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The time charterer's redelivery on short notice

A Norwegian perspective on the loss perspective in damages

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Table of contents

1 Introduction

1.1 Statement of problem

This thesis adopts as its point of departure the time charterer's redelivery on short notice in contravention of the terms of the charter. Specifically, it engages with a known controversy regarding the correct perspective on the owner's losses in an ensuing claim for damages.

Consider a time charter that requires 15 days' notice of redelivery. Instead, the charterer redelivers on a short 3-day notice. The owner cannot refuse redelivery for that reason alone i.e., proper notice is not a condition precedent to redelivery.[1] The owner must take redelivery and bring a claim for damages. Damages ought to place the owner as if he had received proper notice. However, scholars and practitioners disagree on whether proper notice would have entailed *earlier notice* or *later redelivery*. Carver on Charterparties:

> However, where a vessel is redelivered on short notice, it is a nice question whether the gravamen of the breach lies in the charterer's failure to give a longer notice and thus to redeliver at a later date, or in its having failed to give notice at an earlier date.[2]

The aim of this thesis is to bring clarity to this question from a Norwegian law perspective.

The matter is important, not least because it pertains the quantum of damages. We can illustrate this with an example. Assume that the market rates at redelivery are up compared to the charter rate. Further assume that the owner's follow on-fixture gets delayed as many days as notice was late due to the late notice. Under those assumptions, the late notice-perspective yields the greater losses (figures 1 and 2 below). The question concerns the nature of the owner's losses as well. It is more intricate to prove a disposition loss from not having been given notice at an earlier time, compared to would-be extended charter hire inter partes in the missing days of the notice time. Owners might therefore generally favour the early redelivery-perspective.[3] In a specific litigation, however, an owner may still prefer to recover losses from not having been given earlier notice if the market conditions favour that approach, as in our example.[4]

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[1] Jantzen (1938), p. 411. ND 1952 p. 104. Gram (1967), p. 178. For English law see Coghlin et al (2014), ch. 15.14 and Carver (2021), 7–397. Note that the owner is required to accept redelivery even if it is premature in relation to the *charter period* itself, cf. NOU 1993: 36, p. 91.

[2] Carver (2021), 7–400 [711].

[3] Another reason to think so is that the charterer will be incentivized to redeliver on short notice when the market rate is down and the charter is expensive i.e., when the owner prefers extended hire. This point of view cannot be taken too far, however, as short notice redeliveries often occur due to a lack of time for the charterer to order the vessel on a commercially sensible last voyage, which may happen independently of the market conditions.

[4] See e.g., [2015] Lloyd's rep 315 and 1955 AMC 875.

