QUANTITY CONTRACTS: TRANSPORTATION BY SEA WITHOUT REFERENCE TO A NAMED VESSEL

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1. IDENTIFICATION OF THE PERFORMING VESSEL AS A QUALIFICATION OF THE TRANSPORT OBLIGATION

Outside the liner trade, the parties to a maritime contract for transportation of goods are usually called the *owner* and the *charterer*, and the contract is embodied in a document called a *charterparty*. That the party undertaking the transport obligation is designated the *owner* reflects the fact that in most cases a person giving a promise of transport is the owner of a vessel capable of performing the transport. Furthermore, the term reflects the fact that traditionally the performing vessel is identified in the contract.

In the eyes of the law it is, however, quite clear that a promise of transportation may be given—with the same legal implication—by a promisor who is not at the contract date the owner of a vessel suitable for the transport in question. It may be his intention to fulfil the obligation by the use of chartered tonnage, in which case he is usually described as chartered owner. In this article, however, I shall use the term owner for the party undertaking the transport obligation, regardless of whether or not he owns one or more ships.[1]

The other fact, i.e. the contractual identification of the performing vessel, is legally very important. In the present context it is sufficient to point out that to a great extent the fate of the transport undertaking depends upon the fate of the named vessel. For instance, if the named vessel is delayed, the contractual performance is also delayed; if the vessel is lost, the contract is brought to an end.[2] The charterer may in both cases have a claim for damages. In Scandinavian law the starting point is, however, that no claim for compensation of economic losses lies unless the

[1] Scandinavian (and German/French) terminology is more refined, as there is a distinction between (to use the Norwegian terms):
(1) "eier"—which means the person owning a vessel,
(2) "reder"—which means the person manning, equipping and running the vessel (like the bare boat charterer), and
(3) "bortfrakter"—who according to the definition in sec. 71 of the Norwegian Maritime Code (which is identical with the Codes of the other Scandinavian countries with some very small exceptions) is the person "who contracts to carry goods by ship for another person [and who] may be shipowner, charterer (operator) or any other".

[2] Norw. Maritime Code, sec. 129.

owner (or anyone for whom he is responsible) has committed an error in the execution or performance of the contract. Accordingly, if anything happens to the named vessel, and the owner (and/or his servants) cannot be blamed for this, the charterer has no claim for the ensuing losses.[3] Furthermore, even if the owner may rightfully be criticized for what happens to the vessel, in practice he will in many cases be protected by exception clauses—stating, e.g., that the owner is not responsible for loss or damage resulting from error in the navigation of the vessel.[4]

The charterparty is not, however, in all instances so strictly related to one named vessel. Some examples of modifications which not infrequently occur are given below.

When a vessel is named in the charterparty, this may be done with the qualification "or substitute". These two words give the owner the option of performing (in some cases of performance in part) with another vessel, usually subject to the condition that the substitute shall conform to certain requirements as to type, size, position, etc. It should be noted that such an option does not—as a general rule—survive the loss of the named vessel, i.e. if the named vessel is lost, it will be too late for the owner to use the substitution clause. Furthermore, the substitution clause does not—again as a general rule—confer any obligation upon the owner. If the named vessel is damaged (but not so heavily that it is made a constructive total loss), he may find it advantageous to perform with a substitute; but he may also decide not to do so. In other cases a principal vessel is not mentioned in the charterparty: the transport is to be undertaken by "a vessel to be nominated"—here, too, with certain restrictions as to type, size, position, etc. This clause—like the substitute clause—gives the owner an option, but, in contrast to the position under the former, the owner is obliged to act: he has to name a vessel, but once this has been done in conformity with the charterparty, the legal position is henceforth as if the vessel now nominated had been named in the contract at the time of concluding it.[5]

In *liner trade* the structure is basically as follows. Transport is by a liner vessel; which one will depend upon what is convenient for the line at the time of shipment. The contractual relationship is here established by the booking note (or booking contract), stating, e.g., that space is reserved for shipper's cargo without giving the name of the liner on board which the cargo is to be

[3] See Norw. Maritime Code, secs. 130 and 147.

[4] Norw. Maritime Code, secs. 168 and 169, limits the freedom of contract in chartering—in some respects as regards inter-Scandinavian trade. In addition there are more general—mostly judge-made—rules enabling the courts to modify unreasonable exemption clauses.

[5] Generally on substitution and "vessel to be named" clauses, see Falkanger, *Konsekutive reiser*, Oslo 1965, pp. 53 ff.

loaded. If the liner is named, usually there are far-reaching substitution and trans-shipment clauses, eliminating the legal significance of the fact that a vessel is *ab initio* identified as the carrying vessel.

2. THE UNQUALIFIED TRANSPORT OBLIGATION

Now, how does this vessel-centred—and consequently qualified—transport obligation meet the requirements of the cargo owner—the potential charterer?

Obviously there is no straightforward answer to this question. Each case has more or less to be judged on its own merits, but when—as in this article—we are confining ourselves to transportation of large quantities over a certain period of time, it is possible to formulate some not too vague observations. These are presented below.

The cargo owner's wish is—generally speaking—to have the cargo moved from one place to another at times suitable for him, without damage and at the lowest possible price. The price may depend upon various factors; in this context it is important to point out that if the cargo owner has adequate knowledge of the technical requirements of the transportation in question and is willing to run some economic risk, he may achieve a very satisfactory result by taking a vessel on time charter—i.e. having the use of the transport capacity of a fully manned and equipped vessel for a certain period, in return for paying the owner a certain amount per day or month, plus all the expenses directly related to the voyages ordered by him as charterer. But in most cases the cargo owner has not sufficient skill and knowledge to run a vessel efficiently on a time charter, and in any case he does not wish to run the economic risks involved in time chartering. The cargo owner is very often only interested in having the goods transported at a previously fixed price per ton (or other unit), without getting too much involved in the technicalities of modern shipping.

A person who has a definite transportation requirement—in contradistinction to one who intends to speculate in the market—and does not wish to take upon himself the burdens and risks connected with time chartering may decide to have recourse to voyage chartering. That is to say, he may conclude a contract whereby the owner undertakes to move his cargo from A to B in a named vessel, against remuneration depending upon the quantity transported. If the requirement is extensive (with regard to time and quantity) it may be necessary to charter a vessel for several voyages, or several vessels each for one or more voyages.

But this is not an ideal solution of the cargo owner's problem. As long as the transport obligation is connected with one or more named vessels, he ought to realize that in practice there may—in the absence of liability on the part of the owner—be quite a difference between, on the one hand, a promise to move his cargo from A to B in lots and at dates stipulated in advance and, on the other, the actual performance. The obvious solution—from the cargo owner's point of view—is that the contract should not identify the vessel or vessels which are to carry the cargo. In this way the owner's undertaking is transformed into a generic obligation.

He has to provide the necessary means of transport at his own choice, but also at his own risk; that is to say, if he cannot provide the required tonnage or if it happens that a vessel procured by him fails or is unsuitable for the purpose, he may be held liable for breach of contract according to rules which are stricter than are those applicable to a conventional voyage charterparty. It should be noted that the characteristic *generic* obligation is related to the vessel(s), while the other elements of the contractual relationship are in principle concretely or individually determined. In practice even the means of transportation is not described in purely generic words, inasmuch as the contracts invariably contain stipulations and implications with regard to what kind of vessel(s) should perform under the contract.

