

CHARTERER'S LIABILITIES UNDER THE SHIP TIME CHARTER

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I. BACKGROUND

In the early hours of the morning of October 30, 1951, the steamship *Wagon Mound* was taking on fuel, bunkering oil, at a wharf in Sydney Harbor. During the process, a large amount of that oil was spilled into the bay. The oil quickly spread across the bay, and a significant amount accumulated under the wharf

of a nearby ship repair facility where welding work was being performed on two ships. After completing its loading operations, the *Wagon Mound* slipped its lines and left Sydney Harbor. Some twelve hours later, the oil laying under the nearby repair facility wharf was ignited by sparks from welding torches being used by workers above. The subsequent fire severely damaged the wharf and the two ships being repaired alongside. At trial, lengthy expert testimony showed that—although the fuel oil was clearly designed to burn in the *Wagon Mound's* furnace, which powered the ship—the owners of the *Wagon Mound* could not reasonably have been expected to know that fuel oil was capable of being set on fire when spread on water.¹ The *Wagon Mound* owners were, therefore, found not liable to the wharf owner for the damages caused. After years of working its way through the courts, the Judicial Committee of the Privy Council eventually upheld the trial court's finding that the *Wagon Mound* owners were not guilty of negligence to the shipyard wharf owner.² However, in a related case, the Privy Council later held the *Wagon Mound* owners to be negligent to the owners of the two ships damaged in the blaze based on evidence which showed that even though unlikely, the owners should have known it was possible the oil could have ignited and that the *Wagon Mound* owners' representative at the scene made no attempt to contain the spillage of oil into the water.³

The Texas City disaster of 1947—when the French vessel, *Grandchamp*, which was loading a cargo of ammonium nitrate fertilizer, caught fire and exploded, triggering the subsequent explosion of two other nearby ships—left approximately 500 dead and 3,500 injured.⁴ The original cause of the fire on the *Grandchamp* is still unknown, but the subsequent loss of life,

1. See *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co.*, [1961] 1 A.C. 388, 1 Lloyd's Rep. 1 (P.C.).

2. *Id.*

3. See *Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co.*, [1967] 1 A.C. 617, [1966] 1 Lloyd's Rep. 657 (1996).

4. Mark Pandanell, *The Texas City Disaster, April 16, 1947*, at <http://www.local1259iaff.org/disaster.html> (last visited Apr. 4, 2004); FIRE PREVENTION & ENG'G BUREAU OF TEX. & THE NAT'L BD. OF FIRE UNDERWRITERS, *Texas City, Texas, Disaster, April 16, 17, 1947*, at <http://www.local1259iaff.org/report.htm> (last visited Apr. 4, 2004).

personal injury, and property damage is unparalleled in the United States maritime industry.⁵

Clearly, the risks of personal injury and damage to property and the environment in the marine transportation industry have increased substantially since the arrival of the internal combustion engine and the discovery of oil. Since that time, transportation of oil, petrochemicals, and other energy-related products have led to a proliferation of laws and treaties governing trading on and use of our seas. In the author's view, albeit prodded by these laws and treaties, the industry has responded remarkably well to the increased risks associated with those cargoes. The result is that ships plying our oceans are substantially safer and cleaner than they were fifty years ago. Nevertheless, maritime transportation remains a hazardous occupation, especially in the energy and petrochemical business.

Subsequent oil spills—such as the *Torrey Canyon* disaster of 1967 when the *Torrey Canyon* grounded just eleven miles off the English Coast, and 119,328 tons of crude oil were discharged in the Atlantic Ocean— further impressed on owners the environmental hazards involved in transporting oil.⁶ More recently, the escape of 38,800 tons of oil on the coast of Alaska, when the *Exxon Valdez* ran aground and split apart on March 23, 1989, completely changed the legal landscape. The United States Oil Pollution Act of 1990 (OPA 90)⁷ was a direct result of this incident. OPA 90 also led to the passage of other tough laws overseas and international treaties on a rapid basis.

These tougher anti-pollution laws and treaties were instrumental in persuading most of the world's major oil companies to depart from the marine transportation business. Many of these companies sold their tanker fleets to independent owners who then chartered the ships back to the oil companies.

Today, reluctant to shoulder the burden of large overhead

5. See Pandanell, *supra* note 4; see FIRE PREVENTION & ENG'G BUREAU OF TEX. & THE NAT'L BD. OF FIRE UNDERWRITERS, *supra* note 4.

6. For a discussion of the *Torrey Canyon* disaster, see P. Burrows et al., *Accidental Oil Pollution by Tankers*, 3 J. PUB. ECON. 251, 257 (1974), and *In re Barracuda Tanker Corp.*, 281 F. Supp. 228 (S.D.N.Y. 1968), *rev'd*, 409 F.2d 1013 (2d Cir. 1969).

7. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

costs, extensive capital outlays, and the risks involved with ship ownership, marine cargo owners typically turn to independent ship owners to carry their cargoes under a private contract. Since most of the energy transportation business is expressed in terms of large volume deliveries over an agreed period of time, shippers often enter into a "time charter party" whereby they hire a ship for a specified term and direct its trade pattern to meet customer delivery needs.

While charterers may escape the risks associated with operating a shipping company, a prudent charterer should still be concerned about potential liabilities to third-parties, ship's crew, and the environment in connection with the transportation of its product, particularly if that cargo has been classified as a "dangerous cargo" by local or international law.

II. SCOPE

This article focuses on the nature of the time charter relationship and potential third-party risks that a time charterer carrying dangerous cargoes in U.S. waters may be expected to assume by virtue of the time charter relationship.⁸ Due to the increased focus on transportation safety since September 11, 2001 and a rising interest of natural gas as the clean energy alternative of the twenty-first century, this article also covers the potential risks involved in the transportation of liquefied natural gas (LNG)⁹ and compressed natural gas

8. The principles and theories discussed herein generally will apply also to time charterers of ships carrying any dangerous cargo.

9. The U.S. Coast Guard has defined liquefied natural gas to mean "a liquid or semisolid consisting mostly of methane and small quantities of ethane, propane, nitrogen, or other natural gases." 33 C.F.R. § 127.005 (2003).

[LNG] is natural gas cooled to a liquid state. When natural gas is cooled to a temperature of approximately -256°F at atmospheric pressure, it condenses to a liquid. To liquefy natural gas, impurities that would freeze, such as water, carbon dioxide, sulfur, and some of the heavier hydrocarbons are removed. The volume of this liquid takes up about 1/600th of the volume of natural gas at a stove burner tip. LNG weighs about 45 percent as much as water and is odorless, colorless, non-corrosive, and non-toxic."

UNIV. OF HOUSTON LAW CTR. INST. FOR ENERGY LAW & ENTERPRISE, LNG SAFETY AND SECURITY 44 (2003), available at <http://www.energy.uh.edu/lng/>.

(CNG).¹⁰ The U.S. Coast Guard has classified both LNG and CNG, as well as numerous other energy products, as “dangerous cargoes.”¹¹ U.S. Coast Guard rules in this area are in line with the International Marine Organization’s (IMO) classifications of LNG and CNG on its Dangerous Cargoes List.¹²

This article focuses not on a time charterer’s liability to owners of cargo carried on board the ship—the time charterer is often the actual cargo owner—but instead on the time charterer’s duties and potential liability to the ship’s owner and crew and other third-parties not owning or purchasing cargoes being carried on the ship.

After exploring the nature of the time charter and the time charterer’s limited duties and responsibilities under the time charter itself, the article discusses potential liability based on the direct negligence or fault of the charterer, theories of strict liability, and certain statutory obligations concerning the carriage of goods by sea. The article then turns to a discussion of specific laws and conventions that may serve to limit the liability of ship owners, charterers, and certain other parties. Following a brief analysis of environmental issues, the article concludes by examining risk mitigation under existing insurance options.

III. THE TIME CHARTER

A. *Nature Of the Time Charter*

1. *Contract*

A charter agreement, known in the trade as a “charter party,” is a specialized form of private contract for the hire of a

10. CNG is relatively new technology which involves the bulk transportation of natural gas without the need to liquefy and then regassify the gas (as in LNG transportation). Compressed natural gas “is natural gas pressurized and stored in welding bottle-like tanks at pressures up to 3,600 psig. Typically, it is (the) same composition of the local “pipeline” gas, with some of the water removed.” CH-IV INT’L, *LNG Fact Sheet*, at <http://ch-IV.com/lng/lngfact.htm> (last visited Apr. 4, 2003).

