge the vessel within a *fixed time*, he has in other instances no responsibility for hindrances not caused by his own negligence and this principle applies under the FAC-clause also.[129]

Anglo-American law does not recognize the distinction between hindrances on the ship's side and hindrances on the charterer's side practised in the SMC.[130] Instead, if the charterer has assumed a fixed time obligation, the risk of circumstances preventing loading or discharge is his irrespective of whether the hindrances affect the functions resting upon him or the shipowner. If he has not assumed such a fixed time obligation, he has only the obligation to use due diligence in performing the function resting upon him under the contract of affreightment and pay demurrage if he fails to do so.[131]

Although it is generally considered in Anglo-American as well as Scandinavian law that, in the absence of clauses, labour disturbances do not permit the cancellation of the contract of affreightment[132], we cannot always leave the parties without any protection *ex lege*. Thus, in *The Penelope*[133] the general coal strike in Great Britain was considered an unforeseen compulsory change of circumstances not contemplated by the parties and the shipowner was excused from performance. The facts were as follows.

The Penelope was chartered 24 March 1926 for consecutive voyages from Cardiff "or one of other named ports" to "one of certain specified Italian ports".

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[129] See TIBERG p. 51; and STRETCH, Chartering of ships p. 103.

[130] The system of the so-called risk line view or "sphere theory" (Germ. "Sphärentheorie). See further TIBERG pp. 9, 397 et seq.

[131] See further TIBERG pp. 8, 48, 51.

[132] See from English case-law *Ropner* v. *Ronnebeck* (1914) 84 L.J. K.B. 392; and *Braemont* v. *Weir* (1910) 102 L.T. 73; and from American case-law *The West Totant* 1927 AMC 882 SDNY; *Plisson Steam Navigation Co.* v. *William H. Muller & Co. (The Nivose)* 1923 AMC 947, DC Md. where it was held that the strike did not fulfil the requirement of "*vis major* or its equivalent": "The equivalent may be a superior force acting directly upon the loading or discharging of a cargo, or an unusual or extraordinary interruption or prevention of the act of loading or discharging, not occurring through the connivance or fault of the charterer, and which could not have been anticipated when the contract was made." See also *United States of America* v. *Columbus Marine Corp. (The Schroon)* 1926 AMC 178 SDNY.

[133] (1928) 31 Ll.L.Rep. 96 Adm.

The charter party was for twelve months counted from notice of readiness with regard to the first voyage. The vessel was to take cargo from the British ports and return in ballast and perform as many voyages as possible during the charter party period. The charter party provided that if the charterer could not nominate a loading port free of strike the "steamship to be free to interpose a substantially similar voyage". When all loading ports were strikebound at the time for the first voyage under the charter party in June 1926, the parties agreed that the vessel should perform two substitute voyages, but when the second of these voyages had been performed, the shipowner considered the charter party "void" and chartered the vessel to another charterer for a voyage to America. The shipowner succeeded in invoking the doctrine of frustration as a defence against the charterer's claim for damages for non-performance.

The statements made with respect to ice hindrances indicate that an unforeseen strike of more than temporary duration may free the shipowner from performance in Scandinavian law also.[134] SMC § 159, before the amendments in the 1930s, was by some legal writers thought to give an express support for a right of cancellation in case of unforeseen ice-hindrances of long duration.[135] Supposedly, the Scandinavian courts would also be prepared to accept a strike hindrance as an excuse from performance *ex lege*, provided the strike emerges unexpectedly and prevents performance during a considerable period of time.[136]

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[134] See in particular BRÆKHUS, Ishindringer p. 16 et seq.; but cf. ND 1928.328 SCN, where the *charterer* was not permitted to invoke difficulties in the forwarding of the cargo by rail to the ship as an excuse for non-performance.

[135] See, e.g., ASK p. 40 et seq.; LANG p. 442; and HAMBRO p. 150; but cf. RØRDAM, Eis-Hindernisse und Eis-Klauseln, Hansa 1957 p. 2441. The special features of ice-hindrances, which according to the circumstances could be either unexpected or expected, are well demonstrated by the German BSchG § 71 which gives the sender the right to cancel if "die Reise ohne Verschulden des Absenders zeitweilig verhindert [wird]". The word "zeitweilig" implies a "vorübergehendes Hindernis von nicht nur geringfügiger Dauer". See VORTISCH-ZSCHUCHE p. 277 et seq. But the same section, third paragraph, also contains the rule that the sender has no right to cancel if the carrier has to remain in port during the winter, the reason being that such a contingency must have been within the contemplation of the parties. See VORTISCH-ZSCHUCHE p. 280.

[136] See, e.g., BRÆNNE-SEJERSTED, Hydrocertepartiet p. 100. JANTZEN, Baltconcertepartiet p. 203, seems to presuppose that the shipowner has at least some—although insufficient—protection *ex lege* (Norw. "uten reglene hadde rederen vært dårlig beskyttet mot følgene av streik m.v."). But cf. JANTZEN-HASSELROT p. 107; and GRUNDTVIG p. 57.

§ 11.4.3. Economic Unprofitableness

The courts are usually anxious to point out that mere economic unprofitableness is not prevention and as such an excuse for non-performance.[137] However, such statements are untruthful if they are read literally. In reality, there is no situation where a party affected by a hindrance cannot be strictly held to his contract either by imposing upon him the obligation of specific performance or, when it is absolutely impossible to achieve specific performance, by forcing him to provide substituted performance or to pay damages for non-performance. The truth is that the courts, under the pressure of a feeling of reasonableness, have developed excuses from performance in *certain typical situations*, be it by using the doctrine of frustration, impossibility, force majeure or other similar remedies. However, when the court faces a new situation not earlier recognized as an excuse, or when the situation cannot be kept within certain boundaries and thus enlarge the category of typical situations earlier recognized, the courts sometimes refuse to permit the requested excuse by stating that "unforeseen difficulties, however great, will not excuse".[138] The fact that the courts do recognize economic unprofitableness as an excuse, provided the situation could be referred to a certain category, sometimes appears from expressions such as "the *mere fact* [my italics] that a contract has become difficult of performance is insufficient to constitute frustration".[139]

The difficulty to establish firm and settled principles for excuses from performance with regard to *generic* promises has caused the courts only to permit such excuses with utmost caution and this appears clearly from the cases dealing with the shipping contracts for the carriage of goods over a certain period of time (Sw. "transportkontrakt").[140] In order to demonstrate the attitude of the courts, the facts of some cases where the performance of the shipping contracts had been disturbed by the First World War will be briefly summarized.

In *Cork Gas Consumers Co.* v. *Witherington & Everett* (1920) 3 Ll.L.Rep. 194 K.B., the shipowner did not succeed in cancelling the agreement to carry 25.000 tons of coal from Newcastle to Cork between June 1914 and June 1915, in spite of the fact that out of his five vessels two were interned in Hamburg and

[137] See supra p. 181 et seq.

[138] *Dermott* v. *Jones* (1864) 69 US 1.

[139] GUTTERIDGE, L.Q.R. Vol. 51 (1935) p. 111.

[140] See supra p. 50 et seq.

one requisitioned by the Admiralty leaving him with his two smallest vessels. It is pointed out that this was "a general carrying contract" which did not limit the shipowners to using vessels of which they were owners or managing owners (at p. 196). Furthermore, the shipowner did not succeed to invoke the special Emergency Powers Acts 1917–1919 which under certain circumstances permitted the courts to give the parties relief by suspending or annulling contracts which, i.a. owing to alteration of trade conditions occasioned by the war, could not be performed without "serious hardship". See concerning the interpretation of this prerequisite *Maskinonge S.S. Co.* v. *Dominion Coal Co.* (1921) 8 Ll.L.Rep. 279 (at p. 281). In that case the shipowner did not get any relief from a charter party regarding seven consecutive seasons commencing with the spring of 1912 stipulating what he considered as an extremely low rate considering the large increase in prices, wages, provisions, stores, etc. The words "serious hardship" were understood as "serious financial hardship", i.e. an "individual" test not primarily relating to the balancing of the interests of the respective contracting parties under their agreement.

In *Associated Portland Cement Manufacturers Ltd.* v. *William Cory & Son* (1915) T.L.R. 442 K.B., an agreement was concluded in 1910 concerning carriage of cement from the Thames to the Forth at a certain rate per ton over a period of about six years. After the outbreak of the war many of the shipowner's ships were requisitioned, the ports from which they usually carried coal were closed, restrictions causing delay were placed on ships in the relevant trade and the voyages were dangerous and difficult by reason of mines and German submarines and in view hereof the shipowner, referring to a "restraint of princes" clause, maintained that the contract was suspended. The court held that it was not. The "restraint of princes" clause did not apply and the parties had not impliedly stipulated for the continuance of peace.

A similar contract came before the House of Lords in *Larrinaga & Co.* v. *Soc. Franco-Americaine des Phosphates de Medulla* (1923) 16 Asp.M.C. 133 H.L. Here, the shipowner, in a charter party made on 5 April 1913, had contracted to provide six steamships to carry parcels of phosphate from Port Tampa to Dunkirk in the spring and autumn respectively of the years 1918, 1919 and 1920. By reason of the war the first three shipments which fell due to be made in 1918 and early in 1919 were not made and the dispute concerned whether the charterers in August 1919 were entitled to call upon the shipowner to provide ships to carry the last three parcels. The shipowner invoked the doctrine of frustration and, in addition maintained that his obligations under the contract were indivisible, but the House of Lords held in the charterers' favour. The speculative nature of the contract was stressed in an often cited dictum by Lord SUMNER (see supra p. 184). The argument that the contract was indivisible and had to fall altogether owing to the fact that the war prevented three of the shipments from being performed was rejected but it was pointed out that different considerations would have arisen if there had been a lump sum freight for the six voyages; now it was possible to treat the charter party as consisting of six separate voyages, each being a distinct commercial adventure. But in an earlier case *Pacific Phosphate Co.* v. *Empire Transport*

Co. (1920) 4 Ll.L.Rep. 189 K.B. concerning a contract to supply 12 steamers a year over a period from 1914 to 1918 for the carriage of phosphate from two islands in the South Pacific to various ports in Europe, Australia and other parts of the world, the circumstances that supervened in the shipping world due to the war were held sufficient to amount to frustration and to free the shipowner from his obligations. It was pointed out by ROWLATT J. that "the freight is now enormous compared with the 33 sh. 4 d. a ton under the Charter-party at the time. I do not attach importance to the money, beyond its showing that there was an important and fundamental disturbance. The voyage would now earn in freight about £10,000 under the agreement in carrying the phosphate home, and it would cost about £29,000 to do it . . .. If they had to go into the market and charter outside ships, instead of their own, the loss would be more, because they would have to provide those expenses . . . circumstances have now arisen under which one cannot imagine anybody could possibly have made the contract which is now in dispute. Under these circumstances I conceive it to be my duty to say that the contract has come to an end by reason of frustration by events not contemplated by the parties" (at p. 191).

§ 11.5. *Hindrances Affecting the Charterer*

§ 11.5.1. Scandinavian law

SMC § 131.1 provides that the charterer may cancel the contract before loading by paying to the shipowner the full freight as well as any additional damages for non-performance. Thus, the question whether the charterer has any obligation to specific performance is answered in the negative.[1] By the amendments of the SMC in the 1930s, the so-called *fautefreight* system (see supra p. 230) was abandoned and replaced by the principles of general contract law; the shipowner should be compensated for his real loss, no more no less.

The *fautefreight* system implied that the charterer could cancel the contract before the beginning of the voyage by paying *half* freight, provided the shipowner after such cancellation could enjoy the use of the *entire* vessel. If the vessel was chartered to more than one charterer, all

[1] See SOU 1936:17 p. 190; and ASK p. 18. HAMMARSKJÖLD, p. 22, expressed the view prior to the amendments of the SMC in the 1930s that the charterer should be obligated to tender the cargo for shipment in the event the cargo was intended as ballast but this standpoint is not accepted by the present SMC; non-performance in such a case results in an obligation to pay the "additional damages". See concerning the question of specific performance in Scandinavian law generally SELVIG, Naturaloppfyllelse p. 554 et seq.; SUNDBERG, Air Charter p. 407; and RAMBERG, Avbeställningsrätt at notes 34–50.

of them had to agree to cancel in order to get the benefit of reduction (§ 129). After the beginning of the voyage full freight had to be paid (§ 128) but with deduction of any expenses saved by the shipowner by the charterer's cancellation (§ 130). If the master was able to get substitute cargo *half* of the freight charged for such cargo should be deducted from the cancelling charterer's debt to pay the full freight.[2] If the contract of affreightment concerned several voyages the cancelling charterer in principle had to pay "full freight for the voyage which had already begun, half freight for the next voyage and one fourth freight for the subsequent voyages" (Sw. "full frakt för resa, som redan begynt, halv frakt för den därpå följande resan samt fjärdedels frakt för de övriga").

The *fautefreight* system was heavily criticized because of its rigidity.[3] The rules could sometimes work to the benefit of the shipowner, sometimes to the benefit of the charterer depending upon the fluctuations of the freight market and the possibilities of getting substitute cargo. And the practical advantage of having fixed rules determining the amount of compensation was not deemed to outweigh the disadvantage of these haphazard consequences.[4] Therefore, in connection with the amendments in the 1930s, the maritime rules were harmonized with the general principles of Scandinavian contract law and, as a consequence, expenses saved by the charterer's cancellation as well as the shipowner's *possibili-*

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[2] This rule was introduced in the SMC of 1891–3 as an incentive for the shipowner to get substitute cargo and as a compensation for his efforts to do so. If the *whole* amount of the freight for the substitute cargo should be deducted, the shipowner would, of course, see no reason to bother the problem of getting substitute cargo at all.

[3] See, e.g., JANTZEN, ND 1923 p. 385 et seq. and Godsbefordring p. 292 et seq.

[4] The *fautefreight* system still applies in the German HGB § 580, the French Code de commerce art. 288 and the Belgian Code de commerce Liv. II, Tit. III, art. 120. In the German law, it seems to have a strong influence on the interpretation of the clauses in the contracts of affreightment as well. See Hansa 1954 pp. 510 et seq. and 880 et seq. The *travaux préparatoires* to ADHGB show that the *fautefreight* system was warranted on account of the difficulty in determining the amount of compensation to the shipowner. See Prot. HGB pp. 2149, 2151, 2170. According to the prevailing opinion in German law the *fautefreight* is not considered equivalent to a "Vertragsstrafe", since the charterer only exercises his "right" to cancel by paying a determined amount to the shipowner. See PAPPENHEIM II p. 609 et seq.; SCHAPS-ABRAHAM Anm. 1 to § 580; SCHLEGELBERGER-LIESECKE Anm. 1–5 to § 580; WÜSTENDÖRFER pp. 263–362; and CAPELLE p. 555. Owing to the practical advantages of the *fautefreight* system, it is still practised in the clausal law. See, e.g., Baltcon clause 9 c in fine and the comments by RØRDAM p. 75.

ties of getting substitute cargo should be considered when the amount of compensation is determined (§ 134). By these amendments, Scandinavian law approached Anglo-American law where the *fautefreight* system has never been applied.

For the present study it is particularly interesting to examine whether the *fautefreight* system has influenced the rules relating to the charterer's right of cancellation in case of hindrances affecting the purpose of the contract. This question has in Scandinavian law been observed by GRÖNFORS who points out that the *fautefreight* system was considered a special benefit to the charterer and that this view may have warranted a restricted right of "gratuitous" cancellation.[5] However, GRÖNFORS concludes that the interrelation between the charterer's restricted right of cancellation according to SMC § 126 (the vessel's late arrival in port) and the prior *fautefreight* system is difficult to determine (Sw. "svårbestämbart och variabelt"). GRÖNFORS study concerns the charterer's right of cancellation in case the vessel arrives late in port and it is perhaps possible to find a stronger interrelation between the *fautefreight* system and the charterer's right of cancellation when the purpose of the contract is disturbed by circumstances not involving the performance of his counterparty. If the *fautefreight* system really worked to the charterer's benefit it seems feasible to refuse him the further comfort of invoking some legal principle whereby he could escape his duties under the contract altogether. And, indeed, the much-debated question whether the charterer should be given a right of cancellation in case of the perishing of the specific cargo contracted for shipment has clearly been influenced by the existence of the *fautefreight* system.[6] Nevertheless, the *travaux préparatoires* to the amendments in the 1930s do not show that consideration had been paid to the abolition of the *fautefreight* system. The rule introducing the charterer's right of cancellation in case of certain force majeure contingencies was deemed warranted for other reasons. It should also be noted that the present rule in § 131.2. corresponds to German law where the *fautefreight* system still prevails.

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[5] See GRÖNFORS, Befraktarens hävningsrätt pp. 13 et seq. and 24; DAHLSTRÖM p. 155 et seq.; and SUNDBERG, Air Charter p. 451 et seq.; but cf. BRÆKHUS, AfS Vol. 3 (1959) p. 612 et seq.

[6] See BENTZON p. 135; SOU 1936:17 p. 192; and KProp 81/1863, Motiv p. 89 et seq.; GRAM, Søret p. 227; and from German law PÖHLS p. 583; RGZ 169. 203 (p. 207 et seq.); but cf. KÔERSNER, TfR 1919 p. 58 et seq.

By the rule in § 131.2 the charterer has been given the express right to cancel the contract *without* paying any compensation to the shipowner in case, before loading, "the possibility of delivering or carrying the goods or entering them at their destination may be deemed prevented by circumstances which the charterer should not have taken into account at the time of the conclusion of the contract, such as prohibitions of export or import or other measure by authorities, accidental destruction of all goods of the kind to which the contract relates, or similar circumstances, or if the specific goods to which the contract relates have been destroyed by accident" (Sw. "möjligheten att avlämna, fortskaffa eller i bestämmelseorten införa godset må anses utesluten i följd av omständighet, som ej bort av befraktaren vid avtalets ingående tagas i beräkning, såsom utförselförbud, införselförbud eller annan åtgärd av myndighet, undergång av allt gods av det slag avtalet avser eller därmed jämförlig händelse, eller där det bestämda gods avtalet avser gått under genom olyckshändelse"). The reading of SMC § 131.2 closely corresponds to § 24 of the Uniform Scandinavian Sales Acts and to §§ 628 and 629 of the German HGB. It appears clearly from the *travaux préparatoires* to HGB that the charterer's right of cancellation in these instances follows from the doctrine of impossibility (*impossibilium nulla est obligatio*).[7] The objection that the charterer's obligation consisted of paying the freight and that this obligation was not in any way prevented by the aforementioned circumstances was rejected by classifying the contract of affreightment as a *locatio conductio operis*—a contract concerning a performance of a service relating to the goods (Sw. "arbetsbeting"). And since the existence of the goods was necessary in order to enable the shipowner to perform this service and thereby earn his freight, the contract was impossible to perform in case of the loss of the goods. If the contract of affreightment had been classified as a *locatio conductio rei*—a lease—the result would have been different, since it is irrelevant to the lessor if the lessee can use the leased object or not.[8] In Scandinavian legal

[7] See Prot. HGB p. 433; HAMBRO p. 149 et seq.; and KProp 81/1863, Motiv p. 95 et seq.

[8] See Prot. HGB pp. 2368, 2390 and 3947. The minority of the German "Kommission" objected to a charterer's right of cancellation in case of the loss of the goods: "Keines der neueren oder älteren Seerechte sei so weit gegangen, wie der Entwurf, der dem Verfrachter sogar solcher Zufälle aufbürde, welche die Ladung allein betroffen hätten, und weshalb billiger Weise auch der Befrachter allein zur Last fallen sollten" (at p. 3947).

writing, it seems to have been the prevailing opinion that the charterer's obligation consisted of his duty to pay the freight—and this duty could not be avoided if for some reason or another he was not in a position to take the benefit of the shipowner's counter-performance.[9] The introduction of a charterer's right of cancellation in the case of the loss of the goods is discussed in the *travaux préparatoires* to the SMC of 1891-3 and the prevailing opinion did not favour a right of cancellation for the charterer on such grounds. In any event, one was not at that time prepared to introduce such a principle in the Codes.[10] The Finnish Maritime Code of 1873 contained, however, already at this time an express rule awarding the charterer a right of cancellation in case of the accidental loss of the goods (§ 100).[11] It is surprising that the discussion concentrated on an analysis of the charterer's duty with regard to the delivery of the cargo for shipment instead of the problem of the distribution of the freight risk between the parties in case of its accidental loss. The argument that the shipowner is deprived of his possibility of earning the freight in case the cargo is lost before shipment, seems strained and artificial. It is hardly tenable to adopt a principle to the effect that a party's accidental loss of his possibility of co-operating for the purpose of enabling specific performance of the contract must always deprive the counter-party of his right to the promised remuneration.[12] A critical

[9] See, e.g., ASK p. 14 et seq.; BENTZON p. 135; GRUNDTVIG p. 60; and cf. from modern writing RØRDAM p. 11 note 2. See for a contrary opinion HAMBRO p. 149; DAHLSTRÖM p. 190; and JANTZEN, Hvori bestaar befrakternes forpliktelser?, ND 1923 p. 385 et seq. The respective different views taken in this regard are well evidenced by the *travaux préparatoires* to HGB: "... der Befrachter aber kann oder darf das Gut nicht liefern, so kommt er in die Lage, dass er von der kontraktlich zugesicherten Dienstleistung keinen Gebrauch machen kann. Deshalb muss er seine Fracht zahlen, da seine Leistung -Geldzahlung- eine vertretbare ist" (see Prot. HGB p. 3956 et seq). And the contrary view: "Der Befrachter legt die Güter in den Raum des Schiffes und dann beginnt die Plicht des Schiffers, die eingenommene Ladung an den Ort der Bestimmung zu führen und zwar mit diesem Schiffe. Deshalb ist seine Plicht eine individuelle, welche vom Kasus aufgehoben wird" (p. 3958).

[10] See the Swedish Betänkande 1887 p. 119; the Danish Forslag 1891 til Sølov p. 83; and the Norwegian Udkast 1890 til Sølov p. 188 which, however, show certain hesitation on this point—one should not by an express provision in the Code introduce a solution before scientific research and practice had rendered sufficient guidance (Norw. "før det er bragt til Modenhet ved Videnskab og Praxis").

[11] See LANG p. 443.

[12] See SELVIG Naturaloppfyllelse p. 561; Cf. BGHZ (1957) 24. 91 where it is considered that "Abnahmeverzug" is at hand when the hindrance emanates from the

attitude to this approach can be noted from some legal writers, who preferred the method of discussing the question of the distribution of risk; was it reasonable to free the charterer from his obligation to pay the freight in case of the accidental loss of the goods and similar contingencies? In Denmark, BENTZON did not find the charterer's right of cancellation sufficiently warranted in such instances. The rule would lead to practical difficulties in that the courts must always evaluate the evidence regarding the cause of the loss and it was more natural to place the risk with the charterer than with the shipowner. In addition, the charterer could, at that time, escape the contract by paying *fautefreight*.[13] In Norway, KNOPH favoured the same view, although he considered the question admittedly difficult.[14] In Sweden, RODHE, in his study regarding the general problem of adjustment of contracts on account of changed conditions, has understood the discussion concerning the charterer's duties under the contract of affreightment as an escape from the real issue—is it reasonable to free the charterer from his obligation to pay the freight? Since such a solution would have been rather generous at that time rather strained arguments were invoked.[15] And when, finally, the much-debated rule was introduced in connection with the amendments of the SMC in the 1930s, it appears from the *travaux préparatoires* that it was warranted by right and reason and not a consequence of the application of the doctrine of impossibility.[16]

From a comparative viewpoint it is interesting to note that in Sweden efforts were made to solve the question by using remedies similar to those which prevailed and still prevail in Anglo-American law. Thus, it was thought that the problem of the charterer's right of cancellation could be solved by the application of the doctrine of presupposed conditions which comes fairly close to the Anglo-American frustration of purpose.[17] Undoubtedly, the continued existence of the cargo could be said to be

"Bereich" of the "Gläubiger", while there is no "Abnahmeverzug" when the hindrance "nicht nur in der Person des Gläubigers, sondern allgemein nicht behebbar ist".

