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The Time Charter in Japan: A Comparison

Hideo Yoshimoto*

I. THE CONCEPT OF TIME CHARTER

Broadly defined, a time charter is an express contract for certain uses of a vessel. The owner or lessor of the vessel agrees to let the vessel to the charterer for a certain period of time. The charterer then agrees to pay hire to the owner or lessor computed at a specified rate and for a specified time period.1 Because the vessel will be used by the charterer for an agreed time period and the hire will be paid by the charterer to the owner or lessor for a certain period, the time charter is accordingly said to be an agreement similar to a lease of a vessel, a bareboat charter, or a charter by demise.

To examine the concept of a time charter, we must take into consideration what types of use of the vessel fall within the category. In this respect, early American court decisions recognize that under the more familiar time charter, the charterer does not contract for the vessel per se, but rather contracts for the service of the vessel rendered by the owner2 through the owner's master and crew.3

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relationship between the owner and time charterer may be described as that of private carrier and shipper. Although a time charterer acquires use of the whole reach of the vessel, he does not obtain a property interest. Legal possession, though not necessarily exclusive control, remains with the owner. The time charterer neither assumes the general liabilities of the demise charterer, nor benefits from statutes limiting liability.

II. TWO TYPES OF CHARTERPARTY UNDER THE LAWS OF ENGLAND: LEASE OF THE VESSEL (CHARTER BY DEMISE) AND CHARTER NOT BY DEMISE

A. Lease of the Vessel (Charter by Demise)

This type of use of the vessel includes a lease of the vessel and charter by demise of the vessel. Charter by demise is further divided into types:

(1) Locatio Navis (bareboat charter);
(2) Locatio Navis et operarum magistri et nauticarum (charter by demise).

B. Charter Not by Way of Demise (Locatio operis vehendrum mecium)

According to one author, the charter not by way of demise further divides into three types:

(1) Contracts for the use of the ship, on a voyage or series of voyages, in carrying goods to be shipped by the charterers, or in their names. The charterer agrees to pay in proportion to the goods carried, or a lump sum for the voyage, or in proportion to the time occupied;
(2) Contracts similar to (1), but by which liberty is given to the charterer to use the ship for the purpose of taking the goods of other shippers, and to require the master to give bills of lading for goods so shipped; and

4. Gebb, supra note 2, at 765 (citing Clyde Commercial S.S. Ltd. v. United States Shipping Co. (The Santona), 152 F. Supp. 516, 518 (S.D.N.Y. 1907)).
5. Gebb, supra note 2, at 766 (citing Bergan v. International Freighting Corp., 254 F.2d 231, 232, 1958 A.M.C. 1303, 1304 (2d Cir. 1958)).
6. Gebb, supra note 2, at 766 (citing United States v. Shea, 152 U.S. 178, 187 (1894)).
7. Gebb, supra note 2, at 766 (citing In re Barracuda Tanker Corp., 409 F.2d 1013, 1969 A.M.C. 1442 (2d Cir. 1969)).
(3) Contracts for the service of the ship for a period of time, during which the charterer is to have the right, within agreed limits, to direct how the ship shall be used, and is to pay in proportion to the time occupied.

For purposes of this article, type (1) will be termed voyage charter-party, type (2) a sub-voyage charterparty, and type (3) a time charterparty (prevalent in the shipping industry throughout the world).9

C. Charter by Demise

According to one commentator, where "the whole, or substantially the whole, of the ship's services are employed by one person or set of persons," the parties will memorialize the agreement in a document called a charterparty.10

All charterparties, however, are not contracts of carriage. Often, the ship itself and the control over its workings and navigation are temporarily transferred to the persons using the ship. In such a case the contract is really one of leasing the ship, subject, of course, to the express terms of the charterparty. "The liabilities of the ship owner and the charterer to one another are to be determined by the law which relates to the hiring of chattels, and not by reference to the liabilities of carriers and shippers."11 Further discussion of English law treatment of these categories can be found at Section V (A) of this article.

III. TIME CHARTER AND VOYAGE CHARTER

To distinguish the time charter from the voyage charter, the following classifications are used by scholars in Japan:

A. Classification Based on Act of the Carriage or Ability of the Carriage

Contracts directed to carriage of the cargo are voyage charters. In contrast, time charters are directed to the capability of the carriage of the cargo.12

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9. In contrast, the type of use mentioned in (1) is termed Scrutton as the Bareboat Charter or Net Charter, and the type of use the vessel mentioned in (3) is termed a Gross Charter. SCRUTTON, CHARTER PARTIES AND BILLS OF LADING, sec. IV, art. 24, at 45 (18th ed.) [hereinafter SCRUTTON].
10. CARVER, supra note 8.
11. CARVER, supra note 8, para. 318, at 272; SCRUTTON, supra note 9, art. 25, at 47.
12. HAGIHARA, TIME CHARTER, at 334 (copy on file at the offices of the author).
B. **Classification Based on the Charter Period**

Where the voyage determines the charter period, it is a voyage charter. On the other hand, where the charter is determined by a designated time period, it is a time charter.

C. **Classification Based on the Type of Contract**

While the time charter purports to have a carrying ability of the vessel during the period of the charter, designation of loading and discharging of the cargo is subject to the intention of the charterer. This agreement is a type of charterparty contract. The voyage charter, by which the owner agrees to carry the specific cargo from the specified loading port to specified discharging port, however, is a type of contract of affreightment.\(^\text{13}\)

D. **Classification Based on Whether Possession and Control of the Vessel is Transferred to the Charterer**

In a bareboat charter and with a charter by demise, the possession and control of the vessel during the period of charter transfers entirely from the owner to the charterer. With voyage charters and time charters, however, the owner of the vessel retains possession and control of the vessel. Accordingly, this type of charter is called a simple charter.\(^\text{14}\)

E. **Classification Based on Other Methods**

The modern practice of chartering vessels typically involves either a voyage charter requiring a specified number of consecutive voyages for the carriage of cargo, or for as many voyages as the vessel can travel within a certain period. In addition, some special agreements entail the payment of the freight or charter hire based on a certain time period rather than on a proportion of the quantity of cargo carried. Some specific contracts, however, allow only voyage charterparty agreements, and not time charterparty agreements, even though the charterer is substantially directing the vessel to carry the specific cargo from a specific pick-up port to a specific discharge port.

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13. *Id.* at 335, 336.
14. *Id.*
Given the various types of contracts being formed today, there is still some confusion as to the classifications of time charter and voyage charter. Despite the blurring of the distinctions between the time charter and the voyage charter some differences remain between the character of the two types of contracts. For example, the time charter is a contract for use of the vessel, whereas the voyage charter is a contract for the carriage of the goods. Therefore, under the voyage charter party, problems regarding demurrage and dispatch money can arise. The time charter party, however, does not involve a problem of such demurrage and dispatch money; instead, the time charter party involves problems of off-hire.

IV. **Time Charter and Time Charter by Demise**

A. **The Classification Based on a Legal Charter of the Contract**

Japanese statutory law does not stipulate provisions to be applicable for the time charter party. Accordingly, interpretations thereof rely on opinions of Japanese scholars or court decisions. Presently, however, neither court decisions nor scholars in Japan have dealt adequately with the legal character of the time charter.

In contrast, American law recognizes the contract of the time charter by demise as the lease of the vessel whereby the charterer acquires from the owner the exclusive right to possess and control the vessel for a stipulated period.\(^\text{15}\)

Although the owner does not part with legal title, the demise charterer effectively becomes the owner of the vessel in most respects\(^\text{16}\) and is commonly identified as the owner *pro hac vice.*\(^\text{17}\) The master is thereafter under the charterer’s direction,\(^\text{18}\) the crew are the charterer’s men,\(^\text{19}\) and the vessel engages in the charterer’s business.\(^\text{20}\)

\(^\text{15}\) Gebb, *supra* note 2, at 764 (citing Reed v. The Yaka, 373 U.S. 410, 1963 A.M.C. 1373 (1963)).

