- Research Article -

[H] ESTIMATED TIME OF ARRIVAL TERMS: ANALYSIS OF 'START SAILING ON TIME OBLIGATION' IN THE CONTEXT OF TIME CHARTERS[*]

GEMİNİN TAHMİNİ VARIŞ SÜRESİNE İLİŞKİN DÜZENLEMELER: SEFERE ZAMANINDA BAŞLAMA YÜKÜMLÜLÜĞÜNÜN ZAMAN ÇARTERİ SÖZLEŞMESİ AÇISINDAN İNCELENMESİ

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ABSTRACT

An estimated time of arrival term is usually subjected to discussions as to voyage charters. However, due to the fact that such a term will be useful in order for the arrangements regarding the first cargo to be loaded to be made properly and such a term will helpful for a time charterer to have an idea regarding the time when the ship is likely to arrive at the delivery location, shipowners and charterers might also prefer to include this term into time charters. At this point, the purpose of this article is to

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analyse the impact of a term related to estimated time of arrival of the vessel at the delivery location on time charter relations.

It has been established that where the voyage charters contain an estimated time of arrival term, the shipowner is required to commence sailing for the port of loading at a time when, by proceeding with all convenient speed, she will normally reach the loading port by the specified estimated time of arrival. Whether the similar obligation can be imposed to the shipowner under a time charter remains unsettled at the time of writing. In this paper, the author intends to fill the gap in this area of law. In this regard, whether the shipowner has an obligation to start sailing for the delivery location on time under time charters where the charter contains an estimated time of arrival term for the delivery of the vessel will be the main question which the paper will focus. The answer of this question is tried to be given in the light of the grounds behind the existence of the shipowner's start sailing on time obligation under voyage charters. Since the English law is predominant in the field of charterparties, the analysis will be made in this paper from an English Law perspective.

Keywords: Estimated Time of Arrival Term, Expected Ready to Load Date, Expected Date of Readiness for Delivery, Start Sailing on Time Obligation, Time Charters, Voyage Charters

ÖZ

Geminin tahmini varış süresine ilişkin çarter sözleşmesinde yer alan düzenlemeler genellikle sefer çarterleri açısından tartışmalara tabii tutulmaktadır. Fakat, böyle bir düzenlemenin varlığı, gemiye yapılacak olan ilk yüklemeye ilişkin ayarlamaların düzenli bir şekilde yapılabilmesi için faydalı ve çarterere geminin ne zaman teslim edileceği yere ulaşacağına dair fikir verme konusunda yardımcı olacağından, gemiyi tahsis eden ve zaman çartereri (tahsis olunan) de böyle bir düzenlemeyi zaman çarteri sözleşmesine dahil etmeyi tercih edebilir. Bu noktada, bu makalenin amacı geminin çarterere teslim edileceği yere ulaşmasına ilişkin olarak verilen tahmini varış süresinin, zaman çarteri ilişkisi üzerindeki etkilerini incelemek olarak belirlenmiştir.

Sefer çarteri sözleşmesinin geminin yükleme yerine tahmini varış süresine ilişkin olarak düzenleme içermesi durumunda, çarter edenin, normal şartlar altında gemi uygun hızla gittiğinde yükleme yerine belirtilen tahmini varış süresinde ulaşabileceği bir zamanda yükleme yerine doğru sefere çıkılması gerekmektedir. Gemiyi tahsis edene bu tarz bir yükümlülüğün zaman çarteri sözleşmesi altında yüklenip yüklenemeyeceği hususu şu ana kadar netleşmemiştir. Bu makalede, yazar hukukta var olan bu alandaki boşluğu doldurmayı amaçlamaktadır. Bu açıdan, zaman çarteri sözleşmesinin geminin teslimi için tahmini varış süresi içerdiği durumda, gemiyi tahsis edenin zamanında teslim yerine doğru sefere başlama yükümlülüğünün olup olmadığı hususu makalenin odaklandığı temel soru olarak karşımıza çıkacaktır. Bu sorunun cevabı ise sefer çarteri kapsamında sefere zamanında başlama yükümlülüğünün

arkasındaki sebepler ışığında cevaplanmaya çalışılacaktır. Çarter sözleşmeleri alanında İngiliz Hukuku hakim olduğu için, bu makaledeki inceleme İngiliz Hukuku perspektifinden yapılacaktır.

Anahtar Kelimeler: Geminin Tahmini Varış Süresi, Geminin Yüklemeye Hazır Olması İçin Beklenen Tarih, Geminin Teslime Hazır Olması İçin Beklenen Tarih, Sefere Zamanında Başlama Yükümlülüğü, Zaman Çarteri Sözleşmesi, Sefer Çarteri Sözleşmesi

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I. GENERAL CONSIDERATIONS AS TO ESTIMATED TIME OF ARRIVAL TERMS

It is more common to see estimated time of arrival of the ship (ETA) or expected ready to load date of the ship[1] terms in voyage charters[2] rather

[1] It must be noted that 'expected ready to load date' and 'estimated time of arrival' terms do not refer to same point in time. Estimated time of arrival is a stage prior to expected ready to load date. However, it is well established that referring to different points in time does not make necessary application of different constructions as to these terms with regard to obligations of the shipowner. See *Mitsui OSK Lines Ltd v Garnac Grain Co Inc (The Mytros)* (1984) 2 Lloyd's Rep 449, p. 451.

