

The charterparty contract scope and purpose law general essay

Law



The purpose of this essay is to discuss whether there is a conflict between the statements made by Roche J in *Portsmouth Steamship*[1] and the statement made by Lord Hobhouse in *The Hill Harmony*. [2] To answer this question, the time charter as a contract will be interpreted in the light of the parties, their rights and obligations. Then, the statements are interpreted according to how the master shall obey the orders from the charterer. Lastly, the statements will be interpreted within the purpose of safety and danger to the vessel. The charterparty contract – scope and purpose

The starting point for charterparty contracts is freedom of contract. [3] Hill expresses that "Under the provisions of the time charterparty the shipowner agrees that the ship named in the document, including her Master and crew, shall be placed at the disposal of the charterer for his use and employment over a defined period of time." [4] A charterparty is a contract of hire and service of the vessel. [5] The contract provides the right to the use of the vessel for the charterer, against payment of hire to the shipowner. [6] The "business scheme" of the time charterer is that the charterer has the right to "exploit the earning capacity of the vessel". [7] It is therefore a conflict of interests between the Shipowner and the Charterers subject to the Charterparty, where one is for the use of the vessel, the other is for the safety of the vessel. The Charterer is given the key rights under the charterparty. The charterer is given the "key rights" [8] under the charterparty contract. [9] It follows that if these rights shall be given any limitations, this has to be "clearly expressed" [10]. Lord Bingham expresses the relationship to the contract between the parties as "The owner undertakes for the period of the charter to make his vessel available to serve the commercial purposes of

the charterer."^[11]For the charterer "time is money"^[12]¹³, and therefore it is important for the charterer that he can use the whole capacity for the vessel whenever he wants. Commercial reasons therefore give the charterer the right to utilize the vessel as he wishes. The wider the possibility the Charterer have to give orders, the wider is the possibility for the Shipowners to claim indemnities.^[14]Subject to the Charterparty, the charterer is given the rights to utilize the vessel, and with this give orders to the master regarding employment orders.^[15]An example of an employment clause is Art. 8 in NYPE; "the Master shall be under the orders and directions of the Charterer as regards employment and agency".^[16]A distinction between employment and navigation is made in the Hill Harmony^[17]"Employment embraces the economic aspect – the exploitation of the earning potential of the vessel. Navigation embraces matters of seamanship."^[18]This introduction gives an idea of the scope of the Charterparty, and the relationship between the Master, the Shipowner, and the Charterer. The next discussion in the essay, is whether there is a conflict between the two statements. The discussion starts with interpreting whether there master has to obey the orders unduly. Is the Masters obedience to an order absolute? The starting point in the first statement is that the Master shall follow the Charterers orders "without undue question". The statement indicates that the Masters' response to obey has to be immediate and direct subject to the orders from the charterer. This can indicate that the obedience is absolute. This wording does not give the Master any room to consider the orders, nor does the wording give the Master any room to consider the orders in terms of time. The consequence will therefore be that the Charterer has a direct

position and opportunity to order the Master. The wording can therefore indicate that the interests for the Shipowner are not as well protected as they should be after the Charterparty and does not give the Master the opportunity to consider a safety aspect. This actually is a right to go beyond the starting point for the charterer, which is said to be the "key rights"[19] to the vessel. A "key right" will be the main purpose of the contract, the use of the vessel, but cannot and should not go on the expenses of the masters (and thereby the Shipowners) rights under the Charterparty. Nor can it, or should it, endanger the safety of the vessel. The consequence will be that the master has more rights than the nature of the charterparty gives him, he will actually have more than the "key rights"[20] to the vessel, and he will have a better position than the actual contract appoints to him. This means that the wording in the Portsmouth case is absolute in the sense that it does not give a lot of room for the master to not obey the charterer. In *The Hill Harmony*[21], the approach to the Master is different. The statement talks about entitlement to refuse to obey the order. The statement leaves a choice to the master to obey the order or not, within the limits of safety. This opportunity is also interpreted subject to what risk the Shipowners have agreed to bear. This is also subject to the words "entitled to refuse to obey it" opens for discretion and is not absolute as the first statement. In *the Houda*,[22] Leggatt gives the master some "latitude"[23] to consider the aspect of danger. The threshold in the *Houda* is interpreted in accordance with the duty for the master to act "reasonably"[24]. It was thereby held that the order could be obeyed with delay if the order is "ambiguous"[25], "dangerous"[26] and "not

autentic"[27]. However, if it is a legitimate order, the order has to be obeyed, even though the master is given some time to consider the situation and the danger aspect.[28]This means that the two statements are different in terms in when and how the Master needs to obey the orders from the Charterer.

The Aquacharm[29]shows that the " obligation of the master to obey charterers' orders is not absolute, being only to exercise reasonable skill and care".[30]The case was about negligent stowing of cargo by the master, where the master loaded more cargo than he was entitled to for passage in the Panama Canal. In this context it is also important to say that the Masters main task is to care for safety of the ship. This means that he is not a party to the contract of charter. He is obliged to follow the charterers order, but he is also obliged to care for the safety of the ship. This means that if the master follows an order from the charterer and this order results in a loss for the Shipowner. The Shipowner can claim indemnity from the Charterer, if obedience with the orders caused the loss. However, if there is a break in the chain of causation between the orders and the loss, the Shipowner is not entitled to claim indemnities.[31]It is then a matter of novus actus

intervenies. It is then the Master that has acted negligently. There is not a requirement for the master to obey the charterers is not " absolute"[32]33.