It is this type of contract—seen primarily from a Scandinavian point of view—which provides the subject matter of this article.

3. INTRODUCTION OF THE TERM "QUANTITY CONTRACT"

The transportation contract in which the means of transportation is generically determined has no satisfactory and universally accepted name. In practical shipping the term "contract of affreightment" (Norw. "transportkontrakt") or "freight contract" (Norw. "fraktkontrakt") are often used. This terminology has also been adopted by legal writers.[6] But to give a special type of contract a name which taken literally covers many—it might even be said all—types of transportation contracts,[7] is rather unfortunate. A third name sometimes used is "tonnage contract". This is a much better name, but my preference is for "quantity contract" (Norw. "kvantums-

[6] See, e.g., Scrutton, *On Charterparties and Bills of Lading*, 18th ed. London 1974, p. 1 ("freight contract"), and *Charterparties*, Report by the Secretariat of UNCTAD, New York 1974, p. 4 note 12 ("contract of affreightment").

[7] See, e.g. Scrutton, *op. cit.*, p. 1, where "contract of affreightment" includes, *inter alia*, charterparties and freight contracts. And "freight contract" may without doing violence to the language be apprehended as a very general term, covering, *inter alia*, charterparties.

kontrakt"), even though it does not give such a comprehensive indication of the nature of the contract as one would wish. It does not convey that the contract is a maritime one, nor that it is a contract of transportation. But at any rate the term has not been used for other purposes and it does not have misleading associations. On the contrary, it may be said that an essential feature of the contract—the moving of *a defined quantity* of cargo from A to B—is emphasized by the use of the term *quantity contract.*

4. SOME SYSTEMATIC OBSERVATIONS

As far as I know, in the leading maritime countries there are no enactments directly dealing with quantity contracts, and the number of reported cases is surprisingly small.[8]

When looking for other sources of law relevant to the quantity contract, it may appear important to decide whether the contract belongs to the domain of voyage or time chartering. This question is now discussed.

The characteristic feature of voyage chartering is that the owner's remuneration is calculated on the basis of the number of units (tons, standards, cubic feet, etc.) actually transported. A consequence of this is that when a voyage is performed in a shorter time than anticipated, the owner's profit per unit of time is increased, while it is correspondingly reduced when the voyage is delayed. In other words, the essential feature of voyage chartering is that the owner carries the risk of delay.

This is in contrast to time chartering, where the risk of delay rests on the charterer, because the owner's remuneration is connected with the period of time during which the vessel is at the charterer's disposal, not with the quantity of cargo carried.[9]

In the quantity contract the freight claim is connected with cargo to be transported; thus the risk of delay rests on the owner. Accordingly the contract should be classified as a form of voyage chartering. The basic difference from ordinary long-term voyage chartering—i.e. concluding a charter for consecutive voyages—is, as already stressed, that the means of transportation is generically described. This difference is blurred if the

[8] Legal writers have as a whole shown little interest in the contract type; if it is dealt with at all, it is only in a few sentences, sometimes also with reference to certain cases. For a more extensive discussion of the contract, see Falkanger, "Kontrakter om skipning av et bestemt kvantum (transportkontrakter)" (*A.f.S.*, vol. 5, pp. 370–413 (1961)), on which the present article is based. See also Gram, *Fraktavtaler og deres tolkning*, 3rd ed. Oslo 1967, pp. 154–8.

[9] Norw. Maritime Code, sec. 71, subsec. 2: "Voyage chartering takes place when the freight is payable per voyage and time chartering occurs when the freight is payable per unit of time".

charterparty for consecutive voyages contains a substitute clause, making substitution a duty on the part of the owner in circumstances defined in the charterparty.[1] But even if there exists a wide duty of substitution, the obligation to perform *consecutively*—i.e. that the vessel after discharging shall proceed to the loading port, in principle without deviations,[2] distinguishes the two types of contracts. Under the quantity contract the duty to present a vessel for loading is independent of when discharging was completed under the previous voyage.

The practical consequence of the classification is that, if the contract is not exhaustive or is unclear, supplementary rules have to be taken from the set of rules applicable to ordinary voyage chartering. This proposition is clear and unquestionable so long as we are concerned with problems relating to a specific voyage—i.e. the problems arising between the time when a nominated vessel gives her notice of readiness and the time when she has discharged the cargo at the port of destination.[3] But there are questions which have a bearing on the contract as a whole, and on this higher level we may come up against problems where the conventional rules from the sphere of voyage chartering provide less guidance.

On both levels freedom of contract prevails (save for certain exceptions which can be disregarded in the present context),[4] and from what has now been said it is evident that a discussion of the quantity contract is more or less tantamount to an examination of the contract clauses in actual use. An extensive discussion of contract clauses cannot, of course, be undertaken here, and I must confine myself to a description of what—according to my experience—are the important and interesting problems and how these, typically, are solved in the contracts. For our purpose, the clauses may be divided into two groups, viz. those defining the ordinary rights and obligations of the parties (giving the anatomy of the contract), and those dealing with the effects of breach of contract or with the effects of unexpected circumstances making the fulfilment of the contract impossible or at least more burdensome (the pathology of the contract). Not surprisingly, a survey of a number of contracts reveals that a lot of work is put into the "anatomy", while often the "pathology" is dealt with in a cursory—sometimes careless—manner. Experience proves, however, that even the basic description of rights and obligations is in many cases inadequate, as seen through the lawyer's spectacles. Accordingly a supplementing and adjusting construction is necessary.

[1] See Falkanger, *Konsekutive reiser*, pp. 57 ff.
[2] See Falkanger, *op. cit.*, pp. 130 ff.
[3] Cf. the discussion *infra*, section 10.
[4] See p. 66 at note 4.

5. THE PRACTICAL USE OF THE QUANTITY CONTRACT

What role does the quantity contract play in commercial life?

The law reports provide evidence that this type of contract is no new invention. But it was not extensively used until some years after the second world war.

Typically, the quantity contract is concluded for the transportation of homogeneous cargo, in particular raw materials and semifinished products which can be carried in bulk. Examples are oil, coal, ore, cement, wood pulp, grain, rice, sugar and salt. There are, however, examples of more complicated commodities being shipped under quantity contracts—an outstanding instance is cars.

Another typical feature is that the contract is used for large quantities which are to be shipped from A to B over a long period, for example 100,000 tons or more of coal or ore a year over a five-year period. A few years ago contracts were often concluded for very long periods, say 10–15 years. The tendency today, however, is—as in time chartering—to enter into short-term contracts. It has been said that the essential purpose of long-term contracts is the elimination or softening of the effects of variations in the economy. But the changes during the last few years—not only in the freight market but also in business as a whole—have been so dramatic that the prudent businessman realizes that although the situation prevailing next year might offer excellent opportunities it might equally well mean that a well-prepared and seemingly sound and balanced contract is turned into a commercial disaster. Hence the tendency to shorten the contract period.