[13] BENTZON p. 135.

[14] KNOPH p. 186 et seq. See also HALLAGER p. 133.

[15] RODHE, Adjustment p. 177 note 3.

[16] See SOU 1936:17 p. 190. The question whether the charterer's obligation consisted of his duty to pay the freight should not be the guiding issue (Sw. "huru stort intresse än berörda teoretiska konstruktionsfråga erbjuder, densamma naturligen icke får skjutas i förgrunden på bekostnad av de praktiska syften, som här äro att tillgodose").

[17] See supra pp. 150 et seq., 206 et seq.

an essential condition for the charterer and the further requirement under the Scandinavian doctrine that this condition must be understood by the shipowner at the time of the conclusion of the contract was certainly fulfilled also.[18] But, nevertheless, the doctrine of presupposed conditions also boils down to the final, essential question of the distribution of risks and a test of reasonableness. The question is discussed in a case by the Swedish Supreme Court, NJA 1906.124, where the charterer was freed from the contract when the cargo intended for shipment was destroyed by fire. But this decision expressly refers to a force majeure clause in the contract of affreightment and is hardly guiding as to the proper rule *ex lege*.[19]

An evaluation of the question regarding the distribution of risk between the shipowner and the charterer will disclose several reasons *pro et contra* a right of cancellation for the charterer in case of the loss of the goods before shipment or similar contingencies.

Firstly, a right of cancellation for the charterer in such cases seems rather generous considering the general attitude regarding adjustment of contracts on account of frustration of purpose (Sw. "minskad eller utebliven fördel av avtalet") in Scandinavian contract law.[20] For instance, in the law of sales, the buyer has no possibility of escaping the contract if the object of the sale becomes useless for him, e.g., owing to the destruction of his factory by fire.[21] Furthermore, the shipowner may, especially in tramp shipping, have to suffer a considerable economic loss if he has directed the vessel to the agreed port of loading in vain or if, owing to his contractual obligation to the charterer, he has refrained from accepting another favourable contract which is no longer available at the time of the charterer's cancellation.[22] Under such circumstances it

[18] See KÔERSNER, TfR 1919 p. 59.

[19] But cf. KÔERSNER loc. cit supra note 18.

[20] See RODHE, Adjustment p. 175 et seq.

[21] See ALMÉN p. 422. It is sometimes observed that the buyer's interests in this regard should be better considered in order to achieve a reasonable balance between the seller's and the buyer's rights in case of hindrances affecting their respective position under the contract. See, e.g., HELLNER, Köprätt p. 118 et seq.

[22] It would have been possible to reduce such loss to a certain extent if the shipowner had been awarded freight *pro rata itineris* for the voyage in ballast to the port of loading. Before the amendments of the SMC in the 1930s he was considered to have such right but this benefit seems to have disappeared after the amendments. See supra p. 354. The evolution of the law is sometimes surprising; earlier the shipowner did have the right to claim freight *pro rata itineris* for a voyage in ballast while a right of cancella-

seems reasonable that this loss should be borne by the cancelling charterer and not by the shipowner. The more so, as the shipowner is always obliged to give the charterer the benefit of the net revenue from a contract substituted for the original contract (SMC § 134).

On the other hand, there are several reasons supporting a right of cancellation for the charterer. It must be borne in mind that the charterer may have to suffer serious disadvantages from hindrances affecting the shipowner's performance. He may have incurred considerable costs for providing and storing the goods for shipment and perhaps become liable for non-performance under a contract of sale regarding the goods contracted for a voyage which becomes impossible or "impracticable" for some reason or another. There is an old tradition in maritime law to consider the contract of affreightment as a "common venture"[23] and thus it has probably been felt more natural to award the contracting parties protection on equal terms by using the principle of reciprocity instead of a rigid adherence to the doctrines of impossibility or force majeure. This view is particularly apparent in the chapter in the SMC regarding to so-called mutual right of cancellation (SMC §§ 135, 136) awarding both parties a right of cancellation in case of war risks.[24]

Before the amendments of the SMC in the 1930s, the principle of reciprocity clearly appeared from § 159 where the charterer was awarded a right of cancellation if, before shipment, "the goods became 'unfree'[25] through the outbreak of war" or "the contracted cargo by a prohibition of export or import, or the vessel's voyage or the shipment of the goods is prevented by another *vis major* contingency" (Sw. "godset genom utbrott av krig bliver ofritt" eller "det gods, befraktningen angår, förbjudes till utförsel i avlastningsorten eller till införsel i bestämmelseorten, eller fartygets resa eller godsets försändning genom annan åtgärd av högre hand hindras").

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tion for the charterer in case of the loss of the cargo was not yet codified, whereas the present law adds to the shipowner's burdens by codifying the charterer's right of cancellation *as well as* by depriving him of the right of freight *pro rata itineris* for the voyage in ballast.

[23] The rules of general average may serve as an appropriate example.

[24] The principle of reciprocity is invoked by several legal writers in support of the charterer's right of cancellation in case of the loss of the goods. See, e.g., HAMBRO p. 150; LANG p. 443; KALTENBORN p. 364; and LE CLÈRE p. 129 et seq.

[25] See concerning this expression supra pp. 111, 121.

The principle of reciprocity of the present SMC, and of the SMC of 1891–3, only concerns war risks preventing the voyage as such in the Norwegian Maritime Code of 1860.[26] It should be observed that the rule of the charterer's right of cancellation in case of certain *vis major* hindrances systematically belongs to the chapter dealing with the "mutual right of cancellation" (SMC §§ 135, 136) but it was inserted in § 131.2. for the purpose of reaching a better conformity with the system of the Uniform Scandinavian Sales Acts.[27] In German law, the situations which are now treated in different chapters in the SMC (§ 131.2 on the one hand and §§ 135, 136 on the other) are all included in HGB §§ 628, 629. In case of the loss of the goods the contract of affreightment ceases *ipso jure* (§ 628) and in case of prohibitions of export or import, as well as war risks, the right of cancellation is mutual (§ 629).

At first sight, it seems to be a convincing argument for a charterer's right of cancellation in case of the loss of the goods that § 159 gave him such right already in case of an *anticipated* loss on account of war risks or in case of insurmountable hindrances, such as prohibitions of export or import.[28] Nevertheless, one must not overlook the fact that the contingencies enumerated in § 159 are *vis major* contingencies, while the loss of the goods is not necessarily so—at least not according to the definition of *vis major* usually given in Scandinavian law.[29] The argument that, in the case of the contingencies enumerated in § 159, it was difficult to ascertain whether the hindrance affected the charterer or the shipowner, while no such difficulty existed in case of the loss of the goods, hardly seems convincing.[30]

From a commercial viewpoint it might be a wise policy to permit the charterer to cancel the contract in case his purpose has been adversely affected by some unforeseen circumstance. This is particularly true in contracts concerning transport of passengers and goods by air[31] but the competition between the different means of transport may very well cause a more lenient attitude towards the respective buyers of the services of transportation. So far as maritime transport is concerned, such an evolution is accentuated by the growth of liner trade. In tramp shipping and time charters the situation is different, since, in the former type of maritime contracts, the shipowner will hesitate to assume the potential loss

[26] See supra p. 237; and HALLAGER p. 113.

[27] See supra p. 95.

[28] This argument is raised in the *travaux préparatoires*. See SOU 1936:17 p. 194.

[29] See supra p. 145.

[30] But cf. KALTENBORN p. 362; and DAHLSTRÖM p. 189.

[31] See SUNDBERG, Air Charter pp. 459 et seq., 467 et seq.

resulting from a failure to get substitute cargo in the port of loading and, in both types of contracts, a sudden change of the freight market will give the charterer unwarranted possibilities of speculation.

It will be seen that not only German law but Anglo-American law as well has adopted a liberal view towards the charterer's right of cancellation in case the object of the voyage has been frustrated, e.g., by the loss of the specific cargo contracted for shipment. This being so, it would be unwise in Scandinavian law to take a different course unless very strong arguments could be raised against the solution practised in those legal systems.[32] And, in any event, the reasons *pro et contra* a charterer's right of cancellation on the grounds accepted in German and Anglo-American law does not give such a clear indication against such a rule that a different solution is warranted in Scandinavian law.

It is important to remember that the charterer's right of cancellation on account of frustration of purpose in certain instances was only recognized after a considerable hesitation—at least in German and Scandinavian law. Consequently, in German, Scandinavian as well as Anglo-American law, the doctrine of frustration of purpose has been restrictively applied. It appears clearly from the wording of SMC § 131.2 that the charterer may only cancel the contract without paying the freight if the *specific* cargo or *all* cargo of the kind which has been *contracted for shipment* is accidentally lost (Sw. "det bestämda gods *avtalet* avser"; "allt gods av det slag *avtalet* avser"; my italics). It is not sufficient that the cargo *intended* for shipment is lost.[33] The principle *genus non perit* applies here in the same manner as in the Uniform Scandinavian Sale of Goods Acts § 24.[34] Furthermore, it is not sufficient that the charterer can prove that the goods have been *individualized* as the goods intended for shipment, for example by transport from the shipper's factory to a warehouse where they are stored awaiting loading onboard the vessel.[35] But suppose the cargo has been tendered for shipment to the shipowner or his agent and gets lost *before* loading. What then? Could the ship-

[32] See SOU 1936:17 p. 190 et seq.

[33] See, e.g., ND 1921.85 SCS; and concerning the same principle in Anglo-American law infra p. 382.

[34] See supra p. 144.

[35] See in particular *Aaby's Rederi A/S* v. *Lep Transport, Ltd.* (1948) 81 Ll.L.Rep. 465 K.B.; JANTZEN, Godsbefordring p. 298; and SCHAPS-ABRAHAM Anm. 6 to § 628: "einseitige Ausscheidung genügt nicht".

owner require the charterer to tender substitute cargo of the kind described in the contract provided the entire *genus* has not been lost?[36] In German law, HGB § 628.3 expressly provides that generic goods should be treated in the same manner as specific goods "nachdem sie bereits an Bord gebracht oder behufs der Einladung in das Schiff an der Ladungsstelle vom Schiffer übernommen worden sind". And provided they have been so received it is not necessary that the place where the goods are stored awaiting shipment be located close to the ship's berth.[37] From a practical and commercial view-point it seems natural that the crucial time in this respect should be the moment when the cargo is *tendered for shipment*, not when it has been taken onboard. In tramp shipping, where the cargo is tendered at the ship's side, or even onboard in the ship's holds according to FIO-clauses,[38] the problem has only limited importance, but in liner trade, where the cargo is often tendered to the shipowner before the vessel's arrival in port, the situation is different. It would seem that the generic character of the goods for the purpose of the application of SMC § 131.2 has ceased when the charterer has performed all that is required from him in order to enable the shipowner to perform his part of the contract. The generic goods have, in this sense, been transformed into specific goods, since it can no longer be doubted that the *contract* now refers to the goods thus individualized (Sw. "det bestämda gods som avtalet avser").[39]

SMC § 131.2 also provides that the charterer may cancel the contract without having to pay the freight in case his purpose is disturbed by other force majeure hindrances than loss of the goods. The enumeration includes prohibitions of export and import as well as any hindrances preventing

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[36] In this connection it may be noted that in the bills of lading the risk of damage to the goods before loading is usually placed on the cargo-owner, since the periods before loading and after discharge do not come within the Hague Rules. See art. 1(e) and art. 7. But it should be borne in mind that the risk of loss of the goods and the freight risk are two separate questions which, although interrelated, are not necessarily linked together.

[37] See SCHAPS-ABRAHAM Anm. 6 to § 628 with further references.

[38] See supra p. 42.

[39] See JANTZEN, Godsbefordring p. 298; RØRDAM p. 16; and SELVIG § 16.31: "The carrier's right to freight for the goods is inextricably linked to the particular goods that are, as the subject matter of the contract of carriage, *delivered for shipment* [my italics] in the port of departure. If these goods have become lost or have ceased to exist *in specie*, the carrier's right to freight together with the contract, is thereby discharged."

the forwarding of the goods.[40] But it is not sufficient that the hindrance make performance difficult; it has to be practically impossible to perform the contract as contemplated (Sw. "må anses utesluten"). Furthermore, only such hindrances which were reasonably unforeseeable at the time of the conclusion of the contract may be taken into account (Sw. "som ej bort av befraktaren vid avtalets ingående tagas i beräkning").

The charterer may, of course, be affected by various hindrances of another kind than those enumerated in SMC § 131.2. The transport to the port of loading may be prevented by strikes and similar contingencies, subcontractors may fail to deliver the cargo, the contract of sale may be cancelled by the foreign exporter or importer, etc. The charterer's purpose may be frustrated in all these situations but nevertheless this is not sufficient reason to free him from the obligation to pay the contracted freight.[41] Consequently, in such contingencies the charterer sometimes seeks to protect himself by appropriate clauses.[42]

Since, in Scandinavian law, the charterer may only invoke unforeseeable hindrances, he is usually not in a position to free himself from the obligation to pay the freight according to SMC § 131.2 in case of refused licence of export or import.[43] It is only in case of a sudden unforeseeable change of policy of the kind that may happen on the outbreak of war and political disturbances of similar kinds that the failure to get the necessary licence may be invoked by the charterer. The charterer often tries to protect himself against the risk of a refusal of the necessary licence, or of a failure to have the cargo ready for shipment for other reasons, by the clauses "subject licence" and "subject stem" respectively.[44] If the failure to get licence or stem is self-induced by the charterer the clause does not help him; the charterer has to do his best in order to get the contract performed as contemplated.[45]

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[40] This part of SMC § 131.2 has been taken from § 159 in connection with the amendments in the 1930s.

[41] See, e.g., ND 1928.328 SCN; and cf. from German and English law SCHAPS-ABRAHAM Anm. 4 to § 628; and *Bunge y Borne* v. *Brightman & Co. (The Castlemoor)* [1925] A.C. 799.

[42] See, e.g., Baltcon clause 9 B and RØRDAM p. 59 et seq.

[43] See, e.g., ND 1952.19 City Court of Trondheim.

[44] See concerning the clause "subject stem" RØRDAM p. 15 et seq.; ND 1928.38 SCS; ND 1926.97 City Court of Oslo; ND 1924.74 SCN; ND 1922.186 Maritime Court of Kristiania. Cf. also RODHE, Obligationsrätt § 59 at note 76.

[45] See ND 1924.74 SCN; the charterer had failed to arrange the necessary contract

In Anglo-American law, the doctrine of frustration causes the contract to cease automatically; it "kills" the contract.[46] Thus, both parties are automatically freed from their contractual obligations even if the hindrance has not in any way affected themselves but only the counterparty. In the Swedish Maritime Code, there is no such automatic cessation of the contract in case of hindrances affecting the charterer, but the *shipowner* is given the right of cancellation as well, if the transport of the goods would be considerably inconvenient for him (Sw. "väsentlig olägenhet").[47]

The charterer has no possibility of requiring the shipowner to perform the contract at a reduced freight if only *a part of the cargo* is affected by a force majeure hindrance of the kind encompassed by SMC § 131.2. SMC § 132.2 stipulates that in such a case the shipowner may cancel the entire contract (Sw. "häva avtalet i dess helhet"), if the charterer does not pay the whole freight or give adequate security for the correct payment of it before the agreed loading time has elapsed. Thus, the charterer may take a choice between two alternatives; if it is important to have the transport performed with regard to the part of the cargo not affected by the hindrance he will have to pay the whole freight or give security for its payment, or he may choose the alternative of escaping the obligation to pay the whole freight and refrain from his right to have the transport carried out under the original contract. If the first alternative is chosen, the charterer may get the benefit of a reduction in case the shipowner has a possibility of using the additional space available for substitute cargo (SMC § 134) and, if the second alternative is chosen, the charterer may conclude a new contract with the same shipowner or another one concerning the part of the cargo not affected by the hindrance.

The Swedish text of § 132.2 seems at first sight somewhat peculiar.

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of sale and was not allowed to take the benefit of the clause "subject stem". Cf. also ND 1922.321 SCN. In English law, the charterer may invoke the clause unless he has negligently failed to make the proper arrangements. See, e.g., *Sebastian* v. *Altos Hornos de Vizcaya* [1920] 1 K.B. 332.

[46] See supra p. 169.

[47] The text of the Norwegian Maritime Code is different, the same facts which give the charterer a right of cancellation give the shipowner a right of cancellation as well. This principle will be of practical importance only if the charterer hesitates to use his right of cancellation in spite of the fact that there is ample evidence that the contract cannot be performed as contemplated. See JANTZEN, Godsbefordring p. 301; and infra p. 410.

It says that the shipowner may cancel the entire contract irrespective of the fact whether he has any right to compensation or not, unless, upon his request, compensation is paid or security given before the loading time has elapsed (Sw. "Evad rätt till ersättning föreligger eller ej, äge bortfraktaren häva avtalet i dess helhet, såvida ej, på anmaning, ersättning gäldas eller säkerhet därför ställes före lastningstidens utgång"). This text may seem paradoxical, but one must ask oneself what happens if the charterer refuses to pay the compensation or put up security and, as a consequence, the shipowner uses his right to cancel. In such a case the shipowner will lose his right to compensation altogether if the relevant part of the cargo is missing on account of a force majeure hindrance of the kind encompassed by SMC § 131.2 (Sw. "njute bortfraktaren ersättning . . . där ej beträffande det felande godset föreligger sådan omständighet som i 131 § sägs"). In other words, if the charterer wants to have the transport carried out with regard to the part of the cargo not affected by the hindrance, he will have to pay full compensation, but he may escape paying any compensation at all if he induces the shipowner to cancel the contract altogether or, finally, the shipowner may voluntarily accept to perform a part of the contract at a freight reduced in proportion to the missing part. In German law, the charterer may choose to deliver substitute cargo instead of the part affected by the hindrance, provided the shipowner does not suffer any inconvenience therefrom (HGB § 562), or he may cancel against payment of *fautefreight* (HGB §§ 580, 581). But if he chooses neither of these alternatives, he will have to pay full freight. It should be noted that the charterer in this specific case cannot escape his liability to pay the full freight, even if the hindrance is caused by force majeure contingencies.[48] In Anglo-American law, the contract either stands as it is and the charterer will have to pay the full freight, or it falls entirely and both parties are freed from their respective obligations, unless the contract can be divided into separate contracts each concerning a part of the cargo. An ordinary voyage charter cannot normally be divided in such a manner[49] and the practical result under Anglo-American law will be the same as under Scandinavian law; the shipowner cannot be forced into the partial performance of an entire contract.

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[48] See HGB § 636; SCHAPS-ABRAHAM § 636; and VORTISCH-ZSCHUCHE p. 272.

[49] See supra p. 50.

In liner trade, it is necessary to consider the interests of the different cargo-owners.[50] The principle that one of the cargo-owners may not cancel the contract on account of the shipowner's delay if the discharge of the cargo would cause harm to other cargo-owners (SMC § 127) is valid *a fortiori* (SMC § 133). But when the reason for the charterer's cancellation does not lie in the behaviour of the shipowner, the charterer is not free to use his right of cancellation *after loading* if this would cause "considerable inconvenience" (Sw. "väsentlig olägenhet") to the shipowner. In this connection it should be added that the charterer must be able to present all original bills of lading in order to claim delivery of the cargo at another place than the destination.

§ 11.5.2. Anglo-American law

In Anglo-American law, there is no theoretical discussion corresponding to the much-debated question regarding the application of the doctrine of impossibility to the charterer's benefit. The doctrine of frustration has, in this respect, provided a more flexible basis for freeing the charterer from his obligation to pay the freight. And the principle of reciprocity has been a necessary consequence; the commercial object of the contract for the shipowner as well as the charterer may become frustrated by changed conditions. Indeed, the doctrine of frustration of purpose[51] seems to be even more easily applicable to the charterer than to the shipowner. The shipowner's object is ordinarily less specific, viz. that the economy of the contract shall not be upset by hindrances of various kinds, while the voyage charterer's object ordinarily specifically concerns the transfer of cargo from seller to buyer.

The vagueness of the doctrine of frustration causes serious difficulties in its application. It is clear that the doctrine cannot be applied in *all* cases where the purpose of one of the contracting parties has become frustrated. But it is not clear *when* it should be applied and *why*. It is sometimes stated that there must be a frustration of the "common" purpose or intention of the contract[52] but this reasoning seems in most cases fallacious. Ordinarily, there is no "common" purpose at all; the contracting parties are only concerned with their own particular problems and the fact that one party's purpose is known to the other does not mean

[50] Cf. supra p. 98.

[51] See supra p. 206.

[52] See supra p. 154.

that the contract is *based* on a "common" purpose or intention.[53] Irrespective of the legal theories underlying the doctrine of frustration and the explanations of its operation[54] it becomes in the end a question of deciding when it is reasonable to insert the term into the contract which the parties did not expressly provide for. And, in view of the apparent danger to the legal principle of sanctity of contract, it is equally clear that the doctrine of frustration must be restrictively applied. Its application is limited to *certain typical situations* and an enlargement of the category of situations which have become recognized progresses slowly and with the utmost caution. Thus, the doctrine of frustration mainly functions as a remedy for supplementing the contracts with such kinds of obligations as have been deemed to be naturally pertaining thereto and as a kind of safety valve primarily warranted by war and catastrophic events. In this sense, the doctrine of frustration bears a certain resemblance to the Scandinavian doctrine of presupposed conditions[55] and the doctrine of *vis major*.[56]

In Anglo-American law, it has been deemed quite natural to consider the principle of reciprocity; it would be *unjust* to release the shipowner but not the charterer in case of a certain type of hindrance, such as delay, "perishing of the thing" and war risks. Presumably, this explains why the Anglo-American jurists have not paid much attention to an analysis of the nature of the contracting parties' respective obligations. While the doctrine of impossibility may make such an analysis necessary—e.g. in order to ascertain whether the charterer's primary obligation consists of a duty to tender the cargo or a duty to pay the freight[57]—the doctrine of frustration does not warrant such an analysis at all.

As previously mentioned, the doctrine of frustration originated in cases involving situations where the counter-party had not been able to fulfil his part of the contract as planned—whether this is termed "breach of contract" or not.[58] Thus, the charterer may be excused in cases where the vessel's late arrival in port amounts to a delay frustrating the commer-

[53] See TIBERG p. 94, who points out that "In reality it is however the intention of the contract, seen through the eyes of a 'reasonable man', that is interpreted"; and supra p. 173.

[54] See supra p. 172 et seq.

[55] See RAMBERG at note 193.

[56] See supra p. 145.

[57] See supra p. 368.

[58] See RAMBERG at notes 93–94.

cial object of the contract. But the case-law shows that the delay must be considerable in order to constitute a breach of condition[59] which is required in order to free the charterer from the contract.[60]

As pointed out by GRÖNFORS, SMC § 126 relating to the charterer's right of cancellation on account of the vessel's late arrival in port rests on the same idea as the doctrine of frustration but there is, in Scandinavian law, the further requirement that the shipowner at the time of the conclusion of the contract have understoood or have been in a position to understand that a delay of the kind which happened would frustrate the charterer's commercial object.[61] In Anglo-American law, this additional requirement may perhaps be considered as one of the "surrounding circumstances" which may influence the court when deciding whether the charterer shall be allowed the defence of frustration. If, at the time of the conclusion of the contract, the shipowner understood that the contract would be without value for the charterer in case of delay it would appear easier for an English or American court to apply the doctrine of frustration than in a situation where the charterer has had a special purpose unforeseeable by the shipowner.

