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## THE IMPACT OF SLOW STEAMING CLAUSE UNDER CHARTERPARTIES

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*Throughout this article, it will discuss the reasons for which it has been required the institution of a special clause for the slow steaming and the impact that such introduction has on traditional rights and duties of charterer and shipowner.*

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First of all, it is necessary to underline the particular environment for which the introduction of a clause, instructing the ship to proceed at average speed (below the design speed), was essential to limit fuel consumption. During the 1970s, the crisis of bunker's market was characterized by a high price of fuel and low freight rates, thus, many ships started to proceed at moderate speed in order to preserve fuel consumption<sup>[1]</sup>. Furthermore, this behaviour continued during the financial crisis occurred during the 2008-2009: the slow steaming became more spread among the contract of affreightment<sup>[2]</sup>. The main purpose for reducing the speed is not only related to the "volatile market" of bunker cost, but also to the possibility of saving other expenditure (such as ports' dues and taxes), low freight rates and overcapacity<sup>[3]</sup>. However, we should take into account the balance between the economical reasons stated above and the modern sensibility for global environment. The aim is to highlight the possibility to increase the profits and, at the same time, to reduce the CO2 emission<sup>[4]</sup>. Especially, according to the mandatory regulations, the "cut-off" CO2 emission is coupled with the purchase of a more expensive bunker in order to control the gasoline vapours<sup>[5]</sup>. Owing to this balance between environment and economy, BIMCO (Baltic and International Maritime Council) has developed a specific clause for time and voyage charterparties in order to harmonize these needs<sup>[6]</sup>.

**1. Time Charters** Generally, the Time charter is a contract of carriage where the charterer uses the vessel and his crew for a determinate period of time in correspondence for the payment of a fixed hire<sup>[7]</sup>. Under this factis species of contract, the cost's allocation is quite balance between the parties, since the owner pays for the crew and the insurance, whilst the charterer pays for bunkers and other specific costs <sup>[8]</sup>. Consequently, the adventure's risks are divided between the parties whereas, the owner holds the operational risks, the charterer only the commercial risks. Furthermore, this balance is emphasized by a double feature of charterer's and owner's rights and duties that would be regulated by terms agreed into the contract and, by international regulations and agreement (such as Hague-Visby Rules). It seems clear that one of the shipowner's duties is to proceed the voyage with reasonable despatch<sup>[9]</sup>. However, instead of the voyage charter where deviation assumes a different and harsh role, in time charter it is dubious if it is possible to apply the same criteria <sup>[10]</sup>. The shipowner has the traditional duty to prosecute with utmost despatch<sup>[11]</sup> and if the Master decides unreasonably to diverge from the agreed route, the owner would be liable for breaching the obligation. Therefore, in this instance, the shipowner fails to comply with the charterer employment instructions and it gives rise to an indemnity (express or implied)<sup>[12]</sup>. As is stated in *The Aquacharm*<sup>[13]</sup>, there shall be a casual link between the loss and the employment order<sup>[14]</sup>. The utmost despatch's obligation could be qualified as an exception clause (conforming to the contra proferentem rule) for which the shipowner could rely in order to discharge his liability<sup>[15]</sup>. However, in the *Hill Harmony case*<sup>[16]</sup> the owner could not rely in the exception clause given by the incorporation of the Hague-Visby Rules (Paramount Clause)<sup>[17]</sup>. On the other hand, the charterer has the commercial control of the vessel and could instruct the owner to proceed at

slow steam. This statement regarding “speed and consumption” would usually constitute an intermediate term, in which case the termination of the contract would depend on the nature of the breach[18]. However, there are some divergences of view regarding the nature of the term, since in some cases, such as *Lorentzen v White Shipping*, [19] it could be a continuing warranty. The most common clause for speed and consumption was developed by NYPE, deeply; clause 12 provides a warranty of performance upon the shipowner. Due to this clause, the owner guarantees the vessel’s speed and the daily consumption during good weather condition[20]. This ‘performance warranty’ could be used as a measure where the owner decides illegitimately to slow steam (perhaps for marketing reasons), this consequence could be evaluated in the *Pearl C* case[21] where the court held that the owner was in breach of clause 8 NYPE, regarding the utmost dispatch obligation[22]. Differently from the shipowner, the charterer has a commercial purpose to reduce the vessel’s speed and proceed in slow steaming; in this instance it is necessary to introduce a specific clause incorporated into the contract. For that purpose, BIMCO produced an appropriate clause in order to balance the charterer’s rights to reduce the speed and the owner’s apprehension to slow steam. Moreover, the Slow Steam clause has been implemented in NYPE 2014 (clause 38)[23].