[2] The concept of a voyage charter is defined by the authors of Voyage Charter book as follows: "*Voyage charters are those by which the owner agrees to perform one or more designated voyages in return for the payment of freight and (when appropriate) demurrage; the costs of, and responsibility for, cargo handling are left to the terms of the specific agreement.*": Cooke J. - Young, T. - Ashcroft, M. - Taylor, A. - Kimball, J. D. - Martowski, D. - Lambert, L. - Sturley, M.: *Voyage Charters*, 4th Edn., Abingdon 2014, p. 3. For more details as to voyage charter, see Cooke - Young - Ashcroft - Taylor - Kimball, - Martowski - Lambert - Sturley; Ülgener, F.: *Çarter Sözleşmeleri I – Genel Hükümler ve Sefer Çarteri Sözleşmesi*, 1st Edn., İstanbul 2016; Wilson, J. F.: *Carriage of Goods by Sea*, 7th Edn., Essex 2010, p. 49-84; Baughen, S.: *Shipping Law*, 6th Edn., Abingdon 2015, Ch. 9-11.

than time charters[3]. Most of the time, the voyage charterers need to make particular arrangements at the loading port such as making the cargo ready to load, storage of the cargo etc. If the cargo is not situated at the loading port or loading arrangements have not been completed at the time the ship is ready for loading at the loading port, the lay time will start to work against the voyage charterer and he will bear the risk of delay at this stage. In the same way, if the cargo arrives at the loading port early, the voyage charterer may be exposed to storage expenses. The existence of the expected ready to load term helps the voyage charterers in such cases to make their prior arrangements regarding the cargo properly. This explains why this term is so popular in voyage charters[4]. On the other hand, since the time charters are not for the use of the ship for carriage of agreed cargo on an agreed voyage, it might be thought that the time charterer does not have to deal with particular arrangements like the voyage charterer at the delivery place prior to delivery of the ship. Following this ground, it might be asserted that it is not important for the time charterer to know when the ship is likely to reach the delivery location. However, this generalises the situation too much.

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[3] A definition of a time charter was made by per Lord Diplock in *The Scaptrade* (1983) 2 Lloyd's Rep. 253, at pages 256 to 257 as follows: "*A time charter... is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charter-party the charterer is entitled to give to them*": pages 256 to 257. For more details as to time charter, see Coghlin, T. - Baker, A. W. - Kenny, J. - Kimball, J. D. - Belknap, T.: *Time Charters*, 7th Edn., Abingdon 2014; Ülgener F.: *Çarter Sözleşmeleri II – Zaman Çarteri Sözleşmeleri*,1st Edn., İstanbul 2016.; Wilson, 85-112; Baughen, Ch. 9 and 12.

[4] The term as to the expected ready to load date of the ship is commonly seen in standard voyage charter forms. See box 9 of Gencon, line 60 of Shellvoy 4, line 36 of Interntankvoy 76.

Under time charters, the charterer normally wants the ship to be delivered at the location where the first cargo is to be loaded. This is mainly because if the time charterer does not take the delivery at the contemplated loading port, he has to pay unnecessary hire for the period of time that will be spent bringing the ship from the delivery location to the loading port. Where the delivery location for the ship and loading port for the first cargo are determined as the same place, existence of an ETA term will be useful in order for arrangements regarding the first cargo to be loaded to be made properly. In addition to this, it will also be helpful for the time charterer to have an idea regarding the time when the ship is likely to arrive at the delivery location or be ready for delivery where the time charter is made for a short period to employ the ship to load a series of cargoes on short designated voyages between two different ports. Because of these, the shipowner[5] and the time charterer might prefer to include a term related to estimated time of arrival of the vessel at the delivery location or expected date of readiness for delivery in the charter[6]. Explanations under this section are only made regarding ETA term but it should be noted that although ETA and expected date of readiness for delivery refer to different points in time, this does not require appli-

[5] When the term 'shipowner' is considered in terms of article 1131 of Turkish Commercial Code (TCC), 6102, OG. 14/02/2011, N. 27846, it will be sensible to consider it as a person who allocates his/her ship. (*Söz konusu terminolojinin 6102 sayılı Türk Ticaret Kanunu (TTK) RG. 14/02/2011, S. 27846. madde 1131 kapsamında düşünüldüğünde 'tahsis eden' olarak kabul edilmesi uygun olacaktır).*

[6] However, please note that there is no statement as to estimated time of arrival of the ship in NYPE forms, Baltime, BPTime 3 and Shelltime 4 forms.

cation of a different construction regarding these terms in regards to the shipowner's obligations[7].

Under ETA, the shipowner impliedly promises that he has an honest and reasonable belief at the date of the charter that the ship will be able to reach the delivery location at the date specified[8]. There is no undertaking by the shipowner that the ship will be at the delivery location by the ETA. Therefore, when the ETA comes, if the ship is not ready at the delivery location, then this does not constitute a breach by the shipowner as long as the estimation is given in good faith and on reasonable grounds. Whether or not the shipowner has reasonable grounds for his estimation must be determined in the light of the information known by the shipowner at the date of the charter. However 'one must not only consider the information which was in fact known to the owner, but also any facts which he ought to have known or as to which he was put on enquiry'[9]. As such, if the estimation is given by the shipowner without considering the information that he ought to have known, then it is accepted that the shipowner's estimation is unreasonable. In addition, where the shipowner gives an ETA relying on the information given by his servants, any negligence on their part to provide accurate information will be imputed to the shipowner[10]. Therefore, in this situation, an ETA

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7 See fn 1.

8 *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* (1970) 2 Lloyd's Rep 43, p. 47.

9 *R Pagnan & Fratelli v NGJ Schouten (The Filipinas I)* (1973) 1 Lloyd's Rep 349, p. 358.

10 *Efploia Shipping Co v Canadian Transport Co (The Pantanassa)* (1958) 2 Lloyd's Rep 449.

given by the shipowner relying on this inaccurate information is accepted not to be made on reasonable grounds.

When the shipowner's estimation as to the arrival date at the delivery location is not made in good faith and on reasonable grounds, the shipowner will be in breach of the contract and the charterer will be entitled to damages. Furthermore, since it has been established that the shipowner's undertaking that an ETA is given in good faith and on reasonable grounds is a condition of the contract, the charterer is also entitled to terminate the charter[11]. Under English law, classification of contractual terms are made under three groups[12]. These are conditions, warranties and innominate terms. The term warranty can be defined as a term of a contract which has a minor importance[13]. Breach of such a term entitles the innocent party to damages but does not give rise to a right of termination of the contract. Liability of the innocent party to perform his/her contractual obligations remained unimpaired although the other party breached the contract[14]. On the other hand, the term 'condition' is used to classify a term of the contract which has a significant importance for

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[11] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* (1970) 2 Lloyd's Rep 43; *Geogas SA v Trammo Gas Ltd (The Baleares)* (1993) 1 Lloyd's Rep 215.

[12] For more details as to classification of terms under English Law, see Macdonald, E. - Atkins, R.: *Koffman & Macdonald's Law of Contract*, 9th Edn., Oxford 2018, Ch. 8; Davies, P. S.: *JC Smith's The Law of Contract*, 3rd Edn., Oxford 2021, Ch. 25; Treitel, G. H.: *Some Landmarks of Twentieth Century Contract Law*, 1st Edn., Oxford 2002, p.103-138.

[13] Please note that the term 'warranty' is used in a different sense in the context of marine insurance law. For more details in this regard, see Soyer, B.: *Warranties in Marine Insurance*, 3rd Edn., Abingdon 2017, p. 2-4.

[14] *Bettini v Gye* (1876) QBD 183. Davies, 375; Soyer, 1; Cooke - Young - Ashcroft - Taylor - Kimball, - Martowski - Lambert - Sturley, 48.

the parties and in a case that such a term is breached, irrespective of whether the breach is minor or not, party who is not in breach entitles to terminate the charter and sue for damages[15]. There is, in fact, no reported case which held the shipowner's undertaking that an ETA is given in good faith and on reasonable grounds is classified as a condition of the contract in the context of time charters. In *The Mihalis Angelos*[16] (voyage charter case), the judgment that the shipowner's implied promise under the expected ready to load date is a condition of the contract was mainly based on sale of goods cases which held that where the sale of goods contract contains an expected ready to load date, the term is a condition[17]. The Court of Appeal in that case expressed the view that there is no need for different interpretations in this regard and the term 'expected ready to load date' should have the same effect when it is contained in the charters[18]. The judgment in the case is also based on the need for certainty in commercial contracts and the importance of expected ready to load date from the charterer's perspective. The case of *Behn v Burness*[19] was relied on when considering the importance of the expected ready to load date in the charter. Considering the fact that the statement as to the position of the ship at the date of the charter was found to be a substantive part of the contract with a greater importance

[15] *Poussard v Spiers and Pond* (1876) 1 QBD 410. Paul S. Davies, 375; Macdonald, - Atkins, 119.

[16] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* (1970) 2 Lloyd's Rep 43.

