Common Law Position

At common law, owners are obliged to load, stow, trim and discharge cargo at their own risk and expense. In such circumstances, responsibility for any losses arising due to the negligence of the stevedores rests with the owners unless they can prove that the charterers acted in such a manner as to break the chain of causation in accordance with the usual principles of contract law (i.e. the charterers actively interfere with the stevedoring operations and their intervention is the immediate and proximate cause of the loss.)

It is usual, therefore, for the owners to seek to transfer these obligations to their charterers for the sound commercial reason that this effectively turns their charterers into their insurers in respect of accidents arising during stevedoring operations. This is important not only in respect of losses which are self-insured by the owners (either because they are below deductible or wholly uninsured), but also in respect of large insured losses, since the owners will protect their loss record if recovery is possible from their charterers. Naturally, charterers seek to leave responsibility for stevedoring operations with the owners, even if they assume responsibility themselves for arranging and paying the stevedores.

a) Time Charters

Clause 8 of the New York Produce Exchange Charterparty 1946 ("NYPE 46") is an intermediate clause in so far as it provides (at line 77) that "Charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain", thereby shifting primary responsibility for these operations onto the charterers. It is common for owners to seek to insert the words "lash, unlash, tally and discharge" (or some variation of this) in clause 8 to further extend the scope of the charterers' primary obligations.

"Supervision" under clause 8 NYPE 56

Although clause 8 NYPE 46 states that loading, slowing and trimming is to be under the supervision of the master, the Courts have held that the master owes no positive duty to the charterers to supervise these operations. Thus, responsibility for stevedore damage will only switch from the charterers to the owners if the master either
i) actively interferes in the conduct of such operations, or
ii) negligently fails to intervene in the conduct of such operations to ensure the safety of the vessel, crew and cargo; provided such act or omission is the immediate and proximate cause of the loss or damage in question.

"And Responsibility" amendment to clause 8 NYPE 46

Another common amendment to clause 8 NYPE 46 is the insertion of "and responsibility" after the word "supervision" at line 77. Under English law, this amendment has the effect of shifting prima facie responsibility for the proper performance of the specified operations onto the Owners' shoulders. ("Shiroyu Maru" No 9, "Argonaut" and "Alexandros P") Where line 77 is amended thus, responsibility will only be imposed upon the charterers if they actively intervene in the conduct of the specified operations and if this intervention is the immediate and proximate cause of the loss or damage in question.

Stevedore Damage Notice Provisions

Where the charterers are under a primary obligation as regards loading or discharging operations, they will be responsible, prima facie for any stevedore damage which occurs during such operations. They may escape from liability if the charterparty imposes stevedore damage notice requirements on the owners as a condition precedent to liability and the owners fail to issue the necessary notices, since London arbitrators have construed such notice provisions strictly against owners.

"And responsibility" amendment to clause 8 NYPE 46 and combined with the inclusion of a charterers' liability for stevedore damage provision

NYPE 46 form charterparties which contain both the words "and responsibility" in line 77 and a rider clause which purports nevertheless to make the charterers liable for stevedore damage are also common. The approach of London arbitrators, despite the apparent inconsistency between the clauses, has been to try to give some meaning to both within the framework of the charter. As a result, prima facie responsibility for stevedore damage has been treated as resting with the owners under the amended line 77, with the rider clause transferring liability to the charterers only where their active intervention is the direct cause of the damage.

This is demonstrated by London arbitration No. 2/89 (LMLN 242 page 4) where the arbitrators had to consider the combined effect of a clause 8 of a NYPE 48 charterparty amended to include "and responsibility" and a rider clause which provided that stevedore damage caused to the vessel by the charterers or their servants should be repaired at charterers' time and cost. The tribunal decided that prima facie responsibility for stevedore damage lay with the owners under the amended clause 8, but that, if the damage arose as a consequence of the charterers' active intervention, responsibility would shift to them and they would be obliged to repair the vessel at their time and expense in accordance with the rider clause.

Unamended Clause 8 NYPE and combined with the inclusion of owners' liability for stevedoring operations provision

In London arbitration No. 1/92 (LMLN 316, page 3), the tribunal was asked to consider a NYPE 46 charterparty containing the following combination of clauses:

"8. Charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain...."

"35 Gear Breakdown
In the event of a breakdown of ... crane or cranes for any period by reason of disablement or insufficient power, the hire to be reduced pro rata ... If Charterers continue working by using shore gear, such to be for Owners' account but then the vessel not to be off hire pro rata .... Time lost by stevedores as a result of such breakdown ... and all other expenses thereby incurred, to be for Owners' account ...."

"47. Stevedores
The stevedores although appointed by Charterers to be considered Owners' servants and shall load, stow, trim and discharge the vessel under the control of the Master. The Master is to direct and control the loading, stowage and discharging of cargoes in co-operation with the
48. Stevedore damage

Damages to the vessel caused by the stevedores during ... discharging to be repaired at Charterers' expense before redelivery to Owners if it affects vessel's seaworthiness, but Charterers not to be responsible if Master fails to notify ... except hidden damages which to be notified as soon as discovered, in which case a joint survey to be held. Otherwise, Charterers not to be liable."