According to BIMCO slow steaming clause for Time charter parties:

a) Charterer may instruct the owner to adjust the speed in order to meet the designed destination in a particular time

1) Slow Steaming; the Charterer may give instruction to the Master to operate above the cut-out point of the vessels’ engines, in respect of the Master’s obligation about safety of the ship, crew, cargo and environment.

2) Ultra-Slow Steaming; the Charterer may give instruction to the Master in order to proceed above or below the cut-out point of the vessels’ engine, in respect of the obligations stated above. Moreover, if the instructions require an additional modification of the vessel, the master shall not oblige to comply with the employment order.

b) The Owner shall exercise due diligence in order to ensure that the vessel shall minimise the fuel consumption.

1) The Owners’ warranties related to the vessels’ speed and consumption

2) Charterers’ instruction regarding particular destination and time

3) Owner shall exercise due diligence in regard of the optimal use of the vessel’s equipment, navigation routes.

c) The above-mentioned instructions shall not constitute any breach of the due/utmost dispatch’s obligation

d) Charterer shall ensure that these instructions do not constitute any breach of others contract of carriage, additionally, the Charterer shall indemnify the Owner for any consequent liability for the breach of the above-mentioned contract of carriage[24].

Firstly, it is necessary to highlight the main elements of clause 38, which describes the process for slow steaming. The head of the clause introduces the general idea of the shipowner’s duty to comply with the employment instructions (*Hill Harmony*), however the wording ‘particular time’ should not be read as a warranty but only an indication[25]. Moving on the two different aspects of the slow steam as it is stated in (1) and (2), the clause provides the “Slow Steaming” and “Ultra-Slow Steaming”. The first one is the default average of speed which operates above the cut-out point, and for which the engine would not be damaged by the speed reduction. Differently, the Ultra-Slow Steaming provides a reduction below the cut-out point and the engine could have to be adapt for this reduction [26]. Furthermore, Clause 38 (a) is subjected to the Master’s duty to reject the charterer instructions insofar this instructions could affect the safety of the ship (or unseaworthy)[27]. However, the courts held a different point of view and it defines this duty more as a right[28]. If the instruction to slow steam below a certain speed could affect the safety of the ship, the Master shall refuse this order; moreover, he shall decline any direction that can affect the safety of the crew and cargo. Consequently, the owner could be entitled to an indemnity, if expressly incorporate into the contract[29]. This indemnity is provided by Clause 38 (d) and should encourage the parties to conclude a BIMCO slow steaming clause. Furthermore, the final provision of the clause states the exercise of due diligence that, as long as the Master complies with such instructions, there would not be a breach of due dispatch obligation. Moreover, in order to avoid any liability of the owner in respect of others contract of carriage, he charterer shall indemnify the owner[30].

**2. Voyage Charters** Differently from the time charter, the voyage charter is a contract for the use of the vessel in respect of an agreed voyage in correspondence for the payment of freight. Whereas the shipowner takes the costs for bunkers, the charterer only the commercial costs emphasized by the freight[31]. Due to this allocation of costs, the shipowner would be more interested in slow steaming (reduction of bunker consumption might mean lower freight). However, in this instance the risk of delay could shift between the parties, due to the charterer obligation regarding the cargo[32]. Under the voyage charterparty, the COGSA 1992 provides the incorporation of the terms of the contract into the bill of lading and it will link the shipowner with the bill of lading holder[33]. Consequently, if the contract contains the 'cesser' clause, the charter is discharged from any obligation after the cargo has been loaded[34]. Indeed, the contract usually provides a clause that gives to the charterer the option of cancellation if the ship has not offered: 'Notice of Readiness'[35]. Furthermore, 'due despatch obligation' is an absolute duty for which the owner would be bound to perform and any breach entitles the charterer to claim damages[36]. In the contest of voyage charter, the doctrine of deviation finds its purpose, since it provides a specific laden voyage[37]. Traditionally, the consequence of deviation gives to the innocent party the right to terminate the contract or, otherwise, the right to purely claim damages[38]. Deviation could be allowed only in few cases such as agreement or when it is not intentional[39]. Consequently, if the loading/discharging operations exceed the laytime (set of time for such operations), the shipowner would be entitled to demurrage[40]. Due to this structure, the demurrage shall be taken into account in the slow steaming clause, since the shipowner would perform the voyage as soon as possible in order to achieve the maximum benefit.