The voyage charterer's right of cancellation on account of "inordinate" delay was considered in one of the classical frustration cases, *Jackson* v. *Union Marine Insurance Co.*[62] The delay arose from the vessel's grounding and it took some one and a half months to get the vessel off the ground and another six months for the necessary repairs. The extent of time required must be seen in relation to the length of the contracted voyage (in the *Jackson* case from Liverpool to Newport and from there to San Francisco) and the nature of the cargo which may be perishable. And in view of the technical development the time required to permit the operation of the doctrine of frustration is probably considerably less to-day than around the turn of the century.

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[59] See supra pp. 38, 205.

[60] See *Freeman* v. *Taylor (The Edward Lombe)* (1831) 8 Bing. 124 [34 R.R. 647]; *Davidson* v. *Gwynne (The Pomona)* (1810) 12 East 381 [11 R.R. 420]; *Mac Andrew* v. *Chapple (The Ephesus)* (1866) L.R. 1 C.P. 643; *Grammer S.S. Co.* v. *James Richardson & Son, Ltd.* 1931 AMC 431 CCA 2nd; and *International Refugee Organization* v. *Republic S.S. Corp. (The San Francisco)* 1950 AMC 1947 DC Md.

[61] See GRÖNFORS, Befraktarens hävningsrätt p. 20 et seq.; and cf. article 10 of the International Hague Convention of July 1964 regarding the International Sale of Goods.

[62] (1874) L.R. 10 C.P. 125; See for a review of the facts supra p. 165.

While it is settled law that the doctrine of frustration operates to free the charterer in case of *delay* in performing the voyage, the principle of excuse from performance in case of "the perishing of the thing" may also operate to free the charterer, not only when the vessel is lost but also when the *specific cargo contracted for shipment* has perished.[63] And the same attitude would probably be taken if the specific cargo was affected by other absolute hindrances, such as a requisition.[64] Furthermore, it is probable that the charterer may obtain the benefit of the doctrine of frustration in the case of the perishing of unascertained cargo provided *all* cargo of the contract description has become destroyed or unattainable.[65] In this sense, Anglo-American law would appear to be on the same line as the present Scandinavian law.[66]

It should be noted that, ordinarily, the contract of affreightment does not concern a *specific* cargo and that the cargo does not become specific for the simple reason that the charterer has *intended* to ship some individual parcels. Nor does it become specific owing to the fact that it has been forwarded to a warehouse awaiting shipment.[67]

Thus, in *Aaby's Rederi A/S* v. *Lep Transport, Ltd.* (1948) 81 Ll.L.Rep. 465 K.B., the charter party referred to "65,000 cubic feet of wool in bales or bags" and the cargo had been collected by Lep for shipment on behalf of various shippers. The greater part of the cargo was stored in a warehouse where a fire broke out and damaged the cargo before shipment. It was found that "it was quite immaterial to the shipowners where the wool in bales came from, or the particular nature of it, or any characteristics with regard to it" and that "there was no sort of appropriation of the goods to the contract, so that the shipowners were under an obligation to ship any particular bales of wool which were in the vicinity" (at p. 467). Therefore, "the cargo was not in any way a specific cargo, and the charter obligations could have been fulfilled by the charterers getting wool from anywhere else" (per SELLERS J. at p. 468).

In *Hellenic Transport S.S. Co.* v. *Archibald McNeil & Sons Co. (The Iolcos)* (1921) 273 Fed 290, DC Md., it was pointed out that it does not suffice that the charterer *intended* to take the cargo from a certain source "unless that source was, by the terms of the charter or in the contemplation of the parties

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[63] See, e.g., CARVER § 632.

[64] See ROBINSON p. 652; *Joseph Cowden & Co.* v. *Corn Products, Co.* (1920) 2 Ll.L. Rep. 344 C.A.; and cf. *Howell* v. *Coupland* (1876) 1 Q.B.D. 258 C.A.; and *Shipton, Anderson & Co.* v. *Harrison Brothers & Co.* [1915] 3 K.B. 676. In these cases the seller was excused on account of the requisition of the specific goods.

[65] See CARVER § 632 at note 67.

[66] SMC § 131.2. See supra p. 368.

[67] See concerning the same principle in Scandinavian law supra p. 374.

at the time it was made, or by the well-established course of trade, the only source from which the charterer could have been expected to get the cargo" (at p. 279).[68]

The same restrictive approach is taken with regard to the interpretation of clauses. If the clause makes exception for contingencies preventing the *loading* of the cargo this does not protect the charterer in case he is prevented from *providing* the cargo.[69]

As mentioned above (supra p. 373), the principle of reciprocity also warrants that the charterer should be given the opportunity to withdraw from the contract in case of an *anticipated* loss of or damage to the cargo on account of war risks. Ordinarily, the war risks will threaten the vessel *and* the cargo to the same degree and the initiative to cancel the contract is usually taken by the shipowner. The case-law is therefore sparse, but there are indications that Anglo-American law recognizes the same principle of reciprocity as appears from SMC § 135.[70]

The charterer has also tried to invoke the doctrines of frustration, impossibility or *vis major* in order to protect himself against the consequneces of refused licences, strikes, congestions and similar contingencies, but the courts have shown a marked reluctance to apply the doctrines to such situations.

In *Hellenic Lines, Ltd.* v. *Maple Leaf Milling Co.* 1951 AMC 1692 Canada, Province of Nova Scotia, the contract concerned the carriage of 100,000 tons of wheat flour in bags from Toronto to Italy during a six months period and the charterers wanted to cancel the contract on account of "unforeseen restrictions and prohibitions imposed upon importers by the Italian government". It was pointed out that the contract was not based upon a "common" intention. The risk which the charterers took was their own, not one which they shared with the shipowner (at p. 1697). Therefore, there was no frustration. Reference was made to the well-known case of *Blackburn Bobbin Co.* v. *Allen (T.W.) & Sons* [1918] 2 K.B. 467 C.A. See also *Plisson Steam Navigation Co.* v. *William H. Muller & Co.* 1923 AMC 947, DC Md. and *United States of America* v. *Columbus Marine Corporation (The Schroon)* 1926 AMC 178 SDNY which concerned difficulties in providing the cargo on account of strikes.

[68] See also *Plisson Steam Navigation Co.* v. *William H. Muller & Co. (The Nivose)* 1923 AMC 947, DC Md.

[69] See *Bunge y Born* v. *Brightman & Co. (The Castlemoor)* [1925] A.C. 799: ". . . if you wish to make an exception apply to the providing of cargo as distinguished from the loading proper, you must do so in words so clear as to admit of no ambiguity" (per Lord DUNEDIN at p. 807).

[70] See *Essex S.S. Co.* v. *Langbehn* (1918) 250 Fed 98 CCA 5th; and *De La Rama S.S. Co.* v. *Ellis* (1945) 149 F2nd 61 CCA 9th.

In other cases, it is recognized that the defence of *vis major* or impossibility *may* become applicable but the remedy has been refused owing to the fact that the *transportation* or *loading* of the cargo has not been sufficiently prevented by the contingency.[71] Similarly, the preventing effect of congestions has not been considered sufficient.[72]

In some cases, the charterer has tried to avoid paying demurrage by invoking the defences of impossibility or *vis major*. In these instances, due regard must be paid to the particular distribution of risk governing the rules determining the lay-time. Ordinarily, the contracts of affreightment contain explicit clauses ("as fast as can", "with customary dispatch", "weather working days", "strikes mutually excepted", etc.) but, in the absence of a clause, a charterer who agrees to load or discharge the vessel within a fixed time is, under English law, made responsible for the performance of the operation within such time even if prevented by *vis major* hindrances.[73] However, as pointed out by TIBERG,[74] the American cases show a certain inconsistency on this point, since the general principle of *vis major* in some *dicta* has been considered a valid excuse from the charterer's lay-time obligation.[75] TIBERG submits that this inconsistency is due to the Supreme Court case of *Crossman* v. *Burrill*[76] having been misinterpreted to stand for the principle that "*vis major* affords a good excuse for failure to load or discharge within a fixed time agreed upon in the contract, though it is equally often asserted that in such cases the charterer's obligation is absolute".[77] True, it appears from some cases that the courts are well aware of the fact that the *vis major* defence must not be permitted to upset the distribution of

[71] See, e.g., *The Prusa* 1925 AMC 1626 SDNY: "The strike, therefore, although it rendered transportation of coal more difficult, did not make transportation or loading impossible. The strike is therefore no excuse."

[72] See, e.g., *The West Totant* 1927 AMC 882 SDNY. It did not help that the local chamber of commerce declared "the existence of a state of force majeure" in the port. See also *Joseph Cowden & Co.* v. *Corn Products Co.* (1920) 2 Ll.L.Rep. 344 C.A. Congestion alone did not suffice to constitute *force majeure* but only in combination with an embargo on the commercial export freight. Permission to ship was only given "the most urgently required commodities".

[73] See TIBERG p. 157.

[74] TIBERG pp. 158–9, 352.

[75] See for further references ROBINSON pp. 649–52; and GILMORE & BLACK pp. 188–90.

[76] (1900) 179 U.S. 100.

[77] See TIBERG p. 158 at notes 7–8 and p. 405.

risk warranted by the special character of the charterer's obligation[78] but nevertheless it is clearly stated in *Crossman* v. *Burrill* that the defence of *vis major* could afford a complete answer to the claim for demurrage (at p. 111 in the report). And it is undoubtedly still a guiding authority.[79] But the defence is only available in exceptional cases, since there must be "a superior force, acting directly upon the discharge or loading of the cargo and an unusual and extraordinary interruption that could not have been anticipated when the contract was made and not occurring through the connivance or fault of the charterer".[80] And, in addition, there must be *prevention* of the operations. It is not sufficient that the contingency "adds materially to the difficulties and embarrassment of the parties relying on it, if nevertheless it is still possible to perform.[81]

The question whether the party whose performance is affected by a hindrance has a duty to avoid it by not insisting on a performance strictly according to the contractual terms has also a bearing on the preventing effect required to permit the operation of the doctrines of frustration, *vis major* or impossibility. This problem has been treated above with regard to the general principles of contract law (see supra pp. 182, 214, 216) and with regard to the shipowner's duty to substitute another ship (supra p. 298) or choose another route (supra p. 338).

The charterer's duty to accept another performance than the one contemplated at the time of the conclusion of the contract was discussed in *The Teutonia.*[82] Here, the cargo could not be forwarded to the nominat-

[78] See, e.g., *James Hughes Inc.* v. *Charles Dreifus Co.* 1936 AMC 1711 SDNY: "However, in a sense, 'act of God', is a relative term and the particular event must be considered in the light of the obligation, the performance of which it is called upon to excuse" (at p. 1715).

[79] See, e.g., *James Hughes Inc.* v. *Charles Dreifus Co.*, supra: "Exactly what constitutes *vis major* depends upon the facts of each case. It covers an unusual and extraordinary interruption, that could not have been anticipated when the contract was made" (at p. 1713) and "the charterer takes the risk of *all other delays* [my italics], such as those due to bad weather and a crowded state of the docks" (at p. 1714). See also *N.G. Livanos* v. *Bisbee Linseed Co. (The Eugenia)* 1931 AMC 1724 SDNY: "Respondant would, of course, be wholly or partially excused from this obligation in the event of *certain kinds of impossibility* [my italics] or fault attributable to the libellant" (at p. 1728).

[80] *Crossman* v. *Burrill* at p. 113 in reviewing the authorities.

[81] *Hellenic Transport S.S. Co.* v. *Archibald McNeil & Sons Co. (The Iolcos)* (1921) 273 Fed 290 DC Md. at p. 297.

[82] (1872) L.R. 4 P.C. 171.

ed port of Dunkirk on account of the war between France and Germany which broke out subsequently to the charterer's nomination. Instead, the cargo was forwarded to Dover which was a port covered by the range within which the charterer had the right to nominate ports. The charterer had to accept the substituted port and to pay the freight.[83] However, the authority of *The Teutonia* seems to be questioned in *Reardon Smith Line* v. *Ministry of Agriculture*,[84] where it was considered that once a proper nomination had been made, the named port must be regarded as written into the contract of carriage as the contract destination.[85] The American case-law seems to adhere to the same conception.[86]

However, the situation might be different where the charterer has not yet exercised his option when the hindrance intervenes. Is there prevention if there are still ports unaffected by the hindrance available among the enumerated ports, or within the range mentioned in the charter party? Or, in the case of optional cargoes, is there prevention if the charterer could choose to ship a cargo unaffected by the hindrance?[87] The question was raised in *Bunge y Born* v. *Brightman & Co.*[88] with regard to alternative cargoes ("wheat and/or maize and/or rye") and here it was held that the charterer had to avoid the hindrance by choosing the alternative which was still open to him. However, in the *Reardon* case it was considered that the charterer did *not* have to substitute another cargo for the cargo affected by a strike. Furthermore, in the lower court, it was suggested by McNAIR J. that the charterers were free to nominate a port which was already strike-bound.[89]

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[83] See for an analysis of the case SCRUTTON art. 35 Note in fine; SELVIG § 15.3 at notes 7–18; and cf. CARVER § 641 at note 4, where he states with regard to *The Teutonia*, as compared with the case of *Reardon Smith Line* v. *Ministry of Agriculture* (infra), that it might be more reasonable to require the charterer to accept another port of discharge than another port of loading.

[84] [1963] A.C. 691.

[85] However, this point did not have to be decided by the House of Lords.

[86] See the references given by SELVIG § 15.3 note 16; and by TIBERG p. 216 note 4.

[87] TIBERG, p. 218, intimates that if the charterer has not yet made his choice "there is still some ground for saying that no real prevention has been shown, and that the exception should apply only to ports where loading is still possible".

[88] [1925] A.C. 799.

[89] See the comments to the case in Sol.J. Vol. 104 (1960) pp. 61, 80; and cf. the different view with regard to the nomination of strikebound ports in *Yone Suzuki* v. *Central Argentine Railway* 1928 AMC 1521 CCA 2nd.

In American law, some cases indicate that all alternatives must be hindered in order to permit the charterer to invoke the defence of impossibility.

In *P. N. Gray & Co.* v. *Cavalliotis*,[90] the contract concerned the sale of sugar to be transported from Canada to New York and it contained the following stipulation: "Should we have any trouble in getting shipment down in time from the Canadian refinery *the seller has the privilege* [my italics] of shipping from the New York refinery." The Canadian authorities then prohibited the export of sugar. The court stated: "This clause rendered inoperative any defence concerning the embargo, because, where impossible to perform in one place by action of the government, nevertheless it was possible to perform in the other. It is only where both alternatives are rendered impossible that a legitimate defence could be predicated upon an embargo" (at p. 571).[91]

In *Essex S.S. Co.* v. *Langbehn*,[92] a British vessel had been chartered by an American charterer 9 July 1914. The First World War broke out on 4 August 1914 and the vessel was ready for loading at Galveston on 12 August. British vessels were then prohibited "from trading with enemy ports, and from carrying contraband, until the master had satisfied himself that they had not an ultimate enemy destination".[93] The charterer had the option of nominating Rotterdam, Antwerp or Hamburg as ports of destination. On the vessel's arrival at Galveston the charterer asked the master whether he was prepared to take the cargo to Hamburg and, when he answered in the negative, the charterer cancelled the contract. The court stated: "If the charterer had the right to select Hamburg as the port of discharge, it is manifest that the charter party was cancelled by operation of law by the declaration of war" (at p. 99). However, it was stressed that the charterer must exercise his option "in good faith, and without any purpose to evade performance of the charter party" (at p. 100). Cf. *The Innerton*,[94] where the facts were similar. A British vessel was chartered to carry a cargo of grain from a Gulf port to the United Kingdom or to Rotterdam, Amsterdam or Queenstown. The Licensing Committee of the British Board of Trade refused to give a license covering the charter party voyage but indicated that an application for a voyage to a U.K. port would be favorably considered. The charterers, however, insisted that the shipowner should tender the vessel for loading according the original charter terms which he refused to do. The court found it clear that the shipowner in doing so breached the charter party. The charterer's option was available until bills of

[90] (1921) 276 Fed 565 EDNY aff'd (1923) 293 Fed 1018 CCA 2nd.

[91] See also *The Glidden Co.* v. *Hellenic Lines, Ltd.* 1960 AMC 810 CCA 2nd, where reference is made to *Bunge y Born* v. *Brightman, Gray* v. *Cavalliotis* and Restatement Contracts Sec. 467 and sec. 469 Ill. 3 and 4; WILLISTON, Contracts (1936) sec. 1961; and cf. *Ocean Trawlers* v. *Maritime National Fish* (1935) 51 Ll.L. Rep. 299 P. C.

[92] (1918) 250 Fed 98 CCA 5th.

[93] Cf. supra p. 121.

[94] 1944 AMC 570 CCA 5th.

lading had been signed and for this reason the charter party was not proved to be impossible to perform by reason of frustration or otherwise at the time demand was made that the *Innerton* be presented for loading.

The cases dealing with the problem of prevention, when the contracting parties are in a position to avoid the hindrance by choosing alternatives still open to them, seem to be inconsistent. However, the problem must apparently be solved according to the particular facts of each case.

It may very well be that *the words* of the charter party give adequate support for the one solution or the other. Thus, it is possible to find *Bunge y Born* v. *Brightman* and the *Reardon* case consistent with eachother, if the words of the charter party in the former (the charterer was to load a cargo of "wheat and/or maize and/or rye") are understood to mean that he must have any of these categories ready for shipment, whereas the words of the latter (where it was expressly mentioned "charterer has the option . . ." and the exception referred to "the *intended* [my italics] cargo")[95] are understood as a "true" option.[96] In order to clarify the issue a distinction is made between a right of *election* and a right of *selection.* Only the former gives the charterer an "irrevocable right" which means that he does not have to choose another alternative. And the question whether there is a right of election, or only a right of selection, must always depend upon the construction of the charter party. But, although the words in the respective charter parties in *Bunge y Born* v. *Brightman* and the *Reardon* case are admittedly different, it would—at least according to Scandinavian methods of interpretation purporting to find the intention of the parties even behind obscure or ambiguous expressions—seem far-fetched to read the words "wheat and/or maize and/or rye" as not containing a charterer's option. The words do indicate different alternatives and someone has to choose between them. And certainly it could not be the shipowner. The distinction between selection and election does not seem to be very helpful. We will still have to decide whether it is the one or the other or, in other words, whether there is prevention even if one alternative mode of performance is still possible.

[95] The importance of the different wording was stressed by McNair J. in the lower court but the House of Lords did not express any opinion in that particular regard. See [1963] A.C. 691 at p. 721 per Viscount Radcliffe.

[96] See the statements in the *Reardon* case by Viscount Radcliffe (at pp. 718–9) and by Lord Evershed (at pp. 726–8).

In my opinion, the problem calls for a different approach. It would serve the needs of commerce better if less regard were paid to the exact words of the charter party clauses and more attention were directed to the unavoidable test of reasonableness. There might be a considerable difference between cases, where it is more or less indifferent to the charterer whether he choose the one alternative or the other, and cases where he has already made some arrangements which would be upset if he were required to adopt another course.[97] The statement in *Essex* v. *Langbehn*, that the option must always be exercised in good faith, and without any purpose to evade the performance of the charter party, and the observation in the *Reardon* case, that the charterer did intend to ship the cargo affected by the hindrance, could very well indicate that the cases are not as inconsistent with eachother as would appear on the face of it.[98]

The cases holding that the *shipowner* has no duty to substitute another vessel for the one affected by a hindrance also demonstrate that the parties should not be required to accept or tender a different mode of performance if this would be inconvenient to them. However, in some cases, it would undoubtedly be unfair to allow a party to extricate himself from the contract by insisting on a performance strictly according to the contract terms, where such performance has been prevented by some contingency, while there are still unaffected alternatives available which would be nearly as satisfactory. This problem, as most problems connected with excuses from performance, cannot be solved by the application of a definite formula. In the end it becomes a question of reasonableness.

§ 12. *The Double Foreseeability Test*

§ 12.1 *Foreseeability at the Time of the Conclusion of the Contract*

It is frequently asserted that a party may not be freed from the contract if the contingency preventing performance was *foreseeable* at the time

[97] Cf. RGZ (1917) 90.391 *The Takma*: "Der Befrachter braucht sich nicht auf eine Beschränkung seines Wahlrechts, dessen Ausübung mit seinem jeweiligen freien geschäftlichen Massnahmen und Plänen zusammenhängt, einzulassen" (at p. 395). But cf. BGB § 265.

[98] Cf. the statement by Viscount RADCLIFFE in the *Reardon* case: "I think that the decision in the *Brightman* case did lay down certain principles, though not so many or so far-reaching as is sometimes supposed" (at p. 716).

of the conclusion of the contract.[1] However, this statement is far too general to represent the truth. Statements stressing that the hindrance must be "unexpected" or "unforeseeable" or that "it could not have been anticipated" are undoubtedly explained by the fact that the promisor in such cases has not been able to consider the possibility of such events interfering with his performance. If they still happen, his promise may perhaps become unduly burdensome and the original contract is turned into a "different contract". On the other hand, if, at the time of the conclusion of the contract, he was in position to evaluate the risk of the occurrence of the event, it is natural to hold him to his promise. In such a case he could have protected himself by a provision in the contract and the fact that he did not may constitute ample evidence to prove that he was prepared to assume the risk himself.[2] And this fact may also have been reflected in the renumeration which he is entitled to according to the contract.

Thus, the question of foreseeability is of the same type as the question of determining the character of the contingency excusing from performance. In English law, the contingency must turn the contract into a "different contract" or "sweep away its foundation"[3] and, in Scandinavian law, a *vis major* contingency must belong to a category of "unusual" events which normally are not taken into account by prudent promisors in the same position as the actual promisor and therefore not included in his risk undertaking.[4]

As mentioned above, the English cases seem to demonstrate a considerable inconsistency with regard to the question of foreseeability,[5] while the American and Scandinavian cases generally acknowledge that only contingencies which were not—or should not have been—foreseen may free a contracting party from his promise. Presumably, this is explained by the tendency of the English courts to refrain from general statements and to apply the doctrine of frustration to the particular facts of each case, while the Scandinavian courts—and to a certain extent

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[1] See concerning Scandinavian law supra p. 145; English law supra p. 184; and American law supra p. 213.

[2] Cf. LARENZ, Geschäftsgrundlage p. 108: "... weil vorhersehbar, zu dem im Vertrag übernommenen Risiko gehören".

[3] See supra p. 174.

[4] See supra p. 145.

[5] See supra p. 184.

the American courts—sometimes are more inclined to comment upon the *general prerequisites* required in order to bring the remedies excusing from performance into operation. This being so, it is not surprising that foreseeability in English law may, or may not, become relevant,[6] while the Scandinavian courts, in view of the express words of § 24 of the Uniform Scandinavian Sale of Goods Acts and SMC § 131.2 ("ej bort tagas i beräkning"; Engl. "should not have been taken into account") hesitate to admit that a promisor may be excused even if the hindrance was foreseeable. However, in some instances, it may very well be reasonable not to require a contracting party to assume the risk of contingencies which could have been foreseen at the time of the conclusion of the contract. And even if the promisor did reckon with a certain probability of the occurrence of the hindrance, there may be other circumstances which may warrant an excuse from performance, particularly the behaviour and expectation of the promisee.[7] Therefore, unforeseeability is not even in Scandinavian law an indispensable prerequisite. It is one of the factors —and a very important one—to be considered in applying the test of reasonableness. The difference between English law and Scandinavian law is, in this respect, probably not nearly as great as one would be tempted to assume from the general statements expressed in the relevant cases. Perhaps the position of the present Scandinavian law could even be explained by the same words as used by SCHMITTHOFF in his comparative analysis: "Foreseeability is still relevant for the ascertainment of the common intention of the parties but in many regions, including English law, it is no longer the decisive test".[8]

The view that unforeseeability is not an indispensable criterion is expressed in *Bank Line* v. *Capel & Co.*[9] and *Tatem* v. *Gamboa.*[10] Both cases concerned war-time time charter parties prevented from being performed during a certain period. In the *Bank Line* case, the vessel was

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[6] See supra p. 184.