The quantity contract is not exclusively used for large transport undertakings. One example only will be given: a contractor who has undertaken to build an airfield may conclude a quantity contract for the transportation of the machinery and the cement required for the construction.

> To the best of my knowledge the only reliable statistics showing the tonnage actually used under quantity contracts at a given time are those prepared by Norges Rederforbund (Norwegian Shipowners' Association). These tell us that on July 1, 1975, about 11% of the Norwegian commercial fleet, measured in deadweight tons, was engaged under quantity contracts, and that about 4% of the tankers and about 20% of the dry cargo vessels were so engaged.

In most cases there is a sales contract behind the agreement on transportation. A steel mill has, e.g., bought coal from overseas, and entering into a quantity contract is one way of solving the transportation problem. In the present context it will be sufficient to point out some important consequences of this.

If a sales contract of coal is on an *ex works* basis, it is up to the steel mill to arrange for transportation: the steel mill will be the charterer under the quantity contract. The same applies when the contract is on *f.o.b.* terms. The position is different when the sales contract is on *c.i.f.* or *delivered* terms; then it is the seller (the mining company) which will appear as charterer.

In practice the situation is very often less simple. The coal may be sold through intermediary companies, and the transportation, too, may be arranged by intermediary companies. For instance, the coal is bought by a company domiciled in the same country as the steel mill, and resold to the steel mill; the transportation agreement may be concluded by the buyer or one of his subsidiaries. The result of this is that neither the mining company nor the steel mill appears as charterer.

The following may be a commonplace observation, but it is so often overlooked that it is justifiable to make it in this context. Before entering into a quantity contract it is important that the shipowner should be fully aware who his contractual counterparty really is. First, the difference between having as counterparty to the contract a substantial steel mill and having as counterparty a perhaps speculative importer or a subsidiary of the steel mill with small assets, can easily be appreciated. Secondly, the underlying sales arrangement should be taken into consideration so that the quantity contract is as far as possible adjusted to and compatible with the terms of the sales contract. In practice there are, however, often important discrepancies. Thirdly, the sales arrangement may be decisive as to a possible liability under the bills of lading.

As regards the other side, it is natural that the charterer should examine the owner's commercial and financial standing, as well as his particular experience with regard to transport undertakings similar to the one contemplated. In many cases the transportation required is of such an extent that an owner is not willing to undertake it or the charterer does not consider him acceptable. This does not mean that only substantial shipowners enter into quantity contracts. Small shipowners may overcome the difficulties by working together, either on an *ad hoc* or on a more permanent basis. Both of these alternatives are actually used; but the latter, covering a wide range of variants from loose pooling arrangements to pools where the total commercial control of the vessels of the participants lies with the pool operator, is the more important. In such cases of cooperation on the shipowners' side, the importance of clearly stating each individual shipowner's liability towards the charterer and each shipowner's liability towards the other shipowners can hardly be stressed too heavily.

6. THE FORM OF CONTRACT

Some owners and, in particular, some charterers may have worked out sets of clauses which are used as a basis for new negotiations. But so far as I know no forms exist which can reasonably be called standard forms in the same sense as we talk of standard forms of charterparties.

The contracts most commonly occurring may be divided into three categories.

In the first category we have the many cases where a standard voyage-charter form is the backbone of the contract, of course amended in many respects and containing a number of additional and special clauses. Either from the amended printed text or from a special additional clause it will appear, e.g., that "this charterparty is valid for the transport of a total quantity of about 210,000 tons of coal to be shipped as follows: ...". The London Tank Voyage, the Amwelsh and the Gencon forms are often used this way.

The second category is characterized by a distinction between provisions relating to the total contract and provisions relating to each voyage to be performed thereunder. The former are contained in a separate part of the agreement and typically comprise provisions regarding total quantity, dates of shipment, loading and discharging ports, cancelling and adjustment clauses applicable to the total contractual relationship, jurisdiction and arbitration clauses. In this part there will be found a clause saying, e.g., that "otherwise this agreement is governed by the attached charterparty" or that "the attached voyage charterparty shall apply to each voyage". The second part of the agreement is an ordinary standard voyage charterparty, filled in and in many instances amended. The essential thing is that in principle this charterparty should contain provisions relevant for the individual voyage and nothing more.

Thirdly, we have "tailor-made" contracts: here no standard voyage charter is used, and the total contract is drafted to suit the particular requirements of each case.

It is my impression that category no. 1 is predominant. In this connection is worth noting that a number of contracts which at first sight seem to belong to category no. 3 should in fact be regarded as examples of category no. 1.

Now, does it really matter whether the contract belongs to one or the other category? The answer is obviously no, provided that the drafting is properly done. But there are too many cases where the drafting is not adequate. Clauses concerning the total contract and clauses concerning the individual voyages often come pell-mell, making it very difficult to decide

whether a clause—e.g. a *force majeure* clause or a cancelling clause—relates to the total contract or to an individual voyage; and when applying the method typical for category no. 1, it may easily escape the attention of one or both of the parties that a familiar clause may acquire a new and unexpected meaning when made part of a quantity contract.[5]

In my opinion one should distinguish as clearly as possible between the two types of questions; for, once the question is properly put, one is halfway to a satisfactorily drafted clause. In contracts belonging to category no. 1 there is a marked tendency to confuse the issues. When using the approach typical of category no. 2, one is more or less forced to put the right questions, and thus the chances of getting a sensibly drafted contract are considerably increased.

7. THE QUANTITY TO BE TRANSPORTED

The dominant feature of the contract is, as already stressed, the obligation to transport a defined quantity of certain commodities. Correlated to this is the charterer's obligation to deliver cargo. The usual latitude clauses ("about *x* tons", "a full shipment", etc.) represent minor modifications as regards the reciprocity of obligations. More drastic exceptions, however, are not infrequent—clauses giving the charterer the option of having substantially greater quantities shipped are typical. And in some instances the charterer has an entirely free hand. He has the right, but not the obligation, to deliver and have transported cargo up to a certain quantity; some contracts for shipment of cars are on this basis.

a. *The description of the cargo* is, of course, important in all types of contracts of affreightment, but particularly so in a long-term undertaking like a quantity contract. In a contract for a named vessel the description may be related to the characteristics of the vessel (e.g. cargo "not dangerous to the vessel"), but in the quantity contract the properties of the contractual cargo have to be described in a more abstract way, and it is the obligation of the shipowner to find tonnage suitable for the described cargo.

[5] The facts in the case tried by the House of Lords in *Compagnie d'Armement Maritime* v. *Compagnie Tunisienne de Navigation* [1971] A.C. 572 provide a striking example of the consequences of slapdash drafting. The contract between the French and Tunisian companies was based on the so-called London Form tanker voyage charter party, which contains, *inter alia*, a clause stating that the law of the vessel shall apply. During the first four months of the contract, vessels of six nationalities were used. In order to get the question of choice of law settled it was necessary to take the case all the way to the House of Lords. The Lords held that the proper law was French law.

b. *The determination of the quantity.* The contracts provide a spectrum of different ways of fixing the total quantity, from exact figures to very vague indications. Some typical ways are given below.