\(^\text{16}\) “The right of special ownership acquired by the demise charter does not, for example, subject the vessel to the general debts of the charterer. McGahren v. Koppers Coal Co., 108 F.2d 652, 1940 A.M.C. 457 (3d Cir. 1940). Certain officers and agents appointed by the demise charterer, however, have unrestricted authority to create maritime liens for necessaries supplied to the vessel. Ship Mortgage Act of 1920, § 30(R), 46 U.S.C. § 973 (Supp. I, 1971).” Gebb, *supra* note 2, at 764.

\(^\text{17}\) *Id.* (citing Reed v. The Yaka, 373 F.2d 286, 289, 1963 A.M.C. 1373, 1375-76 (1963); Vitozi v. Balboa Shipping Co., 163 F.2d 286, 289, 1948 A.M.C. 695, 698 (1st Cir. 1947)).


The charterer’s obligations to the vessel’s owner essentially consist of paying hire for the charter period, and exercising ordinary diligence in the care of the vessel. The charterer’s obligations to third parties are essentially those of an owner. The demise charterer also is accorded the umbrella of limitation of liability, however, if the statutory criteria (“in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement”) have been satisfied.

It is said that the demise charter is governed under British Law by general common law principles relating to a contract of hire of chattels. Arguably, Articles 601 through 622 of the Civil Code of Japan should apply, mutatis mutandis, to this contract.

The time charterer by demise has a right of possessory action by the Civil Code of Japan to protect his possession of the vessel from any disturbance thereto, and to recover it from any depredation thereof, if he is deprived of it by any third person. The Japanese Civil Code also grants charterers by demise the right to a claim against any obstructionist or depredator for compensation due to loss or damage caused by such depredation. Time charterers, however, do not have any possessory action under Articles 198, 199 and 200 of the Civil Code, because they do not have possession of the vessel under the contract. Accordingly, under the time charter, only the owner has a right of possessory action under Japanese Law.

The time charterer also does not have general authority to give direct orders or instructions to the master and crew of the vessel in connection with a navigable matter of the vessel, because the owner

25. CARVER, supra note 8, para. 318, at 272; SCRUTTON, supra note 9, art. 25, at 47, 48.
26. Navigable matters include equipping the vessel to meet the ship’s navigational needs, maintenance and repair of the ship, administration of sanitation, and medical treatment for crew members during the ship’s navigation. Other navigable matters include supply of food, oil for the engine and kitchen departments, drinking water and store for the crew members, and the determination of plans for works on the vessel. Id.
of the vessel retains control over navigable matters. The time charterer, however, does have a limited power to give direct orders or instructions to the master and crew of the vessel in accordance with the provisions of the time charterparty so that he will be able to carry on his commercial matters.\(^\text{27}\)

One reason why the time charterer has this authority under the standard form of time charterparty is that the owner of the vessel retains possession of the vessel through that of the crew master who is a servant of the owner. The time charterer does not gain possession, and the master and the crew are not the servants of the time charterer. Accordingly, the time charterer does not directly control the management of the ship's sea transportation business. Thus, except to some extent as agreed by the time charterparty, the charterer's command of the vessel remains limited.

The time charterer by demise has a general power over both navigable and commercial matters to conduct and manage the sea transportation business as his own business. A time charterer by demise also has the power of direct control and instruction over the master and the crew, who are his servants.

As to the relative positions between the master and crew and the time charterer in connection with the rendering of their services for navigable matters under the time charterparty, it is considered that the vessel functions through the work of the master and crew. They work under the direct command of the owner on behalf of the time charterer, in accordance with the time charter contract. Accordingly, the master and crew render their services only for their employers (the owners) based on the employment agreement with them, not for the time charterers. Services rendered for commercial matters fall into this same relationship between the master and crew and the time charterer.

This arrangement results in a relative legal position between the ship's owner and the time charterer such that the time charterparty is the agreement for the use of the vessel by the time charterer, with the services being rendered by the master and crew by instruction of the ship's owner in accordance with the employment agreement. Correspondingly, the time charterer has no legal duty to equip the

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\(^{27}\) The commercial matters include selecting the cargo to be shipped by the shipper for the proposed transportation, receiving the cargo, and loading, discharging or delivering of the cargo. Other commercial matters concern the Bills of Lading, supply of the fuel oil, and boiler water, and other matters necessary or incidental to carrying out the sea transportation business. \textit{Id.}
vessel or to prepare the vessel for navigation for matters which the ship's owner, lessor of the vessel, demise charterer, or bareboat charterer is responsible.

Other Japanese scholars opine that the time charterer does have a legal obligation under the time charterparty agreement to equip the vessel and to prepare all things necessary for a commencement of the ship's navigation, similar to the time charterer by demise. This view, however, understates the relative character between the time charter and the time charter by demise. Scholars supporting this view appear to rely only on one decision by the Supreme Court of Germany rendered in 1901 in a time charter by demise case.

This view has lost support in Japan, due chiefly to two more recent decisions handed down by the Supreme Court of West Germany. Both cases discuss time charters. One case relates to the Deuzeit time charterparty in the year of 1956, and the other relates to the Balentime charterparty in the year of 1957.

The Balentime charterparty, and the New York form for time charterparty as amended, prevail in the shipping industry throughout the world providing standard time charterparty agreements. In the performance of the agreement by such standard forms, two types of time charterparty agreements are found in common shipping practice:

(1) Where the time charterparty agrees with the cargo owner to carry the cargo by the time chartered vessel for himself, the time charterer (cargo owner) does not intend to make an agreement with the ship's owner of the affreightment of the cargo by the vessel. In such case, the time charterer (cargo owner) holds the legal position of the cargo carrier to carry the cargo for himself by the vessel with services to be rendered by the ship's owner. The ship's owner is deemed to be the sub-contractor of the time charterer (cargo owner) to perform the ship's navigation in compliance with the intentions of the cargo owner.

(2) Where the parties agree to the time charterparty in order to have the non-cargo owner use the vessel to carry the cargo for another shipper, or the consignee, the time charterer is deemed to be an independent carrier. The ship's owner merely provides the time charterer a function or facility of the vessel in order to meet the time charterer's needs for any particular commercial transaction. Thus, the ship's owner becomes a navigator only as an independent sub-contractor with the time charterer.

28. See generally Carver, supra note 8.
B. Classification Based on Economic Standpoints

1. Indirect Expenses for the Vessel

Indirect expenses for the vessel include: (1) Repayment of the value of the vessel; (2) interest accrued on a loan debited by the owner; and (3) a dividend fund to be divided among shareholders of the owner. By Japanese commercial law, an accumulating fund must be reserved by the owner’s account along with an insurance premium to be paid by the owner for insurance of the vessel, overhead expenses, and taxes levied on the vessel. These expenses are on the owner’s accounts; the time charterer has no obligation to pay such expenses.

2. Direct Expenses for the Vessel

Direct expenses for the vessel include: (1) The navigational expenses incurred from complying with the time charterer’s requirement to carry cargo for his commercial transaction; (2) wages and provisions for the ship’s crew; (3) maintenance expenses for the vessel; (4) fuel costs for the kitchen department; (5) costs of the diesel oil consumed and the upkeep of the engine; (6) expenses of drinking water; (7) repair of the vessel; (8) costs of the supplies and store necessary for the deck and engine departments; (9) charges for medical treatment and sanitation of the crew; (10) consul’s certificate charges for the master and officers on board the vessel; (11) charges for preparation of winch or derrick together with wheel and wire-rope in the usual degree of quality (each having a capacity of less than two tons for loading or discharging of the cargo); and (13) wages for winchmen who shall be provided at each winch and insurance premium. Under the time charterparty, these items are on the owner’s accounts, but not on the time charterer’s account. The owner bears these costs and expenses because the owner has a general power and obligation to operate the ship’s navigation and to control the master and crew in compliance with the requirements of the time charterparty agreement.