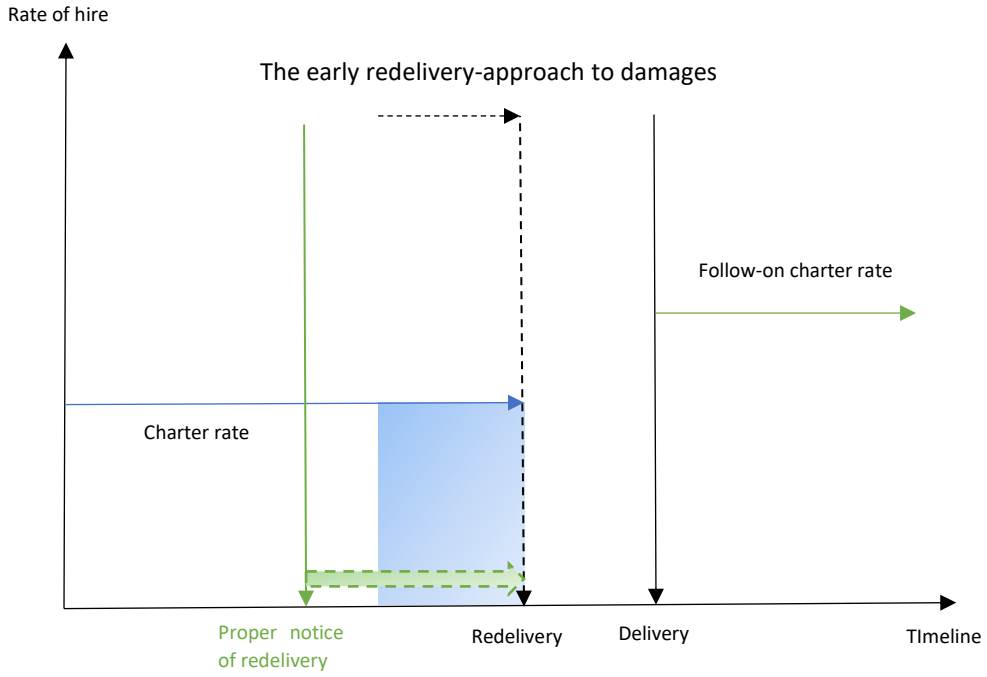

Figure 1. The illustration shows a hypothetical in which the charterer redelivers later in proper relation to the time of notice as it were. The dotted arrows indicate that a parameter has been altered, and the blue area represents lost charter hire as yielded by this perspective. For simplicity, the owner's claim for bunker consumption is not shown in figures 1 and 2.

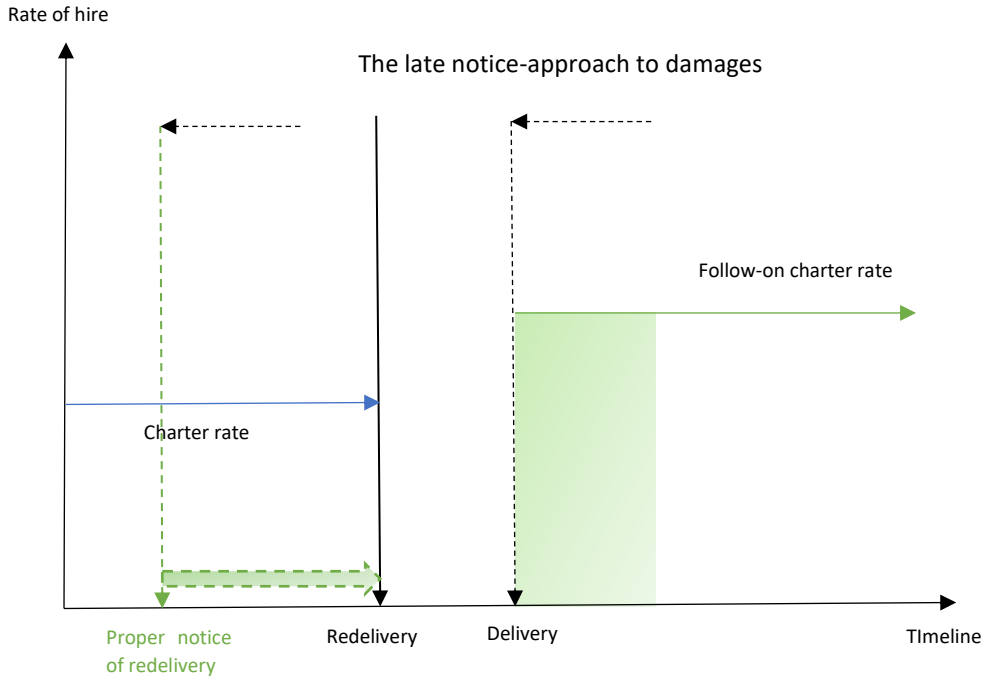

Figure 2. The illustration shows a hypothetical in which the charterer gives earlier notice in proper relation to the redelivery as it were. It is here assumed that the owner is able to use that earlier notice to push forward the vessel's following employment. The loss as yielded by this perspective is represented by the green area.

1.2 Scope of research

1.2.1 Introduction

There is more than one way in which short notice – and notice irregularities more generally – may occur. As explained below, the category may implicate the analysis. To explain how this is accounted for, we will first explain the typology used in this thesis, and then how our main and secondary research questions track that typology.

1.2.2 Typology

A typology may be construed utilizing two plausible criteria of proper notice. In the first dimension, there is notice time. We define notice time as the time between receipt of notice and redelivery. In the other dimension, there is compliance with notice. The second dimension expresses whether redelivery occurs in contravention of what the charterer positively communicates to the owner by way of notice.[5]

		Notice time		
Compliance with notice		**1) Short**	**2) Contractual**	**3) Long**
	A) Early	1A	2A	3A
	B) On time	1B	2B	3B
	C) Late	1C	2C	3C

Table 1.

If the charter demands 15 days' approximate notice and the charterer issues a 3-day notice which he subsequently observes, there is a 1B situation. On the other hand, if he issues a 15-day notice but subsequently redelivers after 5 days, there is a 1A situation.