An example for this is the Aquacharm[34]where the requirement for the master was to exercise " reasonable skill and care"[35], and that the obedience is not " absolute"[36]. This means that the is whether the Master acted within the Charterers orbit, and if he did that with " reasonable skill and care"[37], or if he continued with the charterers order, meant that this was not reasonable and careful, then this means that the master was

negligent, and the chain of causation is broken. Consequently the Shipowner cannot claim indemnities from the Charterer. The two statements are often presented in the same context in the literature.[38]For example, in the Time Charters.[39]The authors write that "It is not up to the master to question unduly the orders from the charterers as to the employment of the ship".[40]Further in the paragraph, the authors use the statement in the Hill Harmony[41]as an example where the master is not only "entitled", but the master is also "obliged to refuse the orders from the Charterers is where these endanger the safety of his ship or her cargo".[42]This quote can indicate that the practice after the Portsmouth Steamship[43]has changed, and that there is a difference between the two statements subject to the Masters order not being absolute. This being that the starting point in the Portsmouth Steamship[44]gives the Charterer more rights after the charterparty because it does not take the charterparty into consideration, and stating that the masters duty to obey orders are absolute. For these reasons, there is a conflict in wording between the two statements regarding whether the master has to obey the orders from the charterer unduly. However, case law has shown that there the master has time to consider the order, in accordance with the situation he is in. Further it is required that the master shows reasonable skill and care when obeying the charterer. Does the difference in choice of the words "obviously grave danger"[45], "safety"[46]and "risk"[47]mean that there is a conflict between the two statements? The wording in the Portsmouth[48]case indicates a high threshold for the requirement to be fulfilled. It can therefore be difficult to prove for the courts that the master was in a situation in which the master

was exposed for " obviously grave danger".[49]This threshold for " danger"[50]is even set higher by the words " obviously"[51]and " grave". [52]The statement in the Hill Harmony[53]however, opens up for a broader possibility for the shipowner to advocate risks that he has or has not agreed to bear. The word " risk"[54]can seem to cover more than " danger"[55], and thereby more than " obvious grave danger."[56]This solution takes the charter party into consideration, and therefore also the intentions of the parties. However, it is obvious that the shipowner will not agree to bear the risk that " obvious grave danger" represents. This is an indication for the statements to express the same. If the shipowners did, then this is what has agreed. The " word " dangerous" and the word " safe" are two sides of the same coin—if the meaning of the word " dangerous" can be affected by the context in a particular charterparty, then equally the meaning of the word " safe" can be affected by the context in a particular charterparty".[57]This statement can indicate that the danger must be interpret subject to the particular ship and the particular danger and perils of the sea. The word danger, safety and risk are all words that generally is an expression for the same term. This statement can indicate that the wording in the two statements are not in conflict, but that they express the same meaning, only in different terms. Both the statements therefore indicate a legal term, subject to perils of the sea and safety. To use the word conflict is therefore not applicable in the context of safety. Lord Hobhouse in the Hill Harmony[58]statement continues by saying that the " master is entitled to refuse to obey it: indeed as the safe port cases show, in extreme cases the master is under an obligation not to obey the order."[59]An example where

the master is obliged to refuse to deny the charterers order, is where the charters give orders they are not entitled to give under the charter party.

[60]In the *Sussex Oak*[61]the charterers instructed to master to go to Hamburg, a port that was considered unsafe due to ice. Devlin J found that the master does not have to obey an order which the charterer has no authority to give subject to the charterer.[62]63This is clearly something that is a risk that the Shipowners " have not agreed to bear", and it is an " obvious grave danger for the safety" of the ship. This is the indication from both the cases, and they set up a safety standard to interpret safety subject to the ship. Moreover, the *Portsmouth*[64]case is from 1929, and the *Hill Harmony*[65]is from 2001. The cases wording for the terminology can be interpret to be the same, even though there is a difference in time and construction of the two statements. Case law does not explicitly interpret the two statements to say whether they are in conflict. Cases discuss different topics, but under the condition that the Master has responsibility for safety of the ship. The cases discuss legal issues as deviation[66], unsafe ports[67], indemnity and causation between obedience from the master, negligence from the crew that the master bears the risk for,[68]utmost dispatch[69]and war risks[70]subject to safety and danger of the ship. Both the statements therefore indicate a legal term, subject to perils of the sea and safety. This means that the Master, in both of the statements, has the responsibility for the safety of the ship. This means that there is no conflict between the two statements subject to the Masters responsibility for safety of the vessel.

ConclusionSubject to the charter party, the charterer is given the " key rights"[71]to the vessel. This means as a starting point that the master has a

duty to obey the orders from the charterer, subject to employment.

However, this duty must be interpreted in accordance with his duties subject to safety of the ship. The first statement sets out an absolute duty for the Master to comply with the charterer's order. The second statement gives room for the master to evaluate the situation. Therefore there is a conflict between the statements subject to how the order should be obeyed. Due to the Master's responsibility for safety of the vessel, her crew and her cargo, on the other hand, the statements do not conflict. There is no conflict between them, even though they use a different terminology. The statements express liability for the Master as a legal term. This term is that the Master is responsible for the safety of the ship, and that he has to obey the orders in accordance with what a prudent master should do subject to safety of the ship. For these reasons the commercial scope must give way for the safety of the vessel. The statements are an expression for the fact that the master's responsibility is for the safety of the ship, and if the orders endanger that, the master is not only entitled to not obey the order, he is also obliged to obey it. On this point there is no conflict between the two statements. A challenge for the future can be that the interpretation of employment orders give and the obedience after the two statements that it will be difficult for the Master to understand whether the order is such for employment and navigation when this may risk the safety of the ship. (or some other future crap....)Words: