

CHARTER PARTIES

A charter party is a highly standardized written document that provides the contractual arrangements for one party (the charterer) to hire the carrying capacity of a vessel, either in whole or in part, owned by another party. Generally, charter parties are subject to the rules and requirements of contract law. Charter party forms are used worldwide, and many of them have been drafted to take into consideration the specific needs of particular trades. Other charter parties are more general in form and are not adapted to a specific trade.

There are three basic types of charter parties: a voyage charter, a time charter, and a demise charter.

Under a voyage charter, the owner of the vessel agrees to carry cargo from one port to another on a particular voyage or voyages. The vessel is manned and navigated by the owner's crew. A voyage charter may be used as a contract of affreightment—that is, for the shipper's purpose of sending its goods from the port of origin to a port of destination. To the extent that a voyage charterer obtains only the carrying capacity of a particular vessel, the charterer is not responsible for maintenance, repairs to the vessel, or injuries to third parties arising from the crew's operational negligence. A voyage charterer usually is not liable for expenses such as bunkers (fuel).

A time charter is a contract for the use of the carrying capacity of a particular vessel for a specified period of time (months, years, or a period of time between specified dates). As with a voyage charter, the vessel owner under a time charter is responsible for the navigation and management of the vessel, subject to conditions set out in the charter party. The vessel's carrying capacity is leased to the charterer for the time period fixed by the charter

party, allowing for unlimited voyages within the charter period. Therefore, the vessel is under the

charterer's orders as to ports of call, cargo carried, and other matters related to the charterer's business. The master and crew remain employees of the owner and are subject to the owner's orders with regard to the navigation and management of the vessel. Because a time charterer obtains only the carrying capacity of a particular vessel, the charterer is not responsible for maintenance, repairs to the vessel, or injuries to third parties arising from the crew's operational negligence. Time charterers usually are responsible for expenses of operating the vessel.

In a demise charter, the charterer not only leases the carrying capacity of the vessel but, unlike a time or voyage charter, also obtains a degree of control over the management and navigation of the vessel. As such, the charterer becomes, in effect, the owner of the vessel *pro hac vice* for the duration of the charter. The test for whether a charter party is a demise charter is whether the owner has turned over to the charterer "the possession, command, and navigation" of the vessel during the period it is in effect. When a vessel with a preexisting master and crew is under a demise charter, the master and crew may remain on the vessel and operate the vessel for the charterer as a provision of such agreement. The master and crew are subject to the orders of the charterer and its agents, and they are considered its employees. Under a demise charter, an owner may also turn over the vessel to the charterer without a master and crew. A demise charter of this type is also referred to as a bareboat charter.

Under a demise charter, the legal relationship between the owner and the charterer is significantly different from that created by a time or voyage charter. Because a demise charter transfers the possession and control of the vessel to the charterer, one who takes a vessel on demise is responsible for maintenance, repairs, or damages caused to third parties by the crew's

negligent navigation of the vessel. Thus, the owner who has demised its vessel will generally not be liable in personam for the fault or negligence of the crew—the charterer will be

primarily liable. Demise charterers usually are responsible for the vessel's operating expenses. In addition to these three types of charter parties, a number of variations have been created to accommodate containerisation and the changing nature of the shipping industry.

The Contract

Most charter party transactions use standardized printed forms. Some of the clauses contain blank spaces that require the parties to supply information. Typically the parties must specify the names of the owner and of the charterer and the amount of payment, referred to as “hire” or “charter hire.” Obviously, a voyage charter must specify the voyage to be undertaken, and a time charter must specify the length of time. In addition, a time charter requires information about the physical characteristics of the vessel and any restrictions on the use of

the vessel. The charter form also sets out standard terms and conditions that apply under the contract. Charter parties typically are negotiated contracts and, in contrast to transport pursuant to bills of lading, are often marked up—that is, provisions are added, deleted, or modified. These changes reflect the market and the relative financial strength of the owner and the charterer.

Typical Areas of Dispute

Freedom of contract is the touchstone to the resolution of charter party disputes between owner and charterer. The rules applicable to charter party disputes derive from the terms of the charter party itself and generally do not implicate public policy concerns. These are contracts between businesspersons, negotiated at arm's length, often through intermediaries (i.e.,

brokers who are experts in the field). It is often assumed that the contracting parties are sophisticated and that considerations of consumer protection are absent. Confirmation of this view is the fact that key terms, such as rate of charter hire and length of charter term, are often subject to hard bargaining. This does not mean that the parties negotiate from equal positions of strength. Like other areas of commercial transactions, supply and demand may strengthen an owner's hand when vessels are in short supply or may put charterers in a better position when there is a surplus of tonnage available in the charter market. The advantages that inhere in these circumstances are not the equivalent of overreaching.