According to the BIMCO Slow Steaming clause for Voyage Charterparties:

- a) The Owner shall be entitled to give instruction to the Master in order to reduce the speed of the vessel.
- b) Whereas the vessel proceeds at reduce speed, this shall not constitute any breach of due/utmost despatch's obligation.
- c) Charterer shall ensure that this instructions do not constitute any breach of others contract of carriage and also, the Charterer shall indemnify the Owner for any consequent liability for the breach of the above mentioned contract of carriage.
- d) This clause shall not prejudice any other rights (implied or express) un der the charterparties[41].

This clause tries to find a balance between the party who pays for the bunker and the commercial purpose of the contract, for this reason, the clause entitles the shipowner to slow steam. The parties should collaborate in order to adopt the required speed, additionally, the clause emphasizes that this decision of slow steam will not be a breach of the due despatch obligation. Consequently, the charterer shall indemnify the owner for any breach of other contracts of carriage as a result of the delay[42]. On the other hand, BIMCO (and INTERTANKO) has drafted a clause in order to improve the charterer position, especially regarding the congestion in port[43]. BIMCO virtual arrive clause would be incorporated into the contract when the shipwoner is entitled to slow steam and tries to avoid any prejudice to the charterer, where a speed reduction could affect consequent events[44]. Therefore, the parties agreed on a new time of arrival in case of delay and also a compensation to the shipowner for the lost of time in accordance to the demurrage rate[45]. The compensation shall be realised before the final discharge; in addition, the extra time shall be computed regarding relevant evidence such as weather and other data[46]. As is stated in the clause, the agreement incorporated into the contract shall not constitute any breach of the due despatch's obligation, as long as the master exercises due diligence[47].

The slow steaming clause has been introduced by BIMCO, could present some difficulties regarding other contracts of carriage such as bill of lading. As is clear in the commercial practice, the bill of lading operates as evidence between the carrier and the shipper but additionally, it entitles third party holder of an original bill of lading to claim for any loss or damage to the cargo[48]. These difficulties are highlighted by the possible discordance between the terms of the contracts, although this could be overcome by the incorporation of the charterparties terms into the bill of lading[49]. However, this incorporation might generate legal uncertainty due to the possible lack of indications of the slow steaming clause. It is necessary to underline that the introduction of the clause could affect the main obligations of the parties. The fundamental issue regarding the due despatch obligation is the third party rights under other contracts, since the carrier is obligated to perform his obligation within a reasonable time[50]. Then, the carrier would be liable in case of delay unless, as is stated in the BIMCO clause, the slow steaming is incorporated in the contract, he exercises due diligence and also, he complies with the charterer's orders[51]. If all of these requirements would be fulfilled, the carrier could rely on the indemnity[52]. Moreover, the Charterers P&I Club has stated that the slow steaming clause shall be included as a precise provision into any bills of lading issued, in order to protect the carrier against any breach of the due despatch obligation[53]. Additionally, this obligation is coupled by the duty to 'proceed without deviation in the usual and customary course'[54]. According to *Scaramanga v Stamp*,[55] deviation includes even a deliberate reduction of speed.[56]. However, BIMCO liberty and deviation clause tried to improve this condition and allows a reasonable deviation in accordance with Article 4 of the Hague-Visby Rules [57].