The time charterer by demise of the vessel will have to pay these items of costs and expenses because the time charterer by demise has the general power to conduct, and obligation for, the ship’s navigational matters and to control the master and crew who are the servants of the time charterer by demise to carry out his commercial transaction.
3. Expenses Necessary for the Voyage of the Vessel

These expenses are those incurred from the ship's voyage to comply with time charterer's commercial transaction requirements. They include:

(1) costs of fuel and diesel oil to be consumed for the ship's navigation to complete the voyage as designated by the time charterer;
(2) The port charges imposed by the port authority on the vessel in each port into which the vessel travels for the commercial transaction (these expenses involve tonnage dues, port dues, pilotage, towage, wharfage, charges for use of mooring buoy, and handling charges for mooring ropes at the wharf and the stevedoring charges);
(3) The costs of boiler water;
(4) Canal dues, and the employment charge of the quartermaster who must be employed for the passage of the canal; light dues; charges for a consul's certificate to the things other than that of the master; officers and crew, pier charge; agency fees employed by the time charterer; costs of the provisions for the persons who serve on the works for the loading; store and stem (including expenses for the use of dunnage and shifting board for the loading of the cargo); charges for discharging; tally; delivery of the cargo; charges for an inspector of hatch coming; fumigation; and costs of the ropes or chain which may be specially required to use for the loading or discharging of the cargo as a custom of the port or by order of the port authority.

The time charterer bears these costs and charges because these expenses will have been incurred for and from the activities of the vessel and other things necessary and incidental to complete the voyage as designated by the time charterer for his commercial transaction pursuant to the time charterparty. For the same reason, time charterers by demise also bear the costs of such expenses.

V. The Theories of Scholars and Court Cases

A. English Law

As set forth in Section II. (A) above, under English law we typically find two types of charterparty: (1) the charterparty by demise; and (2) charterparty not by way of demise.

1. Charterparty by Demise

The charterparty by demise is of two kinds; (1) locatio navis, where the hull is the subject matter of the charterparty, and (2)
locatio navis et operarum magistri et nauticorum, under which the
ship passes to the charterer in a state fit for the purpose of mercantile
adventure.

In both cases the charterer becomes, for the time being, the owner
of the ship (owner pro hac vice of the vessel). Master and crew
are, or become for all intents and purposes, the charterer's servants,
and through them the possession of the vessel is in him. The owner,
on the other hand, divests himself of all control over the ship or
over the master and crew. His sole right is to receive the stipulated
hire and to take back the ship when the charterparty ends. During
the currency of the charterparty, therefore, he is under no liability
to third persons whose goods may have been conveyed upon the
demised ship, or who may have done work or supplied stores for
the ship; those persons must look only to the charterer who has
taken his place.29

2. Charterparty Which is Not a Demise

The charterparty which does not operate as a demise may be
classified as a locatio operis vehendarum mercium. Though it confers
on the charterer the temporary right to have his goods loaded and
conveyed in the ship, ownership remains in the original owner. In
addition, the possession of the ship remains in the original owner
through the master and crew, who continue to be his servants. The
existence of the charterparty, therefore, does not necessarily divest
the owner of liability to third persons whose goods may have been
conveyed on the ship nor does deprive him of his rights as owner.

Carver has divided the charterparty not by way of demise into the
following three classes:

(1) Contracts for the use of the ship on a voyage or services of
voyages, in carrying goods to be shipped by the charterer, or in his
name. The charterer agrees to pay for the vessel either in proportion
to the goods carried, or a lump sum for the voyage, or in proportion
to the time occupied;
(2) contracts similar to the one described above, but by which liberty
is given to the charterer to use the ship for the purpose of taking
goods of other shippers, and to require the master to give bills of
lading for goods so shipped; and
(3) contracts for the services of the ship for a period of time, during
which the charterer is to have the right, within agreed limits, to

direct how the ship shall be used, and is to pay for her in proportion to the time occupied.\textsuperscript{30}

Carver states that this third type of contract comes within the time charter not by way of demise.\textsuperscript{31} In this respect, Scrutton states that under the ordinary form of time charter, the owner agrees with the time charterer to render services for a designated period by his master and crew to carry goods put on board his ship by or on behalf of the time charterer.\textsuperscript{32} The ship owner's remuneration is usually termed "hire," and is generally calculated at a monthly rate based on the tonnage of the ship.\textsuperscript{33} The meaning of the words "to render services . . . by his master and crew," are interpreted in England and other U.K. countries to equal "to render 'function' or 'facilities' of the vessel . . . by his master and crew." However, Scrutton states further that recent developments in chartering practice have tended to obscure the distinction between time charter and voyage charter.\textsuperscript{34} For example, provision is sometimes made for a specific number of consecutive voyages, or for as many voyages as the vessel can perform within a certain period.\textsuperscript{35}

In addition, British Courts have determined that the time charter-party by a form of Balentime charter or New York produce time charterparty is similar to a time charter not by way of demise. Words common to the modern time charters (e.g. "let," "letting," "hire," "hiring," "delivery," and "redelivery") are really only apt in charter by demise. According to Scrutton, however, the words "let," "letting," "hire," "hiring" serve to distinguish such charters from voyage charters. Scrutton contends they do not in themselves characterize such charters as charters by demise.\textsuperscript{36} In this respect, Carver maintains that the modern form of time charterparty is, in essence, one by which the ship owner agrees with the time charterer that during a certain named period he will render services by his servants and crew to carry the goods which the time charterer puts on board his ship.\textsuperscript{37} The provision as to delivery of the vessel at the termination of the charterparty redelivery merely means that whatever possession

\textsuperscript{30} Carver, supra note 8, at 277.
\textsuperscript{31} Id.
\textsuperscript{32} Scrutton, supra note 9, at 49.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Carver, supra note 8, at 312-13.
of the vessel the charterers might take should be relinquished by them within the agreed time and at the ports named.

Carver further notes that in *Italian State Rys v. Mavrogardatos*, the word "redelivery" in a clause providing for the redelivery of the vessel by charterer to ship owner was not an apt word in a charterparty which was not a demise of the ship; that the ship was redelivered when the owner was enabled to reserve control of the ship; and that where, as in that case, the owner withdraws the ship from the service of the charterer, any further action by the latter in the way of redelivering her was prevented.\(^{38}\) According to Carver, it is commonplace that the phraseology adopted in the case of the charter of a ship where its services are put at the disposal of a charterer but it is not a demise, is deceptive.\(^{39}\) The ship is not leased or withdrawn. The services of the boat and those of the crew are put at the disposal of the charterers when the charter begins. When the withdrawal of the ship is spoken of, then, it merely means that those services are no longer supplied.

A charterparty may be made for purposes other than the carriage of goods, for example, for passenger service, or for towage or for salvage. Such contracts, however, fall outside the scope of this book, and the rules with regard to contracts of carriage may not be applicable to them. Most commonly, charterparties are made for the purpose of securing to the charter the use merely of the ship on a particular voyage; or for services of voyages.\(^{40}\)

**B. American Law**

According to American admiralty law scholars Gilmore and Black:

The first problem is of course that of distinguishing the demise from the regular time and voyage charters. The test is one of 'control;' if the owner retains control over the vessel merely carrying the goods furnished or designated by the charterer, the charter is not a demise; if the control of the vessel itself is surrendered to the charterers, so that the master is his man and the ship's people are his people, then we have to do with a demise. As the Supreme Court has said, 'To create a demise the owner of the vessel must completely and exclusively relinquish possession, command, and navigation thereof to the demise.'\(^{41}\)

\(^{38}\) *Id.*
\(^{39}\) *Id.*
\(^{40}\) *Carver, supra* note 8, at 272-273.
In the forms actually used for chartering today, it is usually quite clear which of these arrangements is intended. It is common practice, as well, for the charter to contain an express stipulation in this regard; the time charter we have examined... expressly provided that it is not to be construed as a demise; it could not be in any case, for, as in most time charters, it is perfectly clear that the owner retains control over the navigation and management of the vessel.