11. See discussion *infra* Section IV.B.1.

12. See INT’L MARITIME ORG., INTERNATIONAL MARITIME DANGEROUS GOODS CODE ch. 3 (2000). LNG and CNG are classified at U.N. Nos. 1971 & 1972.

ship. The party that contracts for the use and service of the ship is called the “charterer” or “shipper,” while the party supplying the ship is the “owner” or “carrier.” The charter party, commonly abbreviated by the industry as simply the “charter,” is the underlying agreement that governs the duties, obligations, and liability allocations between a ship owner and a ship charterer. Under a time charter party, a “time charterer” enters into a contract of affreightment with a ship owner for the use of a named ship to transport the charterer’s cargoes during a specific period of time. The charterer may be chartering the ship either to carry its own cargo or cargoes owned by third-parties. The time charter must be distinguished from the demise or bareboat charter under which the charterer is considered to become the owner *pro hac vice*¹³ and as such is responsible for the operation, navigation, and crewing of the vessel.¹⁴ The term of the time charter can be short, six months to one year (even as brief as one or two voyages lasting several weeks), or long—seven to twenty years, with renewal terms. Given the capital costs that are associated with the development of a specialized ship, such as an LNG carrier, an LNG time charter would likely be for a long-term period, perhaps for the entire useful life of a newbuilt ship.

The time charter, therefore, is by its nature a private contract. The rights and obligations of the time charterer under such a contract are derived from the contract itself. Since charter parties have been used in international shipping for hundreds of years, certain standards and forms have been developed to govern the charterer’s responsibilities in the time charter relationship. Various forms of time charters have been developed and are used for different types of cargoes and trades. Many of these forms contain similar or standard language covering the allocation of responsibilities between the ship owner and the charterer. Two such forms referenced in this article are The Baltic and International Maritime Conference’s (BIMCO) *Uniform Time Charter for Vessels Carrying Liquefied*

13. See GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* §§ 420–23 (2d ed. 1975).

14. See THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* §9-3 (3d ed. 2001).

*Gas*¹⁵ and The Association of Ship Broker and Agents (U.S.A.), Inc.'s *New York Produce Exchange Form (1993)*.¹⁶

2. Allocation of Duties

Under a standard time charter, the charterer pays a daily or monthly hire for the use of the ship and also pays for the costs of all fuel consumed by the ship and all port fees. Additionally, the time charterer pays all cargo loading and unloading charges, but the charterer usually is not responsible for supervising or controlling any of these activities.¹⁷ The ship owner typically operates or subcontracts to a third-party who then operates the ship, hires and pays for the crew, insures the ship, pays for all capital items and ship overhead, and is responsible for maintenance of the ship.¹⁸ Most importantly, the operation and navigation of the ship remain under the owner's control. Therefore, the time charterer, because of the nature of the contract, does not have the same risk exposure as the ship owner.¹⁹ However, since the cargo on board the ship usually is owned either by the time charterer or the buyer of the particular cargo, the time charterer will always be a potentially named party in any third-party lawsuit.

B. Limited Duties of a Time Charterer

1. Cargo Risk of Loss

Despite the fact that the final form of each respective

15. THE BALTIC & INT'L MARITIME COUNSEL (BIMCO), *Uniform Time Charter for Vessels Carrying Liquefied Gas* [hereinafter *BIMCO's Gastime*].

16. THE ASS'N OF SHIP BROKERS & AGENTS, *Time Charter, New York Produce Exchange Form* (last revised Sept. 14, 1993), reprinted in JOHN F. WILSON, *CARRIAGE OF GOODS BY SEA 440-54* (4th ed. 2001) [hereinafter *NYPE 93*].

17. SCHOENBAUM, *supra* note 14, § 9-15; see discussion *infra* Section IV.A.4.

18. See generally, HARVEY WILLIAMS, *CHARTERING DOCUMENTS* ch. 3 (3d ed. 1996) (giving examples of chartering documents); 8 BENEDICT ON ADMIRALTY § 18.02[B] (7th ed. 2003) [hereinafter *BENEDICT*].

19. The time charterer stands in contrast to a demise or bareboat charterer, who the law deems to be the owner *pro hac vice* of the ship, and "therefore responsible *in personam* for the negligence of the crew and the unseaworthiness of the vessel." *Forrester v. Ocean Marine Indem. Co.*, 11 F.3d 1213, 1215 (5th Cir. 1993).

charter party is a function of a negotiated transaction between an owner and a charterer, a time charterer customarily has very limited duties under the charter party. Notwithstanding these limited duties, the critical liability allocation that a time charterer does bear is the risk of loss for the ship's cargo, assuming it holds title to such cargo while in transit.²⁰ Even so, the ship owner or carrier still has a duty to properly load, handle, and care for that cargo unless such duty is contractually assumed by the charterer.²¹ The time charterer, however, is obligated to ensure that the cargoes may be lawfully carried and will not cause harm to the ship.²²

As stated previously, this article does not focus on the liability of the charterer for loss of or damage to the cargo on board the ship. The respective duties between an owner of cargo and the carrier are usually governed by the Bill of Lading issued by the carrier for that cargo and by local statutes or international conventions.²³ These rules constitute a wholly separate body of law.

2. *Safe Ports / Berths*

The time charterer generally has a duty to the ship owner to ensure that the ship is only routed to "safe" ports.²⁴ Even in the absence of a specific "safe" port provision in the charter party, courts and arbitration tribunals often find that such an implied

20. For a brief discussion of certain limitations afforded by the United States Carriage of Goods by Sea Act and the Harter Act, see Part IV.C.1 below.

21. See *Hale Container Line, Inc. v. Houston Sea Packing Co., Inc.*, 137 F.3d 1455, 1468 (11th Cir. 1998) ("The duty to load, stow, and discharge cargo in the carriage of goods under a time charter is on the ship and its owner."); *United States v. Lykes Bros. S.S. Co.*, 511 F.2d 218, 224 (5th Cir. 1975) (recognizing that a carrier is obligated to carefully load, handle, stow and care for cargo); *Milltrade v. M/V Kielgracht*, 1997 A.M.C. 2773, 2774 (S.D. Tex. 1996) ("Unless there are provisions in the charter party stating otherwise, the duty to load, stow, and discharge cargo and the consequences for failing to do so properly fall upon the owner of the vessel.").

22. *NYPE 93*, *supra* note 16, § 4; see also 2A *BENEDICT*, *supra* note 18, § 18.06[C].

23. See discussion *infra* Part IV.C.2.

24. "The vessel shall be loaded and discharged in any safe dock or at any safe berth or safe place that Charterers or their agents may direct, provided the Vessel can safely enter, lie and depart always afloat at any time of tide." *NYPE 93*, *supra* note 16, § 12.

warranty exists.²⁵ Because meteorological and political circumstances may arise that threaten the safety of a seemingly-safe port at any particular moment, the ship owner also shares in the responsibility to identify such circumstances. Similarly, many charters also include a “safe berth” clause, which specifies that the charterer must nominate those berths inside a safe port that accommodate the ship’s dimensional characteristics, including length and draft.

Unfortunately, the law with regard to allocation of responsibility for providing safe ports and berths is not settled in the United States. In *Atkins v. Fibre Disintegrating Co.*, the charterers of the ship *Elizabeth Hamilton* instructed the owner to load bundles of bamboo in Kingston and Port Morant, Jamaica for transportation to New York.²⁶ The charter agreement required that after loading cargo in Kingston, the ship was to travel to a “second safe port” to complete her cargo. After loading cargo, in Kingston, the ship proceeded to Port Morant, completed loading with cargo, and set sail for New York. On her way out of Port Morant, the ship struck a reef at the mouth of the harbor and was badly damaged. The district court ruled that Port Morant was clearly not a safe port because, except for a small channel, reefs surrounded the harbor and that the ship’s captain would certainly have been justified in refusing to go to Port Morant to pick up cargo. However, the captain did not object to picking up cargo in Port Morant; rather, he did travel to and load at such port. The court ruled that in making no objection, the captain waived any argument that the harbor might not be safe. The district judge, seemingly adopting a prudent man standard dependent on the facts surrounding the incident, stated: “The master is the navigator, presumed to know best the channel of the ports within the natural range of the adventure, and the capacities of his vessel; and he is the proper person to determine whether his vessel can or cannot

25. See, e.g., *Aegean Sea Traders Corp. v. Repsol Petroleo SA*, [1999] 2 Lloyd’s Rep. 39, 67; *Vardinoyannis v. Egyptian Gen. Petroleum Corp.*, [1971] 2 Lloyd’s Rep. 200, 205; *In re: Arbitration between Petrol Shipping Corp. and Kingdom of Greece, Ministry of Commerce*, S.M.A. No. 788 (N.Y. Arb. 1972).

26. *Atkins v. Fibre Disintegrating Co.*, 2 F. Cas. 78, 78 (1868), *aff’d* *Atkins v. The Disintegrating Co.*, 85 U.S. 272 (1873).

