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***71** CESSER CLAUSES

Machale A. Miller [FNa1]

The cesser clause is a seemingly straightforward provision found in voyage charter parties. [FN1] The clause is designed to provide the shipowner a lien on cargo for certain charges related to carriage and to concomitantly release the charterer from personal liability for those charges. It assumes no particular, universally accepted form. Its wording is not sacrosanct. Indeed, the phraseology of cesser clauses is as varied as the wording of the diverse charter parties in which they are found. Although more complex forms exist, the traditional wording of the cesser clause provides: "The charterer's liability shall cease as soon as the cargo is shipped, and freight, dead freight, and demurrage in loading, if any, are ***72** paid, the owner having a lien on cargo for freight, demurrage and average." [FN2]

The cesser clause has its origin in the mid-nineteenth century. [FN3] Some authorities report that the clause arose in response to the desire of charterers to terminate their charterer responsibility at the earliest moment, because frequently they were acting for undisclosed principals. [FN4] Others suggest that the cesser clause originated in the fact that charterers usually were merchants who sold goods on terms obliging the seller to provide, at its expense, transportation to a destination designated by the purchaser. [FN5] The clause was inserted to allow the seller, as charterer, to avoid responsibility for demurrage and other charter party obligations that were properly attributable to the buyer and would diminish its profit margin. Whatever its origins, the current purpose of the cesser clause is to terminate the charterer's responsibility to the shipowner under the charter party at a commercially appropriate time while ensuring that the shipowner is adequately protected by obtaining security from another source, usually a lien on cargo.

The plain meaning of the traditionally worded cesser clause [FN6] signifies that the charterer's responsibility for performance terminates once the charterer provides a cargo and pays freight, dead freight, and loading demurrage charges. [FN7] In exchange, the shipowner is accorded a lien on cargo to secure payment for unperformed obligations. [FN8] Little in the mercantile world is simple, and application of the cesser clause to end a charterer's responsibility is no exception. Courts have struggled with the proper interpretation and effect of cesser clauses. The judiciary has recognized the obvious correlation between the cessation of charterer liability and the existence of a cargo lien, but their decisions have been unable to formulate and consistently apply a conceptually sound framework for analyzing the significance of that relationship. This inability has stemmed primarily from three considerations: (1) cesser clause issues frequently are intricate because they arise in complex ***73** commercial transactions involving the sale of goods in international commerce and the resultant need to transport those goods; (2) courts are reluctant to adopt interpretations that result in cesser clauses taking away obligations that other provisions of charter parties impose upon the charterers; and (3) the courts are concerned about shifting to the consignee, as owner of liened goods, responsibility for the charterer's obligations.

Cesser clause issues become less complex when considered in the context of the commercial realm in which they arise. The cesser clause is the product of a commercial triangle consisting of seller, buyer, and carrier of goods. The clause is designed to balance the competing interests of these three commercial entities in the context of the so-called triple liability arising out of the voyage charter party, the bill of lading issued thereunder, and the receiver's implied obligations arising out of acceptance of the cargo at the port of discharge. [FN9] Most voyage charter parties are formed to implement a sales contract. [FN10] The sales contract requires either the buyer or seller to arrange and pay for shipment of the goods. [FN11] For example, a CFR [FN12] sale obliges the seller to provide ocean transportation to the buyer's designated destination. [FN13] To satisfy that obligation, the seller often enters into a voyage charter party obligating the shipowner to carry the goods. [FN14] The voyage charter party usually obliges the charterer to pay freight, dead freight, and loading demurrage--all charges within the charterer's control and fairly allocatable to that entity. [FN15] Usually the charter party further obliges the shipowner to issue a bill of lading designed to serve three functions. [FN16] The first is as a receipt so that the seller can establish that the goods have been delivered to and received by the ship for shipment. [FN17] The second is as a document of title allowing the holder to establish entitlement to the goods. [FN18] The third is as a contract of carriage between shipowner and ***74** consignee [FN19] so that international trade will be fostered by furnishing the purchaser and consignee with a document disclosing the purchaser's rights and liabilities with respect to the shipowner carrying the goods. [FN20] Discharge demurrage, [FN21] on the other hand, usually is under the control of the consignee and is properly allocated to that party. [FN22] The cesser clause recognizes these commercial realities and seeks to accommodate the shipowner's needs under its contract of carriage with its charterer's needs under the latter's sale contract.

I. Principles for Construing Traditional Cesser Clauses

Crossman v. Burrill [FN23] is the fountainhead decision in the United States delving into the construction and effect of the cesser clause. In somewhat obtuse terms the Supreme Court established this rule:

> In short, in a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate. [FN24] The Supreme Court created a rule of strict construction, tantamount to contra proferentum

disfavoring the charterer, whereby the cesser clause functions to release the charterer from liability only to the extent that the lien clause creates a commensurate liability. [FN25] Succinctly, the release is commensurate and coextensive with the lien. [FN26]

Crossman, in fashioning this rule of strict construction, relied heavily upon two English decisions, Clink v. Radford & Co. [FN27] and Hansen v. Harrold Bros. [FN28] Clink involved a suit by a shipowner against a ***75** charterer for damages arising out of detention during loading. [FN29] The charterer asserted that the lien component of the cesser clause fully protected the shipowner by substituting the in rem liability of the cargo for the in personam liability of the charterer so that the cesser clause should discharge the charterer from liability. [FN30] In resolving this dispute, Clink established the now-axiomatic principle that a cesser clause releases the charterer from further responsibility under the charter party only to the extent that the lien conferred in the cesser clause is commensurate with the release of the charterer from personal responsibility. [FN31] Clink articulated three guidelines to determine whether the lien was commensurate with the release when ascertaining the efficacy of the cesser clause:

1. No shipowner would forego rights stipulated elsewhere in the same agreement "without any mercantile reason" (i.e., a quid pro quo) so that the lien serves as an equivalent for the obligation released by the cesser provision. [FN32]

2. The outcome-determinant question in each case is "whether if we apply the cesser clause to the particular breach complained of, and so hold the charterer to be free, the shipowner has [no] remedy for his loss." [FN33]

3. If, by construing the cesser clause to release the charterer, "the shipowner would be left without any remedy whatever for the breach, then we should say that it could not have been the meaning of the parties that the cesser clause should apply to such a breach." [FN34]

Clink held against the charterer, after finding that the cesser clause created no lien for detention. [FN35] Consequently, the lien conferred by the cesser clause was not commensurate with the liability sought to be released. Applying the three guidelines mentioned above, the court concluded that the cesser clause did not release the charterer from liability for detention damages arising during loading. [FN36]

***76** The Clink rule, that the lien must be commensurate with the release, and the court's three guidelines for construing cesser clauses are conceptually sound and convincing. The language of the traditional cesser clause, which was found in the Clink charter party, is straightforward and its meaning plain, thereby leading to the conclusion that the release is inextricably linked to the lien. The reference to the lien in a participial phrase following the release language demands such a construction. [FN37] Moreover, the Clink rule and the principles of construction articulated therein are consistent with the approach reasonable businessmen would take in negotiating a charter party. The reasoning in Clink, however, is not immune from criticism. Notions of reciprocity, coextensiveness and quid pro quo are not compellingly inherent in the verbiage of the traditional cesser clause. Its liability-terminating language is broad in scope. It certainly could be interpreted to cut a wider swath thereby, as its wording suggests, eliminating all liability. The courts, however, have not done so and are unlikely to proceed on that path at this time.

The United States Supreme Court in Crossman seemingly articulated a relatively straightforward and simple rule for ascertaining the effect of a cesser clause. Taking its cue from Clink, the Crossman Court initially held that the release must be commensurate with the lien. [FN38] Unfortunately, the Crossman Court neglected to adhere to its own rule. The Court concluded that the cesser clause did not release the charterer because the consignee was not personally liable for demurrage. [FN39] Yet the lien component of the cesser clause under consideration created a lien that fully secured the shipowner for the indebtedness from which the charterer was released so that a one-for-one substitution occurred. [FN40]

The Crossman opinion leaves a wake of confusion. One aspect of the decision appears to effectuate the plain meaning inherent in the juxtaposition of the liability-ceasing and lien-creating provisions, an approach consonant with the sound commercial reasons discussed above. The release is tied to the lien. In rem responsibility of cargo is substituted for in personam responsibility of

charterer. [FN41] Another aspect of that same opinion, however, ignores the lien and focuses on whether the consignee's in personam responsibility has been substituted for that *77 of the charterer. [FN42] The reader is left to wonder which substituted liability determines the effectiveness of the cesser clause to release the charterer. Does its effectiveness turn on the existence of a lien against the cargo, a cause of action against the consignee or a combination of both?

The plain meaning of the traditional cesser clause leaves no room for the confusion created in Crossman. The release of the charterer should be effective whenever a lien, whether created by operation of law or the contractual effect of a cesser clause, serves as a substitute for the released liability. Lack of in personam responsibility of the consignee is irrelevant when the lien suffices to protect the shipowner. [FN43] Perhaps the Crossman Court based its decision upon the belief that the shipowner had no lien on cargo for discharge demurrage. The opinion, however, does not so state. [FN44] Moreover, any such view is manifestly incorrect as a matter of law. The cesser clause in Crossman unequivocally conferred a lien on cargo for demurrage. [FN45] On a more fundamental level, a lien arises against cargo for discharge demurrage by operation of law. [FN46]

The difficulty encountered by the Crossman Court is a direct product of the commercial triangle and the triple liability mentioned earlier. Troublesome issues are presented whenever the contract represented in the bill of lading and the contract represented in the voyage charter party collide. The effect of clauses in the charter party that affect rights and liabilities of the bill-of-lading holder and consignee is perhaps the most prominent of these conflicts. The lien imposed upon cargo for freight and demurrage is yet another conflict. In addition, difficulty arises precisely because one contract (the voyage charter party) directly or indirectly impacts upon the rights and liabilities of parties to a second (the bill of lading). This difficulty is further compounded by judicial recognition that prospective purchasers of goods carried under a bill of lading, acting both as a document of title and a contract of carriage, require certainty concerning their rights under that bill of lading. [FN47]

The interpretation of cesser clauses is inextricably interwoven with the liability of the consignee as well as the presence and efficacy of any *78 lien arising in favor of the shipowner on the cargo for freight and demurrage. This conclusion follows from the principle that the release of the charterer's liability is tied to the existence of a correlative lien that substitutes in rem for in personam liability. [FN48] Accordingly, the law of carriage relating to consignee liability and lien formation warrants particular attention when delving into cesser clause interpretation.