The simplest way is to stipulate the quantity as *x* units, e.g. 100,000 tons of oil, 10,000 cars. Usually the figure is qualified in some way, e.g. by inserting the word *about* ("about 100,000 tons", etc.). But as it may be difficult to decide the leeway afforded thereby, the margins are in most cases given in figures ("*x* per cent more or less", "min .../max ..."). If there is no indication to the contrary, such a provision operates in the charterer's favour. It may happen that the clause is inserted to ensure that the contract shall be brought to a commercially reasonable end: the owner should not have to run the risk of performing the last voyage with part cargo only, and accordingly the leeway is construed in the light of this consideration. But usually the last-voyage problem is specifically dealt with elsewhere in the contract.

Another possible way is to determine the total quantity by reference to a total number of voyages: for instance, the owner has to supply 12 ships (of a certain carrying capacity) per year during five years.

A third possible way is for the owner to undertake to transport, e.g., "the yearly export quantity", or parts thereof. The risks connected with provisions of this type are obvious, as are also the difficulties which the owner may come up against if he contends that the charterer has not delivered the full contractual quantity.

8. THE TIME OF SHIPMENT

In all contracts there are stipulations as to when the carriage shall take place. In many cases three sets of stipulations are to be found. These will now be dealt with in turn.

(1) First, there will be a time limit for the total quantity—e.g. one million tons of ore to be transported through a 10-year period. The beginning of the period is generally clearly fixed: "beginning on January 1, 1976" or "beginning from the time the first vessel presents notice of readiness" (in which case there will be provisions elsewhere as to when or within which dates such notice should be given). The end of the period is not always so clearly defined. A not uncommon stipulation that the contract expires on, e.g., December 31, 1976, may cause difficult problems of interpretation. For example, must the last voyage be completed or be expected to be completed not later than this date in order to come within the contract? Or

is it sufficient that loading shall be completed, or commenced, or notice of readiness be given on or before this date? This question should be answered in the contract, and in fact is often dealt with in a particular clause concerning the final voyage under the contract, e.g.:

> "Any vessel which has been nominated for loading before December 31, 1976, to be governed by this agreement, and any cargo delivered on such voyage to be considered part of the quantity to be shipped under this contract."

To ascertain the real effect of this clause it is necessary to take into account, *inter alia,* the nomination procedure of the contract. If nominations, e.g., have to be given for one quarter of a year some time prior to the commencement of that quarter, the declaration of nomination dated, say, August 1976 will state the names of the vessels which are to carry cargo during the fourth quarter and the expected dates for commencement of loading. A nomination for loading in January is, of course, outside the contract. And the same applies to a nomination for a late December loading if it is clearly apparent that the vessel cannot reach the loading port in December. The last-mentioned nomination may be declared in good faith and with a reasonable margin, but unexpected events may stultify all calculations. One cannot, however, state without reservation that the owner is not obliged to present the vessel and the charterer is not obliged to deliver cargo once it is clear that the nominated vessel cannot reach the loading port before the end of December. The final answer can hardly be given without studying the total contract. Only a few possibilities need be mentioned here. One is that, if the owner is obliged to present the nominated vessel in January, there may exist, e.g. in the voyage charter form governing each individual voyage, a cancelling clause connected with the loading dates in the declaration of nomination.[6]

Another possibility is to use the time for tendering notice of readiness as the decisive moment:

> "Any vessel which has given notice of readiness before the end of December 1976 to be governed by this agreement."

This clause presents the problem whether the owner is obliged to procure a vessel ready for loading in, say, December and whether it is entitled to receive cargo. The answer will depend, *inter alia,* on whether there will remain an unshipped quantity if a vessel is not presented for loading.

[6] E.g.: "The charterer has the right of cancelling the voyage if notice of readiness is not presented within... days from the date stated in the declaration as per ..."

It may be argued that "last-voyage" clauses imply that no obligation exists to transport or deliver cargo after the crucial date. But when the contract does not contain clauses of this type and the termination date is not precisely defined elsewhere, it may be argued that the quantity stipulations are overriding, i.e. the time stipulations should be construed liberally; or, to put the matter in a practical way, one should read the time limitations as if the word "about" had been inserted.

(2) Secondly, in long-term contracts there are provisions as to the quantity to be transported each year or each season, in addition to time limits applying to the total contract. The total quantity may be divided equally over the contract years, but often with an increasing quantity per year. There may be options on the yearly quantity, as well as on the total quantity, giving rise to more or less the same problems of interpretation. It is a matter of elementary common sense, but one which nevertheless is not always paid sufficient regard to, that the options on the total and yearly quantities should be harmonized.

Under the yearly quantity provisions we may have questions of the same type as those related to the last voyage under the contract. Suppose, for instance, that 80,000 tons of the 1976 quantity of 100,000 tons have been transported; at the end of December 1976 20,000 tons are loaded on a vessel which will discharge the cargo in 1977. Should the 20,000 tons be considered as part of the 1976 or part of the 1977 quantity? No generally valid answer can be given—one has to construe the individual contract according to its own facts. In my opinion, however, there are sound reasons for construing the time limitations applying to yearly quantities less strictly than the corresponding provisions relating to the total quantity.

(3) The third set of time limitations is related to the actual performance, usually within each year (or shipping season): When are the individual voyages to take place? Invariably such provisions are connected with the time of loading or the time of presenting notice of readiness to load. In other respects the clauses may differ significantly.

One group consists of clauses fixing the loading dates directly in the contract, with certain margins in the owner's favour, or clauses stating that the owner shall present a ship "every month", "every fortnight", etc. In all these instances there are further stipulations in the contracts as to the size of the vessels which may be used, or as to the quantity which is to be loaded on each vessel.

Another method commonly used is to provide that the quantity shall be carried "fairly spread", or "evenly spread", or "at reasonable intervals", etc. It is submitted that a similar obligation is to be implied if the contract is silent on this point, but an express stipulation will perhaps give the owner

less leeway. These clauses, e.g. the "fairly spread" clause, relate to quantity, not to the number of shipments, a matter which is of importance where the owner is entitled to use vessels of varying sizes. The clause does not require a mathematically even spread over the year; there is a flexibility which unfortunately is difficult to quantify, and accordingly disputes often arise between the parties as to the true contents of the clause.

> In most cases such disputes are solved without the assistance of the courts, but there is one Norwegian Supreme Court decision which illustrates the problems (1935 N.Rt. 117):
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> During the 1930 season the owner was to transport 27,000 fathoms of pulpwood from Leningrad to Norway, "fairly spread". The charterer contended at a certain stage that laytime did not commence when a vessel reached Leningrad, because at that time 19,245 fathoms had been shipped while only 16,200 fathoms should have been shipped according to a mathematically calculated spread. The Court held that even if the mathematical method was not applied but instead the expression "fairly spread" was interpreted in a discretionary and reasonable manner, in this case the owner was outside the contract.