From time to time, a charterer who is about to redeliver on short notice may go through the motions of issuing notices that purport to be contractual, but that both parties understand to be proforma i.e., not genuine.[6] This will be treated as a 1B situation, as there can be no justified expectation that the charterer will comply with a proforma notice.

Notice requirement	Communicated date of redelivery	Redelivery after	Situation
15 days	3 days	3 days	1B
ditto	15 days	5 days	1A
ditto	20 days	15 days	2A
ditto	15 days	25 days	3C
ditto	"15 days"(Proforma)	3 days	1B

Table 2.

[5] The typology is only descriptive.

[6] See [2015] Lloyd's rep 315

1.2.3 Main and secondary research questions

The thesis is going to make an analytical distinction between the two short notice situations 1B and 1A. 1B is characterized by notice being short, but not misleading, whereas the 1A situation invites us to grapple with the significance of redelivery occurring not only on short notice, but also in contravention of what was positively communicated to the owner.

The 1B situation will be treated as the main research question, and the analysis will be geared towards that situation through chapters 3–4. In chapter 5, the thesis will analyse the 1A situation and thereby discuss the properties of notice as a binding communication.[7]

When tasked with finding the applicable loss perspective in a 1A situation, we need to ascertain the legal effects of the issued notice, specifically whether it can amount to a promise to redeliver on or around the communicated date. If so, one may conclude that the owner *may* claim damages premised on that promise, thus yielding a later redelivery perspective on losses incurred. One may observe that there is for the 1A situation a priori two potential bases for the owner's claim, one arising from the fact of the short notice time per se and another from violation of the specifically given notice.

The second basis is not available in the 1B situation. The analysis must centre on how the notice provision itself works and how it interoperates with measurement principles in damages. The benefit of giving primacy to the 1B situation is that it serves to focus the initial analysis, which can then later be expanded upon.

Another justification is that the 1B scenario appears most practically relevant. Of the 5 short notice cases and arbitrations touched upon in this thesis, 4 revolve around 1B situations (see table 3 below). A possible explanation for this trend is that a 1B scenario can arise whenever an unexpected change of circumstances leaves the option to keep the vessel on hire commercially untenable for the charterer e.g., a delay at port or at sea closing the window thought available for another voyage. Plausibly, such occurrences are not exceedingly rare. A 1A situation requires on the other hand, that the charterer first issues a notice in good faith and then proceeds to upend that estimate in such a way that time is gained. That path is plausibly somewhat narrower.

[7] In that regard, it is natural to attach minor commentary to overstay of notice (3C) although the thesis focuses on short notice situations.

1.2.4 Limitations

1.2.4.1 Charter forms

The redelivery notice-clauses used in today's trade can likely trace their origin to the first Baltime 1908 form.[8] Such clauses are found across the board of modern standard forms from NYPE to Linertime and Supplytime. The formulations vary somewhat but broadly follow the same template. These can thus be regarded as a 'family' of standard redelivery notice rules. The discussion in this thesis aims at this set of clauses with an emphasis on the Baltime and NYPE formulations.

In contrast, the bespoke BIMCO Redelivery Clause for Time Charter Parties 2017 falls outside the scope of study. The clause offers a comprehensive regulation of all aspects of redelivery, including notices, and it is designed to remove interpretive doubt. This entails choice-making. The clause provides inter alia, that the owner *can* refuse redelivery prior to expiry of the definite 2-day notice. To manage the scope and remain in the framework of existing research and case law, the thesis will not engage in separate analysis of the bespoke clause.

1.2.4.2 Subject matter

The core subject matter of this thesis is the applicable loss perspective in the owner's claim for damages. This means that application of other rules in damages such as basis of liability, mitigation, foreseeability and so on are not *independent subjects of study*, but they will at times naturally become a part of the core discussion, and it will at other times be natural to extend discussion to these issues to complete the picture.

1.3 State of research and case law.

1.3.1 Norwegian law

Johs. Jantzen's position is clear – a redelivery on short notice can only give rise to a claim for damages premised on a right to *earlier given notice*.[9] In the only known Norwegian arbitration to date implicating the research question, ND 1952 p.104 *Mimona* cited Jantzen's view. Mid-century one could therefore discern the contours of a Norwegian maritime law position.