II. Consignee's Liability for Demurrage

The effect of the cesser clause upon consignees and other holders of bills of lading issued under a charter party is an intricate topic. Before exploring the troublesome issues inherent in that topic, a thorough understanding of the consignee's liability for demurrage under general maritime law is necessary. This need arises from the Clink- Crossman principle that the lien must be commensurate with the release. [FN49]

Whether the consignee of goods, delivered upon surrender of a bill of lading (which does not specifically impose an obligation to pay demurrage), is liable for demurrage imposed by a voyage charter party presents an intricate array of legal issues. The jurisprudence addressing this question is confusing; the confusion arises in part as the result of the complexity inherent in the interrelationship of charter party and bill of lading and in part as the result of the intrinsic artificiality of liens. Delving into these issues is akin to wading into quicksand, and so, with some trepidation, an examination of these issues follows.

Loading demurrage and discharge demurrage present different legal considerations when the shipowner pursues the consignee. The consignee plays no role in creating the delays engendering loading demurrage and is not a party to the charter party calling for its payment. [FN50] Conversely, the consignee usually is the party ultimately responsible for the delays resulting in discharge demurrage. [FN51] Under U.S. law, the consignee's responsibility for demurrage is intertwined with lien law. [FN52] Although this issue is not doubt-free, the preferred view is that, absent a *79 specific provision in the bill of lading imposing responsibility on the consignee for demurrage, the consignee is not per se personally responsible for loading or discharge demurrage. [FN53] However, by operation of general maritime law and U.S. statute in some cases, the shipowner has a lien on the cargo, irrespective

of the identity of its owner, for discharge demurrage. [FN54] Under English law the opposite rule applies. The shipowner has no lien on cargo by operation of law for either loading or discharge demurrage. [FN55]

The U.S. approach is analytically sound. The shipowner's lien for discharge demurrage is a logical extension of its lien for freight. [FN56] Demurrage is simply extended freight. [FN57] Because indebtedness for freight creates a lien on cargo, [FN58] so should indebtedness for extended freight (demurrage). The legal effect of the lien is to allow the shipowner to retain the cargo until freight and discharge demurrage are paid. [FN59] The ***80** liens for freight and demurrage do not attain the stature of a privilege, as conceived under civil law, or of a hypothecation that indelibly attaches to the goods, following their path until the underlying debt is discharged. Instead these are possessory liens that remain valid and enforceable only while the shipowner retains actual or constructive possession of the goods. [FN60] Additionally, the shipowner may await the near completion of discharge and then prevent further discharge by closing the hatches until freight and demurrage are paid. [FN61] The challenge in doing so, of course, is to retain just enough cargo to secure the debt.

The possessory nature of the lien for demurrage has afforded the courts a basis for imposing upon the consignee in personam liability for discharge demurrage when the consignee receives the cargo. [FN62] The consignee, by accepting the cargo, becomes liable under an implied contract based upon the theory that the shipowner surrenders its possessory lien in exchange for the consignee's promise to pay discharge demurrage. [FN63] This implied promise is commensurate with the relinquished lien. [FN64] This is the third of the so-called triple liabilities. The implied contract is conceived as an independent contract separate and discrete from the bill of lading and the charter party. [FN65]

Whether the consignee has in personam responsibility for loading demurrage, on the other hand, can be a complex, sometimes convoluted, inquiry. Two differing factual scenarios are possible, each presenting different considerations and yielding different responses. The first involves a situation wherein the sales contract obliges the buyer to arrange ocean transport (e.g., an FAS sale), and the other when the contract obliges the seller to do so (e.g., a CFR sale). When the buyer is obliged to arrange ocean transport and chooses a voyage charter party as the means of fulfilling that obligation, the buyer will be the charterer, and the bill of lading usually will name seller as shipper and buyer/charterer as consignee. Under that scenario, the charter party represents a contract of carriage once the bill of lading has been transferred by the seller/shipper to the consignee/charterer. [FN66] In this factual setting, unless ***81** the charter party provides otherwise, the consignee would have in personam responsibility for loading demurrage in its capacity as charterer and hence the relevant obligor under the charter party.

Under the second factual scenario, wherein the sales contract obliges the seller to arrange ocean transport, the seller will be the charterer, and the bill of lading usually will name the seller/charterer as shipper and the buyer as consignee. Under these circumstances, the bill of lading becomes the contract of carriage once it has been transferred by the seller/shipper to the consignee/charterer.

When presented with this second factual scenario, the courts understandably are troubled by imposing responsibility upon the consignee, who is not privy to the charter party, for a charge arising through no act or omission on its part and the extent of which it cannot control. [FN67] Even though the charter party provides for loading demurrage, the consignee will not be responsible for that debt unless the bill of lading effectively incorporates the charter party. [FN68] If, however, the charter party provides for loading demurrage and its terms are incorporated into the bill of lading, the consignee will be held liable for loading demurrage, particularly if the charter party also contains a lien clause conferring a lien for demurrage. [FN69] The rationale is that incorporation gives the consignee notice of the obligation. [FN70]

This approach is conceptually sound. The voyage charter party is a contract between shipowner and charterer for carriage of goods. [FN71] That contract typically obliges the charterer to pay freight, dead freight, and demurrage (both loading and discharge) and, in consideration, obliges the shipowner to issue bills of lading and transport the goods. [FN72] The ***82** consignee is not a party to the charter party and hence not bound by it. [FN73] A bill of lading, although issued to a shipper/charterer,

nevertheless under appropriate circumstances, can serve as an independent contract between shipowner and consignee. [FN74] Bills of lading frequently contain a clause incorporating all terms of the charter party. [FN75] An axiomatic principle of contract law specifies that terms of one instrument incorporated into another become terms of the latter (the incorporating instrument) as though fully set forth therein. [FN76] If the charter party creates a loading-demurrage obligation, basic principles of contract law would impose that obligation upon the consignee whenever the bill of lading effectively incorporates the charter party. The courts, nevertheless, exhibit reluctance to hold the consignee personally liable for loading demurrage unless the shipowner relinquished its possessory lien on the cargo by delivering the cargo to the consignee upon its surrender of the bill of lading. [FN77] This reluctance is conceptually grounded in the construct formulated in the Yone Suzuki v. Central Argentine Railway Co. [FN78] district and appellate court cases. Under that approach an implied contract is deemed to be formed by virtue of the consignee's implied promise to pay all debts secured by the possessory lien. [FN79] As Judge Learned Hand succinctly framed the issue in the lower court Yone Suzuki decision: "The promise should be commensurate with the lien." [FN80]

Although perhaps conceptually sound, relying upon the doctrine of incorporation by reference ignores several commercial realities. The incorporated document (the charter party) virtually never accompanies the bill of lading down the negotiation trail. The holder of the bill of lading rarely timely receives a copy of the charter party if requested. The ***83** charter party often is not even completed and executed until long after the voyage has ended. As a result of these practical considerations, the very basis for the axiomatic rule of general maritime law establishing the sanctity of a negotiable bill of lading as the contract of carriage is undermined. As stated in Chilean Nitrate Sales Corp. v. The Nortuna:

It is true that where a bill of lading has been transferred for value to a third party not a party to the charter party, it constitutes an undertaking independent of the charter party, except as to provisions of the charter party expressly incorporated into it. The reason for the rule is that third persons are strangers to the charter party, and as a good deal of the international trade of the world is done on the faith of bills of lading, it is essential that purchasers of goods be enabled to rely on clean bills of lading free from the restraint of agreements between the ship owner and charterer, as to which they have no notice. [FN81] These considerations justify reconsidering the rule that a lien attaches to the cargo for loading demurrage by virtue of a lien clause in the charter party, which is incorporated generically into the bill of lading, without an express, corresponding lien provision in the bill of lading.

To sum up the principles recited in these cases, the consignee will be held personally responsible for loading demurrage whenever four conditions occur: (1) the charter party creates a demurrage obligation, (2) the charter party contains a lien clause embracing loading demurrage, (3) the bill of lading effectively incorporates all terms of the charter party, and (4) the consignee, upon surrendering the bill of lading, accepts the goods unconditionally. [FN82] The question remains, however, whether each of these is a prerequisite or whether the consignee's personal liability may arise in the absence of one or more. Two considerations suggest that each of the four is not a prerequisite. The first of these is the analysis previously set forth delineating how incorporation of the charter terms into the bill of lading alone can serve as the basis for binding the consignee, [FN83] thereby eliminating the other conditions as prerequisites. [FN84] In The Hans Maersk, [FN85] the court concluded that the "consignee, if the bill of ***84** lading incorporates the demurrage clause, is bound by his agreement that a vessel shall be loaded or discharged within a given time." [FN86]

The second consideration stems from vagaries and uncertainties in demurrage lien law. Two unresolved issues relating to demurrage liens are noteworthy. The first issue concerns whether a lien on cargo for loading demurrage arises by operation of law. If so, the second condition mentioned previously (lien clause in charter) is unnecessary for creation of consignee liability. The second issue concerns the effectiveness of the lien clause in the charter.