[17] *Finnish Government (Ministry of Food) v H Ford & Co Ltd,* (1921) 6 Ll L Rep 188; *Macpherson Train & Co Ltd v Howard Ross & Co Ltd*, (1955) 1 Lloyd's Rep 518.

[18] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* (1970) 2 Lloyd's Rep 43, p. 47.

[19] *Behn v Burness* (1863) 3 B & S 751.

to the charterer and classified as a condition in this case, it was expressed that the provision as to expected ready to load date is also an essential role for the interest of the charterer and as such it must be classified as condition. At this point, the problem is that the court disregarded the fact that at the time these sales of good cases and *Behn v Burness* were handed down, the third category of the term, innominate terms[20], did not exist. The third category of the term has been first introduced with Court of Appeal judgment in *The Hongkong Fir* by the words of Diplock LJ; 'There are many contractual undertakings… which cannot be categorised as being 'conditions' or 'warranties'…Of such undertakings all that can be predicted is that some breach will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain'[21]. Contrary to the terms which has condition or warranty status, what will be the legal consequence of a breach of an innominate term (giving a rise a right of damages or a right of termination) is not certain at the beginning. This has been decided considering factual consequences of the breach. Termination right is given to the party who does not have any breach only if the breach 'deprive(s) the party not in default of substantially the whole benefit which it was intended that he should ob-

[20] Instead of the term 'innominate term', sometimes 'intermediate term' is also used by the authors and judges. Such a term is preferred as an alternative since legal consequences of breach of this type of term is somewhere between warranty and condition Davies, 377.

[21] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (Hongkong Fir)* (1961) 2 Lloyd's Rep 478, p. 494.

tain from the contract'[22]. In other words, such a right will be available only if the breach is so serious to go to the roof of the contract. On the other hand, if the impact of breach has a slight effect on the subsequent performance, the innocent party's remedy will be limited with damages[23].

At this point, it is believed that the nature of the ETA term can be re-examined under current law. Especially in a case where the time charter contains the other terms as to delivery time of the vessel such as the cancellation date, it might be challenged that ETA in the context of the time charter should be construed as an innominate term relying on the facts that (i) ETA will lose its importance from the time charterer's perspective in this situation; (ii) the certainty required regarding the amount of delay needed to entitle the time charterer to terminate the charter will already be provided through the cancellation date (the charterer can be certain that once the cancellation date arrives, the cancellation right arises); and (iii) the terms as to ETA can be breached to different degrees, from trivial to serious, so that the nature of this term is convenient to be accepted as an innominate term.

Although there is no promise under the ETA by the shipowner that the ship will reach the delivery location at a specified date, this clause at least imposes an obligation on the shipowner to use reasonable due dili-

[22] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* (1962) 2 Lloyd's Rep. 478, p. 494.

[23] Regarding innominate terms, see Williams, O.: "A Preference for Innominate Terms: The Good, the Bad Bargain and the Ugly", Southampton Student L Rev, 2012, Vol. 2, p. 155; Ozeke, C.: "Assessing Seriousness In Repudiatory Breach Of Innominate Terms", Journal of Business Law, 2017, Vol. 3, p. 198; Macdonald, - Atkins, 122-125; Davies, 377-379.

gence from the date of the charter to ensure that the ship reaches the delivery location by the ETA[24]. Under the statement that the ship is expected to arrive at the delivery location on a specified date, the shipowner might also have a further implied obligation known as the 'start sailing on time obligation'. This implied obligation has been established in a series of cases regarding voyage charters[25]. Unfortunately, the existence of this obligation has yet to be tested by the courts in England and Wales in the context of time charters. Therefore, this implied obligation of the shipowner will be considered next in terms of voyage charters below and it will be explained what the reasoning behind this implied obligation is. Following these explanations, it will be discussed whether or not the same obligation can be imposed on the shipowner in time charters.

II. 'SAILING FOR THE LOADING PORT ON TIME' IN THE CONTEXT OF VOYAGE CHARTERS

The combination of the ETA term and the shipowner's express or implied undertaking that the ship proceeds to the loading port with all convenient speed imposes on the shipowner a new implied absolute obligation under a voyage charter. This new obligation requires the ship to commence sailing for the port of loading at a time when, by proceeding with all convenient speed, she will normally reach the loading port by

[24] The reasoning behind this due diligence obligation is similar with the due diligence obligation under the cancellation clause. See *Marbienes Compania Naviera SA v Ferrostal AG (The Democritos)* (1975) 1 Lloyd's Rep 386; (1976) 2 Lloyd's Rep 149.

[25] *Monroe Brothers Ltd v Ryan* (1935) 51 Lloyd's Rep 179; *Louis Dreyfus & Co v Lauro* (1938) 60 Lloyd's Rep 94; *Evera SA Commercial v North Shipping Co Ltd* (1957) 2 Lloyd's Rep 367; *Geogas SA v Trammo Gas Ltd (The Baleares)* (1993) 1 Lloyd's Rep 215.

the specified ETA[26]. Hereinafter, this obligation is stated as 'the obligation to start sailing for the loading port on time'. Although this absolute implied obligation has been recognised in many authorities, unfortunately the reasoning behind this implication has not been clearly expressed. However, it is inferred from the approach of the court that this implication is made since it is necessary in order to make the contract work.