The "fairly spread" clause may refer to shipments instead of quantity, and in that case the important thing is, of course, the spacing of the loading dates. In most instances there are additional provisions as to maximum and minimum quantity to be carried on one keel. If the difference between maximum and minimum is small, the distinction between a "fairly spread" clause connected with shipments and one connected with cargo will from a practical point of view be reduced to a formality.

In many instances—in particular when the charterer has wide options with regard to a total or a yearly quantity—the contract does not contain any of the above-indicated stipulations. Instead the contract provides a means of fixing the shipping dates from time to time through "programming", "scheduling" or "nomination" procedures. It also happens that such procedures supplement, e.g., a "fairly spread" clause. Sometimes this procedure is very complicated; occasionally it is so intricate that one suspects that it is almost impossible to comply with it, and experience shows that such suspicion is warranted.

A typical pattern is this:

Some time in advance the charterer has to notify the owner of his transport requirements for a certain period (a calendar year, a six-month period, etc). The notification may be of a tentative nature, often followed by a later and definitive notice for a shorter span of time. On the basis of such notice(s), the owner has to submit a shipping programme showing how he intends to carry out the required transportation. Vessels may be

named in such a programme, but generally as a matter of information only and the owner is not bound in this respect. At this stage the point is to establish the time element, and so far the programme may definitely bind the owner, of course with some margins for each tendering of notice. But the programme may also be preliminary, it being stipulated that the final programme shall be agreed on after the transportation requirement and the owner's answer thereto have been exchanged.

9. THE CHARACTERISTICS OF THE PERFORMING VESSELS

The owner decides with which vessels the individual shipments shall be performed, and the starting point is that he has a considerable freedom (and corresponding responsibility) in this respect, but not an unlimited one.

When a charterer accepts a person or a company as owner under a quantity contract, obviously a certain amount of trust and confidence is involved. The charterer relies on the owner's being able to perform contractually, i.e. to load the correct quantities at the correct dates and carry out the voyages as quickly as possible without loss or damage to the goods. The final result will not depend only upon the characteristics of the performing vessels. With a worn-out vessel manned by a second-rate crew the likelihood of delay and damage is considerable. A legal liability on the part of the owner is not an adequate compensation for such risks. Despite generously assessed and quickly settled damages, the charterer is better off when the cargo reaches the destination in time and in sound condition. The charterer may, of course, trust the owner to choose first-class tonnage, but usually the contracts do not leave that point to the discretion of the owners. In most instances there are clear limitations as to his freedom of choice, and some of these will now be examined.

a. *Own or chartered tonnage.* If the owner has suitable tonnage owned by himself, one can hardly imagine that a charterer will contest the right to use this tonnage. The interesting question is whether the owner is entitled to use chartered tonnage instead of or in addition to his own ships. The contract may provide an unambiguous answer, e.g. by describing the owner as "agent or owner of vessels to be nominated", or as "owner or chartered owner of vessels to be nominated", or as "owner, disponent owner, or time- or voyage-chartered owner of vessels to be nominated". A contract provision such as "owner of vessel to be nominated" does not expressly answer the question. The answer may nevertheless be quite

certain. When, for instance, the charterer knew at the time of negotiating the contract that the owner neither had nor intended to acquire sufficient tonnage to fulfil the transportation, a Norwegian court will have no difficulties in implying that the owner has the right to use chartered tonnage—as well as an obligation to procure chartered tonnage if the quantities cannot be moved at the contractual dates with his own vessels. It is submitted that, even in other cases where such indicators as to the intention of the parties do not exist, a Norwegian court will construe the clause in the same way unless the charterer is able to give convincing reasons for his objection. Even if the use of the chartered tonnage is acceptable in general, it may well happen that the charterer has valid reasons for objections in particular cases; for example, the flag of the carrying vessel is important in many respects. But in my opinion the charterer cannot successfully plead that a Norwegian contracting owner has no right to use, e.g., a chartered English vessel; on the other hand, he may—depending upon his connections with the Arab world—have a strong case if the vessel is flying the flag of Israel.

In the present context the indicated construction may appear liberal towards the owner; but it should not be forgotten that, unless there are clear words to the contrary, the construction at the same time places a heavy obligation on the owner. If he cannot fulfil the contract with his own vessel, he will be obliged to charter sufficient tonnage.

In practice some uncertainty as to the right to use chartered tonnage apparently exists—perhaps because the owner is uncertain as to the position under, e.g., English and American law. Accordingly the description is often very detailed: "owned, managed, voyage-chartered or time-chartered tonnage to be nominated".

b. *The physical characteristics of the vessels.* The owner's freedom of choice is, even without specific provisions, subject to the qualification that a nominated vessel shall be so constructed, maintained, equipped and manned that she is capable of withstanding the perils of the sea which are reasonably to be expected on the voyage in question. Furthermore, the vessel must be capable of carrying the contractual cargo without any considerable risk of loss or damage. In short, the nominated vessels should be seaworthy—a term with the same contents as in ordinary voyage chartering, and thus requiring no further discussion here. If the vessel is in fact not seaworthy when notice of readiness is presented, the charterer may rightfully refuse to load her. Whether or not the owner is liable for delay or damage to cargo caused by unseaworthiness will depend upon whether he has exercised due diligence in procuring a seaworthy vessel, since under Scandinavian law there is no implied warranty of seaworthi-

ness. By contract the owner may, of course, warrant the seaworthiness, but in most instances a warranty of seaworthiness is expressly refused.

In addition to the express or implied requirement of seaworthiness, the contracts contain a number of more concrete stipulations as to the characteristics of the vessels: type, capacity, dimensions, loading/discharging equipment, class, particular certificates, etc. Generally this description covers the same facts as in a conventional voyage charter, and the legal significance is the same. However, since the quantity contract covers several shipments with vessels which are not nominated at the time of signing the contract, there are, of course, wider margins than in a voyage charterparty. In a voyage charterparty the cargo capacity of the vessel may, e.g., be given as 100,000 tons 5% more or less. In a quantity contract it may be stipulated that the capacity of the vessels shall be min. 70,000, max. 120,000 tons. This does not necessarily mean that the owner on each voyage is entitled to demand a quantity of cargo between the two figures, since the contractual quantity of cargo for each ship may be defined elsewhere (e.g. "the cargo to be carried in lots of . . . tons"). In such a case it is perhaps more usual not to describe the capacity of the vessels, as it is sufficient to stipulate the maximum dimensions of the vessels to be used.

10. THE NOMINATION OF VESSELS: TRANSFORMATION OF GENERIC OBLIGATIONS INTO SPECIFIC ONES?

a. *Gradually the interest is concentrated on a named vessel.* With regard to the means of transportation the owner has, as we have seen, an abstract or generic obligation. The preceding section has, however, shown that the freedom of the owner may be restricted in various ways—in some cases there may exist a great number of vessels satisfying the requirements of the contract, while in other cases the number may be very small.

In any event, there is from the outset, at least formally, a possibility of choice. At some stage the owner has to make his decision, perhaps still with the legal and practical possibility of changing his mind. As the time for actual performance (tendering of notice) approaches, his freedom becomes—at least commercially—more and more limited. At a certain stage he must also be regarded as legally bound vis-à-vis the charterer. He has no longer the right to use another vessel even if he would prefer to do so. But there may exist a duty to do precisely this if something happens to the originally named vessel; this duty must in any case cease some time prior to the vessel's leaving the loading port with a contractual cargo.