As to the issue pertaining to whether a lien on cargo arises for lading demurrage, U.S. general maritime law is in a state of confusion. One view is that loading demurrage does not create a lien by operation of law. In Elvers v. W.R. Grace & Co., [FN87] the Ninth Circuit categorically stated, "There is no maritime or common-law lien for demurrage prior to loading," [FN88] offering the following explanation:

The reciprocal relation of the ship to the cargo and the cargo to the ship, whereby the ship is bound to the cargo and the cargo

to the ship, is not established until the cargo is on board. After the cargo is loaded on the vessel there is, under the maritime law, a lien on the cargo for demurrage which will then necessarily be incurred only in its discharge. [FN89]

This approach appears contrived. The "on-board" requirement has an anachronistic ring. It nevertheless still exists, but why is that requirement not met as the goods are loaded? Such a construct is no more artificial or contrived than the "on-board" requirement itself. Moreover, on a more conceptually oriented level, as previously mentioned, demurrage is extended freight. [FN90] The freight, layday, and demurrage provisions of the charter party, when read in pari materiae, should be regarded as setting up a conditional freight amount that will be increased if the condition subsequent of failing to perform within stipulated lay days is triggered. [FN91] So construed, the demurrage lien is ***85** simply an application of the freight lien. All things considered, the better view from a theoretical standpoint is that the lien on cargo should arise by operation of law. Although conferring a lien for loading demurrage ostensibly is a harsh approach because of the "secretive" nature of the underlying demurrage obligation, an ameliorating consideration, however, should be taken into account. The consignee, when buying under CFR terms, can protect itself from a freight lien on cargo by inserting in the sale contract a clause requiring the seller, when voyage chartering a vessel, to prepay the freight and to include in the charter party and bill of lading a "freight prepaid" clause. [FN92] If a carrier agrees to prepaid freight and nevertheless neglects to collect the freight prior to shipment, that carrier waives any freight lien it otherwise would have on the cargo. [FN93] Presumably, the sale contract could require that a similar clause for loading demurrage be inserted in the charter party and in the bill of lading (directly or by incorporation). If that occurs, a shipowner failing to collect loading demurrage before the vessel sails waives any lien for loading demurrage otherwise available. [FN94]

Another line of cases concludes that the shipowner has a lien on cargo for loading demurrage by operation of law. [FN95] Those cases, however, do so without citation of authority. For instance, The Saturnus, [FN96] although reciting mere dictum, bases the lien for loading and discharge demurrage upon the nature of demurrage as extended freight. [FN97] The Saturnus approach is appealing precisely because demurrage is extended freight and the shipowner has a lien on cargo for unpaid freight. Once cargo is aboard the ship, the freight lien arises. No sound reason prevents a corresponding lien from arising for extended freight.

The second issue involving the vagaries of lien law deals with the effectiveness of demurrage lien clauses. To consider this issue, recall the wording of the lien-conferring provision in the traditional cesser clause: "Vessel to have an absolute lien upon the cargo for all freight, dead ***86** freight, and demurrage." [FN98] This wording unquestionably embraces both loading and discharge demurrage. No less eminent a jurist than Judge Learned Hand in his Yone Suzuki opinion agrees, stating, "I think it equally clear here that the charter party here meant to include demurrage at either port." [FN99] Other decisions, inexplicably regarding this all-inclusive lien clause language as ambiguous, have concluded that it does not encompass loading demurrage. [FN100] Applying an axiomatic principle of contract interpretation, the lien-conferring provision should be accorded its plain meaning so that it encompasses both discharge and loading demurrage.

Needless to say, the issue of whether the consignee is responsible for loading demurrage is a challenging one. Whenever the consignee is the charterer, the answer is simply derived. The consignee, in its capacity as charter, is liable for loading demurrage imposed by the charter party precisely because as between shipowner and charterer/consignee, the charter party is the governing contract. When, however, the consignee is not the charterer, as the foregoing analysis demonstrates, the legal picture is muddled. In resolving this issue, the courts should adopt a balanced approach that takes into account the competing needs of shipowner and consignee and, particularly with respect to loading demurrage, the intrinsic unfairness of visiting upon the consignee personal responsibility for demurrage. Inasmuch as the current commercial world is far more consumer-oriented than it was in the era when the general maritime law of liens was being formulated, the appropriate rule should be that the nonchartering consignee is responsible for loading demurrage when the charter party creates a demurrage obligation, contains a lien clause embracing loading demurrage only, the bill of lading incorporates the charter party, and the consignee accepts the goods unconditionally. [FN101] Even when these four conditions are met, a degree of unfairness pervades a rule holding the consignee responsible for discharge demurrage because of the secret nature of the underlying debt. That unfairness could be corrected by adding a fifth condition,

namely, that ***87** the bill of lading specifically state that loading demurrage was incurred, thereby alerting the consignee to the debt. Whether the court is prepared to go that far remains to be seen, but, at the very least, a shipowner would be well served by inserting a clause of that type in the bill of lading in order to enhance its prospect of obtaining a favorable court or arbitration ruling upon consignee responsibility for discharge demurrage.

III. Impact of Traditional Cesser Clause upon Charterer's Responsibility for Demurrage

The vast majority of issues arising under cesser clauses relates to the impact of those clauses upon charterers. As mentioned in the introductory portion of this Article, the primary purpose of the cesser clause is to relieve the charterer from further responsibility under the charter party for charges and costs over which it has no control. One frequently arising issue is whether the cesser clause releases the charterer from liability for loading and discharge demurrage. Considering the primary purpose of the clause, one instinctively would think that a cesser clause does not release the charterer from responsibility for loading demurrage because, as a general rule, the charterer has control over the time consumed in loading. The phraseology of the traditional cesser clause, however, subjects that conclusion to doubt.

This doubt is created by the plain meaning of the traditional cesser clause. In unequivocal terms it unqualifiedly releases the charterer from liability. And that release, precisely because it is not restricted, ostensibly is for all liability. That view is corroborated by the lien-granting language in the participial component of the cesser clause which confers a lien on cargo for "all freight, dead freight and demurrage." [FN102] The word "demurrage" from a linguistic standpoint necessarily includes both loading and discharge demurrage. [FN103] Had the parties intended otherwise, they should have added an adjectival modifier restricting the noun "demurrage" to discharge demurrage. The use of the word "all" in the lien-conferring clause makes this conclusion all the more compelling from a grammatical standpoint and from a legal standpoint under the plain-meaning rule.

The jurisprudence has eschewed grammar and created confusion. In Elvers, the Ninth Circuit concluded that the release language of the traditionally worded cesser clause was ambiguous. [FN104] The Elvers opinion ***88** does not cogently articulate the basis for this conclusion, but the clear import of the court's reasoning is that because the release language of the cesser clause states that the charterer's liability shall cease as soon as the cargo is onboard, the clause should not be construed to relieve the charterer from liability accruing before the completion of loading. [FN105] Loading demurrage quite obviously accrues before the completion of loading. [FN106] Accordingly, under the Elvers approach, the cesser clause does not relieve the charterer from responsibility for loading demurrage. [FN107]

In arriving at this conclusion, Elvers relied heavily upon a well-respected English treatise, The Laws of England [FN108] by the Earl of Halsbury, wherein a number of noteworthy principles regarding cesser clause construction are delineated:

1. The effect of the clause varies according to its language. [FN109]

2. The release of the charterer from "future liabilities" arising after loading (notably discharge demurrage) "appears to be absolute." [FN110]

3. Whether the clause releases the charterer from "antecedent liabilities" (notably loading demurrage and deadfreight) depends upon phraseology. [FN111]

4. If the language of the clause clearly states that all liabilities, antecedent as well as future, cease upon loading, the release is "equally absolute" for both. [FN112]

5. If, however, the language is ambiguous, the charterer's liability for antecedent breaches of the charter party will cease "only in so far as an equivalent is given to the shipowner in the shape of a remedy available against the consignee." [FN113]

6. Consequently, the cesser clause will be deemed inapplicable if a different construction would leave the shipowner unprotected. [FN114]

7. The lien clause must be read together with the cesser clause and the two regarded as co-extensive with the result that "[n]o ***89** liability is destroyed by the cesser clause, unless it is re-created in some one else by the lien clause." [FN115]

After setting forth these general principles, the treatise then formulates a fundamental rule of construction for the cesser clause: "The construction of the cesser clause is therefore governed by the construction of the lien clause, and if that clause confers no lien on the shipowner in respect to the claim which is in question, the charterer's liability is not taken away by the cesser clause." [FN116] Ironically, the principles quoted from The Laws of England undermine the Elvers result. The fourth principle set forth above states that if the language is ambiguous, the charterer will be released from liability for "antecedent breaches," i.e., loading demurrage, only if an equivalent right is given the shipowner against the cargo or the consignee. [FN117] In Yone Suzuki v. Central Argentine Railway Co., [FN118] the Second Circuit held that the traditional language of the cesser clause conferring a lien for cargo for "all freight, dead freight and demurrage" creates a lien on cargo for loading demurrage. [FN119] Accordingly, preceding from these two premises, the proper construction of the traditional cesser clause should be that it releases the charterer from responsibility for loading demurrage. Indeed, provided the release is tied to the lien, that conclusion is not only grammatically and legally sound but also eminently fair. If the shipowner wishes to hold the charterer personally responsible for loading demurrage, the shipowner need only negotiate a variant wording of the cesser clause to reflect that intent.

IV. Impact of Traditional Cesser Clause upon Responsibility of Bill of Lading Holder for Demurrage

Almost invariably a voyage charter party, containing a cesser clause, contemplates the issuance of a bill of lading which is designed to serve as a receipt for the goods and, in some instances, also as a document of title. [FN120] A bill of lading so issued may name the charterer as the shipper (consignor) and/or as the consignee. Depending upon how the sales contract allocates the cost of transporting the goods to the buyer's desired destination, the charterer may be the seller or the buyer. When the sale ***90** contract has terms such as CFR or CIF, the seller is required to furnish the ocean transportation. [FN121] Under that scenario the seller charters the vessel. The charterer, upon receiving the bill of lading from the shipowner, may retain possession and thus be the holder of the document. This normally occurs when the charterer, as seller, is concerned over the buyer's creditworthiness or reliability. Alternatively, the charterer, as seller, may transfer possession of the bill of lading to the consignee, as buyer, who becomes the holder of the document. When the sale contract is on Ex-Work, FAS, or FOB terms, the buyer is responsible for furnishing ocean transportation and will be the charterer. [FN122] Under that scenario the bill of lading normally will name the seller as shipper and the buyer as consignee. The seller-shipper, upon receiving the bill of lading from the shipowner, usually transfers it promptly to the buyer-consignee who then becomes the holder of the document.

Under both scenarios the bill of lading routinely incorporates all terms of the charter party including the cesser clause. If incorporation occurs, the question arises whether the cesser clause in the voyage charter party releases the holder of the bill of lading from personal liability for discharge demurrage. This issue presents an analytical dilemma fostered by the conceptual distinction between a holder's status as charterer under the charter party and its status as shipper and/or consignee under the bill of lading as a separate agreement. Analytical difficulty is compounded by the fact that the bill of lading emanates from the charter party and is further complicated when the terms of that charter party are incorporated into the bill of lading.