[7] Cf. supra p. 213.

[8] SCHMITTHOFF, Some problems p. 151. See also HALSBURY, Shipping Vol. 35 § 407 at note f, where it is stated that foreseeability "is one of the surrounding circumstances to be taken into account, and does not prevent the contract being frustrated by the happening of the event". See for a discussion regarding foreseeability and *culpa in contrahendo* in Scandinavian contract law RODHE, Obligationsrätt § 29 at notes 69–77 and § 59 at note 55. Cf. also KARLGREN, Avtalsrättsliga spörsmål p. 77 et seq.

[9] [1919] A.C. 435 supra p. 166.

[10] [1939] 1 K.B. 132 supra p. 293.

requisitioned before delivery, and in *Tatem* v. *Gamboa* the vessel was seized by the belligerents shortly after delivery and kept in custody for about two months. It was considered that the requisition "destroyed the identity of the chartered service" and that the seizure amounted to frustration freeing the charterer from paying further freight, since "once the subject-matter of the contract is destroyed, or the existence of a certain state of facts has come to an end, that result follows whether or not the event causing it was contemplated by the parties".[11]

Obviously, in time of war, one has to reckon with all kinds of potential hindrances and dangers preventing performance, but clearly this does not prevent the operation of remedies excusing performance. Scandinavian law expressly recognizes that war-time contracts of affreightment may be cancelled owing to a substantial increase of risk as compared with the situation as it appeared at the time of the conclusion of the contract. The results in the *Bank Line* and the *Tatem* v. *Gamboa* cases are by no means surprising from the viewpoint of Scandinavian law, although it is frequently asserted that the hindrance must be "unforeseeable".[12] The problem is one of *degree* and the expression that the hindrance should not have been taken into account by the promisor is only another method of expressing the opinion that the change of circumstances amounts to a degree where it is reasonable to excuse him from performance.

The question of foreseeability was again considered in one of the Suez Canal cases, *Société Franco-Tunisienne D'Armement* v. *Sidermar S.P.A.* (*The Massalia*),[13] where the nationalization of the Suez Canal occurred *before* the contract was concluded. The closure of the Canal occurred subsequently but *before* the arrival of the vessel at the port of loading. The shipowner cancelled the charter party one day after the vessel had left the port with cargo onboard. Nevertheless, he was entitled to invoke the doctrine of frustration. Although the case was subsequently overruled by *The Eugenia*,[14] the words of PEARSON J. with regard to foreseeability were approved of. He considered that "the possibility,

[11] Per GODDARD J. at p. 138.

[12] The observation to *Tatem* v. *Gamboa* by UNGER, M.L.R. Vol. 2 (1938) p. 233 at p. 236, that "as a result of this decision nothing short of an express agreement providing against discharge will prevent the operation of the doctrine of frustration", seems exaggerated.

[13] [1960] 1 Lloyd's Rep. 594 Q.B. See for a summary of the facts supra p. 346.

[14] [1963] 2 Lloyd's Rep. 381 C.A. See for a summary of the facts supra p. 346.

appreciated by both parties at the time of making their contract, that a certain event may occur, is one of the surrounding circumstances to be taken into account in construing the contract, and will, of course, have greater or less weight according to the degree of probability or improbability and all the facts of the case". And, in *The Eugenia*, Lord DENNING expressed the same view.[15]

The fact that in some English cases statements may be found to the effect that the contingency must have been "uncontemplated",[16] "unforeseen"[17] or "unexpected"[18] does not necessarily mean that they are inconsistent with the above cases. General statements of such kind must always be read with the particular facts of each case in mind and the expressions used leave open the *degree* of unforeseeability required to permit the operation of the doctrine of frustration.

In American law, it is recognized that the doctrine of frustration does not apply when the event has been "reasonably foreseeable". "The doctrine of commercial frustration is predicated upon the premise of giving relief in a situation where the parties could not protect themselves by the terms of a contract against the happening of subsequent events, but it has no application to a situation where the event that has supervened to cause the alleged frustration was reasonably foreseeable and could and should have been controlled by provisions of such contract."[19] But there are also statements to the effect that foreseeability is one among several relevant factors which have to be considered. Thus, SMIT, in proposing a "gap filling" method to supplement the express terms of the contract, suggests that "unforeseeability ordinarily establishes that a promisor cannot reasonably be presumed to have assumed the risk of occurrence of unforeseen circumstances" and that "the applicability of the gap filling doctrine ultimately hinges on whether or not proper interpretation of the contract shows that the risk of the subsequent events, whether or not foreseen, was assumed by the promisor".[20]

American case-law shows frequent examples where the fact that the hindrance was foreseeable has prevented the promisor from invoking

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[15] See supra p. 348.

[16] See, e.g., *Coppee* v. *Blagden, Waugh & Co.* (1921) 6 Ll.L.Rep. 319 K.B.

[17] See, e.g., *The Penelope* (1928) 31 Ll.L.Rep. 96 Adm.

[18] See, e.g., *Brauer & Co.* v. *James Clark, Ltd.* [1952] 2 Lloyd's Rep. 147 C.A.

[19] 157 A.L.R. 1446–7.

[20] SMIT, Frustration p. 287.

the doctrine of frustration or similar doctrines excusing non-performance[21] but it is also recognized that "it is in the end a question *how* [my italics] unexpected at the time was the event which prevented performance".[22] And the fact that *both* parties are aware of the potential hindrances or risks may warrant another approach with regard to the question of foreseeability.[23]

In Scandinavian law, the war risk cases show that foreseeability is certainly in the focus of attention, since the *increase* of risk necessary to excuse the promisor must be measured against the conditions such as they appeared to the contracting parties at the time of the conclusion of the agreement.[24] Nevertheless, SMC § 135 expressly recognizes the possibility of cancelling contracts entered into *during the war* provided there is a sufficient increase of risk. In time of war, it is always possible to envisage an increase of risk caused by changed methods of warfare but, nevertheless, there are examples where the change has been considered unexpected to a degree which made it reasonable to free the promisor from performance.[25] Conversely, an outbreak of war may be so expected that it could be considered included in the promisor's risk undertaking.

Thus, in ND 1947.267 *The Rigmor* SCN, a Norwegian tanker had been fixed for a voyage from Curaçao to Helsinki on 31 August 1939 when the outbreak of the Second World War was imminent. The shipowner cancelled the contract on 8 September invoking SMC § 135 and the war clause in the charter party. However, the clause was held inapplicable, since the ballast voyage from Oslo to Curaçao had not yet begun.[26] And the increase of risk was considered insufficient in spite of the outbreak of war. The shipowner was deemed to have "taken the chance of war or peace" (at p. 270).

[21] *Balfour, Guthrie & Co.* v. *Portland & Asiatic S.S. Co. (The Nicomedia)* (1909) 167 Fed 1010 DC Ore.; *The Poznan* (1921) 276 Fed 418 SDNY; *Rotterdamsche Lloyd* v. *Gosho Co.* 1924 AMC 938 CCA 9th; *Companhia De Navegacao Lloyd Brasileiro* v. *C. G. Blake Co.* (1929) 34 F 2nd 616 CCA 2nd; *James Hughes Inc.* v. *Charles Dreifus Co.* 1936 AMC 1711 SDNY; *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.* (1945) 147 F 2nd 399 CCA 2nd; *The Glidden Co.* v. *Hellenic Lines, Ltd. (The Hellenic Sailor)* 1960 AMC 810 CCA 2nd (where the shipowner even unsuccessfully tried to get a "Suez Canal Clause" into the contract); and cf. *The Ruth Ann* 1962 AMC 117 DC Puerto Rico.

[22] The *Companhia* case supra (at p. 619 in the report).

[23] See *The Tropic Star* supra p. 287.

[24] See the cases mentioned supra p. 262 et seq.

[25] This was particularly the case when Germany pronounced its unrestricted submarine campaign of 31 January 1917. See supra pp. 263, 284.

[26] See supra p. 75.

When the cases concerning the charterer's excuse from performance in case of refused licences are examined, it is important to bear in mind that the charterer may be required to thoroughly ascertain the position before he enters into the contract, since such an investigation is necessary in order to enable him to carry out his commercial engagements. Thus, it is not surprising that, in several cases, the charterer has not been excused when a prohibition of export or import prevailed at the time of the conclusion of the contract. The fact that the charterer *expected* to get a licence has not helped him.

See, e.g., ND 1933.14 Vestre Court of Appeal; ND 1931.193 SCS; ND 1920.157 SCS, ND 1920.221 Maritime Court of Kristiania. See also ND 1922.321 SCN, where it is stated *obiter* that the charterer should not be awarded the benefit of invoking SMC § 159, since there was a prohibition of import at the time when the charter party was entered into (Norw. "Jeg er imidlertid nærmest tilbøielig til at anta, at der ikke ved denne saaledes forandrede situation i virkeligheten kan sies at være statuert noget nyt importforbud, idet den rimelige opfatning efter min mening er den, at det egentlige importforbud maa sies iverksat allerede i mai 1917, og at de senere bestemmelser kun maa opfattes som skjærpelser i dette forbud". At p. 323). But cf. ND 1921.232 SCS; the charterer did not know of the prohibition of import and it was not considered that he should have known it; and ND 1922.408 Maritime Court of Kristiania, where it was considered that a clause in the charter party related also to hindrances prevailing at the time of the conclusion of the contract.

As evidenced by the express provisions of SMC § 131.2, the charterer may, under Scandinavian law, undoubtedly be freed from performance in case of a refused licence caused by an unexpected change of attitude on the part of the authorities. But it seems that the charterer, at least in certain instances, must take into account the possibility that the authorities from time to time may change their policy.[27]

§ 12.2. *Foreseeability at the Time of the Occurrence of the Event*

Foreseeability becomes relevant not only when the position at the time of the conclusion of the contract is appreciated but also when judgment shall be passed on the conduct of the promisor at the time of the occurrence of the event. This problem has a direct bearing on the important question *when*, according to the doctrine of frustration, the contract

[27] See, e.g., ND 1924.181 SCS reversing the decision of the lower courts (one judge dissenting); and ND 1952. 19 City Court of Trondheim.

ceases to operate or when the promisor is obliged to give notice of cancellation.[1]

Even though the situation in many cases may seem clear enough, e.g. in case of the actual loss of the vessel or a totally unexpected outbreak of war or interference by authorities, the case-law shows many examples where an appreciation of the future developments is extremely difficult. And this is particularly true when frustration on account of "inordinate delay" is considered. Who can tell, on the closure of the Suez Canal, how long time it will remain closed? And how long a war will last? Who can accurately determine war risks which may threaten the vessel on the contracted voyage? Clearly, there is no other way of solving the problem than by reference to the remarkable ability of the "reasonable man" who is always in a position to make a proper evaluation of the situation and has the power of resisting the temptation to "snap at the opportunity of extricating himself from the contract".[2]

It is clear that the reasonable man never acts precipitately; he waits a reasonable period of time in order to get sufficient facts enabling him to form a proper opinion as to the probability of an inordinate delay, the seriousness of war risks or the preventing effect of other calamities.[3]

In ND 1929.17 *The Gijones* SCN,[4] where the shipowner was criticized for having cancelled too late, it was stated that he had had reason to wait and see whether the North Sea blockade and the ensuing operations and attitude of the belligerents would prevent the vessel's voyage from Baltimore to Fyen. The charter party had been concluded in December 1916 and the shipowner cancelled on 24 April 1917, two days before the arrival of the vessel at the port of loading. The charterer also maintained that the shipowner, since he had waited so long, should have waited another two days until the vessel had reached the port of loading, but the court held this proposition irrelevant. It would have made no difference, since, in any event, the shipowner would not have gotten the permit from the British authorities to have the vessel visited at Halifax, where the vessel could sail without passing through the dangerous war zone.[5]

In ND 1941.53 Maritime and Commercial Court of Copenhagen, the charterer's complaint that the shipowner had acted too hastily was approved. The charter party, dated 20 November 1939, concerned a voyage with coal from

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[1] See infra p. 401 et seq.

[2] McNair p. 192.

[3] See McNair pp. 188–92.

[4] See supra p. 250.

[5] See concerning the system practised by the British authorities supra p. 130 et seq.

Boston (England) to Nexø (Denmark) and the crew refused to remain onboard the vessel from Copenhagen to Boston invoking § 36 of the Seamens' Act (see supra p. 242). This caused the shipowner to cancel the contract on 22 December referring to SMC § 135. It was considered that the problem regarding the crew might have been solved if the shipowner had waited until the month of January 1940 had elapsed. The hindrance was not of a sufficient permanent character to permit the shipowner to cancel the contract.

In ND 1945.291, the Supreme Court of Sweden recognized the shipowner's difficulties in appreciating the situation and rejected the charterer's contention that the shipowner should have accepted his refusal to tender the cargo for shipment on the outbreak of the war between Germany and Denmark-Norway on 9 April 1940 and not waited until 4 July after the vessel had taken cargo onboard and proceeded to the port of Uddevalla. But the shipowner's contention that it was not until 4 July that "the danger in performing the voyage had increased to an extent where performance became impossible" was upheld. The Supreme Court stated: "Considering the uncertainty prevailing during the period directly following 9 April 1940 regarding the efficiency and duration of the blockade of the Skagerack the shipowner, being responsible for the loading, cannot be blamed for having given Fiskebybolaget [the charterer] notice of readiness and insisting on the cargo being tendered for shipment, and it has not been proved that the shipowner's allegation, that he—assuming that the blockade would not last long—intended to start the voyage as soon as the conditions made it possible, was incorrect". (Sw. "Med hänsyn till den ovisshet som under tiden närmast efter den 9 april 1940 rådde i fråga om Skageracksspärrens effektivitet och varaktighet kan rederibolaget—som i egenskap av bortfraktare hade att tillse att lastning kom till stånd—icke anses hava saknat fog för sin åtgärd att den 12 i samma månad lämna Fiskebybolaget [befraktaren] lastningsnotis och därefter vidhålla sitt krav på lastens avlämnande, och annat har icke visats än rederibolaget uppgivit eller att rederibolaget—under antagande att spärren skulle bliva av kort varaktighet—avsåg att fartyget skulle anträda resan så snart förhållandena det medgåve" (at p. 298).

The Supreme Court of Denmark considered in ND 1920.142 the shipowner's hesitation in cancelling the charter party on the German proclamation of the unrestricted submarine warfare, 1 February 1917. A sailing vessel, at the time lying in Swansea, had been chartered on 12 December 1916 for a voyage from Lisbon to Denmark. The vessel sailed for Lisbon on 18 January. The vessel was loaded subsequently to the German proclamation and bills of lading were issued on 20 March, 1917. However, the shipowner suggested that the voyage should be put off but the charterer insisted upon the voyage being performed. The shipowner did not dare to let the vessel sail and waited until February 1918 when he informed the charterer that the charter party was cancelled and that the cargo should be discharged. The parties agreed that the German submarine warfare entitled the shipowner to cancel, but the charterer maintained that the shipowner had lost his right to cancel by not cancelling within a reasonable time. In the lower court the decision went in the shipowner's favour, since the charterer had not shown that he had suffered any loss from the ship-

owner's delay in cancelling. The Supreme Court affirmed but upon the ground that the shipowner had acted correctly. And it was pointed out that the charterer could have cancelled the contract himself, since the right of cancellation was mutual (Dan. "Allerede som Følge heraf vil Dommen efter Rederiets Paastand være at stadfæste"). In a previous case, ND 1919.176, the Supreme Court of Denmark did not consider that a cancellation half a year after the proclamation of the unrestricted submarine warfare was made within a reasonable time. The shipowner did not lose his right of cancellation, but he had to pay compensation to the charterer for the loss caused by his delay in cancelling.

A rather strict approach was taken by the majority in ND 1944.241 *The Hop* Norw. Arb. by COUCHERON, NILSSEN and MUSÆUS.[6] The charter party had been entered into on 15 November 1939 for a voyage for the carriage of coke from Grangemouth to Oslo and the shipowner cancelled on 13 December 1939. The majority (COUCHERON and NILSSEN) considered that the shipowner should have cancelled towards the end of November and since the maximum freight permitted by the authorities was increased on 5 December 1939 they allowed the charterer as compensation the difference between the permitted increased freight and the freight before 5 December. Apparently, they wanted to neutralize the profit which the shipowner derived from not cancelling before the increase of the maximum freight. It was stated that the shipowner has to present a reason for the time which he has permitted to elapse from the time when he first became aware of the increase of danger until the time of his notice of cancellation (Norw. "må påvise en grunn for den tid, han har latt forløpe fra fareøkingen viste seg, til han gav meddelelse om kanselleringen" (at p. 251)). MUSÆUS stressed the point that the charterer had not even alleged that the shipowner had speculated in the possibility of an increase of the maximum freight and he did not find that the shipowner could be criticized for having waited until he finally took the serious step of cancelling the contract (at p. 254).

It appears from the above cases that, ordinarily, the shipowner is not criticized for not having cancelled the contract as soon as he became aware of the frustrating event.[7] But should he have a *duty* to wait and be held responsible for breach of duty if he cancels before he has ascertained the probabilities of future developments? While it is clear that he must wait a reasonable time, it is also asserted that he must not be required to wait too long. "Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does

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[6] See supra p. 263.

[7] Cf. KEGEL-RUPP-ZWEIGERT p. 46: "Der Schuldner muss sich äussern, sobald er seine Lage überblicken kann." If he does not, he is considered to have accepted the risk ("Gefahrüberhahme").

not bind, and the law ought to be that the parties can gather their fate then and there."[8]

It is natural that the *court*, when judging the behaviour of the promisor, is led to some extent by the after-events. But it is repeatedly asserted that the court must try to resist the temptation to use a knowledge of the developments which the promisor, acting in the belief that there was frustration of the contract, did not have and should not reasonably have had. "Courts, in passing upon such questions, should endeavor to put themselves in the position of the actors in the transaction, and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate; what those concerned have a right to demand of a master, when confronted with unexpected emergencies, is not an infallible but a deliberate and considerate judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not."[9] Knowledge acquired subsequently may only cast a "reflex light" on the situation as it appeared at the time when the appreciation of the probability of future events was made.[10]

As it appears from the charterer's contentions in ND 1929.17 *The Gijones*, that the cancellation was both too late and too early, the shipowner may sometimes find himself in an awkward dilemma. If he acts too hastily he will be liable for deviation or non-performance and if he acts too late he may be liable in damages or even lose his right of cancellation.[11] This problem becomes particularly apparent when there are

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[8] Per Lord SUMNER in *Bank Line* v. *Capel & Co.* [1919] A.C. 435 at p. 454. See also SCRUTTON J. in *Embiricos* v. *Reid* [1914] 3 K.B. 45 at p. 54: "Commercial men must not be asked to wait until the end of a long delay to find out from what happens whether they are bound by a contract or not."

[9] *The Styria* (1901) 186 U.S. 1 at pp. 9–10. See also *Countess of Warwick S.S. Co.* v. *Nickel Société* [1918] 1 K.B. 372 C.A. (per PICKFORD L. J. at pp. 378–9); *A/S August Freuchen* v. *Steen Hansen* (1919) 1 Ll.L.Rep. 393 K.B.; *Court Line* v. *Dant & Russell (The Errington Court)* (1939) 64 Ll.L.Rep. 212 K.B.; *The Wildwood* 1943 AMC 320 CCA 9th; MCELROY p. 174; CARVER § 446; and SCRUTTON art. 31 at note p.

[10] See *The Isle of Mull* (1921) 278 Fed CCA 4th at p. 138; and SCRUTTON art. 31 at note o-p. But cf. the dictum by COUCHERON, ND 1944.241 *The Hop* supra, in criticizing the shipowner for not having cancelled by the end of November 1939 ("Jeg kan ikke finne, at det som passerte i tiden mellom de siste dager av november og den 13 desember kan ha vært av avgjørende betydning for rederiets beslutning om å kansellere").

[11] See further infra p. 406 et seq.

cancellation clauses in the contract of affreightment giving the parties options to cancel on the occurrence of certain enumerated events.[12]

Although a party must not be given the opportunity of claiming an excuse from performance on the mere assumption that there might be a hindrance or a danger sufficiently serious to frustrate the adventure[13] one must not ask of the shipowner or master "infallibility, but the exercise of a reasoned judgment of the situation as it appeared at the moment, having regard to the rights of all concerned".[14]

In some instances, the *character* of the hindrance is such that it may be *presumed* to last sufficiently long to warrant the frustration of the adventure. But the case-law shows that one should not try to apply a general presumtion of inordinate delay to the constantly varying circumstances appearing in matters involving the doctrine of frustration. Such a presumtion has only been permitted with regard to war and hindrances directly caused by war (such as blockades, seizure, requisitions etc.).[15]

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[12] See, e.g., *Moel Tryvan Ship Co.* v. *Andrew Weir & Co.* [1910] 2 K.B. 844 C.A. (per KENNEDY L. J. at p. 857); *Kawasaki Kisen Kabushiki Kaisha* v. *Belships Co.* (1939) 63 Ll.L.Rep. 175 K.B.; and *The Katrine Mærsk* 1951 AMC 324 Arb.

[13] See *Amritlal Ojha & Co.* v. *Embiricos* (1943) 76 Ll.L.Rep. 175 K.B.; *Balfour Guthrie & Co.* v. *A/S Rudolf and Fjell Line (The Harpefjell)* 1941 AMC 869 SDNY; *The Austward* 1940 AMC 1192 DC Md.; *The Kentucky* 1923 AMC 1226 DC Mass.; and *Luckenbach S.S. Co.* v. *W.R. Grace & Co.* (1920) 267 Fed 676 CCA 4th.

[14] *De La Rama S.S. Co.* v. *Ellis (The Dona Aniceta)* 1945 AMC 389 CCA 9th (at p. 393). See also *The Styria*, supra; *The Kronprinzessin Cecilie* (1917) 244 U.S. 12; *Notara* v. *Henderson* (1872) L.R. 7 Q.B. 225; *The Teutonia* (1872) L.R. 4 P.C. 171; *The San Roman* (1873) L.R. 5 P.C. 301; *Palace Shipping Co.* v. *Caine (The Franklyn)* [1907] A.C. 386 at p. 391: "It is nothing short of preposterous to expect that seamen in a strange port shall speculate on the movements of belligerent war vessels, and nicely weigh the chances of capture".

[15] See with regard to war *Geipel* v. *Smith* (1872) L.R. 7 Q.B. 404 (per LUSH J. at p. 414); *Tamplin (F.A.) S.S. Co.* v. *Anglo-Mexican* [1916] 2 A.C. 397 (per Viscount HALDANE at p. 411). See also *Nobel's Explosives Co.* v. *Jenkins & Co.* (1896) L.R. 2 Q.B. 326; CARVER § 448 at note 87; MCNAIR p. 163; MCELROY p. 175; and GRIGGS p. 12. But cf. with regard to strikes *Braemont* v. *Weir* (1910) 102 L.T. 73; *Ropner* v. *Ronnebeck* (1914) 84 L.J. K.B. 392; CARVER § 449; SCRUTTON art. 31 at notes h-m; MCELROY p. 179 et seq.; and GRIGGS p. 12. In *The Penelope* [1928] P. 180, the British coal strike of 1926 caused the frustration of a 12 month charter party. However, SCRUTTON, art. 31 note i, considers it "uncertain whether MERRIVALE P. regarded the coal strike or the embargo on the export of coal consequent upon it as the frustrating event".