**3. Conclusion** To conclude, the main purpose of the BIMCO slow steaming clause for charterparties is to find an efficient balance between economical reasons and the modern sensibility for the environment. According to this last issue, it is necessary to state that this become more and more important in the international carriage of goods. On the other hand, the slow steaming clause has a vital importance in the contest of a 'volatile market' of bunkers. However, the real challenge is the equilibrium between parties' obligations, especially when deriving from mandatory legislation, and the possibility to reduce the speed of the vessel. For these reasons, particular attention shall be given to the performance warranty as well as the due despatch obligation.

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[4] Intertanko, *Emission reduction clauses*, [online] [January 2016], {https/URL}

[5] Christos Kontovas & Harilaos Psaraftis, *Maritime Policy and Management* [online] [January 2016], {https/URL}

See also, Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version) (Text with EEA relevance ) and Regulation for the air quality control of the State of Maine. Example of different bunker; LSFO in SECAs

[6] BIMCO special circular n. 7 2011 and n. 5 2012. Moreover, INTERTANKO (International Association of Independent Tanker Owners) developed a formula for optimize the speed of the vessel according to the freight rate

[7] Generally payment would be in advance (BALTIME 30 days while NYPE 93 only 15 days)

[8] Clause 2 of the New York Produce Exchange form for Charterer. See also, Julian Cooke, *Voyage Charterers*, (3rd Ed. Informa London 2007) pg. 3

[9] In time charter, the delay assumes a different shape, since there is no equivalent to laytime and the time will run from the 'delivery' to the 'redelivery' and it could be interrupted by off-hire clause (Simon Baughen, *Shipping Law* pg. 189). See also *The Democritos* [1976] 2 Lloyd's Rep 149

[10] Ibid. Supra Fn 7

[11] Clause 8 NYPE

[12] Failure to comply with an order, could amount to a breach of the contract. However, there is an alternative way which provides an indemnity for any loss or damage. *The Island Anchor* [1994] 2 Lloyd's Rep 287 and *The Athanasia Camminos* [1990] 1 Lloyd's Rep 277. See also Simon Baughen, *Shipping Law* pg. 191

[13] (1999) LMCLQ 461; [1999] QB 72

[14] Simon Baughem, *Shipping Law* ( 6th Ed. Routledge 2015) pg. 192

[15] Ibid. Supra Fn 7. However, this is possible only if the language is able to do so.

[16] [2001] AC 638. Even though Article IV rule 2 (a) of the Hague-Visby Rules provides an exclusion in case of Master's fault in navigation, The House of



Lords held that the Master fails to comply with charterer's order and it was 'default'

[17] Ibid. Supra Fn 14 pg. 307 and 615. See also London Arbitration 10/00 where the owner deliberates slow steam in order to reduce the fuel consumption, the arbitration stated that this shall be considered as a breach of the utmost despatch.

[18] Micheal Wilford, Time Charters (5th Ed. LLP London 2003) pg. 109. See also The Aegeon Dolphin [1992] 2 Lloyd's Rep 178 and The Diana Prosperity [1976] 2 Lloyd's Rep 60, CA

[19] (1943) 74 L.L.Rep.161. See also Ibid. pg. 110

[20] Ibid. pg. 112. (wind force 4 Beaufort scale and sea force 3 Douglas scale)

[21] Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C) [2012] 2 Lloyd's Rep. 533

[22] StoneChambers, Slow Steaming [online] [January 2016] {https/URL}: 'Master shall perform the voyages with the utmost despatch', different term compare the NYPE 93 that provides the 'due despatch', however there are no great differences in practice.

[23] Ibid. Supra Fn. 7. Moreover, it makes clear that the clause will not be in contrast with third parties contract of carriage (if incorporated in such contracts) or Master's obligation for the safety of the vessel

[24] BIMCO, Slow Steaming clause for Time Charterparties [online] [January 2016] {https/URL}

[25] Ibid. See also Supra Fn 14 pg. 315 and The Hounda [1994] 2 Lloyd's Rep. 541

[26] Ibid. In order to avoid unexpected damages, the Ultra-Slow shall be agreed by the parties

[27] Court Line v Canadian Transport (1940) AC 934. See also the dicta of Steyn J. in Panaghia Tinnou (1986) 2 Ll.Rep. at 591

[28] Imvros (1999) 1 Ll. Rep 848 and ER Hamburg (2006) 2 Ll. Rep 66

[29] The indemnity could be implied as a result of the implication of law. See also Supra Fn 18. See also Supra Fn 14 pg 317 The George Christos Lemos [1991] 2 Lloyd's Rep. 107 and pg. 320 Portsmouth Steamship v Liverpool & Glasgow Salvage Assosiation (1929) 34 L.L.Rep.459

[30] Ibid. However, it is preferable that such Slow Steaming clause would be incorporated into the bill of lading or sea waybill

[31] Under this aspect, the voyage charterparties is more challenging

[32] Ibid.