Under English law the dilemma is resolved by deftly reading the cesser clause out of the bill of lading. [FN123] In Gullischen v. Stewart Bros., [FN124] the court determined that a consignee, who owned the cargo and held a bill of lading incorporating the charter party terms, was not relieved from liability for demurrage by the cesser clause. [FN125] In reaching that conclusion, the court reasoned that the bill of lading is a contract distinct from the charter party, [FN126] and that the plaintiff-shipowner's cause of action was based upon the bill of lading contract that served as the contract ***91** creating the consignee's liability. [FN127] Observing that the consignee's liability, under the express terms of the bill of lading, was to pay freight and other charges "as per

charter party" and that the charter party in turn stipulated that consignees were to pay demurrage, the court recognized that terminating the consignee's liability under the bills of lading once the cargo had been loaded would create an absurd result. [FN128] To avoid that absurdity, the court in effect rewrote the incorporation clause of the bill of lading by finding that the cesser clause in the charter party was not incorporated into the bill of lading even though the latter incorporates all terms of the former. [FN129] In so holding, Lord Justice Bowen stated:

> The bill of lading by its words incorporates the terms of the charterparty; but these words must receive a reasonable construction. The result is that the bill of lading incorporates certain provisions of the charterparty, but not the clause as to cesser of liability. The argument for the defendants [consignees] would render the bill of lading a nullity: it would be a useless form except as an acknowledgment that the goods had been put on board. [FN130]

Lord Justice Bowen's resolution of this issue may have placed commercial pragmatism above sound legal theory. But in the process, he substituted one absurdity for another. The result becomes all the more unsatisfactory because of the premise upon which Gullischen was predicated, which in actuality may have been more perceived than real. The Gullischen analysis itself is misdirected inasmuch as a finding that the all-inclusive incorporating clause of the bill of lading does not embrace the cesser clause of the charter party does violence to the very breadth of the language of the incorporating clause. Indeed, the conclusion is hard to avoid that Lord Justice Bowen, in a fit of judicial activism, rewrote not only the charter party, which required that bills of lading incorporate all terms of the charter party, but also rewrote the bill of lading, which honored the charter party requirement by incorporating its terms. The tragedy lies in the fact that the premise perceived by Lord Justice Bowen does not exist if the lien component of the cesser clause is recognized as affording the shipowner the same protection as the personal liability of the charterer-consignee by substituting the res (i.e., the cargo) for the person (i.e., the charter-consignee). [FN131] Here lies the fundamental flaw in the approach taken by the Gullischen court in construing the cesser clause. Whereas commercial necessity is fully ***92** protected by substituting a res for a person, some courts seem to think that the cesser clause should be effective only if it adds the thing to the person. Tempering that critique of the Gullischen reasoning is the contradictory consideration that contractual interpretation should be directed at ascertaining and implementing the intent of the parties while taking cognizance of commercial reality. [FN132]

U.S. decisions generally follow the Gullischen approach. [FN133] In Yone Suzuki, the court addressed a factual pattern similar to that of Gullischen. [FN134] A seller under CIF terms satisfies its sales obligation by chartering vessels to transport the sold goods. [FN135] The charter parties, after setting forth laydays for loading and discharge, imposed liability for loading and discharge demurrage. [FN136] The bills of lading issued pursuant to the Gullischen charter parties each contained a clause incorporating all terms of the charter parties. [FN137] The charter parties each contained a typical cesser clause terminating the charterer's liability upon loading and payment of freight while concomitantly conferring a lien upon the cargo for all freight, dead freight and demurrage. [FN138] The shipowner sought recovery of loading and discharge demurrage from the consignee and endorsee of the bills of lading. [FN139] The court found the consignee liable, relying on the principle that an endorsee of a bill of lading, incorporating a charter provision, becomes liable upon receiving the goods for demurrage based upon an implied promise arising from its acceptance of the goods. [FN140] In so doing, the court followed the Gullischen principle that even though the bills of lading may incorporate all terms of the charter party, the cesser clause is not incorporated and does not function to relieve the consignee of in personam responsibility for demurrage, notwithstanding the presence of a lien on the cargo in favor of the shipowner. [FN141]

***93** In The Arizpa, [FN142] the efficacy of the cesser clause in releasing the charterer from liability was tested in a situation where the charterer was named as both shipper and consignee on the bill of lading, but the cargo was received by the buyer to whom the bill of lading had been endorsed. [FN143] The shipowner sought to recover discharge demurrage from the charterer in its status as shipper and, alternatively, as consignee under a bill of lading incorporating the terms of a charter party that expressly required the consignee to pay demurrage. [FN144] The court concluded that the charterer was not liable in its status as either shipper or consignee, but the reasoning process utilized to reach that result varied markedly for each status. [FN145] In concluding that the cesser clause insulated the charterer, as shipper, from liability for discharge demurrage, the court reasoned

that the cesser clause must be interpreted consistently with the intent of the parties to the contracts consisting of the bill of lading and the charter party. [FN146] Recognizing that the cesser clause was intended to terminate the charterer's responsibility after the goods had been delivered to the ship, the court saw no reason why the clause should not apply to eliminate the charterer's/shipper's liability for discharge demurrage because the shipowner was protected by its lien on cargo. [FN147] In reaching this result, the court, without expressly doing so, essentially invoked the principle of mutatis mutandi [FN148] to change the word "charterer" to "shipper" in the incorporated cesser clause.

The Arizpa court's analysis of the impact of the cesser clause upon the charterer's liability, as consignee, was even more involved. Focusing ***94** upon incorporation into the bill of lading of all terms of the charter party containing not only a cesser clause but also a provision obliging the consignee to pay demurrage, the shipowner urged that the charterer, by naming itself as consignee on the bill of lading, assumed the obligations of consignee, including payment of demurrage, and could not avoid that liability by transferring the bill of lading to the ultimate receiver. [FN149] In concluding that the cesser clause relieved the charterer, as consignee, from responsibility for discharge demurrage, the court basically redefined the word "consignee." [FN150] The court noted that bills of lading often name the shipper as consignee in order to permit the shipper-charterer to retain title to and control over the goods. [FN151] The court further noted that, colloquially, the term "consignee" may refer to the person receiving the goods as well as the party named as consignee on the bill of lading. [FN152] The court further concluded that the contract should be construed as a whole and the cesser clause construed in accordance with its traditional purpose of relieving the charterer from obligations arising at the discharge port. [FN153] To do so, the court adopted the traditional meaning of the word "consignee," as used in the incorporated charter party, to signify the actual receiver of the goods. [FN154] The court thereby eliminated the charterer's responsibility as consignee for demurrage under the terms of the bill of lading.

The reasoning employed in the Gullischen, Yone Suzuki, and Arizpa decisions, while reaching the correct result, is contrived. The issues presented in all three decisions could have been resolved on a more conceptually sound basis. Rather than ignoring the all-encompassing language of the incorporating clause in the bill of lading, or arbitrarily redefining contract terms, each court could have reached the same result by construing the cesser clause as releasing a party occupying the status of charterer, bearing in mind that the cesser clause protects the shipowner by substituting a lien on cargo for the release of the charterer. Under that construct, the word "charterer" in the cesser ***95** clause functions to extend its protection to the party who is designated as the charterer in the charter party and hence occupies the status of charterer.

V. Effect of Cesser Clause upon Nonchartering Holder of Bill of Lading

When a bill of lading issued pursuant to a voyage charter party incorporates all terms of the charter party and is transferred to a stranger to the charter party, the impact of the traditional cesser clause upon disputes arising under that bill of lading is called into question. Instinctively, one would conclude that the cesser clause offers the consignee no solace. The consignee is neither a charterer in the conceptual sense nor the "charterer" as that term is defined in the charter party. A cogent argument, nevertheless, is available in support of the conclusion that the cesser clause functions to terminate the liability of the bill-of-lading holder. Under the doctrine of mutatis mutandi, language from an incorporated instrument (the charter party) under appropriate circumstances should be given a meaning consistent with the relationship between the parties to the incorporating instrument (the bill of lading). The conceptional underpinning for the doctrine is that when parties incorporate one instrument into another, they intend that all terms of the incorporated instrument should have significance in determining the rights and liabilities of the parties to the incorporating instrument. [FN155] If that doctrine were to apply in the context of the cesser clause, the word "charterer" would be transformed, mutatis mutandi, into the word "consignee."

In the context of discharge demurrage, the doctrine of mutatis mutandi unquestionably should not apply to relieve the consignee from responsibility for discharge demurrage. The consignee, or its contractors, often are the parties causing the delays that precipitated discharge demurrage. The purpose of the cesser clause is to release the charterer from responsibility for events occurring after the goods are out of its control. Unquestionably, shipowner and charterer did not intend for the cesser clause to release discharge demurrage liability for the entity occasioning the delays giving rise to it. That doctrine of mutatis mutandi is

designed only as a means of effectuating the underlying intent of the ***96** parties. The doctrine, therefore, should not be invoked to transform the word "charterer" in the cesser clause into the word "consignee." [FN156]

Analysis becomes more complex when loading demurrage is involved, but the result is the same. The cesser clause does not relieve the nonchartering consignee from responsibility for loading demurrage. Two factual settings must be considered: one, wherein the bill of lading incorporates a charter party containing not only a cesser clause but also a provision imposing upon the consignee responsibility to pay demurrage; the other, where the incorporated charter party is silent in that regard.