The situation may also be described in the following way:

The abstract obligation is gradually concentrated on a specific vessel, or to put it differently, the abstract obligation to have a certain lot of cargo shipped at about a given date is transformed into a specific obligation.

> "Generic" and "generic liability (obligation)" as opposed to "specific" and "specific liability (obligation)" are terms that were first used (and theoretically refined) in the law of sales. But the underlying principles have been applied in other contractual relationships as well, *inter alia* that between owner and charterer.
>
> In principle, the liability for late delivery, non-delivery, or delivery of goods which are not of contractual standard, depends upon the description of the goods in the contract. When the contract is for specified goods, according to the Scandinavian Sales Acts the general rule is that negligence or carelessness is a prerequisite of liability on the part of the seller. The rule is quite different if the contract is for unascertained (or generically described) goods: now the seller is held liable unless it can be shown that non-compliance with the contract is due to *force majeure* events. With some simplification the position of the seller of unascertained goods may be stated as follows. He is exempted if it is impossible to perform, not only for him but for anyone. In some cases it is physically possible to perform, but the costs are prohibitive The courts have been presented with this problem of "economic impossibility"; at least in the period between the two world wars the courts held the party to his contract unless he would thereby suffer an "exorbitant" loss (but that such a loss would be suffered was very seldom found). The tendency nowadays is to mitigate this harsh rule, but reservations are usually made as regards maritime contracts—because such contracts are of a speculative nature, a fact which ought to be well known to anyone entering into a maritime contract.

b. *Implications by law.* Disregarding for the moment any special contractual regulation, the very heavy liability connected with a generic obligation is gradually lessened. At the outset the liability is strict, with the exception of *force majeure.* Thus the owner is liable for the charterer's economic loss if he presents a vessel too late or not at all—unless the owner is able to show that the delay was due to a *force majeure* event. It is not easy to show that the case comes within this exception. If the owner, for instance, convinces the court that it was not possible to obtain tonnage with the required properties—regardless of the rate—he has *prima facie* escaped liability, but he may enter the danger zone again when the possibility of having tonnage chartered at an earlier stage is examined.

But when the obligation is concentrated on a specific vessel, we are back to the general rule that liability is subject to carelessness or negligence. For instance, when the vessel is delayed on her loaded voyage, the charterer is entitled to damages for delay only if the delay can be attributed to the owner (or anyone for whom he is responsible) as negligence.

The problem here is to define the boundary between the two sets of rules on liability. It appears to be unanimously accepted that the boundary has been crossed when the vessel has completed loading, and that it can probably be set at the commencement of loading. But is this a rational dividing line? Would it be more appropriate to say that the dividing line which we have in mind is crossed on tendering notice of readiness, or even at the date of nominating the vessel? Until the courts have given clear guidelines, an owner relying on the nomination as the decisive moment is in my opinion running a risk—in particular when the time between nomination and loading is not short.

c. *The contractual solutions.* The obvious thing is to have the dividing line clearly defined in the contract. From the owner's point of view it may seem advantageous to have the line placed as early as possible; but this is to disregard the fact that a natural consequence of an early passing of risk is that the owner's freedom to arrange the transportation as it suits him from time to time is correspondingly reduced.

A simple way of drawing the line is to provide in the contract that at a certain date or at the occurrence of a named event, the conventional rules on voyage chartering shall apply to a particular voyage—for instance:

> "The attached voyage charter party to apply to each shipment as from the date of nominating the vessel in accordance with clause ...."

With such a clause, delay arising after the nomination is to be considered in relation to the terms of the voyage charter—the rules of liability of which generally are not too harsh on the owner.

Often contracts are not as clear as this, and one has to approach the problem on a broader basis, first of all by analysing the rules on the nomination of vessels, rules which in most cases are closely connected with the time-fixing procedure described in section 8 above. An example—somewhat simplified—will explain the mechanics and the difficulties involved:

> In a long-term contract for transportation of copper concentrates the procedure, once "the initial period" had expired, was as follows:
>
> Not less than 90 days prior to each contract year the charterer had to give the owner notice of "the estimated quantities for transportation during such year and charterer's preliminary schedule of cargoes during such year". This notice was to be followed by a further 90 days' notice of "date of definite availability of each lot of 20,000 tons". Thereafter the charterer was to "designate a port of loading", not later than 60 days prior to the definite availability date. Within 10 days of receipt of such designation the owner had to

"nominate for transportation of the lot in question ... within 30 days after such definite availability date:

(i) a vessel

(ii) the expected loading date, which shall be within 30 days after the definite availability date, and

(iii) the expected quantity to be moved by the vessel nominated."

Let us assume that on May 1 the charterer gives notice of availability of cargo on August 1. He has to designate the loading port not later than June 2, and this he does, e.g., by telex on June 1. Then the owner must, not later than June 10, nominate a vessel which can be expected to be ready for loading some time between August 1 and August 30.

In addition thereto the contract calls for notices by the owner 10 days, 5 days, 48 hours, and 24 hours before the expected time of arrival at the loading port. And on arrival a new notice of readiness to commence loading is to be given with the effect that laytime begins to count 12 hours thereafter.

It may happen that the owner, after having notified the charterer of the name of the vessel which shall be presented for loading a particular lot of cargo, decides that he would prefer to use a different vessel, perhaps because the named vessel has suffered damage or may be used more profitably under another contract. Is he free to do so? A positive answer presupposes that the other vessel—the substitute—satisfies the requirements of the contract with regard to physical characteristics. And furthermore, it must be in such a position that notice of readiness can be given within the dates stipulated in the contract or definitely fixed in accordance with the provisions of the contract. But this is not necessarily sufficient. If the notification in view of the terms of the contract has to be deemed a definite nomination of the vessel, the effect is as if the name of the vessel had been written into the contract, and unless there are specific provisions to the contrary a substitution requires the consent of the charterer. In the example given above it is submitted that the owner is bound when he has given the notification required by the contract within 10 days of receipt of the charterer's designation of the loading port. Or to be even more concrete, when the owner has on June 10 nominated a vessel for loading between August 1 and 30, he is bound to use the nominated vessel. It should be added that the clauses spelling out the nomination procedure are not always crystal clear; and in such cases it is—as already mentioned—my opinion that the courts will pay regard to the time span between a contended definite nomination and the loading date. If the time is long the courts may be inclined to construe the notification as a tentative one, since the other alternative is a serious restriction of the flexibility which is a general and characteristic feature of a quantity contract. This general attitude may, however, be questioned when the nominated vessel is lost or is so heavily damaged after the nomination as to be incapable of carrying

the cargo in question at the correct time. In many cases the charterer will raise no objection, even if the substitute arrives some time after the last contractual date. But he may for various reasons—e.g. a failing freight market—deny the right of substitution. And it is submitted that he is legally entitled to reject the substitute, with no obligation to give reasons for this.