Most voyage charter forms impose on the shipowner an obligation to proceed to the port of loading with 'all convenient speed'. Sometimes, instead of the phrase 'with all convenient speed', the charter might require that the ship proceeds to the loading port 'with reasonable despatch'. All these different phrases have the same effect. In a case where this reasonable despatch obligation is not expressed in the voyage charter, it is implied by law on the ground that the implication is necessary as a matter of business in this kind of contract[27]. When the reasonable dispatch obligation is applied to the period prior to starting the voyage, it requires that the ship shall approach the loading port without unnecessary delay. This obligation of the shipowner is not absolute but instead is a qualified obligation. Therefore, if the reason that the ship does not proceed to the port of loading without undue delay is something which is not caused by the shipowner's own fault such as weather conditions or congestion at the port, the shipowner will not be in breach of his reasonable despatch obligation. Most of the time, the charter arrangements are

[26] *Monroe Brothers Ltd v Ryan* (1935) 51 Lloyd's Rep 179; *Louis Dreyfus & Co v Lauro* (1938) 60 Lloyd's Rep 94; *Evera SA Commercial v North Shipping Co Ltd* (1957) 2 Lloyd's Rep 367; *Geogas SA v Trammo Gas Ltd (The Baleares)* (1993) 1 Lloyd's Rep 215.

[27] *Louis Dreyfus & Co v Lauro* (1938) 60 Lloyd's Rep 94.

made in advance and there is plenty of time left between the date of the charter and commencement of performance of the charter. In this situation, there is no rule of law that prevents the shipowner entering into intermediate charter arrangements and using the ship for his own purpose[28]. Thus, entering into an intermediate charter where there is still time for commencement of the next charter does not result in the shipowner's breach of the obligation to proceed to the loading port with reasonable despatch. However, in a case where the shipowner deliberately enters into an intermediate charter which he knows at the beginning makes timely performance of the following charter impossible, the shipowner will be in breach of his reasonable despatch obligation[29].

Following these, the question is what will happen if the shipowner enters into an intermediate charter which normally is to be completed within a time that does not interfere with the performance of the following charter but then due to some circumstances for which the shipowner is not responsible a delay occurs during performance of the intermediate charter and as a result the next charter is not performed in a timely way. In this situation, since the shipowner's undertaking to proceed to the loading port with reasonable despatch is a qualified obligation and the delay that occurs during the intermediate charter is the result of events for which the shipowner is not responsible, technically the shipowner should not be liable to the next charterer for delay in performance of the charter, and the risk of unexpected events that occur and cause delay during the

[28] *Monroe Brothers Ltd v Ryan* (1935) 51 Lloyd's Rep 179.

[29] *Nelson & Sons v Dundee East Coast Shipping* (1907) SC 927.

intermediate charter should be imposed on the next charterer. However, when the position of the next charterer is considered, this will not be a reasonable approach. This is because the next charterer is not a party to the intermediate charter and also he does not even have any knowledge as to the intermediate charter arrangements in most situations. It is illogical to place the risks of delay during the intermediate charter on the next charterer and to which he has no relevance. In addition, if it is accepted that the next charterer bears the risk of delay on the intermediate charter, it might be too difficult for him to make insurance arrangements against these risks due to lack of necessary information.

In order to override these potential problems, the shipowner's obligation to proceed to the loading port with all convenient speed has been construed with the terms in the charter that give an indication as to the time at which the ship is likely to arrive at the loading port. For this purpose, the expected ready to load date and the ETA dates are relevant, and these dates are considered as a marker to determine whether or not the ship proceeds to the loading port with reasonable despatch. Accordingly, it is recognised that the combination of this estimated date and the shipowner's express and implied undertaking that the ship proceeds to the loading port with all reasonable despatch imposes on the shipowner a new absolute obligation to start sailing for the loading port on time. It is seen that the implication of this absolute obligation is necessary as a matter of business in this kind of contract as a to place the risk of unexpected delay that occurs during the intermediate charter on the shipowner instead of the charterer.