The analysis is more straightforward when the incorporated charter party imposes demurrage responsibility upon the consignee. In that situation the doctrine of mutatis mutandi is manifestly inapplicable. Were it applied to transform the word "charterer" into "consignee," the cesser clause would directly clash with the clause imposing demurrage responsibility upon the consignee. The doctrine of mutatis mutandi is not designed to create such a conflict. The consignee should be responsible for demurrage by virtue of accepting a bill of lading incorporating a charter party with a provision imposing demurrage responsibility upon the consignee. [FN157] Moreover, as previously mentioned, by surrendering the bill of lading and accepting the goods, the consignee impliedly promises to pay demurrage in exchange for the carrier's release of its possessory lien on the cargo. [FN158]

If the bill of lading incorporates a charter party having no provision rendering the consignee responsible for demurrage, the considerations change but the result is the same. The cesser clause does not relieve the consignee of responsibility for loading demurrage, once responsibility has been incurred. [FN159] Bear in mind that if the bill of lading does not expressly obligate the consignee to pay demurrage and if it does not incorporate a charter party with such a term, the consignee becomes liable for loading demurrage only by virtue of the implied promise discussed in the previous paragraph. [FN160] Logic dictates that this implied promise encompasses not only an undertaking to pay demurrage in ***97** exchange for the shipowner's relinquishment of its possessory lien, but also a promise to refrain from asserting any release from that promise arising out of and incorporated in the bill of lading. [FN161]

VI. Effectiveness of the Lien as a Requisite to Cessation of Liability

Even though the cesser clause may create a lien, which is legally enforceable at the port of loading and/or in the country in which the charter party is formed, subsequent legal and factual impediments may effectively prevent the shipowner from exercising that lien. The laws of the country of discharge may not recognize the lien. Those laws may make enforcement of a lien so difficult as to virtually eliminate the lien as a viable means of redress. Conditions at the discharge port may be so hostile that enforcing the lien is impossible or impractical. On a purely practical plane, the value of the cargo may be less than demurrage incurred during discharge. The typical cesser clause makes no express allowance for these situations, instead merely providing that the charterer's liability is to cease upon loading, and perhaps upon payment of freight, with the shipowner having a lien for freight, dead freight, and demurrage. As previously discussed, the courts, quite properly, have placed a judicial gloss upon this standard clause by requiring that the lien be coextensive with the release. [FN162] The situations hypothesized above test the extent of that judicial gloss by raising the issue of whether coextensiveness is measured on a purely abstract, conceptual level or whether the measure also embraces the actual effectiveness of the lien, i.e., its enforceability from a legal and/or practical perspective.

The situation wherein the demurrage obligation exceeds the value of the cargo presents the easiest issue to resolve. Although parties are free to contract as they wish, general maritime law does not require either that the shipowner be granted a risk-free environment or that contracts be interpreted to effectuate that end. Accordingly, absent compelling language in the cesser clause or elsewhere to the contrary, the shipowner should bear the risk that the cargo's value may be less than the claim for discharge demurrage. Dictum in at least one decision, however, suggests a contrary result. [FN163] That approach, however, is not conceptually sound. Absent unequivocal language to the contrary, the cesser clause should be ***98** construed as releasing the charterer for discharge demurrage even though the cargo value is less than the shipowner's claim for discharge demurrage.

More difficult problems are presented when the laws in existence at the port of discharge do not recognize a lien or, for legal

or practical reasons, the lien cannot be asserted. No U.S. decision addresses the issue. The wording of the typical cesser clause suggests that this is a risk that the shipowner assumes. Indeed, at one point some English authorities, at least in dictum, suggested that the charterer should be released under the cesser clause if the lien clause conferred a lien, it being unnecessary for the lien to be effective at the time of discharge. [FN164] In Overseas Transportation Co. v. Mineralimportexport (The "Sinoe"), [FN165] the court changed course and concluded that, indeed, the lien for demurrage must be effective at the time of discharge for the charterer to be relieved under the cesser clause. [FN166] If the cesser clause is the typical one, merely releasing the charterer while conferring a lien, the result and reasoning of the Sinoe opinion is questionable on the ground that mercantile law does not guarantee the shipowner a risk-free environment. If that is desired, the cesser clause must specifically so provide. Accordingly, without highly specific and focused language, the cesser clause should be enforceable irrespective of the effectiveness of the lien in the port of discharge. [FN167]

The authoritative value of Sinoe is limited by its facts. The cesser clause in that case was not the typical clause, but instead one carefully drafted and tailored to protect the shipowner whenever as a practical matter the lien is not effective. [FN168] The charter party in that case was on the ***99** GENCON (1922) form, [FN169] the boilerplate cesser clause language of which stated: "Charterer's liability shall cease as soon as the cargo is on board Owners having an absolute lien on the cargo for freight, dead freight, demurrage and average." [FN170] That clause was stricken and a printed clause substituted, reading:

> Owner shall have a lien on the cargo for freight, deadfreight, demurrage and damages for detention. Charterers shall remain responsible for dead-freight and demurrage (including damages for detention), incurred at port of loading. Charterers shall also remain responsible for freight and demurrage (including damages for detention) incurred at port of discharge . . . but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo. [FN171]

The Sinoe decision, therefore, should have turned upon the narrow issue of the construction to be afforded the precise language of the cesser clause in question rather than upon the dubious principle that all cesser clauses, by their very nature, release the charterer only if the lien is effective.

An interesting problem developed in Orient Shipping Rotterdam B.V. v. Hugo Neu & Sons, Inc. [FN172] when the shipowner exercised its charter party lien on cargo by closing the vessel's hatches and stopping discharge. In doing so, the shipowner was protecting itself against the cessation of the charterer's responsibility for discharge demurrage pursuant to the cesser clause in the charter party. That particular cesser clause provided that the charterer remained responsible for demurrage incurred at the port of discharge but only to the extent the shipowner was unable to obtain payment by exercising its lien on the cargo. When the buyers and receivers of the cargo at the discharge port complained to the seller, who had chartered the vessel, about the shipowner's decision to prevent discharge until demurrage was paid, the seller/charterer, to avoid further delays, agreed to waive the release otherwise accorded it under the cesser clause. Discharge then resumed, but the charterer subsequently resisted paying discharge demurrage on the ground that its waiver of the cesser clause's protection was coerced by the shipowner's wrongful duress. The court held that duress was lacking, noting that a "wrongful threat" is a prerequisite for duress and that a party enforcing its contractual rights cannot be charged with duress. Closing the vessel ***100** hatches was regarded as a practical means for exerting the lien and hence an exercise of the shipowner's contractual rights.

Closing the hatches represents a practical method for enforcing a lien that otherwise might be impossible to enforce judicially. Indeed, in many cases this solution renders the Sinoe principle inapplicable. Extreme situations nevertheless may arise. In Granvias Oceanicas Armadora S.A. v. Jibsen Trading Co. (The "Kavo Peiratis"), [FN173] the consignee was a governmental agency of the country of discharge and its cargo was immune by law or otherwise from being liened. Moreover, the master, upon advising the consignee that the hatches would be closed and discharge stopped until discharge demurrage was paid, was informed that he would be "put in prison" and warned of the "unpleasant consequences" associated with imprisonment. [FN174] The Sinoe was applied to find that the cesser clause did not relieve the charterer of responsibility for discharge demurrage because the lien, if any, could not be asserted. [FN175]

VII. Effect of Cesser Clauses on Damage Claims

The effectiveness of the cesser clause to terminate the charterer's responsibility does not arise solely in the context of freight and demurrage disputes. Indeed, the very breadth of the traditional cesser clause suggests that its effectiveness extends to all forms of charterer liability including that for damage to the ship and for indemnification relating to cargo damage. The jurisprudence, however, has taken a more restrictive approach. The cesser clause does not immunize the charterer from its legally imposed obligation to indemnify the shipowner for liability it incurs to a consignee for cargo damage resulting from the charterer's negligent loading. [FN176] In American Tobacco Co. v. The Katingo Hadjipatera, [FN177] the court addressed a situation where the consignee sued the ship, in rem, and the shipowner and voyage charterer, in personam, for cargo damage resulting from negligent stowage. [FN178] The court found ***101** the voyage charterer liable to the cargo owner and absolved the shipowner from in personam liability while finding the vessel liable in rem. [FN179] In holding that the shipowner was entitled to indemnification from the voyage charterer for the in rem liability of the ship, the court concluded that the cesser clause does not relieve the charterer from this type of liability. [FN180] The court cited Crossman in support. [FN181] Crossman, however, does not address the issue. [FN182] Evidently, the Katingo Hadjipatera court relied upon the broad rule of interpretation that Crossman adopted from Clink whereby the cesser clause must be read coextensively with the lien clause so that the latter provision provides an alternative remedy. [FN183] Accordingly, if the lien component of the cesser clause does not confer upon the shipowner a lien against cargo for indemnity claims, the court should hold that the parties did not intend for the liability-terminating portion of the clause to release the charterer from that type of liability. If one accepts the Crossman- Clink principle as conceptually sound and controlling, the result reached in Katingo Hadjipatera is correct.

The same result has been reached under English law. In Action S.A. v. Britannic Shipping Corp. (The "Aegis Britannic"), [FN184] the English appellate court, relying upon the Clink principle, held that an FIOS clause, requiring the charterer to load, stow, and discharge the cargo at its risk and expense, was not displaced by the cesser clause. [FN185] Upon observing that neither the cesser clause nor the lien clause, which was found in a separate provision, conferred upon the shipowner an alternate remedy for that accorded by the FIOS clause, the court found that the charterer must indemnify the shipowner for liability incurred to the cargo receiver due to cargo damage caused by negligent discharge. [FN186]

VIII. The Role of Draftsmanship

Many of the interpretational, analytical, and conceptual problems presented by the cesser clause can be eliminated by enlightened draftsmanship. Indeed, the cesser clause has assumed many forms in various charter parties reflecting various degrees of drafter awareness of ***102** potential issues. A review of and commentary upon various forms of cesser clauses that have evolved over the years should prove instructive.

As previously mentioned, the cesser clause in its original, traditional form was very simplistic: "The charterers' liability under this charterparty to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage." [FN187] Another form of the clause adds a single word--"absolute"--to the language so that it reads: "The charterer's liability under this charter-party to cease on the cargo being loaded, the owners having an absolute lien on the cargo for the freight and demurrage." [FN188] The same thought is sometimes expressed in inverse order: "Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage. Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed." [FN189] No case has specifically addressed what change in meaning, if any, is wrought by the addition of the word "absolute." Perhaps the scrivener intended to create a lien that did not depend on possession. [FN190] If so, the addition is certainly not blessed with clarity and should not be so interpreted. These two variants, therefore, serve no useful purpose.

With time the cesser clause became more explicit, expressly addressing the charterer's obligation to pay demurrage at the loading port. For example, one such clause states: "Charterer's liability shall cease when cargo is shipped and Bills of Lading signed, and freight, dead freight and demurrage at loading port, if any, have been payed, provided such cargo be worth the freight and demurrage." [FN191] This phraseology eliminates the issues arising out of the distinction between loading and discharge demurrage. Note that this clause also addresses the contingency that the outstanding charges may exceed the cargo value, thus

rendering the lien ineffective as a practical matter. A clause worded in this fashion eliminates that circumstance as a consideration by tying the charterer's release to the actual economic value of the lien.