11. LOADING/DISCHARGING PORTS AND CARGO HANDLING

In its simplest form the quantity contract is for carriage from one port to another, both being named in the contract. But it is not uncommon that the charterer has options—in some instances very wide options, e.g. entitling him to name one or more ports in a specified trading area. In particular, contracts for carriage of oil very often contain important and far-reaching options.

In principle the stipulations concerning these matters are of the same nature as those pertaining to loading and discharging ports in a charter for consecutive voyages.[7]

Nor do the clauses relating to the performance of the loading and discharging operations and the time allowed therefor present problems which are not known in conventional voyage chartering.[8]

12. FREIGHT AND DISTRIBUTION OF EXPENSES

The remuneration due to the owner—the freight—is calculated on the basis of quantities actually transported, precisely as in ordinary voyage chartering. In comparison with an ordinary voyage charter, the clauses may, however, appear somewhat complicated, because the options mentioned in section 5 above make it necessary to provide for a number of rates covering all possible voyages. In the oil trade this is avoided by referring to the World Scale system, which gives the relationship between the rates of freight for practically speaking all voyages with oil on the basis that the profit (or loss) per unit of time shall be the same for the owner regardless of the actual voyages performed. What the parties have to decide is the level of freight (e.g. W 71), and once this has been done it is

[7] See Falkanger, *Konsekutive reiser*, pp. 92 ff.
[8] *Op. cit.*, pp. 106 ff.

merely a matter of simple arithmetic to find the actual amount of freight to be paid for any voyage.

So far we have not come across any problems not known in connection with charterparties for consecutive voyages. And the same applies to demurrage and the distribution of expenses incidental to the carriage.[9]

The commercial risk involved, in particular when the contract is for a long period, is easily appreciated and is—as already mentioned—a fact that makes many parties hesitant to fix for long periods. From the owner's point of view, the risk may to some extent be eliminated by escalator clauses, establishing a procedure for increasing the freight when the expenses, or certain categories of expenses, increase (or increase beyond a certain limit), or for directly reimbursing increased expenses. To a lesser degree the same applies to various types of hardship clauses, but very often such clauses have a legal significance which is inversely proportional to the length of the clause, or has no legal significance at all. In some cases the last resort is a cancelling clause. In wartime, e.g., expenses have a tendency to skyrocket; if the increase cannot be recouped, the owner may try to get out by using the war cancelling clause.

The problems are, as will be seen, the same as under a charter for consecutive voyages, except for two differences which should be noted. First, under a charter for consecutive voyages the charter is off if the vessel named in the charter is lost or becomes a constructive total loss; and if the vessel has to go to a repair yard or is requisitioned for a substantial period, there may be frustration of the charter—and the owner gets off the hook. Under the quantity contract the owner cannot get out by proving that a particular vessel has been lost, etc.; his obligation is to provide tonnage, and accordingly he may have to charter tonnage at rates high above the contract rate. The second observation is of a technical nature. It may be more difficult to draft an escalator or hardship clause applicable to a quantity contract, since the level of comparison cannot be fixed by reference to a specific vessel as is commonly done in charters for consecutive voyages (viz. the vessel named in the contract).

13. THE RELATIONSHIP BETWEEN THE INDIVIDUAL VOYAGE AND THE TOTAL CONTRACT

For various reasons it may occur that an individual voyage is not carried out as expected. The voyage may be performed, but with delay; or it may

[9] *Op. cit.*, pp. 120ff.

not be performed at all. In both instances it may, depending upon the circumstances, be contended that the cause is on the side either of the owner or of the charterer. The discussion here, however, is limited to causes operating on the owner's side. And the question is: How does such (in an objective sense) faulty performance affect the contract as a whole? This question will be split into two: Is the charterer entitled to cancel the total contract? If he cannot or does not want to cancel it, how does non-performance of one voyage affect the total quantity which is to be shipped under the contract?

a. *Does delay on one voyage or non-performance of one voyage give a right to cancel the remainder of the contract?* Once again, this is basically a question of construing the terms of the contract, as the parties are free to decide what events shall give the charterer the right to cancel, or operate as automatic termination of the contract.

In one respect almost all contracts contain pertinent stipulations, viz. as regards the first voyage. Such clauses are usually similar to those found in charterparties for consecutive voyages[1] or in time charterparties, i.e. they are to the effect that if the commencement of performance, defined as the presenting of notice of readiness for the first time in the port of loading (port of delivery), does not occur within a given date, the charterer has the option to cancel the contract. In some instances it may be doubtful whether the intention is to give the charterer the option to cancel that voyage or the total contract. When cancelling clauses exist with regard to later voyages —typically clauses giving a cancelling right if the vessel does not arrive within *x* days after the date stated as expected loading date in a definite "programme"—the rule is, however, that the cancelling clearly applies to that voyage only.

But under the law of contracts the charterer has a right of cancellation when actual performance differs from what can be expected according to the contract, provided that the difference is substantial. If such a difference exists, it is in principle irrelevant whether the owner can be blamed or not; but if the owner can be blamed it is generally accepted that a smaller difference may be sufficient.

> The question of blame may appear important in one other respect. The loaded voyage has to be performed with due despatch. If the owner exercises due diligence in carrying out the voyage as quickly as possible, it may be argued that the actual performance is contractual. This is correct as far as damages are concerned, but cancelling because of delay may be justified even though the owner has done everything within his power. If the vessel does not reach its destination within a reasonable time—the term reasonable being

[1] *Op. cit.*, pp. 77 ff.

> assessed on the basis of the time usually consumed for the voyage and the characteristics of the vessel, with due allowance for the fact that bad weather may hamper the vessel—a delay exists, which may justify cancellation. The test of substantial difference is, however, flexible, and the courts will no doubt take into consideration that cancelling at this stage is more serious for the owner than is a cancellation before the cargo is loaded.

The starting point is that the right of cancellation applies to the individual voyage. Accordingly the question of substantiality should be decided in relation to that voyage, not in relation to the total contract. There are, however, exceptions.

In the first place, it may be argued that there is such a close connection between all the voyages that it would be commercially unreasonable to cut out one voyage, as the object of the contract may more or less be destroyed if the total quantity is not shipped. The answer may depend upon a very close interpretation of the contract, and in Scandinavian law a number of factors outside the contract itself will have an impact on the interpretation, *inter alia* the negotiations leading up to the final contract. If the contract is considered to be "indivisible", a delayed but eventually performed voyage is not easily accepted as sufficient grounds for cancelling the contract.

Secondly, delay on one voyage may be treated as an indication or proof of the owner's inability to perform in conformity with the contract. One has to expect delays on the voyages to be performed thereafter. In principle such a contention based upon anticipated breach may be accepted by the courts, but it should be noted that the plaintiff will not easily succeed.