A half-century later, Hans Peter Michelet questions the propriety of the earlier held view, citing inter alia concerns that the owner would struggle to prove a disposition loss and that any such loss might face foreseeability-issues.[10] Citing American arbitrations, Michelet suggests to instead apply the *early redelivery*-perspective. It bears mentioning that one of his cited cases, *Loreto Compania vs. Crescent Metals*, does not address a short notice situation at all; the sole

[8] In his 1909 book, Jantzen had not yet incorporated commentary on Baltime 1908, cf. Jantzen (1909), preface (VI). At the time, there was no general notice requirement, cf. Jantzen (1909), p. 33.

[9] Jantzen (1919), p. 240. Jantzen (1938), pp. 411–412.

[10] Michelet (1997), pp. 201–202.

irregularity was that the charterer redelivered too early in relation to the communicated date of redelivery, a 2A situation.[11] *Transocean Shipping v. Western Shipping* does on the other hand operate on a view that the owner is entitled to damages premised on later redelivery following short notice.[12]

It is less easy to say whether Per Gram endorses one perspective over the other. In the earlier editions of his treatise, Gram emphasizes the owner's *lost opportunity* and thus seems to concur with Jantzen that damages ought to be premised on a right to earlier notice.[13] The revised language of the 1977 edition could be taken to indicate a change of mind, Gram now emphasizing that if the owner redelivers prior to the expiry of the required notice time, it constitutes *early redelivery*.[14]

Neither of the above-mentioned authors purport to provide a comprehensive in-depth analysis of the subject matter. For both Jantzen and Gram, it is most essential to refute the spurious notion that an owner can refuse redelivery for reason of short notice alone. It is first in Michelet's treatment, that the issue is explicitly framed as a tension between alternative loss perspectives in damages. While there is no doubt that Jantzen describes damages as premised on a right to correct earlier notice, rather than 'correct later redelivery', it is perhaps less easy to know if he would be as adamant that other loss perspectives must be wrong, as he is that redelivery cannot be denied. One may further observe that the authors do not entertain the potential for differential analysis on account of the type of short notice irregularity. Due to the above as well as more recent international developments, one may conclude that the subject matter has ample research potential.

1.3.2 English court cases.

When the *The Liepaya* was redelivered on a short one day's notice, the Commercial Court awarded damages premised on placing the owner as if notice had been given at a correct earlier time corresponding to the Jantzen approach.[15] *The Liepaya* remained the English authority until *The Great Creation* came along in 2015. Since the market rate was higher than the charter rate, the owner stood to benefit from having their loss viewed as a lost opportunity to fix the vessel earlier. The owner therefore wanted to follow *The Liepaya*. The Commercial Court did not agree. Proposing first that whether one or the other perspective is correct may turn on the facts of each case,[16] the Judge concluded that it would be "wrongful" and "contrary to principle" to

[11] 1970 AMC 1966.
[12] 1955 AMC 875.
[13] Gram (1948), p. 113.
[14] Gram (1977), p. 178.
[15] [1999] Lloyd's rep 649 (672).
[16] [2015] Lloyd's rep. 315 (322, para. 40)

posit a non-breach scenario in which the charterer was to issue notice at a time when they in reality had no reason to believe that they would redeliver at the time they did.[17] The owner was awarded damages premised on a later redelivery pursuant to proper observation of notice time following the notice that was given.

Case	Notice requirement	Communicated notice time	Redelivery after (actual notice time)	Situation	Loss perspective
Loreto Compania (US)	15 days	22 days	16 days	2A	Early redelivery
Transocean Shipping (US)	30 days	9 days	8 days	~1B	Early redelivery
Mimona DS (N)	10 days	~1 day	~1 day	1B	Late notice
The Liepaya (UK)	15 days	1 day	1 day	1B	Late notice
The Great Creation (UK)	20 days	Proforma	6 days	1B	Early redelivery (variable)

Table 3. An overview of cases and arbitrations

2 Methodology

2.1 Initial remarks

As time charter law is largely subject to freedom of contract, the time charters themselves will form the central source of law. Charter law is further illuminated through case law and the maritime law literature. We have already seen positions taken by the Norwegian maritime law authors. The idea of this thesis is, however, to look at the question with fresh eyes and to rather return to the Norwegian literature at the end to review our findings.

The Norwegian case material is sparse. Besides customary principles of interpretation, analogy and contract law concepts will be used as tools to illuminate and substantiate the charter construction. Since we are at times entering into somewhat unchartered territory under Norwegian law, the discussion may be seen as having a de sententia ferenda-character. But the perspective is in principle the law as it is.