A few cases occur in which a fictitious "demise" is used as a sham to take the real owner out of the danger zone of liability, particularly for personal injuries.42

Under American law, as under English law, there is a distinction between demise charters, sometimes called "bareboat" charters, and "time" or "voyage" charters. With demise charters, the charterers take over the vessel and provide master, crew, provisions, insurance and operational control, becoming the owner pro hac vice. As regards third persons, the demise charterers are, in effect, the real owners. This is not so with a time charterer. A time charterer retains many of the characteristics of the contract of affreightment, where the charterers merely take over the vessel's cargo carrying capacity.43

There is seldom any difficulty in distinguishing voyage charters from other types of charters because they are merely contracts of affreightment for one voyage. Difficulty has sometimes arisen in the past in distinguishing between time charters and demise charters. Today, however, the distinction between these two types of charter is well-established in American law and there is seldom any difficulty in determining which type of charter is involved.

American law on the difference between these charters was settled in a series of cases decided by the United States Second Circuit Court of Appeals between 1909 and 1911. The Second Circuit, which sits in New York City, is the leading maritime court in the United States, and its decisions are highly regarded.

The first of these cases is Clyde Commercial Steamship Co. v. West India Steamship Co.44 Clyde concerned a dispute over loss of time due to quarantine restrictions placed upon the vessel because of a fever developed by certain crew members. The court discussed the nature of the time charter, stating:

42. Id. at 241.
43. Id.
44. 169 F. 275 (2d Cir. 1909).
It will thus be seen that the owner officered, manned, and provisioned the vessel, was in entire control of her navigation, and bound to maintain her during the charterparty in good condition. The expression ‘delivery’ of the vessel to the charterer and ‘deliver’ by it at the end of the term to the owner is to be construed in connection with these provisions and with the further provision that she was to be ‘placed at the disposal of the charterers’ to extent of the space agreed upon.

We entertain no doubt that the charter did not amount to a demise of the vessel—if she had been at fault for a collision during the term, it would scarcely be contended that the charterer would be personally responsible.45

Another case is more closely in point. It involves a collision between two vessels, the vessel at fault being under charter at the time of the collision.46 At the time of the collision, the supercargo was actually navigating the Volund as its pilot and the captain was ashore. Nevertheless, the court held that the collision was the responsibility of the owners, not the charterers.47

A third case involved a collision between a vessel and a dock.48 Negligence in docking at the wrong stage of the tide was found to have caused the collision. The tugs provided by the charterers were assisting in docking. An argument was made that this was the chartdrer’s liability. The court rejected this contention on the basis of previous decisions and exonerated the charterers from all liability. The terms of the charter were the same as in The Volund.49

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45. Id.
46. The Volund, 181 F. 643 (2d Cir. 1910).
47. The court stated:
   Since the navigation remains in the hands of the owner, all instrumentalities (human or other) which he uses to conduct it are his own while thus employed, no matter from what source he obtains them. We have no question here as to navigation in waters where the law compels the employment of some local pilot. For the consequences which may result from the failure of any of these instrumentalities properly to do the work the owner who is employing them may be liable; he cannot escape liability for damages done by his vessel in consequence of her being improperly navigated because the person at fault was temporarily assigned by someone else to assist him in doing the work which was distinctively his own. Nor can we assent to the proposition, which is earnestly contended for, that under charterparties of this sort there is some joint, two-headed navigation of the vessel which will put both parties in control.
48. Luckenbach v. Insular Line, 186 U.S. 327 (2d Cir. 1911).
49. The court said:
   It has been repeatedly held that this form of time charter is not a demise of the ship. It is sufficient to refer to our recent decision in The Volund, 181 F. 643, where we held that the navigation of the ship during the time of the charter is in the hands.
The cases discussed above continue to be cited as authoritative. An arbitration decision in 1943 by one of the leading admiralty lawyers in New York reached the same conclusion.\textsuperscript{50} In \textit{Black Gull}, a vessel under time charter was under the command of a pilot provided by the charterers. The pilot was a regular employee of the charterer and had been frequently used, not only in docking the charterer's vessels, but with other vessels. The pilot made a miscalculation while the vessel was docking and the vessel collided with the pier doing serious damage to the pier. The owner attempted to have the liability assessed against the charterers. The arbitrator held that under the time charter all responsibility for navigation fell upon the owners; it made no difference that the actual operation of the vessel was being controlled by a pilot supplied by the charterers.\textsuperscript{51}

The fact that time charterers are entitled to give instructions as to what voyages the vessel is to make, which the master is obligated to follow, does not put the time charterers in the same position as charterers under a demise charter. This, however, is not the law in the United States.\textsuperscript{52}

C. \textit{German Law}

There is no specific provision in the German Commercial Code which applies to a time charter of a vessel. Accordingly, the determination of the character of that contract is subject to the judgment of the owner. We consider the docking of the vessel a part of her navigation.

The master was in control of her, and if her condition was such that it was unsafe to undertake that operation in that state of the tide, he should have waited until the condition was more propitious. Many authorities are cited on appellant's brief in support of his contention that the charterer was in control of the navigation of the vessel for purpose of docking here, and that the rugs were consignee's agents, for whose negligence it would be liable, we find in none of the cases cited anything to induce a modification of the conclusions expressed in \textit{The Volund}.\textsuperscript{50}

\textit{Id.} at 328.

\textsuperscript{50} Black Gull - Damage to Pier 50A at San Francisco, 1947 A.M.C. 156.

\textsuperscript{51} The arbitrator stated:

If the owner is to remain responsible for navigation, the pilot in navigating the vessel is in the owner's employ although in the general employ of the charterer. It is not uncommon for an individual in the general employment of one person to become \textit{pro hac vice} the employee of another.

\textit{Id.} at 157. \textit{The Volund, supra} note 46, is an example of just such a situation.

\textsuperscript{52} In \textit{Volund}, the same argument was made and rejected. The court said:

The provisions (clauses 8, 10) that the captain shall be under the orders and direction of the charterers as regards employment and other arrangements merely authorize the charterer to designate the safe port, and the berth therein to which the ship proceed. How shall he navigate to get there is a matter entirely within the owner's hands.

\textit{Volund, supra} note 46, at 666.
of the court or to the theories of scholars in Germany.

The Supreme Court of West Germany rendered judgment on November 26, 1956\(^{3}\) to determine whether the charterer of a vessel under a Deuzeit time charterplay (the content of which is substantially similar to Balentime charterparty form), used under the charterer's name for his sea carrying business, comes within the category of Ausrüster as provided for in Article 510 of the German Commercial Code.\(^{4}\)

In the Court's view of the German Commercial Code, where the master, crew, or pilot commit negligence in the carrying work related to navigation of the vessel resulting in damage to a third person or vessel, Article 510 will not apply. The owner, the lessor of the vessel (including a bareboat charterer), or the time charterer by demise, however, as their employer will have to bear liability for damage to the third party in accordance with Article 485 of the German Commercial Code.

Furthermore, the Supreme Court of West Germany rendered judgment on December 12, 1957\(^{5}\) in another case, deciding whether the legal position of the time charterer who chartered the vessel by the Baletime charterparty form 1936 comes within the category of Ausrüster as provided for in Article 510 of the Commercial Code.\(^{6}\)

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53. 22 Supreme Court Case Book 200.
54. The Court held:

In order to say that whether or not the user of the vessel is the Ausrüster as provided for in Article 510 of The Commercial Code, even where the user of the vessel control indirectly the vessel and he relies on it by the act of the master, he, at that time will have to absolutely be servant of the user and he also will have to follow entirely to user's instruction as he is subordinate to the user.