Most terms used in standard charter parties are terms of art that have well-established and well-understood meaning within the industry. Old-fashioned as some may seem, the terms (including those described below) ought to be interpreted and applied in litigation as they are understood in the industry.

Misrepresentation

The term "misrepresentation" includes not only fraud or intentional misrepresentation but also any situation where a vessel does not conform to factual representations as stated by the owner in the charter party. Courts today take a pragmatic approach, and resolution of a dispute may hinge both on the materiality of the representation or undertaking and whether the charterer seeks damages or termination of the contract.

Warranties

Size and Speed—A breach of an express warranty as to size and speed may entitle a charterer to recover damages.¹⁶⁴ At the election of the charterer, the breach of such an express warranty may provide a basis for rescission. Rescission of the charter party is available only under circumstances where the breach is material or where it is discovered before the vessel has been accepted by the charterer.

Seaworthiness—In general, a shipowner has a duty to ensure that his or her vessel is seaworthy and capable of transporting the cargo for which it has been chartered.¹⁶⁶ A charter party that describes the vessel as “with hull, machinery, and equipment in a thoroughly efficient state” or “that on delivery the ship be tight, staunch, strong and in every way fitted for the service” gives rise to a warranty of seaworthiness. In the absence of an express and unambiguous stipulation or a controlling statute to the contrary, a warranty of seaworthiness will be implied by law.

The parties may stipulate that there is no warranty of seaworthiness, but such agreements are not favored¹⁶⁸ and will be enforced only if they “clearly communicate that a particular risk falls on the [charterer].”

Breach of the warranty of seaworthiness does not by itself confer upon the charterer the right to repudiate. Repudiation by a charterer is permissible only where the breach of the owner’s undertaking of seaworthiness is so substantial as to defeat or frustrate the commercial purpose of the charter.¹⁷⁰ This view is consistent with the modern approach that the undertaking of seaworthiness is to be treated like any other contractual undertaking. Thus, an insubstantial breach that does not defeat the object of the contract will not justify repudiation unless expressly made a condition precedent to a party’s performance of its obligations.

Likewise, the terms of the charter party must be examined carefully because the parties may have agreed to a lesser undertaking with respect to seaworthiness. For example, an owner may have expressly undertaken only to exercise “due diligence” to provide a seaworthy vessel.

Temporary Interference with Charterer’s Use of the Vessel

Charter parties commonly provide for contingencies, short of frustration, that result from the inability of the charterer to use the ship as intended. This may occur in the case of a mechanical malfunction or illness of the crew or some other factor that renders a vessel temporarily unusable. A common provision in charter parties is an “off hire” or “breakdown” clause. Under an off hire clause, a charterer’s duty to pay hire ceases in the event that it is deprived of the use of the vessel, either in whole or in part, as a result of some deficiency of the vessel, its equipment, or the crew. There are many variations in the wording of an off hire clause, and sometimes there are disputes as to the applicability of the particular clause in question.

Sometimes the inability to use a vessel is unrelated to the physical condition of the vessel itself or its crew, such as where a strike by longshoremen or government intervention prevents a vessel from sailing or from loading or discharging cargo. Other clauses in the charter party may determine who bears the risk of such events. Under a “mutual exceptions” clause, for example, if a party is prevented from fulfilling its obligations because of the occurrence of a circumstance enumerated in the mutual exceptions clause, such non-performance is not considered to be a breach of the charter party contract. “Restraint of princes” (an embargo) is usually one of the circumstances enumerated in a standard mutual exceptions clause. Thus, the action of a government that prevents an owner from fulfilling its obligation to the charterer—for example, by placing the vessel in quarantine—will excuse the non-performance of the owner. Other circumstances commonly excepted are acts of God or of public enemies.

Safe Port and Safe Berth Provisions

In time and voyage charters there are express or implied obligations that the charterer will not require the vessel to call at an unsafe port or enter an unsafe berth to load, discharge, or take on bunkers. Time and voyage charter parties usually contain a provision referred to as a “safe port/safe berth” clause that

purports to place on the charterer the risks to the vessel posed by the particular ports at which the vessel will call and the berths where the vessel will lie. It is not clear whether this clause in a charter party obliges the charterer to “warrant”

the safety of ports and berths entered. A safe berth clause does not impose strict liability upon a voyage charterer, and the charterer is not liable for damages arising from an unsafe berth where the charterer has exercised due diligence in the selection of the berth. Where a time charter party includes a safe port/berth clause, the charterer warrants the safety of the berth it selects. In any event, under a safe port/berth clause the master of a vessel may refuse to proceed to an unsafe port/berth nominated by the charterer without placing the owner in breach of the charter.