§ 13. *Cessation of Contract*

§ 13.1. *Cessation of Contract Ipso Jure*

As mentioned above, in English law, frustration causes the cessation of the contract *ipso jure*.[1] As expressed by Lord SIMON in *Constantine (Joseph) S.S. Line* v. *Imperial Smelting Corporation*, frustration "kills the contract".[2] But it remains valid until frustration intervenes, which in turn has resulted in the principle of "the loss lies where it falls"[3] and the modification of this principle by the Law Reform (Frustrated Contracts) Act, 1943.[4]

If the frustrating event has caused a new situation which removes any doubt as to the applicability of the doctrine of frustration, the principle of automatic cessation causes no problems. Thus, in case of the *actual* total loss of the named vessel there can be no doubt that the contract is off.[5] Consequently, the same principle appears in SMC § 128, where it is stipulated that the contract ceases to operate in case of the actual or constructive total loss of the vessel (Sw. "Går fartyget förlorat eller förklaras det icke vara iståndsättligt, upphöre fraktavtalet att gälla").[6]

From the *travaux préparatoires* it appears that a permanent embargo by a foreign power could be treated in the same manner as a total loss of the vessel.[7] On the other hand, the loss of the cargo contracted for shipment does not, according to SMC § 131.2, cause the automatic cessation of the contract; it is expressly stated that a party who wishes to invoke the principle of SMC § 131.2 must give notice to this effect without unreasonable delay (Sw. "Den som vill åberopa omständighet som nu är sagd give därom meddelande utan oskäligt uppehåll").

Since German law has had a certain influence on the Scandinavian

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[1] See supra p. 169.

[2] [1942] A.C. 154 at p. 163.

[3] *Chandler* v. *Webster* supra p. 169.

[4] Supra p. 171.

[5] But cf. supra p. 298 the discussion concerning the shipowner's duty to substitute another vessel. See SOU 1936:17 p. 183; and SCHAPS-ABRAHAM Anm. 5 to § 628.

[6] The same principle applies to contracts for the carriage of passengers (SMC § 176.2) and is known within other fields of contract law as well, e.g., the contract of lease. See the Swedish Leasing Act of 1907, Chapter 3, § 10.1 (NyttjL 3:10 st. 1) and for further references RODHE, Obligationsrätt § 61 note 2.

[7] See SOU 1936:17 p. 183.

Maritime Codes,[8] it is interesting to note that the principle of the cessation of the contract *ipso jure* has been carried somewhat further in the German HGB. Thus, in HGB § 628, the contract does not only cease to operate ("tritt ausser Kraft") when, before the beginning of the voyage, the ship is accidentally lost, condemned, taken by pirates, captured, or seized and declared good prize by belligerents, but also in case of the loss of the specific goods contracted for shipment.[9] If the vessel or the cargo is lost after the beginning of the voyage the same principle (HGB §§ 630, 633) applies but, in the case of the loss of the vessel, modified by the rules relating to freight *pro rata itineris* (Distanzfracht). In cases of requisitions ("das Schiff mit Embargo belegt oder für den Dienst des Reichs oder einer fremden Macht in Beschlag genommen . . . wird"), inhibition of commerce with the port of destination, blockade of the port of loading or discharge, prohibitions of export or import, or other *vis major* hindrances, as well as certain risks resulting from the outbreak of war, the parties must give notice of cancellation ("Jeder Teil ist befugt, von dem Vertrage zurückzutreten, ohne zur Entschädigung verpflichtet zu sein", HGB § 629). The same principle applies in cases of inordinate delay (i.e. delay causing that "der erkennbare Zweck des Vertrages vereitelt wird", HGB § 637).[10]

Cessation *ipso jure* relieves the contracting parties from the difficult task of giving notice of cancellation in due time. But, in most cases, this is a cold comfort, since they will have to make up their minds anyway whether they are in a position to *act* as if the contract were frustrated without risking an action in damages for deviation or non-performance. Another possible advantage of cessation *ipso jure* could be that the parties are deprived of the possibility of speculation. No matter when notice of "abandoment" or cancellation is given, the proper time for the cessation of the contract will be determined by the law itself.[11] But the temptation to speculate can be counteracted by other means, e.g. by depriving the parties the right of cancellation if notice is not given in due time, or by holding them liable in damages for the loss caused to the other party by a

[8] See supra p. 234.

[9] However, the charterer has the right to deliver substitute cargo provided this can be done before the expiration of the lay-time. See further SCHAPS-ABRAHAM Anm. 8 to § 628.

[10] See SCHAPS-ABRAHAM Anm. 4 to § 637.

[11] See RØRDAM p. 74, in commenting upon the principle of automatic cessation as it appears in BALTCON 9 c.

late notice.[12] In addition, the principle of reciprocity reduces the possibility of speculating; *both* parties can cancel at any time when there are sufficient grounds to do so.[13]

The difficulties resulting from the principle of cessation *ipso jure* are particularly apparent in cases involving frustration on account of inordinate delay.[14] Thus, in *Société Franco-Tunisienne D'Armement* v. *Sidermar S.P.A.* (*The Massalia*),[15] where the vessel had to sail round the Cape of Good Hope instead of through the Suez Canal as intended,[16] the court had considerable difficulties in finding out what the parties had really agreed to do when the vessel faced the impossibility of proceeding through the Canal. It would have been easier if their original contract had remained in full effect according to its original terms until a clear and unambiguous notice of cancellation intervened.

It would seem to be the better solution to give the principle of cessation *ipso jure* a restricted scope of application. If there can be any doubt whether the doctrine of frustration, or similar doctrines excusing from performance, apply, it is better that the parties be induced to clarify their position regarding the problem right away, than to leave the whole matter to be sorted out subsequently by the courts. However, in view of the well-established principle of cessation *ipso jure* in case of frustration, such a solution could hardly be applied in Anglo-American law without special legislation.

§ 13.2. *Notice of Cancellation*

Although, in Anglo-American law, a frustrating event does not require a notice of cancellation to become operative, the position is different when the excuse from performance is based on a clause giving one of the parties, or both of them, the option to cancel on the occurrence of certain enumerated contingencies. A party who wishes to exercise such an option will have to decide if there are sufficient grounds for doing so and the question arises what will happen if he does not give a notice of cancellation within a reasonable time.

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[12] See infra p. 406.

[13] See the observation by the Supreme Court of Denmark in ND 1920.142, supra p. 398.

[14] See CARVER § 447.

[15] [1960] 1 Lloyd's Rep. 594 Q.B.

[16] See supra p. 346.

The problem was considered in *Kawasaki Kisen Kabushiki Kaisha* v. *Belships Co. (The Belpareil)* (1939) 63 Ll.L.Rep. 175 K.B. Here, a time charter had been concluded on 23 April 1937 and it contained the following clause: "In case Japan, Norway, China, U.S.A. or any of the Great European Powers should become engaged in war with any other of these countries, owners and/or charterers have the option of cancelling charterparty." The charterer advised on 2 April 1938 that he intended to use his option according to the clause. The arbitrator found that war between Japan and China had been going on since September 1937 until 2 April 1938 and that, with some insignificant exceptions, no material change had taken place within that period and that a reasonable time for the exercise of the option given by the cancellation clause had elapsed before 2 April 1938. BRANSON J. shared the arbitrator's view and considered that the charter party should be supplemented with an "implied term" to the effect that the option must be exercised within a reasonable time. Reference was made to the dictum of FAREWELL L. J. in *Moel Tryvan Ship Co.* v. *Andrew Weir & Co. (The Langdale)* [1910] 2 K.B. 844 at p. 855.

In *The Simon Benson* 1951 AMC 585 Arb., the vessel had been chartered 14 June 1950 on bare boat terms for one year counted from delivery, which was on 7 July, 1950. The shipowner cancelled on 16 August alleging that the engagement of the United States in the Korean war amounted to "war" in the meaning of the war clause. The charterer, who did not agree to this, also contended that the shipowner had waived his right of cancellation by delivering the vessel on 7 July. He also intimated that the real reason for the cancellation was a rise of the freight market. The arbitrators found that there was a "war" in the meaning of the war clause and stressed that a "party alleging [such] a waiver must show that he has changed his position in reliance on it" (at p. 604).[1] And the charterer had not succeeded in doing this. With regard to the duty to exercise the option within a reasonable time, the arbitrators found that the forty days which had elapsed between the time of the ship's delivery and the service of the termination notice did not exceed a reasonable time (at p. 605). Furthermore, the arbitrators found the charterer's intimation immaterial "that the shipowner's action with respect to delivery and service of termination notice was influenced by the state of the charter market; that it delivered the vessel when rates were low and invoked clause 14 [the war clause] as a means of

[1] Cf. the opinion of the dissenting judge SUNDBERG in ND 1921.232 SCS at p. 236; the charterer's delivery of cargo for loading, which was performed before his notice of cancellation, precluded him from cancelling the contract according to SMC § 159 on account of a prohibition of import earlier unknown to him. Cf. ND 1920.49 SCS; the vessel sailed in spite of the fact that the conditions prevailing at such time entitled the shipowner to cancel the contract, which barred the shipowner from claiming freight *pro rata itineris* when the contract was cancelled in an intermediate port. The Supreme Court reversed the decision of the Court of Appeal to the effect that the shipowner, having sailed when the war risks already existed, was barred from cancelling the contract.

getting the vessel back when it saw that rates were on the rise . . . If a person has a valid reason for terminating a contract—as was the case here—his motives in doing so are not open to inquiry" (at p. 605 in fine).

In *The Katrine Maersk* 1951 AMC 324 Arb., the time-charterer also contended that the shipowner's delay in cancelling had resulted in a "waiver". But it was considered that even if "fighting in Korea prior to November 1950 [notice of cancellation was given on 12 December 1950] constituted warlike operations of sufficient significance to make the cancellation clause operative, the entry of large numbers of Chinese communists into the fighting during that month had two results: (1) it removed any doubt as to the sufficiency of warlike operations in Korea to give rise to the right of cancellation under the charter party, and (2) it introduced a new phase of warlike operations which created independently as of that time a right of cancellation".

In none of the above cases much attention is paid to the *preventing effect* of the contingency invoked as a ground for cancellation.[2] One would have thought that, since the war between Japan and China and the Korean war were geographically limited, it was possible to avoid the war risks. And it is even questionable to which extent the rise of the freight market was caused by the Korean conflict.[3] Therefore, it is improbable that the change of circumstances in these cases would suffice to free the parties from the contract *ex lege* by invoking the doctrine of frustration or impossibility. However, if a contracting party could choose between the option according to the clause and the excuses from performance available *ex lege*,[4] the further question arises whether the excuse available *ex lege* is still open when the *option* has been lost owing to a failure to exercise it within a reasonable time. Since frustration "kills the contract" with clauses and all,[5] it would seem that the contract-

[2] See infra p. 426.

[3] See *The Yankee Fighter* 1951 AMC 579 Arb.: "Since the advent of the Korean trouble, there has been no requisitioning of tonnage, no blockades, freedom of operation of tonnage, without Government direction, negligible changes in war insurance rates since World War II, negligible changes in crew war bonus rates which have been in existence since the termination of World War II, safety of operation on the high seas. And to clear up any misapprehension as to the reason for the high freight market existing since November, 1950, let it be stated this has not been due to the Korean situation but rather to the huge defense and rehabilitation program undertaken by Western Powers."

[4] See infra p. 424 whether clauses exhaustively determine the right to cancel or whether they can be supplemented with remedies available *ex lege*.

[5] It has even been suggested that arbitration clauses are swept away by the frustrating event. See supra p. 170.

ing parties, even when they have lost their right of cancellation under option clauses, still enjoy the protection of the frustration defence.[6]

In *Blane Steamships, Ltd.* v. *Ministry of Transport (The Empire Gladstone)* [1951] 2 Lloyd's Rep. 155 C.A., the charterer had the option to buy the vessel on certain conditions "not later than three months before the expiration of this charter party". The vessel came aground on 5 September 1950 and was abandoned on 6 September. The option was exercised on 7 September and the insurers paid for a total loss. The charterer claimed the right to the amount paid by the insurers but it was held "that in the absence of a specific term to the contrary, there was to be implied in the charter party a term that, if the use of the vessel became commercially impossible during the period for which she was hired, the charter party automatically came to an end".

The position of Scandinavian law seems somewhat confused and the fact that, in this respect, the relevant sections of the Norwegian Maritime Code are inconsistent with the corresponding sections of the Danish, Finnish and Swedish Maritime Codes does not improve things. Thus, in the Norwegian Code § 131.2 it is expressly stated that the *charterer* who does not give notice within a reasonable time (Norw. "uten ugrunnet opphold") must pay any damage resulting therefrom (Norw. "plikter han å erstatte den skade som derav følger"). In addition, the shipowner has, according to the Norwegian Code § 131.3, an unconditional right to cancel the contract if such circumstances are at hand which free the charterer from the contract, while, in the other Scandinavian Maritime Codes, he may only do so if the carriage of the cargo would be "materially inconvenient" for him (Dan. "medføre væsentlig ulempe". Sw. "medföra väsentlig olägenhet"). However, in § 131.3 of the Norwegian Code there is no provision stipulating a duty for the *shipowner* to pay damages in the case of a late notice of cancellation. On the contrary, it seems that his right to cancel can only be exercised if he serves his notice within a reasonable time (Norw. "kan også bortfrakteren heve . . . *når* [my italics] han uten ugrunnet opphold gir meddelelse til befrakteren"). The distinction between the legal effect of a late notice according to who is giving it is presumably explained by the fact that a *shipowner*, who at one time has had the opportunity to cancel the contract under the circumstances then prevailing, should not be able to cancel if the situa-

[6] Unless, of course, the relevant option clause is understood as an express term preventing the implication of a term that the contract, under the circumstances, is frustrated. See supra p. 185 and infra p. 424.

tion *improves* and the contract at the time of the notice of cancellation is possible to perform, while it would be unequitable to force a *charterer* to pay the whole freight if his late notice has caused no damage—or only a damage less than the amount of freight—to the shipowner.

In § 135 of the Norwegian Code it is expressly stated that anyone of the parties must give notice of cancellation within a reasonable time. A failure to do so gives rise to a duty to pay the resulting damages (Norw. "Gjør han ikke det, plikter han å erstatte den skade som derav følger"). The text of § 135 of the other Scandinavian Codes does not even stipulate that notice shall be given within a reasonable time and consequently the legal effect of a late notice is left open. We must therefore turn to the case-law in order to find out whether the different wording of the relevant sections of the Scandinavian Maritime Codes corresponds to a different opinion with regard to the duty to serve notice of cancellation and the legal effect of a late notice.[7]

In Norwegian law, the principle of liability in damages for late notice codified in § 135 of the Norwegian Code was applied in ND 1944.241 *The Hop* Arb.[8] The delay in cancelling was only some 14 days but the fact that the permitted maximum freight was increased in this interval has presumably had some bearing on the outcome. The dissenting arbitrator (MUSÆUS) stressed the point that the right of cancellation was mutual and that a charterer who feared that the shipowner might use his right to cancel might protect himself by using his own right of cancellation and get other available tonnage (at p. 254), while the majority (COUCHERON and NILSSEN) did not consider it reasonable to refer a charterer—who perhaps wanted to contest the shipowner's right to cancel—to safeguard himself by cancelling the contract (at p. 251).

In Danish law, the question came before the Supreme Court (ND 1919.176) before the amendments of the Scandinavian Maritime Codes in the 1930s. The principle now appearing in § 135 of the Norwegian code was used in applying the former § 159 and a shipowner who let half a year elapse before he cancelled referring to the German Proclamation on 31 January 1917 of the unrestricted submarine warfare did not lose his

[7] One would have thought that the fact that the texts are inconsistent demonstrates a different view to the relevant problems but, unfortunately, it happens that the co-operating Maritime Law Revision Committees, even when agreeing in principle, cannot agree on the very text of the provisions.

[8] Supra p. 398.

right of cancellation but was held liable in damages for the loss caused to the charterer by the late notice of cancellation. The contract freight was 51 DKr/ton and the freight for a corresponding voyage increased immediately after the German Proclamation to 95 DKr/ton. In August 1917 when the shipowner gave his notice, the charterer had to pay 110 DKr/ton plus additional insurance, a total of DKr 121.14/ton. The charterer was awarded in damages the difference between the amount he actually paid and the freight prevailing immediately after the German Proclamation. If the shipowner, owing to the late notice, had lost his right of cancellation his loss would have been considerably increased, since he would have had to perform the voyage at 51 DKr/ton, while he could have chartered the vessel at 110 DKr/ton. However, in a later case, ND 1920.142,[9] where the shipowner did not invoke the German Proclamation as a ground for cancellation until one year later, it was not proved that this late notice had caused any loss to the charterer. Since the charterer's only remedy was an action in damages, the lower court saw no reason to consider whether the notice was given too late. However, the Supreme Court stated that the shipowner, under the circumstances, had been entitled to act as he did, and it was added that the charterer could have cancelled himself when he was informed that the vessel was retained in the port of Lisbon.

The Swedish Supreme Court considered in ND 1921.232 a case where a charterer *after* the conclusion of the charter party but *before* the loading of the cargo onboard the vessel was informed of a prohibition of import enacted in the country of destination. However, he permitted the cargo to be loaded onboard without informing the shipowner of the prohibition. Nevertheless, after the loading had been completed, he invoked the prohibition as a ground for cancellation according to the former § 159 of the Swedish Maritime Code (the relevant part of § 159 is now inserted in § 131.2). The Supreme Court found that the fact that the charterer had permitted the cargo to be loaded did not bar him from exercising his right of cancellation according to § 159 (one judge dissenting on this particular point), but held him liable in damages for the loss caused to the shipowner by his failure to give information of the prohibition of import before loading (i.e. for time spent and costs relating to the loading and discharge). This decision conforms with the express provision of § 131.2 of the present *Norwegian* Maritime Code. In a previous case,

[9] See for a summary of the facts supra p. 397.

ND 1920.49, the Swedish Supreme Court rejected the shipowner's claim for freight *pro rata itineris* when he cancelled the contract in an intermediate port invoking as a ground for the cancellation circumstances which entitled him to cancel already in the port of loading. But the Supreme Court awarded him compensation according to the former § 162 of the Maritime Code[10] for the costs of discharge, since he would have been entitled to recover such costs if he had cancelled already in the port of loading. This case is compatible with the principle expressed in § 135 of the present Norwegian Code, and in the Norwegian and Danish cases, in so far as the preservation of the right of cancellation is concerned, but it does not directly express the standpoint that a late notice of cancellation on account of war risks gives rise to a liability in damages. Nevertheless, the court has apparently tried to adjust the relationship between the parties so as to correspond as closely as possible to the situation which would have taken place if the shipowner had served his notice of cancellation in proper time.

There is a further case by the Supreme Court of Sweden which shows that the mere fact that the shipowner does not use his right to cancel the contract when there are sufficient grounds for doing so is not enough to amount to a waiver of his right to cancel.[11] Thus, in ND 1928.170, the vessel had remained in the port of loading a considerable time after the time for loading had elapsed which induced the charterer to believe that the shipowner intended to perform the voyage. However, when the master was requested to take the cargo onboard, he cancelled the contract invoking the charterer's delay in tendering the cargo. The cancellation was found in order and the charterer's claim for damages was rejected.

Cf. the situation when the charterer *in special clauses* has been given a right of cancellation in case the vessel is not ready for loading by a specified time. If it appears that the vessel can not be ready, and the shipowner informs the charterer accordingly, the charterer has no duty to exercise his right of cancellation before the vessel's arrival, or even to inform the shipowner if he intends to invoke the delay as a ground for cancellation, unless the clause contains express provisions to the contrary. SMC § 126 contains a rule to the effect that, upon such notice from the shipowner, the charterer has to inform him within a

[10] On this point the Code was amended in the charterer's favour in connection with the amendments in the 1930s. See SOU 1936:17 pp. 204–5.

[11] But cf. ND 1939.465 Maritime and Commercial Court of Copenhagen, where a seaman's cancellation on account of war risks according to § 36 of the Seamens' Act was considered a breach of contract, since he gave notice only a few hours before the vessel's departure.

reasonable time (Sw. "utan oskäligt uppehåll") if he intends to cancel and that he loses his right of cancellation if he fails to do so. But it is uncertain whether this principle can be applied when the charterer exercises his right according to a cancellation clause.[12]

Summing up, it seems that—in spite of the different wording of §§ 131 and 135 in the Norwegian Code compared with the Codes of the other Scandinavian countries with regard to the legal effect of a late notice of cancellation—there is, in this respect, no significant difference between the laws of the respective countries. Although there is no express support for it in the Danish, Finnish and Swedish Maritime Codes, the cases indicate that a late notice of cancellation under the provisions of SMC §§ 131.2 and 135 will *not* result in a loss of the right of cancellation but only in a liability to pay damages for the loss caused to the party who has been served the late notice. As mentioned above, § 131.3 of the Norwegian Code contains a rule which is different in substance in that the shipowner, under exactly the same circumstances as the charterer, may cancel the contract by invoking hindrances affecting the *cargo*, whereas the other Scandinavian Codes stipulate that he can only do so if it would be "materially inconvenient" for him to perform the contract. Indeed, with regard to the legal effect of a late notice in this specific case—which according to § 131.3 of the Norwegian Code amounts to a loss of the shipowner's right of cancellation (see supra p. 406)—there seems to be no difference either, since the shipowner could hardly maintain that a hindrance which did not cause him to cancel forthwith has been "materially inconvenient" to him.

The special rule of a liability in damages as a consequence of a late notice of cancellation may seem peculiar, since the ordinary consequence under general principles of contract law would be the loss of the right of cancellation.[13] Furthermore, the special rule of liability in damages seems

[12] See *Moel Tryvan Ship Co.* v. *Andrew Weir & Co. (The Langdale)* [1910] 2 K.B. 844; SCRUTTON Art. 34 at notes n-r; CARVER § 613; and JANTZEN, Godsbefordring p. 267 et seq. But cf. the statements from the Swedish *travaux préparatoires* to § 126, SOU 1936:17 p. 181: "Rätten att interpellera föreligger enligt förslagets mening jämväl för det fall, att befraktningsavtalet innehåller kancelleringsklausul." The shipowner may at any rate protect himself by refusing to proceed to the port of loading, since a charterer who has refused to answer the shipowner's notice may have difficulties in proving that he has suffered any damage. See Hansa 1958 p. 2364.

[13] See, e.g., the Uniform Scandinavian Sale of Goods Acts §§ 26–7, 32, 52, 54; ARNHOLM, Passivitetsvirkninger, passim; CERVIN, Om passivitet inom civilrätten, passim; RODHE, Obligationsrätt § 38 H; and KEGEL-RUPP-ZWEIGERT p. 42.

to be unknown in Anglo-American law and is not used in the current war clauses.[14]

However, the special principle of liability in damages as an alternative to the loss of the right to cancel is warranted by the fact that the contract of affreightment—as distinguished from e.g. the contract of sale—involves performance during a protracted period of time, and the circumstances which at one time suffice for cancellation may remain the same—or even become more accentuated as time goes by.[15] And, at least in case of permanent or even increased war risks, it may be manifestly unjust to keep the parties to their bargain owing to the fact that notice of cancellation was not given within a reasonable time. True, the parties can, at least in the case of war risks, always avoid *specific performance* and pay damages for breach of contract.[16] But the damages for breach of contract may considerably exceed damages for the loss caused by the late notice and there is no need to apply a more severe sanction than is required to restore the position between the parties to what it would have been if the notice of cancellation had been given in time. It would seem to be a superfluous luxury to put the party suffering from the late notice in a *better* position than he would have been if he had been served the notice in proper time.[17] Indeed, the *result* of the Scandinavian principle conforms, in one important respect, with the *result* following from the automatic effect of the doctrine of frustration; the court determines under both principles the position of the parties at the time when, in the opinion of the court, the circumstances warranted the cancellation or the frustration of the contract.[18] However, in other respects, the principle of liability in damages may lead to different results than the principle of automatic cessation on account of frustration.[19]

Consequently, *in the absence of a cancellation clause*, the difference

[14] See supra p. 67 et seq.