It should be noted that, this absolute obligation of the shipowner has been reconsidered in *The Pacific Voyager*[30]. In this case, the voyage charter contained a term regarding that the vessel was to perform her service and proceed to the load port with utmost despatch but there was actually no ETA term under the charter. However, the charter form contained a term regarding the estimated date of completion of the voyage which the ship engaged under the previous charter. Regarding the impact of this term, Popplewell J. at the first instance held that the term regarding the estimated date of completion of the voyage which the ship engaged under the previous charter given under the current charter is the *equivalent* of an expected time of arrival term. Therefore, he reached to the conclusion that the combination of that term and due despatch obligation also imposes an absolute obligation on the shipowner to start sailing on time and Court of Appeal upheld this decision. Popplewell J in *The Pacific Voyager* also suggested that where a voyage charter contains no statement of ETA, the obligation to start sailing for the loading port on time can still be imposed on the shipowner by referring to the cancellation date by relying on the ground that 'although there are differences between a cancelling date and an estimated arrival date, they are not sufficient to treat them differently for the purposes of the '*Monroe* obligation[31] [32]. Following from this, it can be said that there is also an absolute obligation of the shipowner to start sailing for the loading port at such time when it allows that the vessel is to be delivered by the cancel-

[30] *CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd (The Pacific Voyager)* (2017) EWHC 2579; (2018) EWCA Civ 2413.

[31] 'The obligation to start sailing for the loading port on time' was referred as 'Monroe obligation' by Popplewell J in the case since this obligation was first settled by the Court of Appeal in *Monroe Brothers Ltd v Ryan* (1935) 51 Lloyd's Rep 179.

[32] *CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd (The Pacific Voyager)* (2017) EWHC 2579, para (26).

lation date[33]. However, in the Court of Appeal, since the existence of this absolute obligation was accepted on the ground that that the charter contains an estimated date of completion of the voyage which the ship engaged under the previous charter, no further comment was made on Popplewell J's submission as to the impact of cancellation date[34]. Therefore, time will show whether the cancellation date will also have a role in this regard. From the author's point of view, due to general view that the cancellation date should be seen as an estimation regarding the delivery time of the vessel[35], it does not seem so difficult that the suggested approach has been found sensible by courts in the future. Regarding the judgment in *The Pacific Voyager*, it can be said that it does not restrict the existence of the absolute obligation to start sailing for the loading port on time only with the situations that ETA term and due despatch obligations are given at the same time under a particular charter. It extends the application of the obligation. Even if ETA term is not included into the charter, other time related terms might create a similar effect and the absolute obligation to start sailing for loading port on time can be imposed on the shipowner. The judgment is also significant since it provides a map to the parties of charter how the start sailing on time obligation should be interpreted in the absence of ETA term in the charter.

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33 For a similar submission also see London Arbitration 15/93 (LMLN 359).

34 *CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd (The Pacific Voyager)* (2018) EWCA Civ 2413, paras (19)-(20).

35 Coghlin - Baker - Kenny - Kimball - Belknap, para (7.7). Regarding relation between cancellation clause and ETA, it was also submitted as an obiter by Popplewell J that *"... cancelling date, in addition to serving the function of triggering the charterers' contractual right of termination, may also properly be regarded as the parties' [latest] anticipated time of arrival at the loading port for the purposes of defining the owners' obligation in relation to such time of arrival*": *CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd (The Pacific Voyager)* (2017) EWHC 2579, para (26).

III. 'SAILING FOR THE DELIVERY LOCATION ON TIME' IN THE CONTEXT OF TIME CHARTERS

A) GROUNDS FOR ACCEPTANCE OF 'SAILING FOR THE DELIVERY LOCATION ON TIME' UNDER TIME CHARTERS

The issue of whether the same absolute implied obligation like those in the voyage charter can be imposed on the shipowner under a time charter in such a way that the ship starts sailing for the delivery location on time when, by proceeding with all convenient speed, she will normally reach the delivery location by the specified ETA, remains undecided at the time of writing. In the context of voyage charters, the shipowner's absolute obligation to start sailing for the loading port on time is triggered by the unity of the ETA term and the shipowner's obligation to proceed to the loading port with all convenient speed, as was seen above. The problem is that the time charter usually does not impose an express obligation on the shipowner to proceed to the delivery location with all convenient speed. The question that should be answered is whether the obligation to proceed to the delivery location with all convenient speed can be implied into time charters.

This obligation was implied into voyage charters in the absence of an express term in this regard, relying on the ground that this implication was necessary as a matter of business in this kind of contract[36]. If the implication of the term to proceed to the loading port with all convenient

[36] *Louis Dreyfus & Co v Lauro* (1938) 60 Lloyd's Rep 94.

speed in a voyage charter is necessary as a matter of business, it must be accepted that it is necessary in time charters as well. It is true that these two types of charters have different features. However, when the positions of the voyage and time charterers who expect the ship to arrive at the loading port or delivery location by the specified ETA are considered, it can be said that it has the same importance from both charterers' perspectives that the ship approaches to the port of loading or delivery location without undue delay. As it is clarified above, there can be particular circumstances which the ETA serves to the benefit of the time charterer and the charterer makes particular arrangements considering this specified date. For example, where the delivery location and the port at which the first cargo is to be loaded are different places, considering the ETA date of the ship to the delivery location, the time charterer may calculate the time which is necessary for the ship to proceed to the loading port from the delivery location and then may provide an estimated time of loading, specific date for loading or cancelling date to his sub-voyage charterer. In this situation, no one can assert that it is not important for the time charterer that the ship approaches to the delivery location without undue delay. Therefore, there is no need to make any distinction between the two types of charter in respect to the implication. The obligation to proceed to the delivery location with all convenient speed should be implied into time charters as well.