The research question also touches on the law on damages. When the thesis discusses measurement principles, it will rely on contract law principles especially as illuminated by the Norwegian/scandinavian literature. When we later in the discussion focus on the 1A scenario and the

[17] [2015] Lloyd's rep. 315 (321, para 30).

question of the binding effect of notice, we also rely on principles and theory on the formation of legal dispositions as well as contract law concepts.

When the perspective is Norwegian law, it will for most practical purposes entail that the parties have opted for Norwegian law to adjudicate disputes arising within an international standard form. A recurring methodical issue in that context is the relevance and weight of foreign, primarily English, legal opinions on the charter construction. It is therefore necessary to anchor and explain how the thesis approaches foreign source material. (see 2.2). Thereafter, the overall conceptualization of the research problem will be explained followed by a layout of the remaining thesis structure.

2.2 Norwegian law interpretation of agreed documents formed within an English legal tradition.

2.2.1 Introduction

Owing to the historically dominant position of London as a centre for maritime arbitration with English as governing law, time charters on international standard forms are not only drafted in the English language, but within an English legal tradition and typically with English choice of law-clauses. Even American forms such as NYPE will typically provide for English law as an option on an equal footing with US maritime law. Consequently, it becomes a methodical point of interest to assess the relevance of English sources of law when the parties elect to have their dispute governed by Norwegian law. A point of departure is that use of international standard forms represents no *formal* derogation from Norwegian law when it follows from the parties' choice of law that Norwegian law applies. The propriety of leaning on foreign law must therefore first be justified internally.[18]

2.2.2 Some general remarks

English and Norwegian construction of contract do not always follow the same principles. For example, Norwegian law does not operate with a clear functional distinction between interpretation and implication,[19] whereas English law provides stringent criteria for the implication of terms.[20] In a similar vein, Norwegian law of contract contains more background material to provide for gap-filling or 'implication of terms in law'.

Accordingly, charter disputes may occasionally hinge on how tensions between the two legal systems are resolved. The decision in ND 1952 p. 442 *Hakefjord*[21] provides an example. The

[18] Haaskjold (2013), p. 421. Selvig (1986), p. 4.

[19] Tørum (2019), p. 104 (3-205 and 3-206).

[20] Tørum (2019), p. 111 (3-222).

[21] See also ND 1950.398.

vessel was found to be off-hire on subjective grounds pursuant to Norwegian background law supplementing the objective grounds found in the charter. In ND 1983 p. 309 *Arica* the English view controlled the outcome. Also concerning off-hire, the issue was whether to calculate time lost on a gross basis adhering strictly to the wording as one would under English law, or to imply a limiting net principle as one would under Norwegian law pursuant to rt. 1915 p. 881 and then MC 1893 § 144 (2). Norwegian law treats agreed standard documents somewhat akin to private legislation, therefore paying heed to the drafters' design.[22] The charter in question was drafted with a view to English law, and the arbitrators concluded (2–1) that there was a clear precondition to apply the rule contained within the prior English precedent of *The Westphalia* (House of Lords, 1891). Unlike in *Hakefjord*, the issue was not formally solved on background law:[23]

> Efter flertallets mening må spørsmålet besvares benektende. Godtar man at et standardformular efter norsk rett må tolkes i overensstemmelse med konsipistenes klare forutsetninger, gir en fortolkning av off hire klausulen løsningen, uten at det er nødvendig å trekke inn bakgrunnsretten, det være seg engelsk eller norsk rett.[24]

When *Arica* referred to the drafters' clear preconditions, the decision invoked an interpretive *result* and not *the interpretive method*. Accordingly, *Arica* did not resolve that one more generally ought to apply the foreseen English *method of interpretation*. Such a view would represent a radical break with Norwegian tradition. Selvig rejects that reference to the drafters' preconditions can lead to general incorporation of English principles of interpretation.[25] The parties may of course *agree* on the English method as the interpretive rule, but this point of view will have limited reach when the parties have elected for Norwegian law to govern the dispute. This is not to say that the interpretive style is blind to the contract's origin. Given the exhaustive and detailed English style, one may by way of ordinary criteria and common sense find cause to apply a more objectivized and system-oriented style of interpretation.

So far, the conclusion is that English law imposes itself primarily through its case law as seen in *Arica*. There, the question presented itself neatly. *The Westphalia* was antecedent to the drafting; it was unequivocal, and the clause adopted its language. More difficult questions arise when the line of authorities is posterior to the drafting, as in the case at hand with *The Liepaya* and *The Great Creation*. The justification can no longer be tied to the drafters' specific idea.