[15] See, e.g., *The Katrine Maersk* supra p. 405.

[16] See concerning the problem of specific performance the statement by BRAY J. in *Moel Tryvan Ship Co.* v. *Andrew Weir & Co. (The Langdale)* [1910] 2 K.B. 844 at p. 849: "If freights have fallen he can refuse to go and the damages will be nominal"; SCRUTTON Art. 34 at note r; SOU 1936:17 p. 182; and JANTZEN-HASSELROT p. 107. But cf. SELVIG, Naturaloppfyllelse p. 544 et seq.; and SUNDBERG Air Charter p. 407.

[17] Cf., e.g., the facts of ND 1919.176 supra p. 407.

[18] Cf. ND 1919.176 and ND 1944.241, where the *result* could have been the same by the application of the doctrine of frustration.

[19] Cf., e.g., ND 1921.232 supra p. 408.

between Anglo-American law and Scandinavian law does not seem to be as significant as it would appear from the different legal remedies. And, when the right of cancellation is based *exclusively on a cancellation clause*, it seems well warranted to adopt the same solution as has been applied in Anglo-American law, i.e. that the option must be exercised within a reasonable time in order to preserve the right of cancellation.[20]

The problem of a *premature* notice of cancellation was considered in ND 1945.369 SCS, where the situation became worse subsequent to the notice of cancellation. The shipowner ceased the loading on 1 September 1939 and cancelled the contract the following day on the outbreak of war between Germany and Poland. After the outbreak of war between Great Britain and Germany on 3 September, the shipowner confirmed the previous cancellation on 6 September by a letter to "notarius publicus". The Supreme Court considered it immaterial if the conditions prevailing on 2 September were sufficient to warrant a cancellation, since, in any event, they were at hand on 6 September. On the other hand, in ND 1922.250 SCS, where the shipowner cancelled on 18 January 1917 invoking impossibility of getting bunkers at Gothenburg but later on 3 February also invoked the German Proclamation of 31 January giving notice of the unrestricted submarine warfare, it was considered that the latter circumstance, although in itself sufficient to justify cancellation, was immaterial, since the voyage could have begun before 1 February 1917. But if the circumstances justifying cancellation exist at the time of the notice of cancellation it may be that cancellation will be permitted even if other circumstances are invoked when the notice is given.[21]

Thus, with regard to *premature* notice of cancellation the *results* seem to be the same under Scandinavian and Anglo-American law, since the frustrating event will be given effect under Scandinavian law also—even if invoked too early—provided it would have sufficiently affected performance of the contract.

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[20] The question whether the relevant clauses *exclusively* determine the right of cancellation or whether they could be *supplemented* with the right of cancellation, which would have existed in the absence of a clause, will be considered infra p. 424.

[21] See ND 1921.117, The Maritime Court of Kristiania; and cf. *Furness, Withy & Co* v. *Rederiaktiebolaget Banco (The Zamora)* [1917] 2 K.B. 873.

Chapter 5

SOME GENERAL OBSERVATIONS ON CLAUSAL LAW

"The tendency of judicial decisions to broaden the scope of the frustration excuse, and the tendency to construe excuse provisions somewhat narrowly as if they were merely declaratory of the common law, may lead to the result that the law will do as well for the parties as they can do by a stereotyped clause."

PATTERSON, Constructive Conditions in Contracts, 42 Col.L.Rev. (1942) 903 at p. 950.

§ 14. *Introduction*

§ 14.1. *Interrelation between Standard Form Clauses and Legal Principles*

Standard clauses in contracts of affreightment form a kind of "clausal law" which, in practice, renders the same normative rules as statutory law, although of a much more heterogenous character. When laying down normative rules, the drafters of standard clauses, as distinguished from the legislators and the courts, are primarily induced to preserve the interests of their principals and, therefore, the standard clauses tend to become too favourable to one party in the contractual relationship to the detriment of the other.[1] Furthermore, standard clauses appear quickly, often for quite specific purposes. This being so, clausal law becomes somewhat haphazard—old standard clauses are replaced by new ones, while only some clauses possess such inherent quality that they succeed in surviving through the decades.[2] Thus, in many respects, clausal law cannot be compared to the normative rules created by the slow, careful and unbiased legislative and judicial process.

As we have seen, the area permitted clausal law is confined by *mandatory law*, and within maritime law notably by the Hague Rules. The shipowner is prevented from using his strong bargaining position to the detriment of his customers and the mandatory law creates a balance between the contracting parties thus contributing to sound and uniform

[1] However, in the case of so-called agreed documents, a certain balance may be created, but in shipping such documents are so far the exception from the rule.

[2] See for an example of such a clause, the "Near" clause supra p. 329.

commercial practices. And, indeed, to judge from the frequency of Paramount Clauses incorporating the Hague Rules *outside the scope where they apply according to the convention*, this evolution has been favourably accepted by shipowners as well.[3] However, the following exposition will show that also *non-mandatory law* has a strong impact on clausal law, since, in addition to its supplementary power, it exercises a considerable influence on the *interpretation* of the standard clauses.

§ 14.2. *The Importance of Clauses in Contracts of Affreightment*

As we have seen throughout this study, clausal law, in practice, plays a much more dominant role than the statutory provisions embodied in the Scandinavian Maritime Codes. It is certainly no exaggeration to say that, apart from the Hague Rules and corresponding national legislation, the statutory provisions of the Maritime Codes, in all important respects, have been set aside or modified by standard clauses drafted in the English language and emanating from English legal thinking. This being so, considerable attention must be paid to the Anglo-American law where these clauses are rooted.[1] A knowledge of commercial practices within the law of affreightment solely based on the statutory provisions of the Scandinavian Maritime Codes is next to meaningless.

The present state of affairs gives rise to advantages as well as disadvantages. The very nature of clausal law makes it *quickly adaptable to changed conditions*. While the legislator wants to lay down normative solutions of long-lasting character, needing careful consideration, the drafters of standard clauses are prepared to act right away. Furthermore, the standard clauses contribute to the creating of *international uniformity*; the differences between the various legal systems are neutralized and the results of cases taken to trial will tend to become the same, regardless of where, or under what law, the cases are decided.[2] It goes without saying that, in the field of maritime law, international uniformity is not only preferable—it is a must.

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[3] See GRÖNFORS, The Mandatory and Contractual Regulation of Sea Transport, J.B.L. 1961 pp. 46–52.

[1] See, e.g., NJA 1954.573 *The Mimona*; SCHMIDT-GRÖNFORS-WILKENS-PINEUS, Huvudlinjer p. 48; RAMBERG p. 125; and cf. for the same opinion in Germany CAPELLE, Zur Auslegung von Charterklauseln, HansRGZ A 1932 p. 127 at p. 131.

[2] See LORENZ-MEYER p. 62 referring to "ein internationales Charterrecht als selbstgeschaffenes Recht der Wirtschaft".

However, there are also serious disadvantages connected with clausal law. The clauses, which are not always drafted after serious consideration, are often ambiguous and the very technique of adding new clauses to standard forms often leads to a state of contradictory clauses leaving no basis whatever for a logical interpretation.[3] In addition, the fact that the clauses are usually drafted for the purpose of protecting one of the parties in the contractual relationship gives rise to a latent danger of abuse.

In view of the inevitable impact of standard clauses in modern commercial practice, and notably within the field of maritime law, it would be idle to adopt a negative attitude. Instead, we should try to find a method enabling us to preserve the undisputable advantages of clausal law while at the same time neutralizing the disadvantages.

§ 14.3. *Distribution of Risk and Freedom of Contract*

It may seem that the contracting parties should be entirely free to provide for the distribution of risk in their contracts as they wish, since "it makes little difference to the community which party must bear the risk; but it makes much difference that we may know in advance which one must bear it".[1] Indeed, in Scandinavian law, the Uniform Scandinavian Sale of Goods Acts § 24 contains a reminder to the seller of generic goods that he may protect himself by an adequate clause if he does not want to accept the stringent liability imposed upon him by the provision.[2]

Consequently, at first sight, the whole problem seems to be one of *interpretation.* What did the contracting parties intend? Did they express themselves in clear words? And, if they did not, may we *supplement* their contract by implication so as to give the contract "business efficacy"[3] or with statutory provisions and general principles? However, it is not as

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[3] See, e.g., ND 1961.127 *The Granville* Norw.Arb.; and RAMBERG pp. 108, 115 et seq.

[1] CORBIN § 1328 (p. 271).

[2] Sw. ". . . utan så är att han på grund av förbehåll vid köpet är från ersättningsskyldighet befriad . . .". The passage in § 24 was not necessary for the purpose of explaining that the provision yields to a clause in the contract providing for an alleviation of the seller's liability, since it is stated already in § 1 that all the provisions of the Act are non-mandatory. Consequently, it is natural to understand the passage as a reminder. See HJERNER p. 580.

[3] See *The Moorcock* (1889) 14 P.D. 64; and supra p. 174.

easy as that. There must be some *general restrictions* of the parties' freedom to distribute the risk in between themselves and this is particularly apparent when the terms of their bargain are expressed by way of *standard form contracts.*[4]

When the risk of damage to or loss of the goods is concerned, the problem is comparatively simple; it should, of course, be possible to place such risks on the one party or the other. Normally such risks are insured and for the party who has to carry the risk it is more or less indifferent if he has to pay the insurance premium *directly* or *indirectly* by an increased contract price. Here, it would seem to be sufficient to draw the limits for the freedom of contract rather generously. The essential point is to require the contracting parties to express themselves in clear words and to make their terms of the standard form contracts easily available to the party who has to carry the risk so as to enable him to consider the risk and take out the necessary insurance.[5] But when we consider the distribution of risk with regard to the part of the so-called *frustration risk*[6] which does not relate to physical damage to or loss of the object,[7] the problem becomes more difficult. Here, it seems particularly necessary to distinguish between negotiated contract terms and *stereotyped standard form terms* which, normally, are not especially considered by the parties at the time of the conclusion of the contract. In these cases, it is especially important that we not only concentrate on the *individual behaviour* of the promisor but also on the question whether the standard form terms conform with *customary and sound commercial practices.*

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[4] The distinction between terms resulting from individual negotiations and standard form terms, particularly in contracts of adhesion, has been observed and commented upon by several legal writers. See, e.g., RAISER, Das Recht der allgemeinen Geschäftsbedingungen; SCHMIDT, S.S.L. Vol. 4 (1960) pp. 205–7; LANDO, Standard Contracts S.S.L. Vol. 10 (1966) p. 126 et seq.; KESSLER, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Col.L.Rev. (1943) p. 629 et seq.; RABEL, Warenkauf p. 100; CURT OLSSON, Verkan av avtalsklausuler i standardformulär; and KARLGREN, FJFT 1967 pp. 415–434.

[5] In Scandinavian legal writing this problem has been studied by KLÆSTAD, Ansvarsfraskrivelse; and GÜNTHER PETERSEN. Ansvarsfraskrivelse, who conclude that it is permissible to make exception from liability apart from damage or loss caused by the promisor's intent or gross negligence. Cf. from English law COOTE, Exception Clauses.

[6] Cf. supra p. 64.

[7] Cf. the German "Leistungsgefahr".

§ 14.4. *Traditional Remedies Against Abuse of Standard Form Clauses*

Since, ordinarily, standard clauses are not the subject of negotations between the contracting parties at the time of the conclusion of the contract, it is particularly important to neutralize the effect of *unusual* and *onerous* clauses not sufficiently brought to the counter-party's attention. The traditional remedy has been to require the party who wants to enjoy the benefit of his standard form clauses to make a *clear reference* to them at the time of the conclusion of the contract. And even such a reference has sometimes been considered insufficient, particularly when the standard clauses contain unexpected and onerous clauses working too much to the counterparty's disadvantage.[1] In such cases it has been required that the standard form terms have been presented in extenso—and with the unexpected and onerous terms printed conspicuously in big print[2]—or that it could be proved that the counterparty was aware of the exact terms.[3]

There are at least three shortcomings of this technique, viz.,

(1) it induces the parties to an *excessive formal procedure* in connection with the conclusion of the contract, which is particularly disadvantageous in "quick-hand transactions",[4]

(2) although so-called "agreed documents" are more readily accepted, it fails to distinguish sufficiently between the *different character of the standard form contracts* concerned, which may vary from being embodied in an agreed document introduced by an official body of high standing to

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[1] See generally FALKANGER, Incorporation pp. 84–87; and SELVIG, Fraktføreransvar pp. 245–255.

[2] See concerning this, the so-called bold-face rule, the statement by DENNING L. J. in *J. Spurling, Ltd.* v. *Bradshaw* [1956] 1 Lloyd's Rep. 392 at p. 396: "I quite agree that the more unreasonable a clause is, the greater the notice which must be given to it. Some clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

[3] See, e.g., *McCutcheon* v. *David Macbrayne, Ltd.* [1964] 1 Lloyd's Rep. 16 H.L., where House of Lords refused to imply the carrier's general conditions into an oral contract although there had been previous transactions between the carrier and the passenger; these transactions were no evidence of *knowledge* on the part of the passenger. But see *Hardwick Game Farm* v. *Suffolk Agricultural and Poultry Producers' Association, Ltd.* [1966] 1 Lloyd's Rep. 197 C.A., where the *McCutcheon* case was distinguished (*obiter*) and where DIPLOCK L. J., with great respect, thought it wrongly decided (at p. 241).

[4] See LANDO p. 131.

a standard form contract drafted by a powerful party and offered the customers on "take it or leave it" terms,[5]

(3) it makes insufficient distinction *between the terms* in the standard form contract concerned and leads to a fictitious approach to the effect that the adhering party ought to have noticed the terms which were fair but not those which were not.[6]

In this context it is also important to observe that *customs of the trade* may automatically, without any reference, become a part of the individual contract, although, in this respect, Anglo-American law adheres to the traditional technique of implication, while Scandinavian law favours the "normative" approach and recognizes customs of the trade as binding *ex proprio vigore*, thus bringing them *a par* with non-mandatory law.[7] Such custom of the trade can be declared to exist provided it has sufficient regularity and notoriety (Sw. "vunnit erforderlig stadga").[8] But the fact that a custom of the trade is *regular* and *notorious* does not necessarily mean that it is *reasonable*. The Swedish rules determining the activity of the Chamber of Commerce when giving *responsa* regarding the existence or non-existence of a custom of the trade, i.e. the question whether it has sufficient regularity and notoriety,[9] do not require the Chamber of Commerce to venture an opinion as to whether it is *reasonable* as well. The task of determining whether the custom of the trade shall influence the relationship between the contracting parties has been left to the courts. And it seems that the courts, in making their decision, should take notice of the fact that the forces making commercial practices regular and notorious are often *the same as lie behind the creation of standard*

[5] See SELVIG, Fraktføreransvar p. 247 et seq.; and KARLGREN, FJFT 1967 pp. 424–6. See generally GRÖNFORS, Handelsbruk pp. 127–32.

[6] See KESSLER, "Contracts of Adhesion", 43 Col. L. Rev. (1943) p. 638 et seq.; and SELVIG, Fraktføreransvar p. 254.

[7] Since it is stipulated in § 1 of the Uniform Scandinavian Sale of Goods Acts that customs of the trade prevail before the non-mandatory provisions of the Code, it may even be contended that the customs of the trade, in this particular field, have a superior rank in the hierarchy of normative rules. But cf. the criticism by KARLGREN, Kutym och rättsregel.

[8] See TIBERG pp. 140–1; and GRÖNFORS, Handelsbruk pp. 118–26; and cf. from English law CARVER § 551: "When a practice has come to be constantly followed by all those engaged in the trade, and is such that its existence is well known among them, it becomes unnecessary in contracting to insert expressly the condition or rule which it established."

[9] See KARLGREN, Handelskamrarnas responsaverksamhet, SvJT 1967 pp. 50–9.

form contracts.[10] Thus, in view of the close affinity between standard form contracts and customs of the trade a *common approach* is needed. If we are prepared to accept a standard form contract as an expression of a reasonable and common commercial practice, we should not be unduly formalistic when laying down the requirements necessary to make it a part of the individual contract. Conversely, we should be prepared to reject *unreasonable* terms even if the parties, in connection with the conclusion of the contract, have complied with the formality of presenting the standard form contract *in extenso* with the unreasonable terms in big print and appearing quite conspicuously.[11] And it would seem that we should not be too ready to permit the unreasonable term to enter into the contract by the backdoor in the guise of a "custom of the trade".[12]

As previously mentioned, the methods of interpretation give the courts a considerable power to set aside unreasonable terms. The contracting parties are so to speak *prima facie* regarded as reasonable men and the words of their contract are interpreted on the basis that, in laying down the terms of their bargain, they conform with the standard of the reasonable man.[13] Thus, if the terms are ambiguous, the courts will have no difficulty in implying a reasonable term or, in case the topic is controlled by non-mandatory law, to apply the normative rule or principle. However, it may be that the words give a more or less clear indication that the drafter of the contract terms has not been particularly desirous of reaching the standard of the reasonable man. What then? Could the courts still deviate from such an indication of intent expressed in the contract? In fact, they have been able to do so by using the famous principles

[10] See KARLGREN, FJFT 1967 p. 419.

[11] The hostile attitude to general conditions printed on the back page of bills of lading have caused some drafters to call the front page 2 and the back page 1. The effect of such a manoeuvre may be subject to dispute but, at any rate, it gives the spokesmen of a formalistic approach an answer which they deserve. Cf. ATIYAH p. 109: "The requirement of notice is simply a palliative devised by judges to mitigate the problem which they could not solve."

[12] TIBERG, p. 145, uses the test of reasonableness in determining the necessary notoriety: "The individual interests, then, would seem to require a sliding scale whereby the necessary notoriety is determined with reference to the reasonableness of each custom." In English law, unreasonable customs of the trade are set aside by the technique of implication; the contracting parties cannot be taken to have impliedly incorporated an unreasonable custom of the trade. See CARVER §§ 559–60.

[13] This principle is codified in BGB § 157: "Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern."

of *contra proferentem* and *ejusdem generis*, and in doing so they have shown a remarkable skill in reaching "just" decisions by construing ambiguous clauses against their author even in cases where there was no ambiguity.[14]

The principle of *contra proferentem* is well expressed in *Texas & Pacific Railway Co.* v. *Reiss* (1902) 183 U.S. 621: "The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument . . ." But cf. LANDO, p. 134, who points out that it is not necessarily the stipulator who would suffer from the principle: "Many cases show that in doubtful situations the most expedient, reasonable or equitable result is reached, but this is not always the one most in favour of the adhering party". See with regard to the application of the principle in Scandinavian law NJA 1950.86; NJA 1951.765; NJA 1951.138 (ND 1951.589); ND 1951.660 SCS (the decision of the City Court); NJA 1954.573 (ND 1954.749); NJA 1963.683; SCHMIDT, Faran och försäkringsfallet p. 171 et seq.; SCHMIDT–GRÖNFORS–WILKENS–PINEUS, Huvudlinjer p. 49; VAHLÉN, Avtal pp. 191, 200, 208, 257, 273; and KARLGREN, FJFT 1967 p. 427. See also RODHE, SvJT 1968 pp. 190–3; and ADLERCREUTZ, Avtalsrätt II p. 15 et seq. and p. 41 et seq. Cf. from German law Hansa 1959. 2258 (Hans OLG); and Hansa 1962.840 (Hans OLG).

In Anglo-American law, the *ejusdem generis* principle is another efficient tool and, in a sense, the drafter is now caught between Scylla and Charybdis; if he expresses himself in too general words he is threatened by the *contra proferentem* principle and if he starts with specific words adding a general formula he exposes himself to the danger of *ejusdem generis*, since the general formula is construed so as to conform with the genus indicated by the specific words.

The question regarding the meaning of an initial general formula followed by specific words was considered in *Ambatielos* v. *Anton Jurgens Margarine Works* [1923] A.C. 175. Here, the charterers excepted themselves from the liability to pay demurrage by stipulating: "Should the vessel be detained by causes over which the charterers have no control, viz. quarantine, ice, hurricanes, blockade, clearing the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay days not to count." The majority of the House of Lords held that the initial general words of the exception clause were not controlled by the subsequent specific words and that the charterers were protected, while Lord SUMNER found himself unable to agree, since the word "viz.", meaning "that is to say", whether taken by itself or followed at a respectful distance by the word "etc." still means "that is to say". Consequently, he

[14] KESSLER op.cit. supra note 6 p. 633.

found the enumeration exhaustive; ". . . it may seem paradoxical that between 40,000 £ and 50,000 £ should depend upon two Latin abbreviations, "viz." and "etc.", but I do not find this consideration either daunts or helps me" (at pp. 189–91). In this case, the majority seems to have paid some regard to the fact that the general formula *preceded* the specific words (see Viscount CAVE L. C. at p. 183), although it is by no means certain that the decision would have been different if the words had been placed the other way around. "There was no genus which comprised all the five cases specified other than the genus described in the general words" (Viscount CAVE L. C. at p. 183). The case is a good exponent of the grammatical interpretative approach practised by the English courts. See further FALKANGER, Sammenligning p. 555.

Although, in many cases, the methods of interpretation have enabled the courts to reach reasonable results, while still paying lip-service to the solemn principle of freedom of contract, the ingenuity of the drafters of standard form clauses has sometimes placed the clauses out of reach of the courts' mitigating power. And, indeed, the interpretative approach to unreasonable clauses has the greatest part of the responsibility for the existence of the distasteful mass of words appearing in most of the present standard forms of contracts of affreightment.

§ 15. *War Clauses and Non-Mandatory Law*

§ 15.1. *Interpretation of Standard Form Contracts*[1]

The interpretation of standard form contracts creates special problems of quite a different character than those arising in the interpretation of individual contracts.[2] When the contract is expressed in a standard form, the parties have usually not formed any definite opinion as to the exact meaning of various clauses, especially not when there is an abundance of such clauses, as in contracts of affreightment. And in shipping further complications arise owing to the fact that the contracts are usually concluded through the medium of brokers.

The Norwegian arbitration ND 1961.127 *The Granville* (per BRÆKHUS, BECH and GRAM), contains some interesting observations concerning a Baltime charterparty to which the parties had added a Paramount Clause, incorporating the Hague Rules, without deleting the contradictory clauses 9 and 13 in the printed text. It is pointed out that none of the parties had paid any special attention to the adding of the Paramount Clause and to the legal effect that the clause might have. The reason why it was added was, so far as could be ascer-

[1] The following is based on my exposition in Unsafe ports pp. 107–111.

[2] See for a general discussion RAISER, Das Recht der allgemeinen Geschäftsbedingungen; and CURT OLSSON, Verkan av avtalsklausuler i standardformulär.

tained, that shipowners and brokers had certain vague and somewhat erroneous ideas that the clause could be of value to shipowners (at p. 139). This being so, the arbitrators applied the well-known standard clauses 9 and 13 of the Baltime charterparty in spite of the principle that added clauses, as a rule, should prevail over the standard clauses of the printed text.

When the text of standard clauses is clear and unequivocal, we shall not be faced with any problem of interpretation at all; the problem is then of another type and concerns the methods which are used in order to reduce the undesirable effects created by clauses drafted too generously in favour of one of the parties. However, there are numerous examples when the text is ambiguous; the words of the clause may originally have been obscure or too incomplete to regulate the matter, new problems may arise which were not envisaged by the drafters, the contract may be equipped with new standard clauses, or—as in ND 1961.127—with added clauses inconsistent with the printed text, it may be doubtful whether the clause concerns the relevant problem at all, etc. The method of interpreting standard clauses is to some extent related to the method of interpreting legal statutes; in both cases we are left with a text which must be adapted to solve the situation at hand even when the language does not give a definite answer.[3] There are, however, important differences. Statute law always has a legislative history and, although there is considerable disagreement regarding the various methods of using the *travaux préparatoires* when construing statutes, such material contains at least *some* guidance for the interpretation in doubtful cases.[4] As regards ambiguous standard clauses, it is usually impossible to get hold of any material at all which could clarify the intention of the drafters and, even if such material is obtainable, it is doubtful whether it should be deemed relevant.[5] The feasibility of comparing any enlightening material, which may be kept by the documentary committee, with the *travaux préparatoires* depends firstly upon the value of the *travaux*

[3] See RAISER p. 253; CURT OLSSON p. 43; ADLERCREUTZ, Avtalsrätt II p. 22; and RODHE, SvJT 1968 pp. 190–1.