In addition, if it was rejected that the obligation to proceed to the delivery location with all convenient speed was implied into the time charter, correspondingly the absolute obligation to start sailing for the delivery

location on time would not be implied. This is because merely the existence of the ETA in the charter does not result in an absolute obligation to start sailing for the delivery location on time. As a consequence, there would be a substantial difference in the division of risk of unexpected delay that occurs during intermediate charter under both types of charters. While the risk of unexpected delay that occurs during the intermediate charter would remain on the shipowner under voyage charters, the same risk would be imposed on the charterer's shoulders under time charters. This would produce an undesirable anomaly in law and create an illogical position. Therefore, it is necessary to imply the term that the shipowner proceeds to delivery location with all convenient speed into time charters. Following the implication of this obligation into the time charter, it must be accepted that a combination of this implied obligation and ETA term will result in the new absolute implied obligation that the ship starts sailing for the delivery location on time when, by proceeding with all convenient speed, she will normally reach the delivery location by the specified ETA.

It could further be submitted that if in the future it is accepted that the cancellation date has an effect on the acceptance of the obligation to start sailing for the loading port on time in voyage charter cases as suggested by Popplewell J in *The Pacific Voyager*, the similar effect of the cancellation date should be an issue in time charters. This is because the cancellation clause serves to the same purpose in time charters and voyage charters which is to give an idea to the charterer as to delivery time of the vessel, providing certainty to the charterer regarding his right to ter-

minate the charter in case of delay and preventing that the shipowner is held liable for damages where the ship is not ready for delivery at the cancellation date and time. While the purpose of the clause is same under both charter, if the law treat the clause differently in terms its effect on implication of a particular term, this will not be a sensible approach.

B) OPERATION OF 'SAILING FOR THE DELIVERY LOCATION ON TIME' OBLIGATION UNDER TIME CHARTERS

After acceptance of the shipowner's absolute obligation to start sailing for the delivery location on time in the context of time charters, it is important to note particular issues as to operation of this absolute obligation. Firstly, it should be emphasised that this absolute obligation is merely attached to the commencement of the approach voyage to the delivery location and not to performance of the approach voyage. The key issue is whether the ship commences the approach voyage to the delivery location at a time when by proceeding with all convenient speed, she will normally reach there by the specified ETA. If it is not, it does not matter what the reasoning is behind the fact that the ship does not set sail for the delivery location on time. There is a breach of the absolute obligation by the shipowner. However, once the ship has commenced the approach voyage to the delivery location at a time when she is normally capable of meeting the ETA, the obligation to proceed to the delivery location with all reasonable despatch once again returns to a qualified obligation. Therefore, the shipowner is excused for the unexpected delay that occurs during the performance of the approach voyage to the delivery location. This means that the risk of unexpected delays

during the performance of the approach voyage to the delivery location is on the charterer's shoulders. In addition, it should be noted that unless the charter says to the contrary, the shipowner cannot rely on exception clauses in the charter for the delay that occurs during an intermediate charter. An exception clause in the charter is only operative after the ship commences the approach voyage to the delivery location[37]. It is seen that the commencement of the approach voyage to the delivery location is like a dividing line with regard to allocation of the risk of unexpected delays between the shipowner and the charterer.

When the shipowner's absolute obligation to start sailing for the delivery location on time is considered from the shipowner's perspective, it can be said that it brings about harsh results. The shipowner acts reasonably and makes intermediate charters that do not prevent the ship meeting its ETA at the delivery location under the next charter but then totally unexpected events cause delay in performance and he is obliged to bear the risk of this unexpected delay on his own. At this point, the shipowner might want to override this absolute obligation and shift the risk of unexpected delay that occurs during an intermediate charter on to the next charterer. This can be done in two different ways. Firstly, the shipowner might subject the beginning of the approach voyage to the delivery location to the condition that the commitments of the ship under an earlier charter are first completed[38]. In this situation, since the shipowner is not obliged to commence the approach voyage to the delivery location be-

[37] *Monroe Brothers Ltd v Ryan* (1935) 51 Lloyd's Rep 179.

[38] See clause 1, lines 7-8 of Gencon 94 and lines 125-126 of Tankervoy 87 forms.

fore he has completed his prior commitments, the risk of unexpected delay during performance of earlier commitments will be on the charterer's shoulders. However, it should be noted that merely disclosing prior commitments of the ship under earlier charters into the present charter is not found to be sufficient to pass the risk of unexpected delay in an earlier charter on to the next charterer[39].