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enter any particular port.”²⁷ Without reciting the facts of this case, the United States Supreme Court later affirmed the district court’s holding.²⁸

The Supreme Court’s ruling at the time appeared clear; that is, the master of the ship is presumed to know his ship and its capabilities and, as a prudent man, must use his own judgment when deciding whether to enter a port designated by the charterer. However, since the Supreme Court’s decision in *Atkins*, two divergent views have arisen among United States Courts of Appeal as to the correct standard of charter liability under safe port/safe berth clauses. The majority view, expressed by the Court of Appeals for the Second Circuit in *Venore Transportation Co. v. Oswego Shipping Corp.*, is one of almost strict liability whereby the charterer whose charter contains a “safe berth” clause is found to have a non-delegable duty to “provide a completely safe berth.”²⁹ The Fifth Circuit, on the other hand, takes the view expressed in *Orduna S.A. v. Zen-Noh Grain Corp.*—that a safe berth clause in a charter does not make the charterer the warrantor of the berth’s safety.³⁰ Rather, the clause imposes a duty to use due diligence to select a safe berth. The Fifth Circuit’s view, therefore, is that only the intervening negligence of the charterer in the berthing process would render the charterer liable under the safe port/safe berth clause. Absent the charterer’s negligence, the ship’s captain, and hence the owner, is responsible.³¹

The U.S. approach (split as it is) can be contrasted with that taken by the English courts. In *Leeds Shipping Company, Ltd. v. Societe Francaise Bunge*, the charterer had directed the owner to send the 5,236 g.w.t. *Eastern City* to Mogador, Morocco to pick

27. *Id.* 78–79.

28. *Atkins v. The Disintegrating Co.*, 85 U.S. 272, 299 (1873). The Supreme Court, after a full examination of the case on its merits, found no reason to disagree with the district court judge, stating: “However full might be our discussion, we should announce the same conclusions. They are clearly expressed and ably vindicated in his opinion. To go again through the process by which they were reached would be a matter rather of form than substance.” *Id.*

29. *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469, 472–73 (2d Cir. 1974).

30. *Orduna S.A. v. Zen-Nok Grain Corp.*, 913 F.2d. 1149, 1157 (5th Cir. 1990).

31. *Id.*

up a cargo of barley.³² On December 28, 1949, while at anchor in Mogador, the *Eastern City* was damaged when she dragged anchor and ran aground. The English Court of Appeals agreed with the trial court's ruling that the evidence in the case clearly showed the Port of Mogador was not a safe port for a ship the size of the *Eastern City* in the winter of 1949. The court also agreed with the trial judge's ruling that a "safe" port was one where, during the period of time when the ship is to be in port, "the particular ship can reach it, use it, and return from it without, in the absence of some abnormal occurrence, being exposed to danger"³³ In *The Robert Dollar Co. v. Blood, Holman & Co., Ltd.*, the trial judge ruled that each case must be examined on its merits.³⁴ The judge found that four important facts for consideration in each case are: "(a) the port itself, (b) the access to the port, (c) the dangers of the voyage, and (d) the size, nature, draft and general circumstances of the ship itself when laden."³⁵

The English courts therefore, appear to eschew the strict warranty concept expressed by the U.S. Second Circuit in favor of a more fact-specific and due diligence-approach. Under the United States Supreme Court's prudent man standard in *Atkins* and the English due-diligence approach, ordering voyages by carriers of potentially dangerous or hazardous cargoes to and from specially designed and constructed loading and offloading terminals at lawful and recognized ports would, it seems, normally be considered to be voyages between safe ports. In addition, because ships such as LNG and chemical tankers are specialty type vessels, which normally trade between designated ports, the likelihood of the owner's captain or port agent being unfamiliar with a particular harbor or berth is almost non-existent. In reality, prior to the owner agreeing to ship a cargo such as LNG to a particular port, the owner likely would investigate the port and its docking facilities. Furthermore, in the author's experience, the U.S. Coast Guard will not permit a

32. Leeds Shipping Co. v. Societe Francaise Bunge, [1958] 2 Lloyd's Rep. 127, 128.

33. *Id.* at 131, 134.

34. Robert Dollar Co. v. Blood, Holman & Co., Ltd., [1920] 4 Lloyd's List L. Rep. 343, 346.

35. *Id.*

ship carrying hazardous cargoes to dock at a U.S. facility unless it has inspected the ship and the receiving facility. Therefore under the *Atkins* approach, it seems probable that, unless the charterer's active involvement and negligence in the docking of the ship can be shown, the charterer's risk of liability in this area is low.

3. *Special Nature of the Ship*

As previously stated, most ships transporting dangerous or hazardous cargoes have been specially designed and built for the particular trade. For example, few LNG carriers today are built "on spec" by their owners. Instead, a company in the business of shipping LNG will approach a known shipowner with a reputation for owning or operating LNG carriers. The shipowner will agree with the LNG shipper to build the ship to the shipper's specifications often involving technology owned by the shipper or a third-party. The LNG shipper, therefore, will enter into a long-term charter with an owner of an as yet-to-be-built ship for a long period—for example, twenty years. The charter itself will contain the specifications necessary to meet the LNG shipper's needs, and the shipowner will commission a shipyard to build the ship. As a result, the shipowner is relying on specifications and technology furnished by the LNG shipper (who is most often the time charterer) relating to the tanks, cooling systems, and safety equipment. In these situations, the time charterer clearly has an elevated threshold of responsibility beyond that of the simple time charterer who charters a ship, for example, for the carriage of dry bulk. Interestingly, the time charters for these specialty ships still generally contain the standard provisions discussed above. The result, therefore, with respect to navigation and operation of the ship, is that the time charterer's contractual responsibility with respect to such a ship appears to be no higher than those of a time charterer of a ship carrying more benign cargoes.

IV. POTENTIAL THIRD-PARTY LIABILITIES UNDER A TIME CHARTER

Given the limited obligations assigned to a charterer under the traditional time charter, it follows that the time charterer's

liabilities to third-parties can only flow from its duties and responsibilities (i) under the charter party, (ii) as the owner of the technology used to design and build the ship in a manner that permits the transportation of dangerous cargoes, or (iii) as the owner of the cargo itself. As noted previously, this article focuses primarily on the charterer's potential exposure to risks arising out of its relationship as a time charterer under contract. Clearly, if the time charterer is negligent or reckless in performing any of its duties under the time charter and a third-party suffers personal injury or property damage, which is proximately caused by that negligence or reckless disregard for others, liability likely could follow. Again, since by the very nature of a time charter, the owner retains sole responsibility for management and navigation of the ship, this exposure to liability is relatively contained.

A. Potential Liability Based on Direct Negligence or Fault

Significant property and personal injury liability exposure could arise in the event of an accident involving the carriage of any hazardous cargo.

1. Collisions and Explosions

In general, the potential catastrophic accident scenarios of a ship carrying hazardous cargoes could be twofold: (i) an accident could involve the collision of the ship with another ship or an allision with a fixed property, such as a loading or offloading terminal;³⁶ and (ii) an accident could involve an on-board explosion. In each of the foregoing circumstances, there would be liabilities for property and personal injury damages that would be apportioned among the parties responsible for such damages. Given that the owner is responsible for the operation, navigation, and maintenance of a ship under a time charter, the owner and not the time charterer is most likely to be the party held liable in such accidents.³⁷ The critical issue in determining

36. Under maritime law, a "collision" occurs when a moving ship hits another moving ship or object, whereas an "allision" occurs when it strikes a stationary object such as a vessel at anchor, a bridge, or a wharf. SCHOENBAUM, *supra* note 14, § 12-1.

37. The NYPE 93 provides that "[t]he Owners shall remain responsible for the

whether a time charterer would have any third-party liability in either of the foregoing accident scenarios would be whether the time charterer was also somehow at fault. In *The Volund*, the Norwegian steamship *Volund* collided with the steam yacht *Normandie* in the North River in New York.³⁸ The *Normandie* sank, resulting in the loss of three lives. At the time of the collision, the *Volund* had been chartered by her owners to the Higginson Company under a time charter. The U.S. Court of Appeals for the Second Circuit first held that even though a time charter may require the charterer to pay certain expenses of the ship, its pilots, captain, and crew and may have the power to direct the captain with respect to the ship's employment, such responsibilities do not turn the time charter into a demise charter. The court then ruled that the navigation of a ship under such a time charter remains in the hands of the owner and that under such charter, there is no "joint, two-headed navigation of the vessel which will put both parties in control."³⁹

2. *Burden of Proof*

Under common law, the degree to which a time charterer might face third-party liabilities would depend on whether the time charterer owed a certain duty to an injured third-party and whether the time charterer breached such a duty. Again, the potential plaintiff would need to overcome the fact that the owner is responsible for the operation, navigation, and maintenance of a ship under the time charter. Thus, a plaintiff would need to demonstrate that a time charterer's actions somehow transformed its role beyond the limited duties that it otherwise undertakes in a standard time charter.⁴⁰ In *Bergan v. International Freighting Corp.*, the *M.S. Bowhill* was being operated by its owner under a time charter to the defendant.⁴¹ The time charter for the *M.S. Bowhill* required the charterer to

navigation of the Vessel, acts of pilots and tug boats, insurance, crew, and all other matters, same as when trading for their own account." *NYPE 93*, *supra* note 16, § 26.