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[22] Falkanger et al (2017), p. 35. Haaskjold (2013), p. 418. Rt. 1991 p. 719. Note that an inter-subjective understanding inter partes will override the intentions of the drafters.

[23] *The Westphalia* was relevant as *interpretive data* per Haaskjold's terminology, cf. p. 424.

[24] *Arica*, quoted in Selvig (1986), p. 6.

[25] Selvig (1986), p. 24.

As a general matter, posterior caselaw on standard forms clarify the meaning of its terms – it becomes part of the charter law relied upon by the parties.[26] But the extent to which one ought to adopt *English* case law has to be regarded as uncertain.[27] Krüger goes far in advocating for incorporation, whereas Solvang (along with Selvig) advises a degree of caution.[28] The difficulty of a partial approach is its vulnerability to internal inconsistencies. *Hakefjord* and *Arica* seen together provide an example, where the off-hire grounds are drawn pursuant to the expansive Norwegian view, while the duration of off-hire is drawn pursuant to the expansive English view, thereby skewing the risk allocation between the parties. But the answer cannot be full incorporation either, as this would undermine the parties' choice of law as well as the Norwegian system of law. No more can the answer be to ignore the form's English law background and international use. In the superposition of Norwegian and English law, one cannot escape difficult line drawing. English cases may both be relevant and carry weight but cannot be relied upon blindly. Below we will attempt to draw the line as it relates to the subject matter and case law relevant for this thesis, but not more broadly or precisely than necessary for the analysis herein.

2.2.3 The thesis' use of foreign case law

It seems a requirement that the English cases are sufficiently clear and consistent for Norwegian arbiters of law to precondition an outcome on them. It is not for Norwegian law to settle doubtful questions of English law. It is questionable whether there is an undisputed English rule contained within the English line of authorities. *The Great Creation* undermined *The Liepaya* and is currently precedent, but the issue has not been subject to Court of Appeals-review. Moreover, *The Great Creation*'s ratio invokes principles for drawing non-breach scenarios, rather than a particular charter construction. The argument on which the outcome relies therefore sorts under the law on remedies. Absent specific regulation, Norwegian law governs the parties' remedies irrespective of the contract's origin.[29] *The Great Creation* is therefore not considered authoritative in a Norwegian law perspective.

When the thesis later on discusses the binding effect of notice, similar reservations apply to giving effect to English decisions insofar as they turn on English doctrines on formation of legal dispositions. Due to the requirement of consideration, English law will not consider a redelivery

[26] Haaskjold (2013), p. 417. The standard form's 'trykknappseffekter' per Krüger (1989), p. 519.

[27] Haaskjold (2013), p. 423. Krüger (1989) on pp. 886–887

[28] Krüger (1989), pp. 886–887. Solvang (2007), p.151. Krüger contends that it is unfortunate if an English law standard form is subject to differential interpretation depending merely on where a dispute arises. But the issue of governing law will typically not turn on passive forum selection rules. Since the charter's default law is English, for Norwegian law to govern usually entails an active choice.

[29] Selvig (1986), p. 26.

notice a contractual promise but may ascribe to it the effect of promissory estoppel on the criteria of that doctrine. For this and other reasons, the relevant English authority *The Zenovia* is not considered instructive.[30]

Legal harmony and other equitable concerns offer a more flexible justification for paying attention to international legal opinions. Kurt Grönfors proposes to give effect to this concern by employing a retrospective international adjustment of the domestic interpretive result.[31] In context of this thesis, it justifies having an eye towards *common points* of construction among international authorities. In that regard, English court cases carry more weight than American arbitrations.[32] Occasionally, the *idea* of harmony is stronger than its reality. As Solvang points out, there are also differences between American and English maritime law.[33] Bearing that in mind, one ought to perhaps not worry too much about certain distinct Norwegian/Scandinavian rules in the charter law. There may as well be equity in giving parties a meaningful choice of law.

Looking beyond doctrine, foreign cases provide illustration material and lines of reasoning that are useful food for thought and analysis. This becomes especially valuable when the Norwegian case material is as sparse as it is. To that end, the thesis relies substantially on foreign case material. This international outlook is in line with tradition in Scandinavian maritime law.