Another way to override the absolute obligation to start sailing for the delivery location on time can be to extend the application of the exception clause in the charter and make the exceptions in the charter applicable in terms of the period before the commencement of the approach voyage to the delivery location with express words. Unfortunately, there is no such extension in standard time charter forms. Both NYPE forms state that exceptions are applicable 'throughout the charter period'[40]. This wording definitely does not cover the period before commencement of the charter period and exceptions under this wording are operative only after the charter duration commences. In the same way, there is no express wording in the Shelltime 4 that indicates that the exceptions are applicable before the period of the approach voyage to the delivery loca-

[39] *Evera SA Commercial v North Shipping Co Ltd* (1957) 2 Lloyd's Rep 367. In this case, at the date of charter, the ship was already under an earlier charterparty and the charter contained the following words "*the vessel now due to arrive UK to discharge about 30th August; estimating 14 days to discharge, expected ready to load under this charterparty about 27th Sept. 1953*". While the ship was performing earlier commitments, the delay occurred due to the congestion at the port. As a result, the ship did not meet its expected ready to load date under the present charter. The court found that the term quoted above did not have a power to pass the risk of delay that occur during earlier charter to the next charterer, so that it was held that the shipowner was in breach of his absolute obligation to start sailing for the loading port on time.

[40] See clause 16 of NYPE 46 and clause 21 of NYPE 93 forms.

tion. The impact of the words 'delay in delivery' in the exception clause under the Baltime form was considered in the *Helvetia S*[41] and this wording was also not found sufficient to expose the risk of delay during the construction of the ship to the charterer on the ground that the charterer was not a party to the ship construction contract that was made before the date of charter[42]. Since the next charterer is not a party to the intermediate charter, following the same reasoning in the *Helvetia S,* it can also be said that the exceptions in clause 12 of Baltime do not have any application in terms of the delay under an intermediate charter so that does not provide any protection to the shipowner for delay in this sense. Although the wording of the exception clause in the standard charter forms is not found to be wide enough to shift the risk of unexpected delay that occurs during an intermediate charter on to the charterer, it is submitted that there is no reason in principle that the exception clauses cannot give such protection to the shipowner if such intention of the parties is clearly expressed and the clause is properly worded.

CONCLUSION

As it is seen that the law is more settled as to the operation of ETA in the context of voyage charter due to the fact that the usage of such a term is more common in practice under this type of charter. However, this does not mean that ETA terms will not find any application in terms of time charters. Since the charterparties are operated under freedom of contract

[41] *Christie & Vesey Ltd v Maatschappij Tot Exploitatie Van Schepen En Andere Zaken Helvetia NV (The Helvetia S)* (1960) 1 Lloyd's Rep 540.

[42] *Christie & Vesey Ltd v Maatschappij Tot Exploitatie Van Schepen En Andere Zaken Helvetia NV (The Helvetia S)* (1960) 1 Lloyd's Rep 540, p. 548.

principle, the parties to time charters can always include a term for estimated time of arrival of the vessel at the delivery location into their contracts. That's why it was important to consider the impact of this term in the context of time charters too.

Analyses of law of voyage charterparties as to ETA terms were made in this paper show that ETA terms need to be operated similarly under the time charter in most aspects. Where the time charter contains such a term, it primarily needs to be accepted that the shipowner impliedly promises that he has an honest and reasonable belief at the date of the charter that the ship will be able to reach the delivery location at the date specified. In addition, that such a term imposes an obligation on the shipowner to use reasonable due diligence from the date of the charter to ensure that the ship reaches the delivery location by the ETA although this is not expressly stated. One of the differences between time charter and voyage charter might be related how the status of ETA terms will be interpreted under these two type of charters. Where the shipowner does not have an honest and reasonable belief at the date of charter that the ship will arrive to the delivery location at the specified date, it is believed that it will be more sensible to interpret this term as an innominate term and not to give a charterer to right to terminate the charter automatically following the shipowner's breach of this promise under time charters.

Lastly, the analyses made in this paper mainly focussed on the absolute obligation to start sailing for the delivery location on time and these show that there is a gap in law whether such an obligation will be imposed on the shipowner under time charters where the charter contains

an ETA terms for delivery. When the grounds behind that such an obligation is imposed to the shipowner under voyage charters have analysed, it was found that there is nothing that prevents that similar grounds are relied on in the context of time charters and the shipowner is required to start sailing for the delivery location on time under time charters where the charter contains an estimated time of arrival term for the delivery of the vessel. The author of the view is that the contrary approach will cause to a substantial difference in the division of risk of unexpected delay that occurs during intermediate charter under both types of charters and this is not desired. However, it should be noted if the shipowner wants to override this absolute obligation and shift the risk of unexpected delay that occurs during an intermediate charter on to the next charterer, this can always be possible through the express terms in this regard and extending the application period of the exception clauses.

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