38. *The Volund*, 181 F. 643, 644 (2d Cir. 1910).

39. *Id.* at 645, 665-66; *see also* *The Beaver*, 219 F. 139, 142 (9th Cir. 1915) (discussing *The Volund*). For a brief discussion of the Jones Act, see Part IV.A.5 below.

40. *See* SCHOENBAUM, *supra* note 14, § 9-18.

41. *Bergan v. Int'l Freighting Corp.*, 254 F.2d 231 (2d Cir. 1958).

bear the risk and expense of “any fines or extra expenses” incurred in consequence of the carriage of passengers by the *Bowhill*.

The plaintiff, who was a crew member employed by the owner, was injured while transporting passengers from shore to the ship. The plaintiff sued the charterer for damages under the United States Jones Act.⁴² The *Bergan* court relied on the holding in *Munson S.S. Line v. Glassgow Nav. Co.*⁴³ in stating: “The mere fact that the charterer is liable for the expense of an operation under the terms of a time charter is insufficient to render the shipowner his agent in performing it.”⁴⁴ In so ruling, the *Bergan* court held that the plaintiff remained the employee of the owner for purposes of the United States Jones Act⁴⁵ and the charterer was not liable for his injuries.⁴⁶

3. *Navigation, Operation and Maintenance of the Ship*

Clearly, absent certain intentional behavior by a time charterer, creative arguments to assess liability on a time charterer would likely be unsuccessful with respect to those areas of responsibility—such as the navigation, operation, and maintenance of a ship—which are exclusively reserved to the owner. While the master of the ship is under the charterer’s orders with respect to what cargo is to be loaded and where it is to be loaded, the navigational aspects of each voyage are without doubt under the owner’s and not the charterer’s control. Therefore, unless a time charterer directly influences the navigational decision-making of a ship and the ship owner or operator accepts such direction, an accident involving the collision of a ship with another ship or an allision with a fixed property would not normally be the charterer’s fault.⁴⁷ Similarly, unless a time charterer directly influences the maintenance

42. *Id.* at 232–33.

43. *Munson S.S. Line v. Glasgow Nav. Co.*, 235 F. 64 (2d Cir. 1916).

44. *Bergan*, 254 F.2d at 233 (citing *Munson*, 235 F. at 64).

45. 46 U.S.C. app. § 688 (2000).

46. *Bergan*, 254 F.2d at 233.

47. See 70 AM. JUR. 2D *Shipping* §§ 435, 444 (1987); see also *The Barnstable*, 181 U.S. 464, 468–69 (1901); *Walker v. Braus*, 995 F.2d 77, 81 (5th Cir. 1993) (holding that a time charterer normally is not liable for collision damages).

activities of a ship and the owner accepts such direction, an accident involving an explosion on board a ship due to its improper maintenance activities would not ordinarily be the fault of the charterer. Standard maintenance clauses in charters usually impose on the ship owner the duty to maintain the vessel as seaworthy and in good order and condition throughout the life of the charter.⁴⁸ Even where there is no express duty of seaworthiness during the life of the charter, it is settled law in the United States that an implied warranty of seaworthiness exists at the time the charter commences.⁴⁹ Many standard time charters, such as the New York Produce Form, contain a provision that requires the owner to maintain the ship “in a thoroughly efficient state in hull and machinery and equipment for and during the service”⁵⁰ The U.S. Supreme Court has found that such a provision requires the owner to ensure that the ship is seaworthy “at the commencement of each voyage” under the time charter.⁵¹ Furthermore, at least one U.S. district court has found that even without the express charter provision found in the New York Produce Form, an implied warranty of seaworthiness at the commencement of each voyage similarly exists.⁵²

4. *Towage, Loading and Unloading*

A time charterer traditionally has the contractual duty to pay the fees associated with the local piloting of a ship in a port, for example, the fees of the port pilot and any necessary tugboats; however, unless expressly agreed in the charter between the ship owner or operator and charterer, that duty does not extend to overseeing the actual pilotage or the operations of the tugboats. Thus, if a collision were to result from the actions of the pilot or a tugboat captain, the time charterer should not have any legal liabilities to third-parties in

48. See *BIMCO's Gastime*, *supra* note 15, § 4; *NYPE 93*, *supra* note 16, § 6; see also MICHAEL WILFORD ET. AL., *TIME CHARTERS* § 11.4 (5th ed. 2003).

49. WILFORD ET. AL., *supra* note 48, § 3.137; *Work v. Leathers*, 97 U.S. 379, 380 (1878).

50. See *NYPE 93*, *supra* note 16, § 6.

51. *Luckenbach v. W. J. McCahan Sugar Ref. Co.*, 248 U.S. 139, 149–50 (1918).

52. *Coca Cola Co. v. The Norholt*, 333 F. Supp. 946, 948 (S.D.N.Y. 1971).

connection with such an accident, because the time charterer has no legal duty, short of assuming the same, with respect to overseeing such operations.⁵³ Being responsible for payment of the necessary fees but not for actual operations does not render the charterer liable.⁵⁴

A time charterer also has the contractual duty to pay the fees associated with the loading and unloading of a ship's cargo; however, as noted previously in Part III.B.1, unless expressly agreed or affirmatively assumed, that duty does not usually extend to supervising such activities.⁵⁵ Thus, if an explosion or accident were to occur as a result of the loading or unloading of any potentially volatile cargo, again, the time charterer should not have any legal liability to third-parties in connection with such an accident, unless actual negligence on its part were shown.⁵⁶ In *Whyche v. Oldendorff*,⁵⁷ the court ruled that a clause in the time charter in question—making it the charterer's responsibility to load, stow, trim, and discharge the cargo under the supervision of the ship's captain—was not sufficient “to shift the responsibility for stevedoring operations or control of the ship to the time charterer.”⁵⁸

5. *Jones Act — Death on the High Seas Act*

Unfortunately, maritime accidents can lead to personal injury and death. As such, our discussion cannot be limited simply to issues surrounding property damage. In the personal injury context, maritime law has developed provisions that are unique from shoreside tort law.

a. *Jones Act*

No discussion of third-party liability in the marine

53. WILFORD ET. AL., *supra* note 48, § 12.64; *H. Schuldt v. Standard Fruit and Steamship Co.*, 1979 A.M.C. 2470, 2478 (S.D.N.Y. 1978).

54. *The Volund*, 181 F. 643, 667 (2d Cir. 1910).

55. *See* 2A BENEDICT, *supra* note 18, § 181; SCHOENBAUM, *supra* note 14, § 9-15; *see also* *Hale Container Line v. Houston Sea Packing Co.*, 137 F.3d 1455, 1469 (11th Cir. 1998); *Milltrade v. M/V Kielgracht*, 1997 A.M.C. 2773, 2775-76 (S.D. Tex. 1996).

56. *See* 2A BENEDICT, *supra* note 18, § 181.

57. 284 F. Supp. 575 (E.D. Va. 1967).

58. *Id.* at 575.

environment would be complete without a brief discussion of the United States Jones Act.⁵⁹ The Jones Act provides that any seaman, including both U.S. and foreign seamen, who is injured or killed “in the course of his employment” may bring an action for damages with a right to a jury trial.⁶⁰ The term “seaman” is not defined in the Jones Act, and it has been left to the courts to determine which plaintiffs fall within that term. The crew of a ship are certainly “seamen,” but at times so are certain other persons, such as contractors’ employees who contribute to the function of the ship and have a substantial connection to the ship.⁶¹

The defendant in such a lawsuit is also not defined, but court decisions make it clear that the defendant can be both the seaman’s employer and the operator of the ship on which the seaman was injured.⁶² Courts have, however, repeatedly held that although an employer-employee relationship is essential to recovery under the Jones Act, the employer need not be the owner or operator of the ship.⁶³ Likewise, the owner or operator

59. 46 U.S.C. app. § 688 (2000). The Jones Act is so called after the name of one of the original sponsors of the bill.

60. *Id.* § 688(a).

61. In 1995, the Supreme Court clarified that there are two essential requirements for seaman status: (1) “an employee’s duties must ‘contribut[e] to the function of the vessel or to the accomplishment of its mission,’” and (2) “a seaman must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995) (quoting *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991)). As a general rule of thumb, “[a] worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.” *Id.* at 371 (citing a rule of thumb developed in the Fifth Circuit). Even if an injured person is not considered to be a “seaman” under the Jones Act, such person may still be able to recover damages under a parallel statute, the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-905 (2000), which provides a remedy for longshoremen and harbor workers who meet the definition of an employee.