That is, by the Deuzeit time charterparty, unless some specific clause contains in it the charterer cannot give his instruction directly to the master of the vessel, accordingly, although if the charterer has some dissatisfaction to the acts of the master, he can affect only his intention to the master through the act of the owner of the vessel, so long as the charterer chartered the vessel by Deuzeit time charterparty from, the owner still retains his power to instruct directly to the master and crew as his servants.

The Deuzeit time charterparty does not contain any element to indicate that the owner transfer legally his right to the charterer, by which the charterer can conduct the vessel by the act of the master.

Id.

55. 26 Supreme Court Case Book 152.
56. The Court stated:

Whether or not the contents of general form of Baletime charterparty 1936 contains a clause relating to a position of Ausrüster as provided for in Article 510 of The Commercial Code is similar to that of Deuzeit time charterparty form, a problem concerning Ausrüster could not be found from the contents of Baletime charterparty form and as stated before, the contents of the employment clause of the charterparty does not involve any element to support legal position of the time charterer as the
In 1901, the Supreme Court of Germany characterized the time charterparty as a combined agreement consisting of both the agreement for lease of the vessel and the agreement for the supply of service of the master and crew of the vessel. The court clearly found that in a contract of time charterparty the owner must deliver to the charterer: (1) the hull of the vessel; and (2) the supply of the service of the master and crew.

This type of contract by charterparty, as described by the Supreme Court of Germany, does not fall within the usual form of time charter contract, but more closely resembles a time charter by demise. Accordingly, the judgment of the Supreme Court of Germany should not operate as precedent in the interpretation of a charter by time charter contract of the type prevalent in the shipping industry of the world today.

D. French Law

Under French law, charterparties are categorized into three types:

1. The voyage charterparty (affretement au voyage):
   A contract by which a shipowner puts a ship, either in whole or in part, at the charterer's disposal for a voyage or a series of voyages.

2. Time charterparty (affretement à temp):
   A contract by which a shipowner undertakes to put a manned and equipped ship at the charterer's disposal for a specified period of time.

3. Bareboat charterparty (affretement coque nue):
   A contract by which a shipowner hires a non-manned, non-equipped or only partly-manned and partially-equipped ship to a charterer for a specified time.

In categories (1) and (2) above, customarily, the parties define in the convention of affreightment the possession and control of the

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*Ausriister.* In view of the above, in the case of the ship's collision, the owner of the vessel as the employer of the master and crew must bear a liability to pay damage suffered by the opponent party due to the negligence committed by his master and crew.

*Id.*

58. Article 5 and 6 - Law June 18, 1966 (copy on file at the offices of the author).
60. Article 10, Law June 18, 1966 (copy on file at the offices of the author).
ship, outlining all questions related to the employment of the master and crew and the management of the ship.

When the master and crew remain under the control of the shipowner as his servants for the navigation of the ship, the charterer is not liable for physical damage or injury to any third party when caused by negligent navigation of the ship. This is always the case for time charters where a distinction is made between nautical management (gestion nautique) of the vessel which is incumbent upon shipowner, and the commercial management (gestion commercial) which is incumbent upon the charterer.

French domestic law, in its section concerning contracts of affreightment, provides that the terms and the effect of the contract are agreed upon by the parties. French law also dictates that it is only in absence of contractual stipulations that the effect of the contract is governed by the provisions of the law, and by the provisions of a complementary décret enacted for the application of the law. This means that, in matters of contracts of affreightment, the parties have complete freedom to insert any clause governing the relations between them, to the exception of course of clauses conflicting with French public policy.61

In contrast when there is a demise of the ship (affretement coque nue) the charterer is liable for damage or injury sustained by a third party. The charterer retains control of the master and crew who have become his servants for the navigation of the vessel. Consequently, the charterer warrants the owner against any claim by third persons which may arise from the operation of the vessel.62

E. Dutch Law

The information having been obtained and the vessel having been let by bareboat charter, the bareboat charterers in their turn may let the vessel by time charter to another charterer. The time charterparty is listed on the form issued by the Kobe Shipping Exchange in 1927, as revised in July 1971.

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61. General principles of contract are fully valid under French law as are the following provisions found in the décret which implements the law.

   Article 19: The owner undertakes to deliver the ship—properly manned and equipped.

   Article 20: The owner remains in charge of the navigation of the ship.

   (Copy on file at the offices of the author.)

62. In this respect, the décret provides in Article 28, paragraph 2, that: “the charterer recruits the crew, whose wages and for whose food he pays, incidental expenses are being for him to pay.” (Copy on file at the offices of the author.)
For example, a vessel collided with an oil pier in 1974. The pier owner instituted legal proceedings against the time charterers for the damage. Under Dutch law, the question of liability in these circumstances would be governed by Article 320, 536 and 544a of the Dutch Commercial Code (Wetboek Van Koophandel).

There is no doubt that the time charterer is not the operator of the vessel in the sense of Article 320, because, according to clause 6 of the time charterparty form, the wages of seamen are paid by the bareboat charterer and not by the time charterers. According to clause 9, paragraph 3, the money which the master borrowed, shall be deducted from the hire; so, it is considered as money borrowed by the bareboat charterers, not by the time charterers. According to clause 12, paragraph 2, bareboat charterers can also instruct the master.

The bareboat charterers, not the time charterers, are entitled to change the master, if a justifiable request by the time charterers is made. Therefore, it follows from the charterparty that the time charterers do not command the ship themselves, and that they do not have it commanded by a master in their service. In short, they are not the "operators" of the vessel.

Therefore, under Dutch law, the pier owners cannot hold the time charterers liable, since those time charterers are not the operators of the vessel. Dutch law assumes that the master of the vessel has been

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63. Article 320 reads in translation:
   The term 'operator' shall mean and include the person who uses a ship in navigation at sea and commands her himself, or has her command by a master in his service.
   Consequently, this article introduces the term 'operator.'

See legal opinion of Mr. Jean Marot, Attorney, on 5th June 1980, Senior Partner of Marot-Lassez in Paris, France, on the legal position of the time charterer under French law (copy on file at the offices of the author).

64. Article 536 of Dutch Commercial Code is part of the section dealing with collisions. It reads, in translation:
   If one of the ship which were in collision or another ship is to blame for such collision, the operator of the ship to which blame attaches, shall be liable for the whole of the loss or damage.
   Consequently, the liability is limited to the operator of the ship, and to no one else.
   Article 544a reads, in translation:
   1. The provisions of this Section shall apply to like manner to impact or contact between ships and other movable or immovable objects.
   2. A ship which comes into collision with other object fixed or secured in a proper place and properly lighted, if necessary, shall be liable for any loss or damage, unless it appears that such collision is not due to fault of the ship.

(Copy on file at the offices of the author.)

It follows from the first paragraph of Article 544a that the rule laid down in Article 536 does not apply only to collisions between vessels, but also extends to collisions between vessels and fixed objects.
appointed by the bareboat charterers and not by the actual proprietors (the use of the word "owner" is avoided here to prevent confusion; bareboat charterers are often termed "the owner" with respect to the time charterparty). Although bareboat charterers, as operators, are liable for the collision damage, the pier owners would be further able to enforce their claims against the vessel alone, notwithstanding that the vessel is the property of the proprietors, not of the bareboat charterers.65

The Court of Appeal at the Hague has answered, by judgment of 2 April 1965,66 the question of what is meant by "the use of the ship in navigation at sea by a person other than the proprietors." The court ruled this to be the use by the bareboat charters in whose service the master is, and that time charterer, who does not appoint and command the master, definitely does not use the vessel in the sense of Article 318r.67

F. Swedish Law

The distinctive features of a time charter under Swedish law are defined in sections 137 and 138 of the Swedish Maritime Code.68

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65. This right is based on the following articles of the Dutch Commercial Code, quoted in translation:

Article 318c:

1. Subject to the provision of Article 318q hereof preferential debts against ship are:
   (1) Costs of execution;
   (2) Debts due to the master and the crew arising under their service agreement and relating to the period during which they have served aboard a ship;
   (3) Compensation due for Salvage, Pilotage dues, Canal and Harbour dues and other shipping dues;
   (4) Debts arising from collisions.