[4] See concerning the importance of the *travaux préparatoires* in Scandinavian law STRÖMHOLM, Legislative Material and Construction of Statutes, S.S.L. Vol. 10 (1966) pp. 173–218; EKELÖF, Teleological Construction of Statutes, S.S.L. Vol. 2 (1958) pp. 75–117; and SCHMIDT, Construction of Statutes, S.S.L. Vol. 1 (1957) pp. 155–98 and cf. concerning the present standpoint of Anglo-American law LØDRUP § 3.24 at notes 81–83.

[5] But cf. SUNDBERG, Law of Contracts p. 147; and Air Charter p. 474.

préparatoires under the system of law concerned, and secondly upon the character of the documentary committee. If the *travaux préparatoires* are treated as no more or less than expert advice to the judge in doubtful cases,[6] and if the documentary committee consists of experts of equal standing with the experts participating in the legislative process, then it seems possible to treat the intention of the "norm-giver" in the same way. But even so it might be argued that the intention of the draftsmen of standard clauses should be wholly irrelevant.[7] On the other hand it is essential to ascertain, if possible, how the standard clauses have been understood by commercial men. In any event, the possibility that the clause has been understood in a way which does not correspond to the intention of the drafters cannot *a priori* be excluded. And if it can be ascertained that the clause has in fact been understood in a certain manner in practice, such a meaning of the clause should prevail even if it does not correspond to the intention of the drafters.[8] Nevertheless, it is difficult, if not impossible, to ascertain how standard clauses, of the type discussed in the present study, are understood by commercial men. And one might ask whose opinion of the clause are we searching for: the opinion of the employees of shipowners, brokers, and potential charterers? Or perhaps the opinion of managing directors or even of their learned counsels?

As there is no guidance to be found from the intention of the "norm-givers" and as, most probably, it cannot be ascertained that the relevant clauses have been understood by shipping people in one way or another, it seems that we are left with the *very text* of the clauses. However, before the text of the relevant clauses is considered, it is important to observe that in Anglo-American law the courts are apt to do their utmost to derive an intelligent and proper meaning by a semantic analysis of the text, no matter how obscure and incomprehensible, whereas the Scandinavian courts seem prepared to discard the clause more readily. The reason for this different approach lies presumably in the fact that Anglo-American courts, as we have seen, prefer to base the result directly on the intention of the contracting parties, while the Scandinavian courts are inclined to yield to the "pressure" of the normative solutions which can be derived from statutory provisions or general principles or, in the absence of such guidance, from a free evaluation of reasons *pro et contra.*

[6] This view is taken by STRÖMHOLM, op. cit. note 4 p. 218.

[7] See RAISER p. 254.

[8] Cf. BECKMAN p. 104.

§ 15.2. *Expressum Facit Cessare Tacitum*

In spite of the fact that, in principle, there is no room for non-mandatory law and implied terms when the contracting parties have regulated the matter by express terms in their contract—*expressum facit cessare tacitum*—we shall see how non-mandatory law and legal principles may affect the contract clauses from two opposite angles;

(1) they may *reduce* the scope of the clause which would follow from a strictly literal interpretation;

(2) they may *broaden* the scope of the clause by *supplementing* non-mandatory law and general principles.[1] And the more *fundamental* and *general* such principles are, the greater their influence on the contract clauses becomes.

The comparison between Anglo-American and Scandinavian law has shown that an excuse from performance is only permitted if a "radically different" situation has emerged as compared with the situation at the time of the conclusion of the contract. In Scandinavian law, it is frequently asserted that such a change of circumstances must have been reasonably unforeseeable, while in Anglo-American law it seems that foreseeability is only one among several circumstances to be taken into account; it may or may not be relevant under the circumstances.[2] With respect to war risks, under Anglo-American as well as Scandinavian law, it becomes in the end a question of comparing the situation as it appeared when the contract was made with the new situation adversely affecting performance. And, in this context, we shall have to consider not only *the type of the "frustrating event"* but also its *effect on the marine adventure* and to which extent the promisor may be considered to have promised performance in spite of such an effect.

As we have seen, many war clauses refer to the *effect* of the event on the possibilities of performing the contract as agreed. Thus, in voyage charters and bills of lading, the common type of war clause, preceding the modern type, refers to events "whereby the free navigation of the Vessel is endangered" and in the modern types reference is made to "war risks" and the "aggravation" of such risks.[3] But, in *time charters*,

[1] Cf. in this regard the same phenomenon with regard to the interpretation of statutory law, supra p. 222.

[2] See supra p. 389. It is doubtful whether there is any significant difference between Scandinavian and Anglo-American law in this respect. See supra p. 391.

[3] See supra pp. 70, 74 et seq.

the war cancellation clauses usually only stipulate that the contracting parties may cancel on the occurrence of certain events. Thus, if such clauses are to be taken literally, the *mere fact* that the event has occurred would suffice *even if it has not the slightest effect on the marine adventure.* Would, in such case, non-mandatory law and general principles be permitted to *reduce* the scope of the clause by *supplementing the prerequisite that the event must have had sufficient impact on the marine adventure?* And, if so, would the same *degree* of prevention, disadvantage or risk be required as *ex lege* in the absence of a clause?

Conversely, if the scope of the war clause is *narrow* and only refers to one or a few calamities—e.g., that the parties may cancel "if the nation under whose flag the vessel sails should be engaged in war"—should non-mandatory law and general principles be permitted to *broaden* the scope of the clause and award the contracting parties the possibility of cancelling in situations not expressly provided for in the clause?

We shall see how these fundamental questions will cause the principle of *expressum facit cessare tacitum* to be applied differently when the expressions used in the war clauses are considered. Thus, if the occurrence of the event does not in any way affect performance—e.g., a minor, distant war where one of the Great Powers is involved—the expression "war" will tend to become narrowly construed. And, conversely, if a situation not expressly mentioned in the clause emerges and seriously affects performance, the courts will be prepared to construe the clause most liberally in the favour of the suffering party. The latter proposition is well evidenced by the cases dealing with the interpretation of the expression "Restraint of Princes" and shall not be further elaborated here.[4] But the question of a *restrictive attitude* to events not—or insufficiently—affecting the marine adventure will be considered. In this context it is also important to observe whether the contracting parties have provided for remedies as an *alternative* to cancellation—and notably by the insertion of "escalation" clauses[5]—since this may have a bearing on the determination of the *degree* of inconvenience required to permit the operation of the cancellation clause.

The exposition of the war clauses in § 2.2 has shown that the clauses are explained by the fact that the parties want to avoid subjecting themselves

[4] See supra p. 279 et seq.; and for cases permitting supplementation of SMC § 135, ND 1947.267 SCN (*obiter dictum*); ND 1945.369 SCS; ND 1915.78; and supra p. 250.

[5] See supra p. 79 et seq.

to the *risks caused by war*. The real question would therefore seem to be whether the contracting parties by not expressly mentioning the war *risk* in the clause have intended to deviate from the original purpose of war clauses in contracts of affreightment. The natural view seems to be that it has been considered *superfluous* to add any words regarding the effect of the outbreak of war, since it has been thought *self-evident that such an event seriously affects the marine adventure.* If this is correct, we should uphold the requirement that the event must have affected the marine adventure in order not to give the contract another meaning than the one intended. However, there is another possibility. It *may* have been thought that the relevant outbreak of war in any event affects the *general economy of shipping* in one way or another and, in particular, causes a rise of the freight market. And, in such a case, the party invoking the war clause would most strongly insist that the court does not look into any potential intention behind the clear words; the words are there and should be interpreted literally. The following cases concerning the interpretation of the expressions "war" and "warlike operations" shed some light as to the attitude taken by the courts in England and the U.S.

In *Kawasaki Kisen Kabushiki Kaisha* v. *Bantham S.S. Co. (The Nailsea Meadow)* (1939) 63 Ll.L. Rep. 155 C.A., the charter party had been entered into on 2 June 1936 between a British shipowner and a Japanese charterer and it contained the following war clause: "Charterers and owners to have the liberty of cancelling this charter-party if war breaks out involving Japan." The shipowner cancelled on 18 September 1937, since on that date Japan and China initiated military operations *animus belligerandi.* However, the Foreign Office considered the situation at that time "indeterminate and anomalous". The Court considered that the word "war" "must be construed, having regard to the general purpose of the document, in what may be called a common-sense way" . . . and that "to suggest that within the meaning of this charter-party war had not broken out involving Japan on the relevant date, is to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law rather than the common sense of business men" (per GREENE M. R. at p. 164).

The *Kawasaki* case lays down the important principle that one should not search for any independent meaning of the word "war"; it must be construed as having regard to "*the general purpose of the document*". In this case, military operations had been performed, which would lead a common sense business man to think that war had broken out. But suppose a formal declaration of war had been given and that it was clear

to anybody that no military operations would follow. Would, in such a case, the meaning of the word "war" according to international law prevail and bring the clause into operation? It is submitted that, if it should be "construed as having regard to the general purpose of the document", it would not give rise to a right of cancellation under the clause.

In an American case concerning the interpretation of the word "war" with regard to the Korean conflict in 1950, *Manning Bros. Inc.* v. *Albatross S.S. Co.* (*The Yankee Fighter*),[6] the court had to consider the meaning of the word "war" with regard to U.N. actions. The court intimated that it would not be reasonable to characterize U.N. forces as "being at war". Thus, the meaning of the word "war" was discussed independently from the meaning which the parties might have had when stipulating in the war clause that the charter party should be terminated "in case of war involving U.S.A.". But, at the same time, the arbitrators made several observations purporting to show that there had not been any material changes with regard to shipping caused by the "Korean trouble".

The tendency to construe the word "war" without considering "the general purpose of the document", appears clearly from another case dealing with the same question, *Seven Seas S.S.Co.* v. *Prudential S.S. Corp.* (*The Simon Benson*).[7] However, in this case, the war clause operated to free the shipowner from performance.

In *The Simon Benson*, the war clause began: "In case of war involving the United States". The court pointed out that the word "involving" was "artfully drawn," since "according to Webster's New International Dictionary" it meant "to draw into an entanglement or complication". This enabled the court to conclude that "the United States has been involved in the Korean war practically from its outset and the fact that it has been fighting as a member of the United Nations and not independently is clearly immaterial" (at p. 593). Reference was made to the *Kawasaki* case in so far as it supported the view that the statement of the official authorities is not decisive. Thus, the fact that President Truman referred to the North Koreans as "a bunch of bandits" and said that the action under the United Nations was a "police action" was thought immaterial. The court made a comparison to the situation in the *Kawasaki* case and to the fact that Japan always referred to its conflict with China as the "China Incident". But, on the other hand, the court does not seem to have been prepared to ascertain what might have been "the general purpose of the document". The charterers' argument that the war clause should be understood as a "frustration clause" was dealt with as follows: "Prudential argues that the parties,

[6] 1951 AMC 579 Arb.

[7] 1951 AMC 585 Arb.

when they used the term "war involving the United States" in clause 14, had in mind a war between the United States and the Soviet Union which might bring about a frustration of the contract. The obvious answer to this argument is that if this was the intention of the parties they should so have expressed it. The clause is unrestricted. It means any kind of a war, declared or undeclared, and between any contending nations" (at p. 602). And the fact that the shipowner's cancellation mainly seemed to have been induced by the rise of the freight market caused the court to make the following remarks: "Lastly, Prudential intimates that Seven Seas' action with respect to delivery and service of the termination notice was influenced by the state of the charter market; that it delivered the vessel when rates were low and invoked clause 14 as a means of getting the vessel back when it saw that rates were on the rise. Mr. Rethymnis candidly admitted that he was not unmindful of the financial side of the matter but said that the thought of war was uppermost in his mind. In any event, this is all immaterial. If a person has a valid reason for terminating a contract—as was the case here—his motives in doing so are not open to inquiry" (at p. 605).

In view of the standpoint taken in *The Simon Benson* it follows *a fortiori* that expressions such as "warlike operations" would suitably cover the "Korean trouble". Thus in *Aktieselskabet Dampskibsselskabet Svendborg* v. *Balboa Transport Corp.* (*The Katrine Mærsk*),[8] it was considered "entirely clear . . . that the contingency stated in the cancellation clause had occurred". And when the nature of the 1956 Suez crisis was considered in *The Ulysses*,[9] the same general approach was taken.

Here, the war clause read: "If war is declared against any present NATO countries i.e. . . . France . . . United Kingdom . . . Owners or Charterers have the right to cancel this charter party upon the completion of the particular voyage the vessel is engaged upon." The time charters, which concerned three vessels, were negotiated in New York 1955. The Ulysses and two other vessels were to be delivered for a five year period "various dates in 1956". The shipowner cancelled on 5 November 1956 invoking the hostilities between Egypt on the one hand and United Kingdom and France on the other, while the charterer maintained that there was no "war" in the meaning of the war clause. After an account of the evolution of the conflict, the District Court of Maryland (reasons affirmed by CCA 4th) stated: ". . . that the speech [Nasser's] of November 1, confirmed by the statement of November 3, constituted a declaration of war even under the technical requirements of international law. I am satisfied that it would be considered a declaration of war by business men generally engaged in the shipping business, and that it satisfied the requirements which the agents of Navios and of Owners had in mind when they negotiated the charterparty" (1958 AMC 1925 at p. 1941).

[8] 1951 AMC 324 Arb.

[9] 1959 AMC 18 CCA 4th.

In *The Ulysses*, reference is made to the opinion with regard to the word "war" by "business men generally engaged in the shipping business". So far no reference is made to the "purpose of the document". But, in addition, the Court refers to what the agents of the contracting parties had in mind when they negotiated the charter party. However, this reference concerns the expression "if war is *declared* against" [my italics], which the charterers succeeded in getting into the charters instead of a broader expression suggested by the shipowner. The court, however, understood the clause as intended to permit the shipowner to take advantage of the rise of the freight market caused by the Suez crisis.

In Scandinavian law, the same problem arose under SMC § 159 before the amendments in the 1930s. This section did not deal with the causal interrelation between the event and the possibilities of performing the contract as agreed. According to its literal wording it permitted cancellations when the vessel or cargo had become "unfree" through the outbreak of war. Nevertheless, the cases show that the courts required that there have been a real risk before the contract could be cancelled.[10]

In ND 1915.78 the Supreme Court of Denmark, in supplementing the war clause of the charter party, stated: "Den ovennævnte Klausul i Certepartiet findes at maatte forstaaes derhen, at den ikke udelukker Anvendelsen af de nærmere Regler i dansk Sølov (§ 159) og i tysk Lovgivning (Handelsgesetzbuch § 629), hvorefter hver af Parterne uden at give nogen Erstatning kan hæve Fragtkontrakten, naar der før Skibets Afgang fra det Sted, hvor Rejsen skal begynde, udbryder Krig, der gør Skib eller Ladning ufri. Retten kan ganske vist ikke forstaa denne Bestemmelse derhen, at den skulde finde Anvendelse i alle Tilfælde, hvor Skibet tilhører en krigførende Magt. Men den findes at maatte anvendes, naar Parterne med en vis Føje maa regne med Fare for Opbringelse." (Transl. "The cited clause of the charter party cannot be taken to exclude the rules of the Danish Maritime Code (§ 159) and of German law (Handelsgesetzbuch § 629), permitting the parties to cancel the contract of affreightment without paying compensation, when, before the vessel's departure, a war breaks out making the vessel or the cargo unfree. The court finds it impossible to understand this provision to the effect that it should be applied in all events where the vessel belongs to a belligerent power. But it should be applied when the parties had reason to expect a risk of seizure.")

There is no reason why the Scandinavian courts should look upon war clauses any differently from the "statutory" war clause of § 159 as long as there is no indication that the purpose of the war clause is different

[10] See supra p. 244 and, in particular, NJA 1919.387 SCS; and ND 1915.78 SCD.

from the purpose of the "statutory" war clause.[11] While, in Anglo-American law, and notably in the United States, the courts have felt themselves bound by the meaning of the words "war" and "warlike operations" as such, the Scandinavian courts will presumably pay more regard to the context in which the words have been used and notably the *intended function of the clause*. And, in searching for the intended function of the clause, the courts will probably yield to the pressure of the normative solutions embodied in non-mandatory law and require that there have been a danger or a prevention affecting the marine adventure.[12]

The fact that, apart from the very text of the clause, we have little guidance in finding out the intended function of the war clauses, has presumably induced the courts in England and the United States to feel even more restricted "within the four corners of the document" than would follow if the terms had been negotiated individually.[13] However, when we are left with the text alone, we seem to be forced into the artificial procedure of considering the words in a context which presumably never entered the minds of the contracting parties until one of them discovered a golden opportunity of extricating himself from the contract for the purpose of taking advantage of the fluctuation of the freight market.[14] In *The Simon Benson* (supra p. 427), it was suggested that, if the contracting parties wanted to have the clause understood as a "frustration" clause they should have said so. It is respectfully submitted that we would reach more equitable results if we looked upon the problem the other way around. If it was the intention of the parties that the clause should operate in another way than a traditional war clause, they should have expressed it and added "whether endangering the vessel's trade or not"[15]

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[11] Cf. generally concerning *force majeure* clauses VAHLÉN, Avtal p. 195.

[12] Cf. the same approach taken to *force majeure* clauses in sales contracts NJA 1918.20; NJA 1918.35; and NJA 1942.548.

[13] In *The Ulysses*, the wording of the war clause was discussed at the time of the conclusion of the contracts but it does not appear whether the question of the causal interrelation between the event and the performance of the marine adventure was considered.

[14] It should be observed that the freight market may very well deteriorate on account of *other* factors, while, at the same time, the event—e.g., an unimportant, minor conflict—brings the clause into operation. In such a case the *charterer* is the one to take the jackpot.

[15] Suggested in NC p. 3743.

or similar expressions. This would turn the clause into a provision openly allowing the parties to reconsider their position after the occurrence of the event, no-matter if it affected performance or not. However, the intention of basing the contract on the conditions prevailing at the time of the conclusion of the contract would certainly be much better explained in a different *type* of clause, and notably an "escalation" clause.

Furthermore, it seems strange that in ordinary time charters, perhaps covering a considerable period of time and with detailed "escalation" clauses ameliorating the hardship for the shipowner, the war clause should be regarded as a special kind of "combined war and freight market" clause, governed by certain "keywords", instead of a safety-valve intended for calamities seriously affecting the position of the contracting parties. To use the war clause for such purposes leads to confusion; the clause will possess "hidden forces", normally to the shipowner's advantage and the charterer's detriment, but sometimes also the other way around.

In view of the impact of Anglo-American law, and the discussion regarding the relevant clause in shipping circles, we cannot exclude the possibility that war clauses of the type here discussed will *now* be understood in a different sense than before the above cases were decided. The effect of the court decisions may be twofold; the force of precedent makes it probable that the same clause will be given the same meaning the next time it is considered by a court in the same country and, when this fact has become sufficiently well known in commerce, the parties will be bound by the clause as it is generally understood, even if strong arguments could be raised against the interpretation once practised by the courts.[16]

There might be raised an objection against the suggestion of incorporating a requirement that the enumerated events must affect the marine adventure, since we must then determine *how* and to which *degree* the events shall affect the position of the contracting parties in order to bring the clause into operation. Is the effect on the parties' general economical situation relevant? Or must there be war risks endangering the vessel's trade? And, is *any* causal interrelation between the event and the performance of the contract sufficient? If we apply the same stringent require-

[16] See RAMBERG p. 110; and cf. GOMARD, Forholdet mellem Erstatningsregler i og udenfor Kontraktsforhold, Copenhagen 1958, p. 338, where he stresses the fact that an agreement concerning a matter which is regulated by a known principle of law may, owing to the circumstances, be said to contain a silent promise by the parties to be bound by such a principle.

ments which would have governed in the absence of a clause, it may be contended that the clause is entirely superfluous and that it can not have been the intention of the parties that the clause should be devoid of any meaning. Nevertheless, the last proposition is hardly tenable. The present study has shown that the drafters frequently insert clauses conforming with the underlying non-mandatory law. It would therefore seem that, if the parties did not qualify the nature of the causal interrelation—e.g., by words such as "endangering" or "affecting"—, we shall have to supplement the contract with the principles governing *ex lege* in the absence of a clause.[17]

The present situation with regard to the interpretation of the relevant type of war clauses is confusing. In Anglo-American law, a peculiar type of "combined war and freight market clause" in the disguise of a traditional war clause sometimes forces the courts into artificial interpretations of the "key-words" ("war", "warlike operations", etc.) and, in Scandinavian law, it is uncertain whether this particular type of clause should be given the same meaning as in the above-mentioned American cases. This should be an incentive for the contracting parties to clarify how they want the clause to operate. If they want it to operate as a "safety-valve" for disastrous calamities preventing or endangering the vessel's operations under the charter-party, they should add "provided the vessel's trade is prevented or endangered by such events". And if they want to exclude the element of speculation, always more or less pertaining to time charters of long duration, they should preferably do so in another *type* of clause, where the charter hire is made dependent upon the market fluctuations and the increase or fall of costs, i.e. in "escalation" clauses.[18]

§ 15.3. *Some Remarks in Conclusion*

§ 15.3.1. *A modern approach*

We have seen that the traditional approach upholds the indispensable requirement that the party who has to carry the risk of the contingency, or is otherwise adversely affected by a standard form clause, should, at the time of the conclusion of the contract, have adequate means of

[17] Cf. the cases mentioned supra note 12.

[18] See for such a type of clause, the "Price Revision" Clause (cl. 13) in U.S. War Department (1941) Time Charter Party, STRETCH pp. 240–3.

becoming aware of his position in the relevant respect. However, we have also seen that the courts, in their efforts to reduce the effect of "onerous" terms, sometimes have applied this requirement too stringently against the party deriving the benefit of the clause, while, at the same time, encouraging him to have his clauses redrafted and a system worked out for the purpose of defeating the adhering party's complaint that the clause has not been efficiently brought to his knowledge at the time of the conclusion of the contract. By resorting to this indirect technique the courts have contributed to the present state of affairs where commercial men, owing to the mass of words appearing in most standard forms to contracts of affreightment, since long have surrendered and given up the idea of acquiring an adequate knowledge of their position under the contract by reading its terms as they appear from the standard form and, presumably, this goes for clauses conspicuously written in big print too.

It would seem that, in addition to the requirement that the adhering party to the standard form shall have adequate means of getting to know its contents, we need a remedy whereby the courts directly could rule out

(1) *unexpected* clauses not conforming with customary practices and

(2) *unreasonable* clauses, even if they should appear with some consistency in the relevant trade.

When applying such a remedy, especially devised in order to cope with the problem of *contracts of adhesion*, the courts should not concentrate on the knowledge and feelings of the *individual* contracting party—indeed, not even those of the average man engaged in the relevant trade—but rather on the insight of a customer well aware of the current commercial practices.[1] Neither statutory provisons nor the terms of standard form contracts are read by the average man but, although in certain cases he may have to suffer from his lack of prudence, it should not be the task of the courts to protect him to the extent that the terms of standard form contracts *de facto* unknown to him, but conforming with commercial practices, should be set aside. Hence, the normative rules from statutory law and standard form contracts practised in commercial life will be treated in a similar way. But, clearly, this cannot be done until we get

[1] Cf. LANDO p. 132: "... the [General Conditions] of the stipulator should in some way be made accessible to the adhering party, but *habitués* and newcomers should not be treated differently."

sufficient reassurance that the normative rules from these different sources are based on the indispensable requirement of reasonableness.[2]

Is there, then, such a remedy available which could solve the difficult problem caused by the advent of standard form contracts? Unfortunately, it would seem that the position is different in the different countries.