The original cesser clause evolved as parties became more aware of issues that arose under the traditional wording. In an attempt to clarify ***103** when the charterer's liability ceases, one drafter submitted the following clause: "Vessel to have lien on cargo for all freight, dead freight and demurrage, it being understood that any and all liability of the charterer under the charter shall cease and determine as soon as the cargo is on board and freight is paid." [FN192] This clause clearly makes the charterer responsible for freight. Additionally, in stating that the charterer's liability shall "cease and determine" once the cargo is on board, the drafter intended to leave the charterer responsible for any charter-party obligations arising (i.e., determining) before all of the cargo was on board. This clause is a refinement over the previous one, creating no doubt about the drafter's intent to leave the charterer responsible for all liability arising from the charter up until the time of completion.

Cessation of liability does not encompass freight, dead freight and demurrage at the loading port so that the charterer remains responsible for all three. This clause, therefore, is consistent with the traditional purpose of the cesser clause to insulate the charterer from the indebtedness arising under the charter party over which the charterer has no control while leaving the charterer responsible for those debts it can control.

Explicit language eliminating the charterer's continued liability for discharge demurrage is found in the following clause: "The charterer's liability shall cease as soon as the cargo is shipped, and freight, dead freight, and demurrage in loading, if any, are paid, the owner having a lien on the cargo for freight, demurrage and overage." [FN193] This clause leaves nothing to chance. The charterer is not released from personal responsibility until it has paid freight, dead freight, and loading demurrage. The charterer correspondingly is not responsible personally for discharge demurrage, the owner's lien on the cargo serving as a substitute.

An excellent example of informed scrivening is presented in the following cesser clause found as Clause 8 of the GENCON form that takes into account issues relating to the effectiveness of the lien at the port of discharge:

Owner shall have the lien on the cargo for freight, dead-freight, demurrage. Charterers shall remain responsible for dead-freight and demurrage, incurred at port of loading. Charterers shall also remain responsible for freight and demurrage incurred at port of discharge, but only to such extent ***104** as the Owners have been unable to obtain payment thereof by exercising the lien on cargo. [FN194] This version of the cesser clause eliminates most of the difficulties addressed in this Article. Needless to say, no drafter, however able and informed, can anticipate all factual scenarios that a shipowner and charterer may encounter, but this clause presents a fair accommodation to the needs of both parties.

[FNa1]. Miller & Williamson, LLC, New Orleans, Louisiana; Adjunct Faculty 1976-2001, Tulane Law School. J.D. 1972, Tulane Law School; B.A. 1969, Tulane University.

[FN1]. A voyage charter party takes one of two forms. One is a true charter party where the object of the contract is to let a vessel for use by the charterer as a nonvessel-owning carrier. The other, notwithstanding the nomenclature, is not a charter party but rather a contract of affreightment where the object of the contract is the carriage of cargo, usually to fulfill the charterer's obligation under a sales contract. 2 Thomas J. Schoenbaum, Admiralty and Maritime Law §11.1, at 199 (3d ed. 2001). The cesser clause is usually found in voyage charter parties that function as contracts of affreightment.

[FN2]. The Arizpa, 63 F.2d 42, 42, 1933 AMC 224, 225 (4th Cir. 1933); see also Wharton Poor, American Law of Charter Parties and Ocean Bills of Lading §27, at 72 (5th ed. 1968 & Supp. 1974). Over the years the wording of the cesser clause has evolved into more elaborate provisions as drafters employed language designed to counteract unfavorable court decisions.

[FN3]. See Eliza Lines, 61 F. 308, 326 (C.C.D. Mass. 894), aff'd, 114 F. 307 (1st Cir. 1904), rev'd, 199 U.S. 199 (1905).

[FN4]. See id.

[FN5]. See id.

[FN6]. See The Arizpa, 63 F.2d 42, 42, 1933 AMC 224, 225 (4th Cir. 1933).

[FN7]. See Poor, supra note 2, §27.

[FN8]. See Arizpa, 63 F.2d at 43, 1933 AMC at 225; see also Poor, supra note 2, §27.

[FN9]. See Eliza Lines, 61 F. at 326-27; Poor, supra note 2, at 72-73.

[FN10]. See, e.g., 2 Schoenbaum, supra note 1, at 198-200.

[FN11]. See generally id.

[FN12]. CFR, Cost and Freight (... named port of destination), International Chamber of Commerce, INCOTERMS 2000 (1999), available at http:// www.iccwbo.org/incoterms/preambles.asp (last visited Jan. 20, 2002) [hereinafter INCOTERMS 2000].

[FN13]. Id.

[FN14]. See Mexican Produce Co. v. Sea-Land Serv., Inc. 429 F. Supp. 552, 554 (D.P.R. 1974).

[FN15]. See Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty §§4- 1, 4-8 (2d ed. 1975).

[FN16]. See id. §3-1, at 93.

[FN17]. See id.

[FN18]. See id.

[FN19]. See id.

[FN20]. See U.C.C. §7-302 (2001); Internatio, Inc. v. M/V Yinka Folawiyo, 480 F. Supp. 1245, 1252 (E.D. Pa. 1979). The purchaser frequently is named as consignee on the bill of lading. Doing so, however, is not required. Often no consignee is named, and the bill of lading is "to order." Occasionally, the seller/charterer/shipper is named as the consignee. The latter two approaches afford the seller greater control over title to, and possession of, the goods.

[FN21]. For an explanation of "demurrage," see 2 Schoenbaum, supra note 1, §11-15.

[FN22]. See Shaver Transp. Co. v. Louis Dreyfus Corp., 414 F. Supp. 1040, 1043 (D. Or. 1976).

[FN23]. 179 U.S. 100 (1900).

[FN24]. Id. at 108.

[FN25]. Id.

[FN26]. Id.; see also Sir Alan Abraham Mocatta et al., Scrutton on Charterparties and Bills of Lading, §184 (19th ed. 1984). Other ways of expressing the concept are: (1)the release is a quid pro quo for the lien or (2)the lien must offer an alternative remedy substituting in rem liability of cargo for in personam liability of charterer.

[FN27]. [1891] 1 Q.B. 625 (C.A.).

[FN28]. [1894] 1 Q.B. 612 (C.A.). The Hansen decision simply elaborated on the principles articulated in Clink.

[FN29]. See Clink, [1891] 1 Q.B. at 625.

[FN30]. Id.

[FN31]. Under this approach the lien-conferring component of the cesser clause is the quid pro quo for the liability-terminating component.

[FN32]. Clink, [1891] 1 Q.B. at 627. Evidently, the rationale behind this conclusion is that conferring rights in one provision of an agreement and totally removing them in another is illogical.

[FN33]. Id. at 627.

[FN34]. Id. at 627-28. The second and third grounds are redundant, conveying the same principle in different terms. They both may be result oriented, depending upon one's perspective.

[FN35]. Id.

[FN36]. Id.

[FN37]. See id. at 627.

[FN38]. Crossman v. Burrill, 179 U.S. 100, 107 (1900).

[FN39]. Id. at 114.

[FN40]. Id. at 108.

[FN41]. See id.

[FN42]. See id. at 109-10.

[FN43]. Indeed, it would seem that a lien on cargo would be easier to enforce than an in personam claim against the charterer.

[FN44]. See generally Crossman, 179 U.S. at 108-14.

[FN45]. See id. at 108.

[FN46]. E.g., Western Bulk Carriers (Austl.) Pty. v. P.S. Int'l, Inc., 164 B.R. 616, 620, 1994 AMC 1981, 1986 (S.D. Ind. 1994).

[FN47]. See Chilean Nitrate Sales Corp. v. The Nortuna, 128 F. Supp. 938, 940, 1955 AMC 1576, 1582 (S.D.N.Y. 1955).

[FN48]. See Crossman, 179 U.S. at 109-10.

[FN49]. See id. at 108; Clink v. Radford & Co., [1891] 1 Q.B. 625, 627- 28 (C.A.).

[FN50]. Nor would it seem that the consignee is an intended beneficiary of the charter party, being at best an incidental one. Restatement (Second) of Contracts, §§302, 315 (1981). As a CFR seller, the charter is the beneficiary of the shipowner's services because CFR sale terms oblige the seller to arrange and pay for ocean transit. See Mexican Produce Co. v. Sea-Land Servs., Inc., 429 F. Supp. 552, 554 (D.P.R. 1974); see also INCOTERMS 2000, supra note 12.

[FN51]. See Gulf P.R. Lines, Inc. v. Associated Food Co., 366 F. Supp. 631, 635, 1977 AMC 2671 (D.P.R. 1973) (AMC reporter summarizing case); see also Shaver Transp. Co. v. Louis Dreyfus Corp., 414 F. Supp. 1040, 1043 (D. Or. 1976). Of course, the sale contract may allocate responsibility for discharge costs to the seller/charterer under a CFR, CIF, CPT, or CIP term.

[FN52]. See The Saturnus, 250 F. 407, 411 (2d Cir. 1918).

[FN53]. See Donaldson v. McDowell, 7 F. Cas. 887, 887 (D. Mass. 1873) (No. 3985). Donaldson predicates this conclusion upon the consideration that the consignee is not a party to the bill of lading. This principle applies only if the consignee does not accept delivery of the goods and yields to the corollary that by taking delivery the consignee impliedly promises to pay discharge demurrage.

[FN54]. See Hawgood v. One Thousand Three Hundred and Ten Tons of Coal, 21 F. 681, 686 (E.D. Wis. 1884); Two Hundred and Seventy-Five Tons of Mineral Phosphates, 9 F. 209, 211 (E.D. N.Y. 1881). The reasoning in these vintage cases is expectably arcane. These decisions conclude that inasmuch as maritime law creates a lien for freight on the ground that the master is deemed to contract directly with the cargo, as a fictitious legal entity, the contract to remove the cargo should also be deemed to be made with the merchandise. The Pomerene Act confers a lien on goods covered by a negotiable bill of lading for charges relating to "storage, transportation, and delivery (including demurrage and terminal charges)." 49 U.S.C. §80109(1) (1981). The Uniform Commercial Code confers a similar lien on the goods but qualifies the lien by limiting it to charges stated in the bill of lading or tariff or, if not so stated, to reasonable charges, when a negotiable bill of lading is held by a purchaser for value. U.C.C. §7-307 (2000).