62. See *GILMORE & BLACK*, *supra* note 13, § 6-21(a) & n.121; see also *Guidry v. S. La. Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980) (recognizing that a ship owner or operator, an independent contractor, and a third person who borrows a seaman may all be deemed employers subject to Jones Act liability and also recognizing that it is possible for a seaman to have more than one Jones Act employer).

63. See *GILMORE & BLACK*, *supra* note 13, § 6-21(a); *Yelverton v. Mobile Lab., Inc.*, 608 F. Supp. 400, 405 (S.D. Miss. 1985) (“[I]t has never been a requirement that the Jones Act employer be the owner or operator of the vessel of which the claimant is

of the ship may be liable even though it is not the direct employer of the injured seaman, so long as an employment relationship exists.⁶⁴

The Jones Act is a complex piece of legislation, and a full discussion of its parameters is beyond the scope of this article. The courts are continually redefining or expanding the Act's boundaries. In the words of Grant Gilmore and Charles L. Black in *The Law of Admiralty*: "[N]othing about the Jones Act is either true or false until the Supreme Court has held it to be so."⁶⁵ However, comfort can be taken by the time charterer from the fact that the ship owner retains responsibility for the crew under the standard time charter; therefore a time charterer is unlikely to be deemed a Jones Act defendant for negligence purposes.⁶⁶ In *Matute v. Lloyd Bermuda Lines, Ltd.*, a crewman sued the time charterer of the cargo liner *The Lloyd Bermuda* under the Jones Act for injuries he suffered while working on the ship.⁶⁷ Under the terms of the time charter, the owner retained responsibility for and control over the ship, the captain, and its crew, including their hiring and firing. In such situations, the court noted: "Courts are hesitant to imply a relinquishment of possession and control by the owner of a ship absent the most explicit language indicating that the owner completely and exclusively gives up 'possession, command, and navigation' of the vessel to the charterer."⁶⁸ The court in *Matute* ultimately held that the time charterer of a ship "is not subject to the traditional [ship] owner's maritime liability of maintenance and cure" under the Jones Act.⁶⁹ It follows,

alleged to be a crew member."), *aff'd* 782 F.2d 555 (5th Cir. 1986). See also *Hall v. Diamond M Co.*, 635 F. Supp 362, 364-65 (E.D. La. 1986), for a full discussion of the "borrowed servant" doctrine established by the courts in Jones Act cases.

64. GILMORE & BLACK, *supra* note 13, § 6-21(a); *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 236 (3d Cir. 1991), *overruled in part by* *Neely v. Club Med Management Servs.*, 63 F.3d 166 (3d Cir. 1995).

65. GILMORE & BLACK, *supra* note 13, § 6-21(a).

66. See *Matute*, 931 F.2d at 235; *Banegas v. United Brands, Inc.*, 663 F. Supp. 198, 201 (D.S.C. 1986).

67. *Matute*, 931 F.2d at 233.

68. *Id.* at 235.

69. *Id.* at 233-35. An injured seaman's employer has a general obligation to "maintain and cure" him or her through the provision of medical treatment and

therefore, that since a time charterer would neither directly employ any crew members or any other persons involved in loading or unloading the ship, nor would it maintain, operate, or control the ship, the time charterer should have minimal Jones Act exposure.

b. Death on the High Seas Act.

The United States Death on the High Seas Act (DOHSA), enacted two years prior to the Jones Act, provides a cause of action to beneficiaries of any person—whether a seaman or not—whose death was “caused by wrongful act, neglect, or default” in an incident occurring more than three (3) nautical miles offshore—and thus, not within state territorial waters.⁷⁰ In *In re American Dredging Co.*, three passengers died when they were thrown from a pleasure vessel when their pleasure craft collided with a dredge pipeline operated by American Dredging Company.⁷¹ The accident occurred at 3:15 a.m., and the court found that the pipeline was not lit in a manner required by statute. The court ruled that since the accident occurred in state territorial waters, DOHSA did not apply.⁷² The court ultimately held, however, that even though DOHSA did not apply, under the U.S. Supreme Court ruling in *Moragne v. States Marine Lines, Inc.*⁷³ the plaintiffs could still recover under the local state’s wrongful death statute.⁷⁴ The court also held that “DOHSA does not distinguish between legal theories under which a claimant might sue. That is, a claimant can bring a cause of action based on either negligence or unseaworthiness under DOHSA.”⁷⁵ Again, similar to reasons previously discussed

shoreside support, including shelter and food. This obligation “has been recognized consistently as an implied provision in contracts of marine employment.” *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943) (citation omitted).

70. 46 U.S.C. app. § 761 (2000); see *In re American Dredging Co.*, 873 F. Supp. 1539, 1546 n.6 (S.D. Fla. 1994) (“Neither DOHSA nor the Jones Act apply to wrongful death actions brought on behalf of non-seamen who die in territorial waters.”).

71. *In re American Dredging*, 873 F. Supp. at 1541.

72. *Id.* at 1541, 1546.

73. 398 U.S. 375 (1970).

74. *In re American Dredging*, 873 F. Supp. at 1546.

75. *Id.*

in Part IV.A.5.b, since the time charterer will not be the owner or operator of the ship, the liability concept attributed to unseaworthiness would seem not to apply to the time charterer. Therefore, fault or neglect of some kind on the charterer's part would need to be shown. In the time charter context, this standard of fault might be difficult for a plaintiff to meet.

6. *Minimum Potential Liability*

In sum, a time charterer generally has limited potential third-party liability under common law principles of negligence and fault, given the limited duties that it undertakes in a time charter. Nonetheless, critical attention must be given to the negotiation and drafting of such an agreement to ensure that a time charterer has appropriately limited its duties to the owner and has not indemnified the owner for liability to third-parties. Last, even if a circumstance should arise in which a time charterer is found liable for third-party damages, certain liability limitations exist under international maritime conventions that may serve to limit that liability.⁷⁶ However, should the charterer voluntarily expand its role such that, for example, in any given situation it becomes more actively involved in the navigation, berthing, loading, or unloading of the ship, the charterer could naturally be responsible for property damage or injuries flowing from any negligence.

B. Potential Liability Based on Strict Liability Theories

Recognizing the minimum potential liability to which a standard time charterer is susceptible under negligence and fault principles, strict liability theories also deserve discussion because of the nature of the dangerous cargo at issue. As detailed below, potential liability in this area can also be minimized by the time charterer.

76. See discussion *infra* Section Part IV.

1. *Inherently Dangerous Cargoes*

a. *Strict Liability*

In the United States, strict liability may be imposed on someone who carries on an abnormally dangerous activity and causes harm to another.⁷⁷ Courts usually agree that the six factors set forth in section 520 of the *Restatement (Second) of Torts* are relevant in determining whether an activity is abnormally dangerous.⁷⁸ Whether marine transportation of certain cargoes is “ultra hazardous” may therefore depend on the same six factors. If the cargo that the time charterer directs the owner to carry is deemed inherently dangerous or hazardous, some might argue that if personal injury, death, or property damage results from an explosion or escape of that cargo, then the charterer, as owner of the dangerous cargo, should be held strictly liable for such injury, loss, or damage.

The law in this area could tangentially be viewed as no different from the “strict liability” rulings by the courts and statutes passed by legislators for accidents on land. However, although the courts appear to have incorporated into admiralty law the general doctrine of strict products liability law as uniformly recognized by all of the States,⁷⁹ the courts have so far refused to apply such strict liability theories to the maritime transportation of ultra hazardous materials. It has in fact been established that “[t]he imposition of a rule of strict liability for the carriage of ultra hazardous materials, which varies from

77. See RESTATEMENT (SECOND) OF TORTS § 519 (1976).

78. These factors include the following:

- (a) existence of high risk of harm to another person, his land or his chattels;
- (b) likelihood that the harm will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is uncommon; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520.

79. See *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1134 (9th Cir. 1977). The United States Supreme Court has expressly sanctioned the *Pan Alaska Fisheries* court and other federal appeals' courts recognition of “products liability, including strict liability, as part of the general maritime law.” *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865 (1986).

state to state, would destroy [the] uniformity” of general maritime law and, therefore, the rule is not recognized in admiralty.⁸⁰ Specifically, in *EAC Timberlane v. Pisces, Ltd.*, the U.S. Court of Appeals for the First Circuit refused to extend certain shoreside strict liability principles for the carriage of ultra hazardous cargo to maritime law.⁸¹ Therefore, under the *EAC Timberlane* ruling there should be no strict liability imposed on a time charterer facing third-party claims based on its ownership of “dangerous” cargo or its charter agreement.

b. U.S. Coast Guard Rules

The U.S. Department of Transportation has defined “hazardous materials” for transportation purposes to include “non-liquefied compressed gas”⁸² and all cryogenic liquids.⁸³ The latter would include LNG. As such, these materials are considered one of many “dangerous cargoes.”⁸⁴ Ships carrying such cargoes, then, are subject to U.S. Coast Guard regulation and inspection.⁸⁵ These Coast Guard regulations do not determine any third-party rights and are only designed to cover certain criteria that permit the Coast Guard to establish safety regulations, rules, and procedures for both the construction of ships carrying such cargoes and the operation of such ships in U.S. waters. It is possible that a plaintiff might point to these rules in attempting to meet its burden of proof that such cargoes are inherently dangerous.

c. Title to Dangerous Cargo.