In Scandinavian law, a general principle of reasonableness appears from § 8 of the Uniform Scandinavian Promissory Notes Act[3] and, in Swedish law, the inherent force of this principle has turned it into a general principle of law to the effect that terms in *any* type of contract clearly repugnant to good commercial practices or else unconscionable[4] may be mitigated or entirely set aside.[5] When the Promissory Notes Act was being prepared it was suggested by the Swedish drafters that the principle be inserted in the Contracts Act instead so as to give it a general application, but a unanimous agreement could not be reached on this point between the drafters representing the respective Scandinavian countries.[6] In Norway, there is a broader legislative support in § 18 of the Price Act (Prisloven) stipulating that contract terms working unreasonably to the other party's detriment, or which are clearly repugnant to the interests of society, may not be demanded, agreed or maintained (Norw. "Heller ikke må det kreves, avtales eller opprettholdes forretningsvilkår som virker urimelig overfor den annen part eller som åpenbart er i strid med almene interesser").[7] However, the principles enabling the courts to set aside or mitigate unconscionable contracts have been initiated and developed primarily with regard to contract terms entered into after individual negotiations and have no *specific* reference to standard form contracts. This being so, it is strongly warned in the *travaux préparatoires* against an application of the principle in other than cases

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[2] See for a system implying the approval of the standard form contracts by official bodies LANDO p. 139 et seq.

[3] See supra p. 161.

[4] "Unconscionable"=lying outside the limits of what is fair and reasonable. See further infra p. 436.

[5] See further RODHE, Adjustment pp. 169–70, where an account is given of similar provisions in other fields of legislation.

[6] See NJA II 1936 p. 52.

[7] Since § 18 of the Price Act primarily concerns *the price*, the scope of the cited passage is subject to dispute. See ARNHOLM, Privatrett II pp. 265–7 with further references.

of obvious unreasonableness (Sw. "uppenbar otillbörlighet").[8] Nevertheless, it would seem that the principles contain sufficient inherent force and elasticity to become applied with due regard to the special features pertaining to standard form contracts.[9] If so, Scandinavian law already provides sufficient support to enable the courts to treat standard form contracts in a way which would serve the needs of society better than the traditional semi-covert techniques.

The problem of the application of the principle of reasonableness to standard form contracts has recently been considered by KARLGREN,[10] FJFT 1967 p. 415 et seq., who points out that § 8 of the Uniform Scandinavian Promissory Notes Act, apart from the admonition that it should only be applied in cases of "obvious unreasonableness", regards the situation when the relevant term *in casu* brings about unreasonable results. This may be the case even if the term was reasonable at the time of the conclusion of the contract but its application *later* becomes unreasonable owing to changed conditions. Thus, an element from the doctrine of presupposed conditions[11] seems to have been worked into § 8 and this fact alone requires a restrictive attitude (at p. 430). Furthermore, the section does not provide a ground for ruling out unreasonable terms *as such*; it is only when their application *in casu* gives rise to obvious unreasonableness that the section comes into operation. This being so, the principle of § 8 has only rarely been applied in practice.[12] KARLGREN considers this attitude well warranted with regard to terms negotiated individually but suggests an extended use of the principle *in case of standard form contracts.* He points out that in such a case it would suffice to yield to the non-mandatory law (at p. 431). And *de lege lata* there would be no reason to feel unduly restricted by the words of § 8. Consequently, it should be possible to rule out unreasonable standard form terms *as such,* even if they did not work unreasonably *in casu.* KARLGREN also refers to BGB §§ 138 and 242 which have enabled the German courts to cope with the specific problems of standard form contracts.[13]

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[8] See NJA II 1936 p. 51.

[9] Cf. VAHLÉN, Avtal p. 246.

[10] Några synpunkter på den köprättsliga formulärrätten, FJFT 1967 pp. 415–34.

[11] See supra p. 150.

[12] See FJFT 1967 p. 431 note 12 for cases where the application of § 8 has been rejected. See for further references VAHLÉN, Avtal p. 236 et seq., where he points out that the principle is especially warranted in case of standard form contracts (at pp. 238–9).

[13] See, e.g., BGHZ (1964) 41.151 (storage of furniture; a provision reversing the burden of proof for bailee's negligence set aside); and BGHZ (1962) 38.183 (bailee's exception for gross negligence on the part of himself and his employees in leading position rejected). See the comments by LARENZ p. 96.

The standpoint concerning standard form terms is discussed by the Swedish Supreme Court in NJA 1962.159 *The Gudur*, where the shipowner in a standard form transhipment clause had exempted himself from liability for a part of the transit to the agreed destination (see supra p. 227). The majority, while acknowledging that such a term may cause inconveniences to such a degree that it should be set aside ("Det sagda utesluter ej, att under särskilda förhållanden olägenheter av nyss antytt slag kunna te sig så stötande, att bortfraktaren kan finnas böra svara för skada å godset utan hinder av friskrivningsklausul", at p. 165), found that no inconvenience had arisen *in casu*. KARLGREN dissented and stressed the point that *clauses of such type* as the one considered in the case should not be upheld. The requirement that clauses of the relevant type should be more specific seemed to him well warranted by general principles of law for the purpose of alleviating abuse and inconveniences following from an exploitation of freedom of contract in the extreme guise of clausal law ("Kravet på en konkretisering av ifrågavarande konossementsklausuler synes ock motiverat med utgångspunkt från allmänna rättsgrundsatser, till mildrande av de missbruk eller olägenheter, som ett utnyttjande av avtalsfriheten i 'formulärrättens' extrema form är ägnat att medföra", at p. 169).

The need to give the courts power to rule out unconscionable contracts and clauses has been strongly felt in the United States. "The deficiencies of [these] semi-covert techniques of policing against unconscionability are obvious . . . first, by avoiding a direct holding on unconscionability, the courts have implied that unconscionable contracts are really not bad, thereby encouraging draftsmen to reword these offensive contracts and try again; second, by evading the real issues, the courts have failed to set minimum standards of decency for the commercial community; and third, by disguising the methods of policing against unconscionability, the courts have generated confusion respecting the proper methods of contract interpretation."[14] And compared to these deficiences of the traditional techniques the provision of UCC 2–302 heralds a new approach:

"(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

[14] HAWKLAND p. 46.

The last paragraph of UCC 2–302 is especially interesting, since it indicates that the question of unconscionability may have to be determined after an evaluation of the "commercial setting, purpose and effect" of the relevant contract or clause. The official comments to UCC contain the following enlightening remarks:

"This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."

Thus, for the purpose of the present study, it should be noted that the doctrine of unconscionability must be used with due regard to the main features of the respective contracts of affreightment and without disturbing the typical allocation of risk pertaining to such contracts. It refers to the situation *at the time the contract was made* and it allows the court to refuse to enforce the contract in its entirety, *or* to set aside the unconscionable clause, *or* to limit the application of the clause to avoid any unconscionable result. Hence, the court possesses sufficient remedies to rule out the unconscionable clause *as such*; it does not seem to be an indispensable requirement that the clause have caused hardship to the other party *in casu*. The provision applies to contracts and terms negotiated individually and no specific reference is made to standard form contracts. And it appears from the very word "unconscionable"[15] and from the comments to the section that it should only be applied in exceptional cases; in "situations in which one party tries to take 80% of the pie". The cases in which the section has been applied mainly involve warranty disclaimers and limitation on remedies.[16] Nevertheless, the

[15] From "conscience" (samvete).

[16] See HAWKLAND p. 47.

section is sufficiently broad to give the court an efficient weapon to deal with the special problems arising under standard form contracts and to set the standard of reasonableness accordingly.

In English law, the need for a new approach is also strongly felt but until now the courts have mainly resorted to the traditional, interpretative remedies. There are to my knowledge no cases supporting the view that a term could openly be set aside on account of its unreasonableness. However, the *theory of the fundamental term* has sometimes assisted the courts when the interpretative technique has failed to provide the necessary support. Hence, "exempting clauses are nowadays all held to be subject to the overriding proviso that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it."[17]

The theory of the fundamental term was used in the case of *Hardwick Game Farm* v. *Suffolk Agricultural and Poultry Producers' Association, Ltd.* [1966] 1 Lloyd's Rep. 197 C.A., where the court on the one hand declined to follow the stringent requirement of notice laid down in *McCutcheon* v. *David Macbrayne, Ltd.* [1964] 1 Lloyd's Rep. 16 H.L. (supra p. 417), but on the other hand refused to give effect to a "latent defect" clause invoked by the seller as a defence against the buyer's claim of compensation for the damage caused by the fact that the feeding stuff sold contained deleterious substance which killed or stunted his birds. "To deliver poison to the extent it was found to be in these deliveries defeats the whole purpose of the contract. The goods not only failed to nourish as food but brought about destruction and deterioration" (per SELLERS L. J. at p. 221). See for further references REYNOLDS, L.Q.R. Vol. 79 (1963) p. 534 et seq.; and FALKANGER, Sammenligning p. 557 et seq.

Consequently, from an international viewpoint, we seem to be in a stage of development, with regard to the attitude to be taken towards unreasonable terms in standard form contracts.

As previously mentioned, the impact of non-mandatory law works in the other direction too; it may enlarge the excuses from performance provided for in the clause. Have we, then, reached a stage where "the law will do as well for the parties as they can do by a stereotyped clause"?[18] I think the answer must be no and notably for the following reasons.

We have seen statements to the effect that the parties should not be credited with the "foresight of a prophet" and their lawyers with the

[17] Per DENNING L. J. in *J. Spurling, Ltd.* v. *Bradshaw* [1956] 1 Lloyd's Rep. 392 C.A. at p. 395. But cf. the traditional approach in the *Suisse Atlantique* case [1966] 1 Lloyd's Rep. 529 H. L. at pp. 548, 562, 564.

[18] PATTERSON, supra p. 413.

"draftsmanship of a Chalmers"[19] and, under Anglo-American as well as Scandinavian law, we have been prepared, by various devices, to supplement their contracts with excuses which they did not provide for. And, indeed, this function—although a threat to the "sacred" principle of *pacta sunt servanda*[20] and the "not making a new contract for the parties theory"—should be welcomed, since we certainly do not want stipulators possessing outstanding draftsmanship and supreme foresight to demonstrate their abilities in lengthy contract clauses. Nevertheless, in a question such as this one, where the bargain may be ruinous owing to changed conditions, it is natural that the parties prefer to protect themselves by express provisions rather than to speculate on the possibility of the courts helping them out of the difficulties if war risks should intervene and seriously affect performance.

Moreover, the courts adhere to the "all or nothing" principle; either the contract stands as it is or falls completely. The courts have not been readily prepared to assume "the confusing, if not impossible, task of adjusting the equities between the owner and the charterer",[21] although some cases show that the courts in time charters have been forced to *modify* the terms of the charter when a requisition has not been deemed sufficient to warrant the frustration of the contract.[22]

Should we, then, with respect to contracts of affreightment consider the traditional "all or nothing" principle too rigid and propose a principle of modification? Thus, the courts' mitigating power would be considerably increased and we could, perhaps, expect more equitable results *in casu.* On the other hand, it may be subject to serious dispute whether an increased interference of the courts is at all warranted and, in any event, the courts themselves will certainly find themselves in trouble when invited to "adjust the equities between the parties". True, if the needs of society are better served by a principle of modification than by the traditional "all or nothing" principle, the courts must be ready to assist us, but, presumably, we will in such a case have to accept a rather heterogenous case-law creating uncertainty with regard to the proper placing of the

[19] Lord DENNING in *British Movietonews* v. *London & District Cinemas* [1952] A.C. 166, in [1951] 1 K.B. 190 at p. 201. His suggestion, that in view of this the court should be able to qualify the contract, was rejected by the House of Lords. See supra p. 172.

[20] See supra p. 162.

[21] *The Isle of Mull* (1921) 278 Fed 131 CCA 4th at p. 135.

[22] See, e.g., *Chinese Mining & Engineering Co.* v. *Sale & Co.* [1917] 2 K.B. 599; and supra p. 303 et seq.

risk and with the ensuing difficulties in procuring any available insurance coverage.

While the principle of modification seems unsuitable owing to the particular distribution of risk in contracts of affreightment, it may very well be preferable in other contract types, such as the sale of unascertained goods and contracts concerning re-iterated performance over a longer period of time. See NJA 1923.20 (the buyer could by offering an appropriate additional compensation bring the seller below the limit of sacrifice (the "Opfergrenze") and avoid his repudiation on account of the violent increase of prices caused by the war[23]); the decision by Eidsivating Court of Appeal 9 November 1964, commented upon by ERIKSRUD, LoR 1967 pp. 33–40; and for further references RODHE, Adjustment pp. 183–4. In Germany a general principle of modification has been suggested by KEGEL, Veränderungen pp. 204, 234, who suggests that each party *in dubio* should bear an equal part of losses caused by "Umstände, die ausserhalb des Machtbereichs beider Vertragsteile liegen und mit denen [sie] nicht zu rechnen brauchte[n]". See also the German proposal for a codification of such a principle STOLL pp. 78–9; and RODHE, Adjustment pp. 188–9. But in the German proposal it is added in fine: "Der Ausgleichsanspruch ist ausgeschlossen, wenn nach den gesamten Umständen und dem Sinn des Vertrages der Schuldner die Gefahr einer Veränderung der Verhältnisse tragen sollte." And in these very words lies the clue of the matter. It is hardly possible to introduce such a far-reaching general formula without distinguishing between the *individual* and *typical* features of each contract.

It would therefore seem to me that one of the important functions of the war clauses should be to provide for *alternatives* to the complete disappearance of the contract. The courts are not in the same position as the contracting parties to decide what the shipowner *can* do and what the charterer *wants* him to do and it is not always that the main features of the marine adventure will be sufficiently firm to enable the courts to develop solutions suitable as *typical* modifications of the relationship between the contracting parties in various *typical* situations. And an application of the principle of modification solely according to *the individual facts of each case* would fail to give sufficient guidance regarding the governing legal principles and thus create uncertainty within the trade. For these reasons, it is submitted that the contracting parties themselves should provide for the alternative solutions and the existing standard forms of contracts of affreightment show that they have not failed to do so.[24]

[23] Cf. KEGEL-RUPP-ZWEIGERT p. 128.

[24] See, e.g., the general so-called "escalation" clauses and the specific Suez Canal and Panama Canal clauses supra p. 79 et seq.

§ 15.3.2. The advent of the optimal war clause

It seems that the development leading on to the voluminous war clauses of our times has mainly been caused by an *inadequate correlation between the functions of the drafters of the standard form contracts and the functions of the courts.* The drafters—led to believe that the courts would strictly adhere to the "not making a new contract for the parties theory"—have been induced to express themselves in many words. Furthermore, the desire of the courts to rule out unreasonable clauses by the traditional interpretative approach, primarily by the aid of the *contra proferentem* and *ejusdem generis* principles, have invited the parties to use their utmost ingenuity in depriving the courts of their power of interference. And this has resulted in extensive enumerations, tautology and the ridiculous "not deemed to be" and similar drafting techniques.

Indeed, it would be far better if, on an international level, the non-mandatory law would be openly permitted to efficiently *supplement* the clauses, thus reducing the need for drafting complete regulatory provisions in the standard form clauses, and if the courts would be openly permitted to rule out unreasonable standard form clauses, thus disencouraging the drafters from resorting to lengthy enumerations and various artificial devices. The drafters of the standard forms could then concentrate on their important function to explain in *few* and *clear* words—which would stand the chance of being read by commercial men—the central issue of distribution of risk and cover the points which are better regulated by contract clauses than by non-mandatory law.[25]

I am prepared to accept the accusation of having paid too little regard to the traditional approach of Anglo-American law and of having suggested the courts to "make a new contract for the parties". But as this study has shown, the courts in England and the United States—although slowly and after considerable hesitation—have done so for many years and, in the absence of legislative support, preferably behind the cover of suitable fictions. Still, we are yet in the midst of a development. Although the *results* tend to become the same, the different approach adopted in Anglo-American law as compared with Scandinavian law creates a feeling of uncertainty among the drafters of the standard forms. Hence, it will certainly take some time before we have reached the ideal stage when we can extend our welcome to a missing friend—the optimal war clause.

[25] Such as clauses providing *alternatives* to the cancellation of the contract. See supra p. 440.

ABBREVIATIONS

A.C.	Appeal Cases (from 1891)
ACL	Atlantic Container Line
AcP	Archiv für die civilistische Praxis
ADHGB	Allgemeines deutsches Handelsgesetzbuch
AfS	Arkiv for Sjørett
A.J.I.L.	American Journal of International Law
A.L.R.	American Law Reports Annotated
AMC	American Maritime Cases
ASBCA	Armed Services Board of Contract Appeals
Adm.	Admiralty Court or Division
aff'd	affirmed
Aleyn	Aleyn's Select King's Bench Cases
App.Cas.	Appeal Cases (1875–1890)
Arb.	Arbitration
Asp.M.C.	Aspinall's Reports of Maritime Law Cases
B. & P.	Bosanquet & Puller's Common Pleas Reports
B. & S.	Best & Smith's King's Bench Reports
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGH LM	Nachschlagewerk des Bundesgerichtshofes, Leitsätze und Entscheidungen. Ed. by von Lindenmaier u. Möhring
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
BIMCO	Baltic and International Maritime Conference
BSchG	Binnenschiffahrtsgesetz
Bing.	Bingham's Common Pleas Reports
Bl.H.	Henry Blackstone's Common Pleas Reports
C.A.	Court of Appeal
C.B.	Common Bench Reports
CCA	Circuit Court of Appeals
c.i.f.	cost, insurance and freight

C.J.	Chief Justice
C.J.S.	Corpus Juris Secundum
CMI	Comité Maritime International
Cogsa	Carriage of Goods by Sea Act
C.P.	Common Pleas Cases
C.Rob.	Christopher Robinson's Admiralty Reports
cert.den.	certiorari (i.e. leave for appeal to U.S. Sup.Ct.) denied
Col.L.Rev.	Columbia Law Review
Com.Cas.	Commercial Cases Reports
DC	United States District Court (federal)
D.C.Cir.	United States Court of Appeals for the District of Columbia Circuit
DC Md.	United States District Court of Maryland
DC Ore.	United States District Court of Oregon
DC SD Fla.	United States District Court for the Southern District of Florida
DC Wash.	United States District Court of Washington
D.J.	District Judge
D.J. & S.	De Gex, Jones & Smith's Chancery Reports
D.M.F.	Droit Maritime Français
Dan.	Danish
E. & B.	Ellis and Blackburn's Queen's Bench Reports
EDNY	United States District Court for the Eastern District of New York
ED Pa.	United States District Court for the Eastern District of Pennsylvania
ED Va.	United States District Court for the Eastern District of Virginia
E.R.	English Reports
ETL	European transport law
East	East's King's Bench Reports
Eng.	English
Ex.	Exchequer Cases
F 2nd	Federal Reporter, Second Series
FAC	Fast as can

F.C. & S.	Free of Capture and Seizure
FIO	Free In and Out
FJFT	Tidskrift utg. av Juridiska Föreningen i Finland
Fed	Federal Reporter
Fed Cas	Federal Cases
Fla.	Florida
Fr.	French
Germ.	German
HGB	Handelsgesetzbuch
H.L.	House of Lords
Hansa	Hansa, Zentralorgan für Schiffahrt, Schiffbau, Hafen
HansGZ	Hanseatische Gerichtszeitung
HansOLG	Hanseatisches Oberlandesgericht
HansRGZ	Hanseatische Rechts- und Gerichtszeitschrift
Harv.L.Rev.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
I.L.Q.	International Law Quarterly
Il Dir.Mar.	Il Diritto Marittimo
Ill.	Illinois, Illinois Reports, Illustration
Ill.L.Rev.	Illinois Law Review
J.	Judge, Justice
J.B.L.	Journal of Business Law
J.C.L.	Journal of Comparative Legislation and International Law
JJ.	Judges, Justices
K.B.	King's Bench Division, English Law Reports
KProp	Kungl. Maj:ts proposition
L.C.	Lord Chancellor
L.J.	Law Journal Reports, New Series; Lord Justice
L.JJ.	Lord Justices
L.Q.R.	Law Quarterly Review
L.R.	Law Reports

L.T.	Law Times Reports
Ll.L.Rep.	Lloyd's List Law Reports (1919–50)
Lloyd's Rep.	Lloyd's List Law Reports (from 1951)
M. & S.	Maule & Selwyn's King's Bench Reports
MDR	Monatsschrift für Deutsches Recht
M.L.R.	Modern Law Review
M.R.	Master of the Rolls
Macph.	Session Cases, 3rd Series [Macpherson] (Scottish)
Mass.	Massachusetts, Massachusetts Reports
Md.	Maryland
Me.	Maine
Mich.L.Rev.	Michigan Law Review
Miss.	Mississippi, Mississippi Reports
NC	Nordisk Skibsrederforening Medlemsblad (eller Circulære)
ND	Nordiske Domme i Sjøfartsanliggender
ND Cal.	United States District Court for the Northern District of California
N.H.	New Hampshire Reports
N.J.	New Jersey
NJA	Nytt Juridiskt Arkiv (Swedish Supreme Court Reports)
NJA II	Nytt Juridiskt Arkiv, avd. II
NJMF	Förhandlingar vid nordiska juristmöten
N.Rev.	Nedre Justitierevisionen
N.S.	New Series
NTIR	Nordisk tidsskrift for international ret
N.Y.	New York, New York Reports
NYC	New York City
NYS	New York Supplement
NoPl	Norsk sjøforsikringsplan av 1964 (Rederplanen)
NoPlV	Norsk transportforsikringsplan for varer av 1967
Norw.	Norwegian
OLG	Oberlandesgericht
Ore.	Oregon

P.	Probate Division (from 1891)
P.C.	Privy Council
P.D.	Probate Division (1875–90)
Pa.	Pennsylvania
Q.B.	Queen's Bench Division, English Law Reports (from 1891)
Q.B.D.	Queen's Bench Division, English Law Reports (1875–90)
RG	Reichsgericht
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
R.R.	Revised Reports
Rt.	Norsk Retstidende
S.C.	Session Cases (Scottish)
SCD	Supreme Court of Denmark
SCF	Supreme Court of Finland
SCN	Supreme Court of Norway
SCS	Supreme Court of Sweden
SDNY	United States District Court for the Southern District of New York
SMC	Scandinavian Maritime Codes
SOU	Statens offentliga utredningar
S.S.L.	Scandinavian Studies in Law
Show.	Shower's King's Bench Reports
Sol.J.	Solicitors' Journal, London
Story	Story's United States Circuit Court Reports
Sup.Ct.	Supreme Court, Supreme Court of the United States
Sw.	Swedish
SvJT	Svensk Juristtidning
SvPl	Allmän svensk sjöförsäkringsplan av den 13 juni 1957
SvStT	Svenska Stadsförbundets tidskrift
TfR	Tidsskrift for rettsvitenskap
TFS	Tullverkets författningssamling
T.L.R.	Times Law Reports
T.R.	Term King's Bench Reports (by Durnford & East)

UCC	Uniform Commercial Code
UfR	Ugeskrift for Retsvæsen
U.S.	United States Supreme Court Reports
U.S.C.	United States Code
WvK	Wetboek van Koophandel (Netherlands Commercial Code)
Va.	Virginia
Wall.	Wallace's United States Supreme Court Reports
Wash.	Washington
ZHR	Zeitschrift für das gesamte Handelsrecht und Konkursrecht

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