[FN55]. The Saturnus, 250 F. at 411. In ascertaining whether Crossman was justified in adopting so severe a rule of construction, analysis of the Clink decision and the legal climate in England that cultured its result is fruitful and revelatory. Under English law a shipowner has no lien on cargo by operation of law for demurrage. The contract of affreightment may create a consensual lien on cargo for demurrage. The English courts, however, placed severe limits on this freedom of contract by applying a strict rule of construction that disfavored creating such a lien by contract. Understandably, the English courts became reluctant to interpret the cesser clause in any fashion other than strictissimi juris. Clink is simply a reflection of this tendency. See discussion in The Hyperion's Cargo, 12 F. Cas. 1138, 1138-39 (D. Mass. 1870) (No. 6987), aff'd sub nom. Donaldson, 7 F. Cas. at 887.

[FN56]. See The Bird of Paradise, 72 U.S. (5 Wall.) 545, 555 (1866).

[FN57]. See Hawgood, 21 F. at 686; In re Commonwealth Oil Ref. Co., 734 F.2d 1079, 1081, 1988 AMC 303 (5th Cir. 1984) (AMC reporter summarizing case).

[FN58]. 4,885 Bags of Linseed, 66 U.S. (1 Black) 108 (1861). This lien is possessory in nature and ordinarily lost by unconditional delivery of the cargo, but the parties may agree that the lien survives beyond discharge. Arochem Corp. v. Wilomi,

Inc., 962 F.2d 496, 1992 AMC 2347 (5th Cir. 1992).

[FN59]. See The Bird of Paradise, 72 U.S. (5 Wall.) at 555. In doing so the shipowner is not committing a conversion precisely because the lien entitles the shipowner to possession.

[FN60]. See id. The shipowner by entering into a nonseparation agreement with the cargo owner may deliver the goods while retaining a lien.

[FN61]. See Orient Shipping Rotterdam B.V. v. Hugo Neu & Sons, Inc., 918 F. Supp. 806, 812, 1996 AMC 1366, 1376 (S.D.N.Y. 1996).

[FN62]. See Vane v. A.M. Wood & Co., 231 F. 353, 354 (S.D.N.Y. 1916).

[FN63]. See Yone Suzuki v. Cent. Argentine Ry. Co., 275 F. 54, 55 (S.D.N.Y. 1921).

[FN64]. Id.

[FN65]. See The Eliza Jane, 61 F. 308, 326 (C.C.D. Mass. 1894), aff'd, 114 F. 307 (1st Cir. 1904), rev'd, 199 U.S. 199 (1905).

[FN66]. Ministry of Commerce v. Marine Tankers Corp., 194 F. Supp. 161 (S.D.N.Y. 1960); Albert R. Reed & Co. v. M/S Thackeray, 232 F. Supp. 748 (N.D. Fla. 1964).

[FN67]. See Trans-Asiatic Oil Ltd. v. APEX Oil Co., 804 F.2d 773, 781, 1987 AMC 1115, 1126 (1st Cir. 1986).

[FN68]. See Yone Suzuki, 275 F. at 55. A complex body of case law has developed in ascertaining whether the bill of lading uses language sufficient to incorporate the charter party. The basic test is whether the reference in the bill of lading adequately identifies the charter party sought to be incorporated. See Southwestern Sugar & Molasses Co. v. Eliza Jane Nicholson, 126 F. Supp. 666, 668, 1955 AMC 746, 748 (S.D.N.Y. 1954). Beware, however, that this issue has many permutations.

[FN69]. See Eliza Jane Nicholson, 126 F. Supp. at 668, 1955 AMC at 748. Typically, the lien clause in the charter party recites, "Owner having a lien on the cargo for freight, dead freight and demurrage" without specifying whether loading and/or discharge demurrage is contemplated. The Arizpa, 63 F.2d 42, 42, 1933 AMC 224, 225 (4th Cir. 1933). In Yone Suzuki, Judge Learned Hand held that a similarly worded clause was intended to create a lien for demurrage incurred at both ports. Yone Suzuki, 275 F. at 56.

[FN70]. See Mitsui & Co. v. M/V Hermann Schulte, No. CIV.A.95-3270, 1996 WL 365669, at *2 (E.D. La. July 1, 1996) (citing Associated Metals & Minerals Corp. v. M/V Venture, 554 F. Supp. 281, 283 (E.D. La. 1983)).

[FN71]. Gilmore & Black, supra note 15, §4-1, at 193.

[FN72]. Id.

[FN73]. See Chilean Nitrate Sales Corp. v. M/V Nortuna, 128 F. Supp. 938, 940, 1955 AMC 1576, 1582 (S.D.N.Y. 1955).

[FN74]. See Crossman v. Burrill, 179 U.S. 100, 106-07 (1900); see also Trans-Asiatic Oil Ltd. v. Apex Oil Co., 804 F.2d 773, 781, 1987 AMC 1115, 1127 (1st Cir. 1986).

[FN75]. See Cargill Inc. v. M/V Golden Chariot, 31 F.3d 316, 1995 AMC 1077 (5th Cir. 1994), for a comprehensive review of cases addressing the efficacy of an incorporation clause. Incorporation by reference is simply a drafting technique that promotes economy of style. The quest for brevity, however, often engenders disproportionate confusion particularly when the terms of each document clash and when terminology in the incorporated instrument has no place in the incorporating instrument. A relevant example is the term "charterer" which is not a bill-of-lading term.

[FN76]. Associated Metals & Minerals Corp. v. M/V Venture, 554 F. Supp. 281, 283 (E.D. La. 1983); Republic Bank v. Marine Nat'l Bank, 53 Cal. Rptr. 2d 90 (Cal. Ct. App. 1996).

[FN77]. See Vane v. A.M. Wood & Co., 231 F. 353, 354 (S.D.N.Y. 1916).

[FN78]. 19 F.2d 645, 1927 AMC 678 (S.D.N.Y. 1927), modified, 27 F.2d 795, 1928 AMC 1521 (2d Cir. 1928).

[FN79]. Id. at 648, 1927 AMC at 682.

[FN80]. Yone Suzuki v. Cent. Argentine Ry. Co., 275 F. 54, 55 (S.D.N.Y. 1921).

[FN81]. Chilean Nitrate Sales Crop. v. M/V Nortuna, 128 F. Supp. 938, 940, 1955 AMC 1576, 1582 (S.D.N.Y. 1955) (citations omitted).

[FN82]. See id.; Vane, 231 F. at 354; Yone Suzuki, 275 F. at 55.

[FN83]. See supra note 69 and accompanying text.

[FN84]. The conceptual soundness of this result depends upon the wording of the incorporation clause in the bill of lading and upon the wording of the clauses incorporated from the charter party. If a generic incorporation occurs without specific reference to a lien clause in the charter party, the commercial realities discussed in Part II suggest that mere incorporation should never suffice and that all four conditions listed in the text accompanying note 82 must occur for the consignee to be liable for demurrage.

[FN85]. 266 F. 806 (2d Cir. 1920).

[FN86]. Id. at 808.

[FN87]. 244 F. 705 (9th Cir. 1917).

[FN88]. Id. at 707.

[FN89]. Id.; see The Maggie Hammond, 76 U.S. (9 Wall.) 435, 449 (1869) (applying the maxim, "Le batel est oblige a la merchandise et la marchandise [sic] au batel.").

[FN90]. See In re Commonwealth Oil Ref. Co., 734 F.2d 1079, 1081, 1988 AMC 303 (5th Cir. 1984) (AMC reporter summarizing case).

[FN91]. When calculating the freight rate, the shipowner takes into account the anticipated length of time of the voyage and affords the charterer a designated time within which to load and discharge the vessel. If the transit takes longer than anticipated, this is a risk that the shipowner assumes. If, however, loading or discharge takes longer than anticipated due to causes for which the shipowner is not responsible, fairness dictates that the charterer should bear that risk. Because freight is calculated on the

bases that time is money and that the utilization of the ship's time is the predicate for freight, demurrage is charged on a daily basis for the time taken to load and discharge the vessel beyond that allowed in the charter party. For that reason demurrage is extended freight.

[FN92]. See Sea-Land Serv., Inc. v. Andrew Corp., No. CIV.A.88C8296, 1992 WL 41344, at *3-*4 (N.D. Ill. Feb. 25, 1992).

[FN93]. See id.

[FN94]. See id.

[FN95]. See Carleton v. Three Hundred Sixty-Seven Tons of Coal, 206 F. 345, 347 (D. Me. 1913); The Saturnus, 250 F. 407, 411 (2d Cir. 1918) (citing Davis v. Smokeless Fuel Co., 196 F. 753, 755 (2d Cir. 1912)).

[FN96]. 250 F. 407 (2d Cir. 1918).

[FN97]. Id. (citing Davis, 196 F. at 785).

[FN98]. Crossman v. Burrill, 179 U.S. 100, 103 (1900).

[FN99]. See Yone Suzuki v. Cent. Argentine Ry. Co., 275 F. 54, 56 (S.D.N.Y. 1921).

[FN100]. The reluctance to construe the lien clause broadly undoubtedly is attributable to the heavy reliance U.S. courts used to place on English decisions when their country was developing its own body of general maritime law. As noted in The Hyperion's Cargo, 12 F. Cas. 1138, 1138-39 (D. Mass. 1871) (No. 3985), aff'd sub nom. Donaldson v. McDowell, 7 F. Cas. 887 (C.C.D. Mass. 1873), historically a struggle has existed between shipowners to create contractual liens and the courts to narrow those provisions by strict construction. The English courts undoubtedly were concerned over holding the goods responsible for delays at the load port occurring without the consignee's default. See Yone Suzuki, 275 F. at 56.

[FN101]. These are the four conditions found at note 82 and accompanying text.

[FN102]. Crossman, 179 U.S. at 103.

[FN103]. Yone Suzuki, 275 F. at 56.

[FN104]. Elvers v. W.R. Grace & Co., 244 F. 705, 709 (9th Cir. 1917).

[FN105]. See id. at 707-09.

[FN106]. Id. at 709; see Gilmore & Black, supra note 15, §4-8, at 211.

[FN107]. See Elvers, 244 F. at 709.

[FN108]. 26 Halsbury's Laws of England (1st ed. 1907-1917) [hereinafter Halsbury's].

[FN109]. Elvers, 244 F. at 708.

[FN110]. Id. (quoting Halsbury's, supra note 108, at 133).

[FN111]. Id.

[FN112]. Id.

[FN113]. Id. (quoting Halsbury's, supra note 108, at 133).

[FN114]. Id.

[FN115]. Id. (quoting Halsbury's, supra note 108, at 133). Many cesser clauses, like the traditional cesser clause, combine the language absolving the charterer from liability with that conferring the lien in a single provision rather than in two separate clauses.

[FN116]. Id. (quoting Halsbury's, supra note 108, at 133).

[FN117]. See id.

[FN118]. 27 F.2d 795, 1928 AMC 1521 (2d Cir. 1928).

[FN119]. Id. at 801, 1928 AMC at 1532.

[FN120]. See The Fri, 154 F. 333, 336 (2d Cir. 1907).

[FN121]. See Mexican Produce Co. v. Sea-Land Serv., Inc., 429 F. Supp. 552, 554 (D.P.R. 1974).

[FN122]. See INCOTERMS 2000, supra note 12; Albert E. Reed & Co. v. M/S Thackeray, 232 F. Supp. 748, 750, 1965 AMC 958, 960 (N.D. Fla. 1964).

[FN123]. See Gullischen v. Stewart Bros., [1884] 13 Q.B.D. 317, 319 (C.A.).

[FN124]. Id.

[FN125]. Id. at 318-19.

[FN126]. Id. at 318.

[FN127]. Id. at 318-19.

[FN128]. Id. at 319.

[FN129]. Id.

[FN130]. Id.

[FN131]. See id.

[FN132]. Interpreting contracts is a precarious undertaking, raising the intriguing question whether the objective approach of section 201 of the Restatement (Second) of Contracts should be favored over the subjective analysis recommended by Corbin.

[FN133]. See Yone Suzuki v. Cent. Argentine Ry. Co., 27 F.2d 795, 1928 AMC 1521 (2d Cir. 1928).

[FN134]. Id. at 799, 1928 AMC at 1521.

[FN135]. Id.

[FN136]. See id. at 801, 1928 AMC at 1532.

[FN137]. Id.

[FN138]. Id.

[FN139]. Id.

[FN140]. Id.

[FN141]. Id. at 800, 1928 AMC at 1531.

[FN142]. 63 F.2d 42, 1933 AMC 224 (4th Cir. 1933).

[FN143]. Id., 1933 AMC at 225.

[FN144]. Id. at 42-43, 1933 AMC at 225-26. The shipowner based its suit upon breach of the bill of lading as the contract and upon breach of the charter party.

[FN145]. Id. at 43, 1933 AMC at 226.

[FN146]. Id. The court evidently conceptualized the situation as involving a single contract manifested simultaneously in both the bill of lading and the charter party. That approach is fundamentally flawed. Each document (charter party and bill of lading), in its own right, is potentially a contract of carriage. When the bill of lading is held by the charterer, the charter party is the contract of carriage. When the bill of lading is held by a third party, the bill of lading is the contract of carriage. See Ministry of Commerce v. Marine Tankers Corp., 194 F. Supp. 161, 162, 1961 AMC 320, 322 (S.D.N.Y. 1960); Chilean Nitrate Corp. v. The Nortuna, 128 F. Supp. 938, 940, 1955 AMC 1576, 1582 (S.D.N.Y. 1955).

[FN147]. The Arizpa, 63 F.2d at 43, 1933 AMC at 226. The shipowner based its cause of action against the shipper for demurrage upon the principle articulated in Louisville & Nashville Railroad Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924), whereby the primary obligation to pay the carrier's charges is imposed upon the shipper.

[FN148]. "All necessary changes having been made." Black's Law Dictionary 1039 (7th ed. 1999). According to the sixth edition of Black's Law Dictionary, this Latin phrase means, "With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like." Id. at 1019 (6th ed. 1990).

[FN149]. Id. As a fundamental precept of contract law, a party may assign to another the former's right to receive performance, but may not assign responsibility to the other contracting party for reciprocal performance, thereby immunizing itself from contractual liability to the latter. See Restatement (Second) of Contracts §317(2) (1987). This principle commonly is referred to as the nondelegability doctrine.

[FN150]. See The Arizpa, 63 F.2d at 43, 1933 AMC at 226.

[FN151]. Id.

[FN152]. Id.

[FN153]. Id. at 43-44, 1933 AMC at 227.

[FN154]. Id. at 43, 1933 AMC at 226. In analyzing this issue, the court effectively performed a reverse mutatis mutandi. In any event, the court manifestly was wrong in this conclusion. The consignee is not necessarily the receiver of the goods.

[FN155]. See Republic Bank v. Marine Nat'l Bank, 53 Cal. Rptr. 2d 90, 91 (Cal. Ct. App. 1996).

[FN156]. Another approach is that adopted in the Gullischen opinion, where the court concluded that the clause in the bill of lading incorporating the charter party did not incorporate the cesser clause. Gullischen v. Stewart Bros., [1884] 13 Q.B.D. 317, 319 (C.A.). As previously mentioned, that approach is artificial, counterproductive, and ultimately unnecessary.

[FN157]. See CIA. Naviera Somelga, S.A. v. M. Golodetz & Co., 189 F. Supp. 90, 96 (D. Md. 1960).

[FN158]. See Yone Suzuki v. Cent. Argentine Ry. Co., 27 F.2d 795, 801, 1928 AMC 1521, 1532 (2d Cir. 1928).

[FN159]. See Ministry of Commerce v. Marine Tankers Corp., 194 F. Supp. 161, 163 n.6, 1961 AMC 320, 323 n.6 (S.D.N.Y. 1960).

[FN160]. Yone Suzuki, 27 F.2d at 801, 1928 AMC at 1532.

[FN161]. See id.

[FN162]. See Crossman v. Burrill, 179 U.S. 100, 108 (1900).

[FN163]. In Ledward, Bibby & Co. v. S.S. Harmatris, 1940 AMC 797, 798 (S.D.N.Y. 1940), the court stated that under the cesser clause "the charterer's liability to the owner ceased as soon as the cargo was loaded, except so far as the cargo might be worth less than freight or demurrage."

[FN164]. See Fidelitas Shipping Co. v. V/O Exportchleb, [1963] 2 Lloyd's Rep. 113, 124 (C.A.). In that opinion Lord Justice Pearson in dictum thought it inappropriate to require the lien provision of the cesser clause to do double duty: (1)create the lien and (2)restrict the release of liability to instances when the lien was effective at the time of discharge. The other judges did not agree, and the case ultimately was decided on another point. See [1965] 1 Lloyd's Rep. 223 (C.A.).

[FN165]. [1972] 1 Lloyd's Rep. 201 (C.A. 1971).

[FN166]. Id. at 204. The Sinoe court reasoned that, once it is accepted that the two parts of the cesser clause (creation of lien and release of charterer liability) are coextensive, "it is sensible to require that the lien should be an effective lien" further fortifying the conclusion with the observation that "[a] right without a remedy is a vain thing." Id. Lord Justice Megaw, in his opinion, qualified the "effectiveness requirement" by adding that "[I]t is not enough for the shipowners to show merely commercial inconvenience or difficulty. It must be impossibility." Id. at 206.

[FN167]. See id. The shipowner, when entering into the charter party, knows the port of discharge and should know the applicable law. If the law of the port of discharge does not recognize the lien, the shipowner should have phrased the cesser clause differently.

[FN168]. Id.

[FN169]. Baltic and International Maritime Council (BIMCO), Uniform General Charter (GENCON 1922).

[FN170]. The Sinoe, [1972] 1 Lloyd's Rep. at 204.

[FN171]. Id. at 205. This language is now standard.

[FN172]. 918 F. Supp. 806, 1996 AMC 1366 (S.D.N.Y. 1996).

[FN173]. [1977] 2 Lloyd's Rep. 344 (Q.B.).

[FN174]. 2 Lloyd's Rep. at 347.

[FN175]. The facts of the case are more complex. The charterer issued the bill of lading with the shipowner's authorization, but the bill of lading did not incorporate the lien clause in the charter party, thereby preventing a discharge demurrage lien from arising. Reliance on the Sinoe principle, therefore, was an alternate basis for decision.

[FN176]. See Am. Tobacco Co. v. The Katingo Hadjipatera, 81 F. Supp. 438, 448, 1949 AMC 49, 63 (S.D.N.Y. 1948).

[FN177]. Id. at 438, 1949 AMC at 49.

[FN178]. Id. at 442, 1949 AMC at 52. The voyage charterer was Hellenic Lines, Ltd., itself a common carrier that had voyage chartered the vessel for utilization in its business. Id. at 440, 1949 AMC at 50. This voyage charter, therefore, was a true charter party and not a contract of affreightment.

[FN179]. Id. at 448, 1949 AMC at 62.

[FN180]. Id.

[FN181]. Id.

[FN182]. See Crossman v. Burrill, 179 U.S. 100 (1900).

[FN183]. See id. at 108.

[FN184]. [1987] 1 Lloyd's Rep. 119 (C.A. 1986).

[FN185]. Id. at 121.

[FN186]. Id.

[FN187]. Clink v. Radford, [1891] 1 Q.B. 625, 625 (C.A.).

[FN188]. See, e.g., Atl. Richfield Co. v. Good Hope Refineries, Inc., 604 F.2d 865, 871, 1980 AMC 470, 477 (5th Cir. 1979) (quoting a similarly worded clause from an Exxonvoy 1969 charter party containing an "absolute lien" provision).

[FN189]. Crossman v. Burrill, 179 U.S. 100, 103 (1900).

[FN190]. In Cutler v. Rae, 48 U.S. (7 How.) 729, 734 (1849), the court, in discussing the lien on cargo for general average contribution, differentiated a qualified lien dependent upon possession from an absolute lien which, although undefined, impliedly signifies one existing independent of possession.

[FN191]. Ledward, Bibby & Co. v. S.S. Harmatris, 1940 AMC 797, 798 (S.D.N.Y. 1940).

[FN192]. The Eastern Bell, 1923 AMC 271, 272 (W.D. Wash. 1923).

[FN193]. The Arizpa, 63 F.2d 42, 42, 1933 AMC 224, 225 (4th Cir. 1933).

[FN194]. Orient Shipping Rotterdam B.V. v. Hugo Neu & Sons, Inc., 918 F. Supp. 806, 811, 1996 AMC 1375, 1380 (S.D.N.Y. 1996). A similar clause was found in Overseas Transportation Co. v. Mineralimportexport (The "Sinoe"), [1972] 1 Lloyd's Rep. 201, 204 (C.A. 1971).

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