Article 318q deal with lower ranking debts.

Article 318r: It reads, in translation:

Claims for debts and moneys due as mentioned in Article 318c and 318q hereof shall be enforceable as preferential debts against the ship, even if they arise from the use of the ship in navigation at sea by a person other than the proprietor, unless such person has no right as against the proprietor so to use the ship and unless the creditor is not a bona fide creditor.

(Copy on file at the offices of the author.)

66. See NEDERLANDS JURISPRUDENTIE, No. 369 (1965); Schip & Schade No. 55 (1965) (The "THEO") (copy on file at the offices of the author).

67. See legal opinion of Mr. Theodorus Rys on 1 May 1980, member of Rotterdam Bar on the legal position of the time charterer under the Dutch law (copy on file at the offices of the author).

68. These sections, which are identical to the corresponding sections of Danish and Norwegian Maritime Codes, read in translation as follows:

Section 137:

In case of time chartering the carrier shall, during the time the ship is at disposal
Clauses 2 and 6 of the relevant charterparty sections are analogous to section 138, and clause 5 with section 137, of the Swedish Maritime Code.

Put broadly, the provisions of the form used for the relevant charterparty are similar to the provisions of the standard form Balentime 1939, which conforms with Scandinavian Maritime Law. It is clear that under Swedish Maritime Law the relevant charterparty will be recognized and classified as a time charterparty.

Under the terms of the relevant charterparty as well as under the provisions of the Swedish Maritime Code, responsibility falls on the owner to hire and pay for the master and crew of the vessel. The master and crew are, thus, the servants of the owner. In addition the statutes establish that the shipowner is liable for damage caused by the fault or neglect committed by the master and crew in the service of the ship.

Swedish law is also clear that under a charterparty the owner shall pay for the wages of the master and crew, provisions and insurance of the vessel, and maintain the vessel. Where the owner employs the master and crew, the time charterers cannot be liable for collisions between the chartered vessel and other vessels or fixed objects such as a pier. The fact that under the terms of the charterparty the master is under the direction of the charterer as to the employment and voyages of the vessel does not alter the situation. The navigation of the vessel to carry out the orders of the charterer is always the responsibility of the master and crew, for whose fault and negligence the owner is liable.

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69. Section 233, paragraph 1, of the Swedish Maritime Code, identical to the corresponding section of the Danish and Norwegian Maritime Codes, reads in translation:

Section 233:

The ship owner shall be liable for damage caused by the fault of neglect in service, committed by master, mariners, pilot, tug or any other person performing work in the service of the ship.

(Copy on file at the offices of the author.)

70. See legal opinion of Mr. Lennart Hagberg, Swedish lawyer, Senior Partner of Mannheimer & Zetterlof, made on 9 May 1980, on the legal position of time charter under Swedish law (copy on file at the offices of the author).
The only question to be discussed here is only whether in principle, the time charterers can be held responsible for the damage to fixed objects caused by vessels which they have on time charterparty. Section 233 of the Norwegian Maritime Code of 20 July 1893, as amended on 7 April 1932, reads as follows:

Chapter 10:
Shipowner's Liability:
1) Vicarious Liability of the shipowner;
Section 233: The shipowner shall be liable for damage caused by the fault or neglect in service, committed by the master, mariners, pilot, tug or any other person performing work in Service of the ship.
The shipowner shall have recourse against the person who caused the damage in respect of any sum paid by reason hereof. However, the statutory rules providing relief for the person who caused the damage by limiting his liability to the person who suffered the damage shall apply correspondingly to the shipowner's claim.

The Norwegian Maritime Code contains no definition of the word "shipowner," but it always has been accepted by Norwegian maritime law scholars that the word "shipowner" means the actual registered owner of the vessel—or when the vessel is let on a bareboat charterparty—the bareboat charterer. Scholars maintain that the bareboat charterer is the party who has the employment contract with the master of the vessel.

The English translation of the Norwegian Maritime Code says that it is the shipowner "who is responsible," but this translation is to some extent inaccurate since the word in the original Norwegian text, namely the word "reder," has no corresponding English translation.

The leading maritime scholar in Norway, Professor Dr. Juris Sjur Braekhus, in an article about the vicarious liability of the shipowner according to Scandinavian law, writes the following about the word "owners" of section 233 of the Maritime Code (section 233 was at that time section 8):

1) Term Owner:
(a) According to the maritime codes, (section 8) it is the "reder" who is liable for the faults and neglects of those on board. The "reder" has above been translated to mean "owner" (shipowner). This translation is not quite exact. The "owner" (under section 8) is he who manages the vessel, engages the crew and carries the financial risk of the vessel's tradings. Normally the ship is also his
property, but not necessarily so. The proprietor of the ship may have let it out for hire and it may have been requisitioned from him; the lessee or the requisitioning authority, who has manned the ship and commissioned it for service, is then the "owner" and liable for the faults and neglect of those on board ("chartered owner," "requisitioned owner").

Ordinary chartering, whether on a voyage basis or on a time basis, does not alter the position of the owner. The charterer does not become the employer of the crew, and is not liable for their fault and negligence.

Professor Dr. Juris Sjur Braekhus' opinion has been the prevailing view of maritime law scholars for many years, although it has been questioned. This author knows of no legal decision which holds the time charterer responsible for collision damage between vessels or between a vessel and a fixed object. And, as far as it is known, it has never been argued that time charterers should be responsible for such damage.

Under Norwegian law, there is no doubt that the time charterers are not responsible for damage to third parties, even if they may have a right to give orders to the master with respect to the voyages that the vessel shall perform.

**H: Danish Law**

The general position of Danish law on time charterers under the Maritime Act, section 233, states that the owners of the vessel are liable for damage due to misconduct or negligence of the master, the crew, the pilot or other engaged in running the vessel.

As to the understanding of the term "owner" in the context of this section, it is generally agreed in Danish legal theory that it shall be construed as "managing owners," indicating the legal or physical person that mans and commissions the vessel for service. The reasoning behind this understanding of the section is that the person that is the employer of the master and crew and the manager of the vessel should also bear the liability that follows from the activity of the vessel and crew. Applying this construction to bareboat and time charterparties normally leaves no doubt that the bareboat charterer

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71. **BRAEKHUS, JURIDISKE ARBEIDER FRA SJO OG LAND 328.**

72. **See legal opinion of Dr. Ole Lund, President of Northern Shipowners Defence made on 12 May 1980, on the legal position of time charterer in Norway (copy on file at the offices of the author).**
and not the time charterer is the managing owner of the vessel. The bareboat charterers normally employ the master and the crew, and they have the authority to instruct and command them. Thus, the bareboat charterer is responsible for the nautical running of the vessel.

The time charterer has a very limited scope of power to instruct the master and the crew, namely the right to decide within certain limits, where the vessel shall sail. This right of the time charterer to govern the commercial side of the running of the vessel, however, does not change the fact that the bareboat charterer is solely responsible for the nautical operation of the vessel. Under Danish law, the failure of the master to secure the anchor and the vessel properly to lay safely in a typhoon, for example—if an error at all—is an error in the navigation of the vessel, for which the time charterers cannot be held responsible.\(^{73}\)

I. **Swiss Law**

Swiss Sea Navigation Law article 94, paragraph 1 provides:

By the charterparty of the vessel, owner or management owner, as a tenderer of the ship’s space (verfrachter) has a duty to entrust the use of the vessel to charterer a whole or a part of ship’s space (raumgehalt) of a specific sea going vessel (seeshiff) for a specific period (time charter) or specific or several voyages (voyage charter), and the charterer has a duty to pay remuneration thereof.