During discharge, the stevedores negligently damaged one of the ship's cranes. The owners claimed that the charterers should pay for the repairs; whilst the charterers denied liability and countered-claimed for the cost of hiring shore cranes.

The tribunal held that, although clause 47 obliged the charterers to appoint the stevedores, it also provided that the stevedores were deemed to be the owners' servants and obliged the master to direct their operations. The tribunal added that, since clause 47 was a typewritten rider clause, it took precedence over any conflicting provisions contained in clause 8 of the printed NYPE form. The net effect of this was the same as if clause 8 had been amended to include the words "and responsibility"; prima facie responsibility for stevedore negligence, therefore, rested on the owners.

However, the tribunal then considered the effect of rider clause 48 which appeared to be contradictory, in that it appeared to set out an express code in respect of stevedore damage under which responsibility fell on the shoulders of the charterers. The tribunal indicated that, although the master was expressly responsible for controlling and directing the stevedores' operations under rider clause 47, it was, in practice impossible in many circumstances for him to prevent the stevedores performing these operations in a negligent manner. Therefore, it was only sensible for the charterers, who chose and appointed the stevedores, to be liable if the stevedores were "unavoidably" negligent. On the facts of the case, the tribunal concluded that the stevedores had been unavoidably negligent and ordered the charterers to pay for repairs to the damaged crane under clause 48. Had the tribunal not made this finding of fact, liability would have rested with the owners.

New York Produce Exchange 1993 ("NYPE 93")

NYPE 46 is still in common use and so owners and charterers continue to try to obtain a commercial advantage by seeking to change clause 8. Whilst the charterers of the NYPE 93 form sought to make the starting position more favourable to the owners by expanding the scope of clause 8, there is no doubt that further confusion and uncertainty will be created as the parties will seek to improve their positions when negotiating fixtures.

Clause 8 of the NYPE 93 form provides as follows:

"... and the Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unloading, discharging, and tallying, at their risk and expense, under the supervision of the Master!"

This clause provides that these operations are to be carried out at the risk and expense of the charterers under the supervision of the master. As the clause is drawn, prima facie responsibility for these operations will rest with charterers.

Shelltime

An example of a stevedore clause in a tanker contract can be found at clause 16 of the Shelltime 4 charterparty. The clause reads as follows:

"Clause 16 – stevedores, pilots, tugs

16. Stevedores when required shall be employed and paid by Charterers, but this shall not relieve Owners from responsibility at all times for proper stowage, which must be controlled by the Master who shall keep a strict account of all cargo loaded and discharged. Owners hereby indemnify Charterers, their servants and agents against all losses, claims, responsibilities and liabilities arising in any way whatsoever from the employment of pilots, tugboats or stevedores, who although employed by Charterers shall be deemed to be the servants of and in the service of Owners and under their instructions (even if such pilots, tugboat personnel or stevedores are in fact the servants of Charterers or their agents or any affiliated company); provided, however, that

(i) the foregoing indemnity shall not exceed the amount to which Owners would have been entitled to limit their liability if they had themselves employed such pilots, tugboats or stevedores, and

(ii) Charterers shall be liable for any damage to the vessel caused by or arising out of the use of stevedores, fair wear and tear excepted, to the extent that Owners are unable by the exercise of due diligence to prevent redress thereof from stevedores."

As discussed above, in the absence of express terms, the Owners are responsible for the operations of loading, stowing and discharging cargo. Where, however, the charterers provide and pay for stevedores, responsibility for operations performed by them may be transferred to the charterers. Looking at the first sentence of clause 16 in isolation, it might be argued that the owners remain responsible for stowage whilst responsibility for all other operations performed by stevedores (who are employed and paid by the charterers) is transferred to the charterers. However, this would create conflict with the indemnity provisions contained in the second sentence of the clause which states that pilots, tugboats or stevedores who are employed by the charterers "shall be deemed to be the servants of and in the service of owners and under their instructions." Thus, it would seem that the true construction of the clause is that the charterers will only be under a responsibility if they actively interfere in the relevant operations and their intervention is the immediate and proximate cause of the loss.

b) Voyage Charters

Analogous concerns arise in connection with voyage charters. In particular, if the voyage charter contains no express provisions apportioning responsibility for cargo operations, responsibility will fall upon owners in accordance with the position at common law.

Confusion often arises where a charterparty requires the charterers to appoint or to pay for stevedores, but does not specify clearly which party is to be responsible for the stevedores' acts. The cases which have considered various forms of wording which have been used in this context are succinctly summarised in "Voyage Charters" (First Edition 1993) at page 270) as follows:

"(1) Words which have been held not to transfer the responsibility from owners to charterers:

- "Charterers being allowed to appoint a head stevedore at the expense and under the inspection and responsibility of the Master for proper stowage". "The Helene". See also Sack v. Ford, Union Castle v. Borderdale.