[33] Under the terms of the charterparty

[34] Ibid. Supra Fn 14 pg. 188. In addition, the contract provides two remedies for the shipowner in case of non payment of freight and demurrage, the lien on the cargo and the lien on subfreight

[35] Clause 16.2 of BPVOY 4. This term is implied by law and any breach, could arise the option for the charterer to cancellation Clause 5 ASBATANKVOY

[36] Ibid. Moreover, bad weather or other events are irrelevant for the purpose of the obligation. See also The Balears (1993) 1 Lloyd's Rep. 215

[37] Carrier would be under the duty to proceed the laden voyage: **a)** by usual and customary route, **b)** with reasonable despatch, **c)** in the same ship, **d)** under deck. Any breach of these requirements was considered as a deviation and the carrier would be liable. See also, Tafaka [1990] 1 Lloyd's Rep 536, Balian v Joly [1890] 6 TLR 345

[38] Ibid. Supra Fn 35. See also Hain v Tate&Lyle (1936) 41 Com. Cas. At 345. The carrier would be considered as common carrier and the only defence: **a)** Act of God, **b)** King's enemy, **c)** Inherent vice of the goods

[39] Deviation is allowed: **a)** usual and customary route **b)** when it is not intentional, **c)** under an implied agreement, **d)** under an express agreement (liberty clause), **e)** statutory provisions

[40] Simon Baughen, Shipping Law (6th Ed Routledge Oxon 2015) pg. 192

[41] BIMCO, Slow Steaming Clause for Voyage Charterparties [online] [January 2016] {https/URL}

[42] Ibid.

[43] BIMCO, Virtual Arrive for Voyage Charterparties [online] [January 2016] {https/URL}

[44] Ibid.

[45] Ibid. If left blank 50% of the rates. Moreover, the agreement takes into account the saved bunker cost.

[46] Ibid.

[47] Ibid.

[48] Ibid. Supra Fn 14 pg. 6, 7. It is necessary to assert the differences between a shipowner's bill of lading, if is signed by the owner or its agents and a charterer's bill of lading, if is signed by the charterer or its agents. This statement is necessary in order to highlight who is the carrier and then, who is liable. Consequently, the party is entitled to sue the carrier under the contract of carriage or otherwise in tort (pg. 29 and 46). See also The Vikfrost [1980] 1 Lloyd's Rep. 560

[49] Julian Cooke, Voyage Charters (3rd Ed. Informa, London 2007) pg. 517. See also Simon Baghuen, Shipping Law, pg. 193

[50] If the charterparties does not indicate a specific time. See also Simon Baughen, Shipping Law pg. 208

[51] Ibid. Supra Fn 19 and 29

[52] Ibid.

[53] The Charterer P&I Club [online] [January 2006] {https/URL}

[54] Davis v Garret (1830) 6 Bing. 716, 725. Ibid. Supra Fn 37 pg. 251

[55] (1880) 5 CPD 295, CA. Where a vessel reduces its speed in order to tow another vessel. See also Simn Baughen, Shipping Law, pg. 89

[56] However, some deviation might be acceptable if the purpose of such deviation is; to save life (but not for the purpose of the salvage award), the cargo carried or under the terms of a specific clause agreed by the parties 'Liberty clause'. Moreover, according to Glynn v Margeston [1893] AC 351, HL and Leduc v Ward (1888) 20 QBD 475, CA. where it was held that the liberty clause indicates only ports in course of the voyage. Justification for deviation is provided also by the incorporation of Paramount clause (Hague-Visby Rules)

[57] BIMCO, Liberty and Deviation Clause [online] [January 2016] {https/URL}

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