Notwithstanding a safe port/berth provision, negligence on the part of the master may relieve a charterer of its liability to the extent that such negligence permits the fact finder to conclude either that the port was safe because the peril could have been avoided by prudent seamanship or that, in the case of an unsafe port, the master’s conduct was an intervening, superseding cause of the resulting damages. Obviously, not every risk taken by a master will be considered a superseding cause. If the casualty results from the combined negligence of the charterer and the vessel’s master or other agent of the owner, damages are to be apportioned according to the respective fault of the parties.

Demurrage and Detention

In a time charter, the charterer has the vessel’s carrying capacity at its disposal for a specified period of time. As such, it makes no difference to the owner whether the charterer makes efficient use of the time chartered vessel. By contrast, in voyage charters, the time during which the voyage charterer may use the vessel is measured by the length of time it takes to complete the voyage. Obviously, it is to the owner’s advantage to have the voyage

completed as quickly as possible: The sooner an owner has the vessel at his disposal, the sooner he can use it for his own purposes or charter it to another person. Consequently, a frequent issue in voyage charter party disputes is the shipowner's claim for "demurrage."

Voyage charter parties provide a time frame for loading and unloading the vessel. Under such a provision, the charterer is allowed "laytime"—a specified period (hours or days) during which it can perform its loading and unloading operations without incurring charges in excess of the agreed rate of charter hire. These clauses vary greatly. If a charterer takes longer to load or discharge cargo than is provided in the charter party (i.e., it exceeds its laytime), it will be charged an additional amount called "demurrage." Thus, demurrage refers to the sum that a charterer agrees to pay for detaining the chartered vessel for that period of time that exceeds the laytime. It should be noted that where a charterer completes loading or unloading in a period of time less than that specified as laytime, the charterer has conferred a benefit on the owner and may be entitled to financial allowance referred to as "dispatch."

A typical demurrage clause in a charter party specifies the amount of demurrage that must be paid and the maximum amount of time allowed for demurrage. In this respect, demurrage should be distinguished from detention. Whereas demurrage is a contractual charge imposed on the charterer for exceeding laytime, detention is a legal remedy, in the form of damages, available to the shipowner after the period during which demurrage has expired.¹⁸⁰ Nonetheless, detention is recoverable only where the owner can demonstrate that it has sustained damages, such as an opportunity cost.

Withdrawal

A charter party may include a clause permitting the owner to withdraw the vessel where hire payments are not made in accordance with the requirements set out in the written agreement. A shipowner may insist on strict compliance with these requirements; and where these requirements are not complied with,

courts are likely to uphold the owner's right to withdraw its vessel. Owners may not withdraw a vessel while cargo is on board.

Subcharters

The right of a charterer to sublet or subcharter a vessel depends on the wording of the charter party. Charter parties often expressly authorize a charterer to subcharter the vessel and usually specify that a subcharter arrangement does not relieve the principal charterer of its obligations to the owner under the head or primary charter party. The owner is not in privity of contract with subcharterers who may not rely on the terms either expressed or implied in the head charter

party. The head charter party may, in order to protect the owner's right to hire, contain a provision giving the owner a lien on subfreights whereby the owner steps into the shoes of the charterer with respect to freight due the charterer from cargo interests.

Liability of the Owner for Damage or Loss of Goods

Charter parties, per se, are excluded from the terms of the Carriage of Goods by Sea Act (COGSA). Any disputes between the owner and charterer must be resolved according to the terms of the charter party. Courts generally apply the rule of freedom of contract in the interpretation and enforcement of charter parties. This approach enables the parties to bargain freely and to include in the contract any stipulation allowed by law. As such, the parties are free to incorporate the terms of COGSA by reference into the charter party, and they frequently do. Thus, various provisions of COGSA often become terms of a charter party through contractual stipulation. The parties are, of course, free to modify, or even exclude, COGSA provisions in the contract. Such modifications are permissible as long as COGSA does not apply by operation of law.

Even where a carrying vessel is under charter, however, there are circumstances in which COGSA is applicable as a matter of law. This occurs where the owner has issued a bill of lading to the charterer, who in turn has transferred the bill of lading to a third party, such as a consignee. These situations are discussed in the following section.

Arbitration Clauses

Most charter parties contain a clause whereby the parties agree to resolve by arbitration disputes that arise under the charter party. These provisions are enforceable and, under certain circumstances, may bind others, such as a consignee.