> In a recent arbitration decision concerning a shipbuilding contract—with arbitrators of very high standing (two Supreme Court judges and a professor of law)—the rules were summarized as follows:
>
> "Generally, anticipated breach can be relied on only when after a realistic evaluation it must be regarded as certain that contractual delivery will not take place. Normally this presupposes an acknowledgment from the debtor that breach of contract will occur or it must be proved that the conditions absolutely necessary for correct fulfilment are not present ...."[2]

b. *The quantity obligation when one voyage is not performed.* When one voyage (or several voyages) is not performed, it is seldom that the contracts give an explicit answer as to whether there remains an obligation to ship the quantity which ordinarily would have been carried on such a voyage—necessarily at a later stage. This is remarkable, as it would appear to be expedient to have a contractual solution based upon a careful consider-

[2] Published in *Nordiske Domme i Sjøfartsanliggender* 1975, pp. 298 ff. (Justices Mellbye and Blom and Professor Brækhus arbitrators).

ation of the problems prior to signing the contract. The clauses I have seen may roughly be divided into two groups: in one, the non-shipped quantity is to be considered as shipped in relation to the total quantity obligation; in the other, the charterer is given the option of demanding its shipment later on.

When no such provisions exist, it is submitted that one should be somewhat careful in formulating general rules, because the facts which the court may consider relevant may differ very much from case to case. It should be noted, however, that if the conclusion is reached that the total quantity obligation remains, many difficult questions may arise as to when and how the unshipped quantity should be shipped. Problems of this nature constitute in themselves an important, perhaps decisive, factor when considering whether the intended but non-shipped quantity should be deducted from the total quantity.

With these reservations I suggest that one should first of all establish why the voyage was not performed, as the answer may provide at least some guidance. As a complete survey is not possible within the scope of this article, some observations based on a few examples must suffice:

If a vessel is not presented within the date (directly or indirectly) fixed in the contract, the charterer is entitled to cancel that voyage, and usually there will also be a basis for claiming damages for loss suffered, if any. The charterer may exercise the option purely for market reasons, for now he can obtain tonnage at a lower rate. Here there are no grounds for not making deductions from the total quantity.

Another reason for cancelling may be that a voyage performed, e.g., a week or two later than contracted for is more or less physically impossible (e.g. because of ice) or commercially purposeless. The question here is whether the charterer may demand, e.g., an additional ship during the next shipping season. I believe that as a rule the answer should be in the negative, which implies that the charterer has to rely on his claim for damages based upon the situation when the voyage should have been performed. An offer by the owner to provide an additional ship later on may—depending upon the circumstances—be regarded as a reasonable means of mitigating the damages. But as a rule (and I again stress this reservation) one should not make it a contractual duty of the owner to perform such an additional voyage during the next season, as the effect of this would in many instances be that the owner in fact paid damages based upon the situation not in the first but in the second season.

A third reason for exercising the cancelling option may be that the charterer cannot provide the cargo at a later date, owing to the stipulations of the underlying *f.o.b.* contract of sale. If the sales contract contains rules

on the effect of non-shipment, it is my submission that the quantity contract should so far as possible be construed in the light of such stipulations. In some cases the sales contract may have a great or even a decisive influence, e.g. where it was the intention of the parties to make the sales contract and the quantity contract "back-to-back". In other instances the sales contract will be of little or no importance, e.g. when the owner has had no knowledge of the terms of the sales contract, or where the parties, both having knowledge of the sales contract, have decided that the quantity contract shall stand on its own feet.

When a cargo is lost, typically when a vessel is lost with her cargo on board, the reasonable solution is that the quantity which the vessel had on board shall be deducted from the total quantity. One argument for this is that the contracts usually link the quantity obligations to shipment/shipping (in contrast to what is to take place at the port of discharge). Furthermore, the general rule in conventional voyage chartering is undoubtedly that the owner cannot demand new cargo when the one received is lost, and the charterer is not entitled to have another cargo shipped. Unless there are clear words to the contrary, it is reasonable to infer that the parties have accepted that this rule shall apply to the quantity contract as well.

14. SOME CONCLUDING REMARKS

Seen from the charterer's point of view, the quantity contract is an almost ideal contract form when his transport requirements are of a certain magnitude and extend over not too short a period of time. Even if these two factors are to some extent uncertain at the time of contracting, the quantity contract may be the best solution—provided that the owner is willing to accept the risks connected with wide options in favour of the charterer. The most attractive features of the contract are the following. First, the charterer is secured transportation of defined lots of cargo at dates which are defined without an unreasonably wide leeway. Secondly, the cost of transportation is based upon the quantity of cargo actually transported—at rates which in principle are fixed in advance and are unaffected by the development of the actual transportation costs. Thirdly, the charterer's involvement with the actual transportation problems is minimal.

The owner's attitude is, no doubt, more ambivalent. If the alternative is to fix his vessels on time charterparties or charterparties for consecutive

voyages, the undeniable risks connected with quantity contracts would—I believe—tend to turn the scales in favour of conventional chartering, giving as this does continuous employment of the vessels. An evaluation of this nature is restricted to "trading only with vessels owned by oneself", thus disregarding the possibility of using chartered tonnage in order to fulfil contractual transport obligations. The most important observation to make here is that such a narrow approach is contrary to the basic concept of shipping as being a service. The charterer's requirements are not always met by offering him ordinary time or voyage charterparties. Furthermore, such an approach overlooks the commercial benefits which may be derived from quantity contracts, i.e. above all the flexibility enabling the owner to use the vessel (own or chartered) which it suits him best to nominate from time to time under the contract. As pointed out, this flexibility, with all its advantages, has a reverse side, viz. the strict rules of liability applying where the owner is not able to present a contractual vessel at the contractual date. It has to be realized that the owner has to accept such risks, and that no adequate protection by way of insurance exists. But it should also be remembered that the greater tonnage the owner has under his management, the easier it is to meet an emergency—e.g. by re-routing a vessel when the vessel intended for a specific voyage under a quantity contract has suffered damage requiring time-consuming repairs. It is evident that many shipowners are too small to act as owner under a quantity contract, as their resources and reserves will be insufficient if something unexpected happens. This is a fact proved by the many forms of cooperation in existence nowadays between shipowners, *inter alia* in order to form sufficiently strong entities to make the undertaking of the role as owner under a quantity contract a commercially acceptable risk. Of course, pooling arrangements, etc., give rise to problems of their own, but these cannot be discussed here.

One final observation—applying to both sides—is necessary. It is often stated that many contracts are based upon "trust and confidence", i.e. one should not enter into such a contract unless one has "trust and confidence" in the other party. I think that one should not overemphasize the element of trust and confidence; the truth probably lies somewhere between "I win, you lose" and "I win, you win too". But in relation to quantity contracts covering substantial quantities to be carried over perhaps several years, I believe that the trust-and-confidence aspect should be taken seriously—because experience shows that unforeseen situations may arise which are not covered by the clauses of the contract, and that the provisions for the foreseen situations simply do not meet the actual requirements of practical life. If the contract is to turn out to be a reasonable undertaking, the

parties will from time to time have to show good will and expressly or implicitly agree to adjustments of the contract. It is, however, necessary to stress that the leniency to be expected from a reasonable party has clear limitations. So the last few words should be read not as an encouragement to neglect proper drafting of a contract but rather as a warning. The requirements of practical life may be such that even a well and reasonably drafted contract may have to be amended in order to bring it to a commercially acceptable ending.