Generally, the time charterer will be the titled owner of any

80. See *EAC Timberlane v. Pisces, Ltd.*, 745 F.2d 715, 721–722 (1st Cir. 1984).

81. *Id.* at 722; see also *Great Lakes Dredge & Dock Co. v. City of Chicago*, No. 92-C-6754, 1996 WL 210081, at *5 (N.D. Ill. 1996) (concluding that strict liability claims against a shipper based on state laws that are not supported by the general maritime law must fail).

82. 49 C.F.R. § 173.115(d) (2003).

83. *Id.* § 173.115(g); see also *id.* § 193.2007 (stating that with respect to onshore pipeline facilities, “[h]azardous liquid means LNG or a liquid that is flammable or toxic.”).

84. See 46 C.F.R. § 30.25-1 (2003).

85. See *id.* § 153 (2003).

dangerous or hazardous cargo while the cargo is aboard the ship. This situation can differ depending on the terms of the sales contract for the cargo between the time charterer and its buyer. For example, if the time charterer sold the cargo with title passing FOB-point of origin, the buyer would take title to such cargo at the shipping port, and then the time charterer would be merely acting as the transporter or “carrier” of the cargo for the buyer. However, it can be assumed that in an action involving the explosion of such a cargo, any plaintiff would sue the ship owner, charterer, carrier, buyer, and any other parties connected with the cargo’s ownership and shipment.

This result—that the cargo owner would most likely be sued—would be the same whether the cargo is classified as dangerous, hazardous, or completely benign. In current times, it seems inevitable that the owner of any product being transported in interstate commerce will be sued if an accident occurs and a third-party is injured. In the maritime transportation arena, however, since state law strict liability principles for the transportation of ultra hazardous cargoes do not apply to maritime law under the *EAC Timberlane* ruling mentioned previously, any plaintiff would need to show actual negligence on the charterer’s part in order to recover.

2. *Owner of the Technology / Design Defect*

A time charterer might face further independent exposure as the owner of certain technology used in the designing and building of a specialized ship, such as an LNG carrier, which is built to the particular time charterer’s specifications. In this regard, the time charterer might be viewed as the designer or co-designer of the equipment involved in an accident.

a. *Safe Alternative Product*

Under U.S. common law, an injured party may recover from the designer of the product if he or she can show that the inherent nature of the product is defective.⁸⁶ As previously

86. See generally William A. Dreir, *Design Defects Under Proposed Section 2(b) of the Restatement (Third) of Torts: Products Liability—A Judge’s View*, 30 U. MICH. J. L.

stated, the U.S. Supreme Court has recognized that the law of products liability is part of the general maritime law.⁸⁷ U.S. courts currently apply, among other tests used to determine liability, the rule set forth in section 2(b) of the *Restatement (Third) of Torts: Products Liability*.⁸⁸ Under that section, a design defect is deemed to include any product in which the “foreseeable risks of harm . . . could have been reduced or avoided by the adoption of a reasonable alternative design.”⁸⁹ This standard recognizes that although every product cannot be expected to be completely safe, it should be as safe as possible.

Case law supports the above *Restatement* proposition.⁹⁰ Under this rule, one could conclude that even if the particular cargo is deemed to be potentially dangerous (and even ignoring the EAC Timberlane Court’s refusal to extend strict liability rules to govern the carriage of ultra-hazardous cargoes), so long as there is no safer alternative, a time charterer should not be held liable solely because, as owner of the on-board-ship technology, it is considered to be the designer of the cargo tanks and equipment. If in any particular case the equipment on board a ship carrying hazardous cargoes was found to be defective *per se*, the experts would need to determine whether there is a reasonable, safer alternative for the transportation of such cargo that would have reduced or avoided the harm caused.

b. Other Tests

The reasonable alternative design test is not the only test used by the courts, although it appears to be the most common, when considering defective design. Other tests used by courts are the reasonable manufacturer/reasonable buyer test, which focuses on the perspective of a reasonable buyer or seller in establishing defectiveness, and the pure risk-utility test, which focuses on the utility of the design versus the risk of harm arising from the product.⁹¹ The charterer should also be aware

REFORM 221 (1997).

87. See *E. River S.S. Co. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

88. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

89. *Id.*

90. See, e.g., *General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985).

91. See *Brown v. Link Belt Div. of FMC Corp.*, 666 F.2d 110, 114 (5th Cir. 1982);

that courts have, at times, even found that a particular design that caused harm may be enough in and of itself to establish liability, but these findings seem to be limited to obvious and egregious cases of poor design.⁹²

c. Duty to Warn

Finally, our courts, in their wisdom, have determined that even if a product is not itself defective it *may be deemed defective* if the designer or manufacturer fails to adequately warn others of its potential dangers.⁹³ This is a continuing duty to warn of new dangers that are discovered, and the warning must be such that it renders the product safe for the consumer.⁹⁴ Under this rule, therefore, a time charterer would be best advised to ensure that reasonable signs are posted aboard the ship—for instance, on the cargo tanks or holds aboard the carrier—and at the loading and unloading facilities, warning of any potential risks about which the average person might not be expected to be aware. However, in *In re Incident Aboard (Ocean King)*, the district court found that inadequate warnings were given concerning the safe, maximum pressure levels of the blowout preventers being used. The Court of Appeals for the Fifth Circuit ruled that the lower court was in error when it failed to clearly establish the maritime rule of comparative negligence reiterated by the U.S. Supreme Court in *United States v. Reliable Transfer*.⁹⁵ The *Ocean King* court then ruled that “[t]he District Court’s failure to impose liability in proportion to fault clearly violates the rule of *Reliable Transfer* and the Fifth Circuit’s

Krummel v. Bombardier, Corp., 206 F.3d 548, 551 (5th Cir. 2000). *But see In re Incident Aboard*, 813 F.2d 679, 686–87 (5th Cir. 1987), *amended by In re Incident Aboard*, 877 F.2d 322 (5th Cir. 1989) (holding that a “manufacturer has no duty to warn of dangers when the user is already aware of that danger”).

92. *See, e.g., Anderson v. Whittaker Corp.*, 894 F.2d 804, 812 (6th Cir. 1990) (upholding the district court’s finding that a hull design was defective when vent openings in the ship’s hull allowed water to freely enter the ship).

93. *See Krummel*, 206 F.3d at 551; *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984).

94. *See In re Incident Aboard*, 813 F.2d at 684.

95. *Id.* at 688–89 (referring to *United States v. Reliable Transfer*, 412 U.S. 397, 411 (1975)).

application of this rule.”⁹⁶ Thus, it is clear that in maritime cases, courts will follow the comparative negligence rule established in *Reliable Transfer* even in failure-to-warn defective product cases.

C. Potential Liability Under Carriage of Goods Regimes

1. Carriage of Goods Under United States and International Law

There is also a complete overlaying statutory regime, both in the United States and abroad, which governs the shipment of goods—which would include LNG, CNG, and other petroleum based cargoes—on our oceans. The United States Carriage of Goods by Sea Act (COGSA)⁹⁷ governs “all contracts for the carriage of goods by sea to or from ports of the United States in foreign trade.”⁹⁸ COGSA, however, only covers contracts of carriage where a bill of lading or similar document of title is issued.⁹⁹ Even though a charter party may be a contract of carriage, it is explicitly not subject to COGSA unless a bill of lading is issued with the specific intent that it will govern as the contract of carriage.¹⁰⁰ Some charter parties also contain a “Clause Paramount” which serves to fully incorporate the terms and standards of COGSA in the owner/charterer relationship. COGSA does not, however, cover cargo shipments between non-U.S. ports. In such a case, the laws of the foreign nations involved apply. In this regard, many foreign nations have adopted the United Nations Convention on the Carriage of Goods by Sea¹⁰¹ (Hamburg Rules) and the so-called “Hague-

96. *Id.*

97. 46 U.S.C. app. §§ 1300–15 (2000).

98. *Id.* § 1312. For contracts of carriage between U.S. ports, the Harter Act applies. *Id.* §§ 190-196. However, “[a] stipulation that COGSA is to apply to domestic carriage will leave the Harter Act applicable to the periods before loading and after discharge.” SCHOENBAUM, *supra* note 14, § 8-15 & n.12 (citations omitted).

99. 46 U.S.C. app. § 1301(b).

100. *Id.* § 1305.

101. *United Nations Convention on the Carriage of Goods by Sea*, [1978] 9 Y.B. INT’L TRADE L. 212, U.N. Doc. No. A/CONF/89/13/annex1, available at <http://www.admiraltylawguide.com/conven/hamburgrules1978.html>.