- "Stevedores to be appointed by the Charterers ... but employed and paid for by the Owners at current rates ..." Harris v. Best.

- "Cargo on delivery alongside to be received by the Master ... and to be at vessel's risk ... shipper for the sum of two dollars per load to appoint and pay any stevedore to load the cargo." Anderson v. Crucell.

- "Cargo to be loaded slowly and discharged free of expense to steamer, with use of steamer's winch or winchmen if required." Ballantine v. Paton, cf. Government of Ceylon v. Chandris, below.

(2) Words which have been held to transfer the responsibility from the Owners to the Charterers:

..."
"Ship to be slowed by Charterer's stevedore at the expense and risk of the vessel." *The Catherine Chalmers* 6

"Charterers to provide and pay a stevedore to do the slowing of the cargo under the supervision of the Masters." *Blys & Gysen v. Drysdale*. 7

"Charterers are to load stevedore and trim the cargo at their expense under the supervision of the Captain." *Court Line v. Canadian Transport* 8 See also *Filitos v. Shipman*. 9

"Cargo to be loaded, discharged, trimmed and stowed free of any expense to Owners." *Government of Ceylon v. Chandris*. 10

"Costs... Free in and stowed – The Charterers shall load and stow the cargo free of any expense whatsoever to the Owners." GHZ Rollmex v. Ettawysses ("The Panaghia Tinnou"). 11

The editors of Voyage Charters observed that the decision in *The Catherine Chalmers* seems dubious since it gives no meaning to the word "risk". They also commented that it is not easy to reconcile the decision in *Ballantyne v. Paton* with those in *Blys & Gysen v. Drysdale* and *Government of Ceylon v. Chandris*. The commentary goes on to outline the following guides to construction which may be deduced from the authorities:

1. Since the responsibility for loading and discharging operations within the ship, and for stowage, is normally that of the Owner, clear words are necessary to transfer the responsibility for these operations to the Charterer.

2. A clause which confers upon the Charterer the right to appoint stevedores does not, without more, transfer to him the responsibility for their acts or omissions.

3. A clause which makes the Charterer responsible for the expense of employing stevedores to perform loading, stowage or discharging does not, without more, transfer responsibility.

4. A clause which provides that the Charterer shall perform loading, stowage or discharging does transfer responsibility for those operations."

It is clear, therefore, that certain forms of wording do transfer to the charterer the right to nominate and the duty to pay stevedores to load, stow and discharge the cargo, but which leave responsibility for the proper performance of those operations with the owners. One important example of a form of wording under which responsibility for such operations is transferred to the charterers can be found in the FIOST amendment to clause 5 of the Gencon form of charter (as revised in 1922 and 1976). This clause provides as follows: *(b) F.I.O. and free stowed/trimmed.*

The cargo shall be brought into the holds, loaded, stowed and/or trimmed and taken from the holds and discharged by the Charterers or their agents, free of any risk, liability and expense whatsoever to the Owners.

The Owner shall provide winches, motive power and winchmen from the crew if requested and permitted; if not, the Charterers shall provide and pay for winchmen from shore and/or cranes, if any. *(This provision shall not apply if vessel is gearless and stated as such in Box 15).*

The FIOST alternative in clause 5 imposes an obligation on the charterers to perform as well as to pay for loading, stowage, trimming and discharge operations. It also expressly provides that these operations shall be performed without liability, risk or expense to the owners. Thus, although there is no direct authority on the effect of this provision, it seems fairly clear that the entire responsibility for the operations in question are transferred to the charterers. It follows that where the FIOST alternative is selected i) the owners are under no liability to the charterers for damage caused by careless loading or discharging or by bad stowage, and ii) the charterers are liable to indemnify the owners in respect of any liability the latter may owe to the bill of lading holders as a consequence of the improper performance of such operations. It is also submitted that, since the clause imposes an obligation to load and slow and discharge the cargo upon the charterers, it also imposes, by necessary implication, an obligation on them to carry out those operations in a proper and careful manner. Thus, even where no liability to a bill of lading holder is involved and the owners are therefore unable to rely upon the implied right of indemnity, the owners are entitled to recover damages from the charterers in respect of any losses suffered by them resulting from breach of that obligation, e.g., if the charterers' stevedores negligently damage the ship.

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1. [1965] 1 Lloyd's Rep 568
2. [1985] 2 Lloyd's Rep 216
3. [1996] 1 Lloyd's Rep 421
4. (1665) 6 B.R. 415
5. (1862) 13 C.B. (N.S.) 90
6. [1919] 1 K.B. 612
7. (1892) 68 L.T. 75
8. (1938) 14 T.L.R. 256
9. (1912) 5 C. 246
10. (1875) 32 L.T. 847
11. (1920) 4 Lloyd's Rep 24
12. (1940) A.C. 954
14. (1965) 2 Lloyd's Rep 204, 213
15. (1996) 2 Lloyd's Rep 566