Article 93, paragraph 2, provides:

A charterparty does not merely mean the contract of affreightment by sea (seefrachtvertrag).

J. **Soviet Law**

From a review of the provisions of Soviet Maritime Code,\(^ {74}\) it can be said that it succeeded from the contents of the Baletime charter-

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73. See legal opinion of Mr. Jan P.S. Erland, Partner of the law firm of Gorrissen and Partners of Copenhagen made on 28 May 1980 (copy on file at the offices of the author).

74. Soviet Maritime Code (Sept. 17, 1968) provides:

Chapter 1. General Provisions, Article 1:

Soviet Maritime Code controls several relations which shall be incurred from maritime transactions (paragraph 1). The maritime transactions in this Code means acts which relate to the use of the vessel for a purpose of the transportation of the goods, passengers, luggage and mail bags, or fishery and other sea industry, collection of useful minerals, tug, icebreaking works or other purpose of economic, academical and cultural works.
party form, and, therefore, the interpretation thereof should accord with the decisions of English Courts.

K. Italian Law

Italy has established well-regulated provisions in the Code of Navigation of 1942 (*codice della navigazione*) relating to charter of vessels and airplanes. In that code, the charterparty of a vessel or airplane is understood as one type of contract for use of a navigable utensil (*veicolo*), either ship (*nave*), or airplane (*aeromobile*). In Italy, the contract for the use (*impiego*) or utilization (*utilizzazione*) of the vessel, and other navigable utensils is the contract of navigation (*contratti navali*). The Code of Navigation of Italy re-named the contract of navigation, however, to the contract in relation to the utilization of the navigable utensil (*contrati di utilizzazione della nave*), and divided the chapter of contract relating to utilization of navigable utensils into two chapters: one for ships (art. 376 to art. 468) and

(paragraph 2).

Chapter 10, Article 178 provides, in relation to time charter:

By the time charter, the owner of the vessel with the remuneration has a duty to tender the vessel to the charterer for a specific period for a purpose of the transportation of the goods or passengers or other purposes of the works as provided for in Article 1 of this Code.

Article 179 provides that:

in the conclusion for the time charter, the agreement in writing to be made by the contract parties is preferential in effect than that of the provisions of this Code.

Article 181 provides:

The owner of the vessel must tender the vessel to the charter with appropriate condition for use of the vessel complying with a purpose as agreed by the contract and with appropriate equipment and manned (paragraph 1).

The owner of the vessel further during the term of the contract must keep the vessel in good conditions and pay the provisions for the crew (paragraph 2).

Article 183 provides:

The charterer, in accordance with the terms of time charterparty, uses the vessel from the commencement of the time of the contract and liable for a responsibility under the Bills of Lading signed by the master (paragraph 2).

The master shall obey to the instruction of the charterer in relation to the matter of the voyable of the vessel excluding instruction regarding ship's navigation, the order in the vessel and organization of the crew members (paragraph 3).

The charterer shall not liable from the salvage of chartered vessel, loss or sinking of her resulted from the causes which has been incurred from the negligence committed by the crew, but, it is a case only that the owner employed crew onboard (paragraph 4).

There are many other provisions of the time charter in the Soviet Maritime Code. Some examples include: The provisions of the indispensable condition of time charter (Art. 182), provisions of the responsibility in connection with the unseaworthiness (Art. 184), the provisions relating to the amount of hire to be paid by the charterer in a case of sinking of the vessel (Art. 185), and the provisions relating to apportionment of salvage reward (Art. 186).

Translation of Soviet Maritime Code (Sept. 17, 1968) by Mr. Eisuke Yoshinaga and Sotaro Isikawa (copy on file at the offices of the author).
one for airplanes (art. 939 to art. 964). Moreover, in each charter, it provided for the contract of lease, charter of the vessel or airplane (noleggio), and the transportation of goods.\textsuperscript{75}

VI. THEORIES OF SCHOLARS AND COURT CASES IN JAPAN

The theories of scholars in Japan relating to the characteristics of the time charter break into two general classifications: (1) a contract of affreightment by the ship; and (2) a lease of the sea enterprise to be carried by the ship.

A. The Contract of Affreightment

The time charter is one type of voyage charter, because the charterer does not have possession of the vessel. The charterer is, therefore, merely a consignor for the carriage of the goods. As a result, the time charterer has no legal position as provided for in article 704 of the Japanese Commercial Code.\textsuperscript{76} Accordingly, a general rule of contract of affreightment by the ship can be applied to the time charter.\textsuperscript{77} Of course, there are several modified explanations of the character of the time charter, based on this explanation.

B. The Theory of Transformal Contract of Affreightment\textsuperscript{78}

The time charter is one type of legal contract which exists as an intermediary substantial entity between the lease of the ship and the

\textsuperscript{75} Under the Code of Navigation of Italy, 1942:
(i) In the contract of lease of the vessel or airplane, the navigable utensil (ship or airplane) is deemed as the object of the supply by the contract.
(ii) In the charter of the navigable utensil (ship or airplane), the object of the supply by the contract is deemed to be the work (opus). Accordingly, the navigable utensil (ship or airplane), in relation to the work as the object of the supply by the contract, operates as a function of measures (mezzo/strumento) only to perform the contract. For example, in the navigation of the vessel or airplane, the navigation itself is deemed as the operation of a function of measures.


\textsuperscript{76} Article 704 as translated reads:
If the lease of a ship makes her copy on file in navigation for a purpose of engaging in commercial transactions, he shall in relation to third person have the same rights and duties as the owner in connection with matters relating to the use of the ship. 2. In the case mentioned in preceding paragraph, any preferential right which has arisen in connection with the use of the ship shall be effective even as against the owner of the ship; this shall not, however, apply in cases where the holder of the preferential right was aware that the use was not in conformity with the contract.

(Copy on file at the offices of the author).

\textsuperscript{77} See letter opinion of Dr. Tomihisa Ichimura (copy on file at the offices of the author); Minami, New Charterparty 17; Mori, The Principles of the Maritime Law 134.

\textsuperscript{78} See Tanaka, The Substance of Lecture of the Maritime Law 96; Ugaya, The Explanation of the Maritime Law 279.
voyage charter. In view of the above, general rules of the contract of affreightment will also apply to the time charter.

C. *The Theory of Joint Contract*\(^79\)

The time charter is characterized by a joint contract for lease of the ship and for supply of labor of the crew to the charterer. This theory depends upon the judgment of the Supreme Court of Germany in the year of 1901 on the case of charter by demise.\(^80\)

D. *The Theory of the Principle of Estoppel*\(^81\)

Dr. Sozo Komachiya states that the legal character of the time charter is a contract of affreightment by the ship. In relation to third parties, however, and if the third party believes that the time charterer is the carrier, the time charterer shall be liable to such third party on a principle of estoppel for any loss, damage, injury suffered by such third party resulting from any accident, or from negligence committed by the ship’s crew in connection with the carriage of goods by sea.

To the above explanation of Dr. Sozo Komachiya, the following critical opinion has been rendered by other scholars in Japan: The question of the liability on a principle of estoppel is based upon the facts expressed by an actor to other persons, not on how a third person believes it was made by the actor.

E. *The Theory Based on the Shape of the Use of the Vessel*\(^82\)

A shape of the use of the vessel by time charter divides the charter into commercial matters and nautical matters. As to commercial matters, the charterer maintains control over it and is liable to third persons. As to nautical matters, however, the owner controls them and is liable to the third person.\(^83\)

F. *The Theory of the Lease of Sea Enterprise*

This theory was asserted by Dr. Teruhisa Ishii. He states that the time charterparty includes various specific clauses, such as:

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80. See generally supra note 57.


82. Nishihara, *The Outline of The Maritime Law* 193, 204.

83. It is said that this theory was reflected by Article 305, paragraph 2 of the draft of revision of French Commercial Code, 1919 (present Article 7 of Commercial Code, 18 June 1966).
(1) The general clause which indicates lease of the ship (let, hire clause);
(2) the clause that the owner place the ship at disposal of the charterer (disposal clause);
(3) clause of employment of the master and crew (employment clause);
(4) where the charterer has a dissatisfaction to the service of the master and crew, the charterer can require to the owner to change them (misconduct clause); and
(5) the pure chartering clause, such as the charterer bear a costs of coal, fuel and boiler water (net charter clause).

In the actual international transaction, the time charter has been made by a form of Baletime Charter 1936 which prevails in the international shipping industry. From the fact that the above specific clauses are contained in the time charterparty, it becomes clear that the owner of the ship will tender the vessel with the master and crew onboard the ship to the charterer for a certain period, and the master and crew onboard ship will provide their labor under an employment contract with them to perform the charterer's business. In addition, where the ship was transferred to a new owner, the master and crew also transferred to the new owner with the ship. The relative position of the ship, and the master and the crew, is deemed to be a single system of a movable enterprise. In view of the foregoing, the time charter is considered the lease of the movable enterprise by the owner of the ship to the charterer.

G. The Theory of the Lease of One Unit of Constructed System of Movable Sea Enterprise

This theory is propounded by Professor Mr. Hisashi Tanigawa. Tanigawa bases his theory on that of Dr. Teruhisa Ishii. Therefore his opinion accords with a main point of Ishii's theory.

H. The Judgment of Court Cases in Japan

1. Lower Court Cases

The first judgment rendered by the lower court in connection with the time charter was in the year of 1909. Since then, and until the year of 1921, several more cases in connection with the time charter

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84. See Article 43 of Seamen's Law of Japan (copy on file at the offices of the author).
85. Ishii, MARITIME LAW 173.
86. Tanigawa, LEGAL CONSTITUTION OF THE TIME CHARTERPARTY 617.
were decided by the lower courts. In all of these cases, the lower court decided that the time charter is the charter of the ship on the one hand, or the lease of the ship on the other. Upon this basic principle the lower court has not yet decided definitively the character of the time charter.

2. The Judgment of Old Supreme Court of Japan in the Year of 1922

The Supreme Court decided that where the time charterparty contained specific clauses, such as; (1) the time charterer can direct to the ship's movement; and (2) if the charterer has some dissatisfaction to the service of the master and crew he can request the owner change them, that the character of the time charter is deemed to be the lease of the ship.

3. The Judgment of Old Supreme Court of Japan in the Year of 1925

The Supreme Court decided that where the time charter is agreed upon pursuant to the standard form of time charterparty, it becomes in essence a joint contract consisting of an agreement to lease the hull of the ship and the agreement to supply the services of the ship's crew.

4. The Judgment of Old Supreme Court of Japan in the Year of 1928

The Old Supreme Court of Japan decided, upon investigation of the clauses contained in the contract of time charter, that where the charterer takes the possession of the ship from the owner, and manages his sea transportation business for himself by use of the


88. Old Supreme Court of Japan, Case Docket No. (o) 818, 1921, decided on June 2, 1922 reprinted in COMMERCIAL SECOND CASE BOOK 985 (Komachiya, ed.).

89. Old Supreme Court of Japan, Case Docket No. (o) 502, 1924, decided by Civil Affairs Division No. 1, on June 28, 1925, reprinted in 7 CIVIL CASE BOOK 519.
ship, the charter of the vessel is not covered by the Japanese Commercial Code, but rather by the joint contract consisting of both the agreement to lease the hull of the ship, and the agreement to supply the service of the ship’s crew. This is true even though the owner can instruct the crew to carry on the ship’s navigation, with his duty to discharge or change employment of the crew being as agreed in the charterparty and even though the charterer still has a right to control the navigation of the ship.

There has been no new judgment by the old or the new Supreme Court of Japan in connection with the character of the time charter since the year 1928. Accordingly, at present in Japan, the judgment of the old Supreme Court of Japan in the year of 1928 is the controlling law.

I. Comment on the Decisions of Old Supreme Court of Japan

1. As to the Judgment in the Year of 1922

The judgment of the court is based on the facts as found by the judges of the Supreme Court; however, in my opinion, the judgment was based upon an insufficient investigation of the facts involved. Accordingly, this author finds the judgment to be inadequate.

2. As to the Judgment in the Year of 1925

The judgment, in my opinion, reflects the judgment of the Supreme Court of Germany in 1901. Again, however, the judgment of the Supreme Court of Germany in 1901 was rendered on the premise that the character of the charter was deemed to be a lease of the ship. In contrast to the judgment of the Supreme Court of Germany in 1901, the Supreme Court of Japan based its judgment on the clauses contained only in the standard time charterparty form. The Supreme Court of Japan followed an insufficient study in determining the meaning of the charter and decided that the joint contract constituted an agreement both to lease the hull of the ship and to supply the service of the ship’s crew. Arguably, it was a most inadequate judgment compared to those of the courts outside Japan.

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3. *As to the Judgment in the Year of 1928*

It is generally known in Japan that this judgment followed that of the Supreme Court of Germany in 1901. The facts are similar to those of the judgment of the Supreme Court of Germany, in which that court concluded that the charterparty is not a voyage charter as provided for in the Japanese Commercial Code, but rather an agreement for both the lease of hull of the ship and to supply service of the ship’s crew. Again, however, the opinion of the Supreme Court applies as a precedent to the charter by demise, but not to the prevailing time charter used in the shipping industry throughout the world. Even at the present time, the Japanese lower courts, with some doubt, apply the rule as precedent in Japan in these cases.

**Conclusion**

The theories of the scholars in Japan and the judgments of the Japanese courts were based on an insufficient understanding of the character of the time charter. A better view of the character of time charter reveals:

The time charter is one type of contract allowing use of the ship by the time charterer to be tendered by the owner of the vessel in order to carry the business of the charterer under the terms of the contract for a certain period of time. The owner of the ship does not transfer the possession of the ship to the charterer. The owner retains the right to control the ship, and the master and crew, and agrees to render the service of the ship (such as function or facility) by the master and crew to the charterer, by which the charterer can sufficiently carry out his commercial transaction as he intended (indirect control over the ship by the charterer) for a certain period of time. In addition to such render of the service of the ship by the owner, the charterer agrees to pay periodically the agreed amount of the hire to the owner.

In view of the above, during the term of the time charter, the owner or disponent owner of the ship must always keep the ship well-equipped and prepare to tender the vessel in compliance with the charter terms. During the charter’s currency, the owner is bound to leave from the requirement of the charterer or to take free movement to the other direction without the charterer’s consent. Against such restraint by the charter to the movement of the ship, the charterer agrees to pay periodically the hire to the owner or managing owner computed at the agreed-upon rate of hire and for
the agreed-upon period, irrespective of whether the ship is on hire or not.

The time charter is a legal method by which the charterer can acquire the ship owned by the other person, the vessel being well-equipped and prepared for good performance, in order to function in conformity with the use intended by the charterer to carry on his sea enterprise. The objects of the contract to be supplied by the owner to the charterer under the time charterparty, however, do not include the ship and the labor of the ship’s crew on board the ship, but only the function or facility of the ship which belongs with the vessel as its specific character in a satisfactory condition.

In addition, we must analyze the legal meaning of the function or facility of the ship. A function or facility of the ship does not merely mean a function or facility of the respective machinery or other equipment (such as navigable equipment, engine equipment, radar or correspondence equipment, or loading or discharging equipment, etc). Rather, it means the function or facility of the ship which is produced by this equipment together with the expertise of the master and crew who are well-educated, well-trained, and well-experienced for the navigation of the ship. Accordingly, the function or facility of the ship means that which master and crew produce by use of the ship’s equipment to conform with the purposes of the charterer’s sea enterprise, e.g., the service (ekimu in Japanese) of the ship which shall be rendered by the master and crew under the time charterparty.