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Visby Rules”¹⁰² (herein collectively called the Carriage of Goods Conventions).

2. *Bills of Lading*

The bill of lading is a document issued by the master of the ship, on behalf of the ship owner, to the shipper, who is typically the time charterer in the time charter situation. The “ocean bill of lading” is normally a negotiable instrument and provides evidence that cargo of a certain description and condition were received and loaded on the ship. The shipper, if not the titled owner of the cargo, will then usually endorse the bill of lading over to the buyer of the cargo. Due to the ocean bill of lading’s negotiable status it must be presented by the consignee (endorsee of the instrument) at the time of offloading of the cargo to demonstrate the consignee’s right to possession of the underlying goods. In a time charter situation, where the terms of the charter party govern, the bill of lading may only serve as a cargo receipt.

3. *Applicability of COGSA*

COGSA and the Carriage of Goods Conventions are mentioned here only by way of noting that should bills of lading be used in the shipments, the pre-existing statutory and treaty provisions could govern. Both COGSA and the Carriage of Goods Conventions also have specific provisions for so-called “dangerous cargoes.”¹⁰³ However, neither COGSA nor the Carriage of Goods Conventions definitively determine the liabilities of the cargo owner or time charterer to third-parties. Instead, their rules focus on the ship master’s rights and obligations between the ship owner and the cargo owner with regard to ship cargoes.

102. The Hague-Visby Rules were established under the 1968 Brussels Protocol. *The Hague-Visby Rules*, Feb 23, 1968, available at <http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html>.

103. See, e.g., 46 U.S.C. app. § 1304.

V. LIABILITY LIMITATIONS UNDER MARITIME LAW

A. *General*

One of the interesting features of maritime law is the doctrine promoted by shipowners over the last two or three hundred years, whereby ship owners and, in some cases, charterers are permitted to limit their liability to a maximum dollar amount based on the actual, or some other computed, value of their ship. Although both U.S. law and international maritime conventions (which form the bases of various other nations' maritime laws) establish maritime liability limitations, there are critical distinctions between these differing legal regimes. The most notable of these differences is that U.S. law does not provide liability limitations to charterers, but the international conventions appear to do so.

B. *United States Law*

The United States bases its limitation of liability regime on the Limitation of Shipowner's Liability Act (Limitation Act).¹⁰⁴ The Limitation Act provides that a shipowner may be entitled to limit its liability to the post-casualty value of the ship plus any pending freight; however, the Limitation Act does not extend these liability limitations to time charterers, insurers or other parties.¹⁰⁵

In order for a shipowner to avail itself of the Act's liability limitations, a shipowner must demonstrate that the relevant accident or tort occurred without its "privity or knowledge."¹⁰⁶ Essentially, if a shipowner—and in the context of a corporate shipowner, the shipowner's managing agents or officers—could and should have exercised due diligence that could have prevented the accident or tort, then the shipowner will not be entitled to the liability limitation.¹⁰⁷ Further, as stated above, neither the time charterer nor its insurers would be able to limit

104. *Id.* §§ 181–196.

105. *Id.* § 183(a).

106. *Id.*

107. See PATRICK GRIGGS & RICHARD WILLIAMS, *LIMITATION OF LIABILITY FOR MARITIME CLAIMS* 332 (3d ed. 1998).

their liability under the provisions of the Limitation Act.

C. International Conventions

1. General

Although each nation has its own respective legal regime that governs maritime liability limitations, with the notable exception of the United States, most other major maritime nations base their maritime liability laws on the Convention on Limitation of Liability for Maritime Claims (1976 Convention).¹⁰⁸ As further described below, the 1976 Convention extends its liability limitations to shipowners, charterers, insurers, and related parties. The 1976 Convention serves as the basis of the maritime liability laws of forty countries, including significant maritime trading nations such as the United Kingdom, Norway, and Japan.¹⁰⁹

2. The 1976 Convention

The most critical element of the 1976 Convention is that liability limitations are extended to shipowners *and* charterers, as well as ship operators, managers, salvors, and the insurers of all of the above.¹¹⁰ Unlike the United States, therefore, in

108. 1976 Convention on Limitation of Liability for Maritime Claims, IMO Doc. No. LEG/CONF.5/10 of 19 Nov. 1976, 1456 U.N.T.S. 221, *available at* <http://www.admiraltylawguide.com/conven/limitation1976.html> [hereinafter 1976 Convention].

109. As of January 8, 2004, the other nations that have based their maritime liability laws on the 1976 Convention are: Argentina, Australia, Bahamas, Barbados, Belgium, Benin, Croatia, Denmark, Dominica, Egypt, Equatorial Guinea, Estonia, Finland, France, Georgia, Germany, Greece, Guyana, Hong Kong, India, Ireland, Latvia, Liberia, Marshall Islands, Mauritius, Mexico, Netherlands, New Zealand, Poland, Sierra Leone, Spain, Sweden, Switzerland, Tonga, Trinidad & Tobago, Turkey, United Arab Emirates, Vanuatu, and Yemen. Note, however, that some of these nations have included either certain declarations or reservations to the 1976 Convention. For instance, France, Germany, and the Netherlands specifically exempt the application of the Convention to ships traveling on inland waterways within their respective jurisdictions, and Sweden specifically imposes a higher liability limit for ships designed for drilling. INT'L MARITIME ORG., *Status of Conventions—Complete List*, at http://www.imo.org/includes/blastdataonly.asp/data_id%3D8876/status.xls (last visited Apr. 4, 2004) [hereinafter *Status List*].

110. 1976 Convention, *supra* note 108, at art. 1.

jurisdictions such as those of parties to the 1976 Convention, the time charterer and its insurer can avail themselves of the Convention's protection. The amount of the limitation is based upon a formula that reflects the initial tonnage of a ship before its casualty.¹¹¹ This calculation yields a far-higher value than permitted under the U.S. Limitation Act. As an example, applying such a formula to a typical LNG carrier, the current liability limitation would be approximately fifty million dollars for claims of personal injury and property damage.

Some commentators have interpreted an English Admiralty Court decision, *The Aegean Sea*,¹¹² to mean that, under English law, the 1976 Convention does not afford charterers the right to limit their liability against third parties. In *The Aegean Sea*, a loaded tanker grounded and subsequently exploded outside of LaCoruna, Spain, causing one of the largest oil spills of the 1990s.¹¹³ The shipowners brought an indemnity claim against the oil company that chartered the *M/V Aegean Sea* under a voyage charter.¹¹⁴ The Admiralty Court ultimately held that under the specific facts of the case, a charterer cannot limit its liability in respect of an indemnity claim against the charterer made by the ship's owner, either directly or by way of an indemnity.¹¹⁵ It seems, therefore, that the rule in *The Aegean Sea* should apply only to attempts by charterers to limit liability as between charterers and shipowners. Nothing in the opinion language of *The Aegean Sea* supports the proposition that charterers have no right under the 1976 Convention to limit their liability against third-party claimants other than the owner.

In a post-*Aegean Sea* case, the English High Court again examined a request for limitation of liability by the charterers under the 1976 Convention. Like the *Aegean Sea* facts, the action was brought by the owners of the container ship *CMA*

111. *Id.* at art. 6.

112. *Aegean Sea Traders Corp. v. Repsol Petroleo S.A.*, [1998] 2 Lloyd's Rep. 39.

113. *Id.*

114. *Id.*

115. *See id.* at 70. It is notable that the owners asserted that the bills of lading issued by the owner contained an implied indemnity for claims brought against the owner. *Id.* at 43.

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Djakarta against the charterer—in this case a time charterer.¹¹⁶ The action involved an onboard explosion and fire that led to the crew's abandonment of the ship. After the ship was salvaged, it underwent substantial repairs. The owners sued the charterer for a contribution of approximately twenty-six million dollars for salvage and ship repairs plus an indemnity against cargo claims. This case is also interesting in that the owner's claim was based on the theory that the source of the explosion was two shipping containers containing bleaching powder. The owners alleged that the charterer had breached the terms of the charter requiring that no dangerous cargo be shipped without the owners' knowledge and consent. The case was referred to arbitration, and the charterers appealed the tribunal's finding that it could not avail itself of the 1976 Convention's limitation of liability provisions.¹¹⁷

After examining the history of the 1976 Convention and its predecessor English statutes, the court upheld the arbitration tribunal's ruling that the 1976 Convention's limitation of liability provision did not protect the charterer from claims by the owner. In making its decision, the High Court found no grounds to distinguish the *Aegean Sea* case and was of the view that the inclusion of the word "Charterers" within the meaning of those "Shipowners" protected by the Convention meant that only charterers—including time charterers—who "are nonetheless in a real sense directly concerned in the operation of the vessel and have incurred liability as such" are intended to be covered by the 1976 Convention.¹¹⁸ In dicta the judge noted as follows:

I have not forgotten that, from time to time, time charterers may engage in a role akin to that of an owner—for instance by the issuance of time charterers' bills of lading which attract liability in respect of cargo claims. In these circumstances it was conceded by the respondents that the charterers could, if necessary, invoke limitation under the convention against a claim

116. *CMA Cgm S.A. v. Classica Shipping Co. Ltd.* [2003] 2 Lloyd's Rep. 50.

117. *Id.* at 50–52.

118. *Id.* at 54, 58.

brought by cargo-owners.¹¹⁹

It will be interesting to see if, as some authors have suggested, in future cases the English courts expand this interpretation beyond liability of a charterer to an owner to exclude charterers from invoking the charterer's limitation right expressed in the convention against third party claimants other than the owner.

The limitations under the 1976 Convention automatically apply unless an injured party can demonstrate that the limitation should not indeed be applied.¹²⁰ In order for a party to demonstrate that the liability limitations of the 1976 Convention should not apply, that party must show that the tortfeasor—the shipowner—acted or failed to act “with the intent to cause such loss, or acted recklessly and with the knowledge that such loss would probably result.”¹²¹ Under such a standard, only acts or omissions of willful intent or recklessness, and not mere negligence, will result in a loss of their liability protection.¹²²

3. *The 1996 Protocol*

In 1996, the Protocol to Amend the Convention on Limitation of Liability for Maritime Claims (1996 Protocol)¹²³ was developed in order to increase the liability limitations of the 1976 Convention and implement certain other reforms to the convention.¹²⁴ Nevertheless, as of January 8, 2004, the 1996

119. *Id.* at 54.

120. 1976 Convention, *supra* note 108, at art. 4.

121. *Id.*

122. See GRIGGS & WILLIAMS, *supra* note 107, at 332.

123. Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, IMO Doc. No. LEG/CONG.10/8 of 9 May 1996, 36 I.L.M. 1433.

124. In 1996, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) was also established. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), IMO Doc. No. LEG/CONF.10/8/2 of 9 May 1996, 35 I.L.M. 1406. This Convention is also still not yet in effect, requiring 12 nations to ratify it before it can take effect and of those 12 nations, 4 must have a merchant marine which exceeds a certain gross tonnage amount. *Id.* The HNS Convention would apply to catastrophic accidents involving the international maritime shipment of certain

Protocol has only been ratified by nine nations,¹²⁵ and until ten nations have ratified it, the Protocol will be of no legal effect. However once in effect, the 1996 Protocol will significantly increase the liability limitation. For example, with respect to a typical LNG carrier, the total aggregate limitation of liability would be approximately one hundred twenty million dollars under the 1996 Protocol.

VI. ENVIRONMENTAL LIABILITY RISKS AND REGULATIONS UNDER UNITED STATES LAW

Interestingly, although CNG and LNG may be labeled as “hazardous materials” by the U.S. Coast Guard, CNG and LNG are neither “hazardous substances” under the United States Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹²⁶ nor “marine pollutants” under OPA 90.¹²⁷ This comfort from a pollution standpoint, however, is not afforded to the crude oil or petrochemical carriers as those cargoes are specifically covered by both CERCLA and OPA 90.¹²⁸

Nonetheless, given that the propulsion of an LNG carrier would be fueled by petroleum and fuel oils, there is always an environmental risk, which is present in all traditional motor ships, that even if the cargo being carried is not a “dirty” cargo such as oil, oil powering the ship could spill on to our seas. Under OPA 90, the owner, operator, or demise charterer—owner *pro hac vice*—of a ship would be liable for the clean-up costs

hazardous and noxious substances (HNS), including LNG and various petrochemical products. The 1996 Convention is unique in that it would establish a strict liability regime for both shipowners carrying HNS as well as the receivers of HNS cargoes. Under this system, injured parties would be entitled to seek compensation first from the shipowners and then from a fund established by the receivers of such cargoes in the event that the shipowner could not satisfy the injured party's claims (either because of the shipowner's financial inability or the satisfaction of a liability limitation). While the registered shipowner is liable for pollution damage under the HNS Convention, no claim for compensation may be made against any charterer, including a bareboat charterer. *See id.* at art. 7, para. 5(c).

125. As of November 2003, Australia, Denmark, Finland, Germany, Norway, Russia, Sierra Leone, Tonga, and the United Kingdom have ratified the Protocol. *Status List*, supra note 109.

126. 42 U.S.C. §§ 9601–75 (2000).

127. 33 U.S.C. §§ 2701–61 (2000).

128. *Id.* § 2701–02; 42 U.S.C. § 9601.

associated with such environmental contamination, not the time charterer.¹²⁹ Similarly, in the international context, the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) has been adopted by the International Maritime Organization to specifically provide remedies to “persons who suffer damage caused by spills of oil, when carried as fuel in ships’ bunkers.”¹³⁰ However, the Bunker Convention has not yet been ratified by any nation, so it currently has no legal effect. Ratification by eighteen nations, five of which must have ship registries of a combined gross tonnage of one million or more tons, is necessary before the convention can become effective.¹³¹ Nonetheless, in the context of an LNG charter, a charterer would be well-served to protect itself against such risks by: (a) ensuring that the relevant charter party contains an appropriate indemnity provision whereby the shipowner would indemnify the charterer in connection with such matters; and (b) verifying that the shipowner’s insurance policies adequately backed such an indemnity obligation.

VII. INSURANCE

Ultimately, given the potential risks—no matter how small—to time charterers, as discussed above, charterers naturally have sought to protect against these risks by obtaining insurance. The types of insurance coverage and the party that should obtain coverage naturally depend on the respective duties and liabilities of each party under the time charter.

A. *Shipowner Policies*

Shipowners typically obtain the principal insurance policies to cover the risks associated with the damages to the ship and potential third-party personal and property damages. Specifically, an owner usually obtains: (a) hull and machinery insurance, which will cover potential damages to the ship and

129. 33 U.S.C. § 2701(32).

130. International Convention on Civil Liability for Bunker Oil Pollution Damage, IMO Doc. No. LEG/CONF 12/19 of 27 Mar. 2001.

131. *Id.* at art. 14(1).

its permanently attached equipment and machinery; and (b) protection and indemnity insurance, which will protect against the potential liabilities associated with third-party personal injury—including the ship's crew—and property damages.¹³² Charterers can avail themselves of the protections of these insurance policies by having their respective time charter require that the charterer will be an additional loss payee under the owner's third-party liability policies.¹³³

B. Charterer policies

Charterers also typically obtain insurance policies to cover the risks associated with the loss of the cargo and any legal liabilities that the charterer might face that are not otherwise covered by the owner's insurance policies. Specifically, a charterer usually obtains: (a) cargo insurance to protect against damages to or loss of the cargo; and (b) charterer's legal liability insurance, which will cover the liability risks associated with a charterer's legal liability under a time charter.¹³⁴ In fact, there are a number of protection and indemnity clubs (P&I Clubs) which are available solely to their members who are charterers—not owners—that will insure such risks.¹³⁵

VIII. CONCLUSION

In sum, the potential liability risks assumed by a time charterer of a hazardous cargo ship is substantially more limited than the risks assumed by the ship owner. Appropriate insurance coverage can further mitigate the inherent risks. With the possible exception of the safe port/safe berth provision, which seems to impose a higher burden on the charterer, the normal duties of a time charterer necessarily limit the charterer's liability to the ship owner, as well as to third-parties.

With respect to third-parties, absent negligence arising out of a deliberate action of the time charterer, the owner, and not the time charterer, will most likely be the party to face exposure

132. See 8 BENEDICT, *supra* note 18, § 12.07–08.

133. *Id.* § 12.07.

134. *Id.*

135. *Id.*

for third-party personal injury and property damages. In addition, a time charterer appears to incur only limited exposure to liability under the Jones Act and Death on the High Seas Act. Further, under U.S. law, the charterer's risk as the owner of a potentially dangerous product and as the owner of the technology for such product also appears to be low, provided the charterer ensures that certain proactive steps are taken, such as the posting of reasonable warning signs at appropriate locations on board the chartered ship. If the charterer were ultimately found to be liable under U.S. law, however, the charterer would not be afforded the same opportunity to invoke the limitation of liability protection that is afforded to a ship owner. In other jurisdictions, such statutory protections might be available to both the charterer and its insurer. In the end, outside of exposure for its own negligence, the principal liability risk that a time charterer faces is the potential risk of loss of the cargo if the charterer has retained title.

Notwithstanding the limited liability risks that a time charterer faces, it is critical that a time charterer ensure that the terms and conditions of its respective time charter adhere to the risk allocations that time charterers customarily bear. Moreover, it is important that a time charterer not only obtain charterer's liability insurance, but that it also secures appropriate and customary indemnity obligations from the owner, including the requirement that appropriate insurance policies be in place to protect against any potential exposures.