2.3 Why loss perspective?

The issue at hand is whether the owner's relevant losses are those caused by notice arriving X days late, or those caused by redelivery occurring X days early. We refer to these as alternative loss perspectives because they determine the direction to look for potential losses. Unlike a *causal chain*, a loss perspective does not set out to describe reality; it is a normative device that provides a setup for the causal inquiry. Loss perspective is therefore conceptually equivalent with *causal perspective*.[34] It is thought beneficial to frame the research question in this way because it puts the disputed matter into its appropriate context i.e., measurement of damages. Secondly, it provides a neutral framework for analysis i.e., it does not presume or tend towards any outcome. *Any* measure of damages operates with a loss perspective.

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[30] See ch. 5.2.2.

[31] Grönfors (1989), p. 52.

[32] There are concerns with giving weight to American arbitrations, see Solvang (2009), p. 120. The available decisions are many, but often divergent and lack instruction from above as parties are effectively barred from appealing.

[33] Solvang (2009), pp. 96–101.

[34] The term loss perspective is preferred to avoid invoking the dichotomy between the two causal perspectives that may generally be applied in the measure of damages i.e., the positive and negative interest of contract. The discussion here is narrower and occurs within the framework of the positive interest.

Alternatively, one could treat it as a matter of understanding where the 'gravamen of the breach lies', as it is said in e.g., Carver on Charterparties. It is certainly not incorrect to ask the question in this way, but it is not preferred here. While the relevant losses are those *caused by the breach* – meaning a breach analysis and a loss perspective analysis is closely related – to identify the breach is not always sufficient to identify the correct loss perspective.

Even when one has fully understood the breach, the contractual norm *may* be of such a character that it does not follow logically what ought to be considered correct performance for the purpose of measuring damages. This may be the case when the contractual norm has still unresolved freedom degrees, a wiggle room. A classic example is where a party to a sales contract may choose the final quantum to be delivered within a range and default occurs prior to the exercise of said option. To determine the applicable loss perspective then requires the application of norms in addition to interpretation of the primary contractual rule. The bigger point is that legal controversies may arise in the process of defining 'correct performance' for the purpose of measuring damages.[35] Another reason to extend analysis to include measurement principles is the existing discourse on the research problem, which relies in part on the application of such principles.[36]

2.4 Remaining layout

The main body of the thesis consists of three chapters. Chapters 3–4 seek together to answer the research question as it pertains to the 1B short notice situation, whereas Chapter 5 centres in on the charterer's redelivery in contravention of what was stated in the notice emphasizing the 1A scenario.

Chapter 3 interprets the redelivery notice obligation i.e., what is required of a redelivery notice and what it *does* within the normative framework of the time charter. Building on the previous conclusions, chapter 4 discusses and puts forth the thesis position on the correct loss perspective in context of damages. Chapter 3's perspective can be said to be negative in the sense that it is tailored for the effect of a 1B short or missing notice i.e., when notice is lacking.

In contrast, chapter 5 is based on a positive perspective in the sense that it examines whether the charterer is in some way bound by that which is positively communicated in a notice. There is a functional comparison between the perspectives applied in chapters 3 and 5 with the contract law concepts of *failure to inform* (*misligholdt opplysningsplikt*) and *information risk* (*opplysningsrisiko*). It can be regarded as a question of its own – even if the obligation to notify is

[35] Falkanger (1965), p. 173: "Both scenarios can be difficult to ascertain in context of damages, not only because of evidentiary issues, but also because difficult legal questions may arise (translated)."

[36] I.e., *The Great Creation*.

merely an obligation to inform with no pre-defined pull on other contractual rules – whether one is still bound in some way by the information that one does give. There is of course an element in charter construction in this exercise as well, since any such binding effect can only be understood in light of the contractual obligation to which a notice responds.

3 Time charter construction

3.1 Introduction

In this chapter, we will construe the redelivery notice obligation with emphasis on what is required of notification (3.2.), what a (short) notice does in the normative framework of the charter (3.3) and whether the obligation requires a result or merely an effort of some standard (3.4).

3.2 Proper notice's criteria

3.2.1 Introduction

The English noun notice was borrowed from Old French and derives originally from the latin verb *gnoscere* meaning "come to know, to get to know".[37] According to the Oxford English Dictionary, a notice is a "notification or warning of something, especially to allow preparations to be made." The term notice may refer to both concrete and abstract concepts. On one hand, it may reference the specific message. On the other hand, notice may invoke the amount of time from notification until the event i.e., notice time. The phrase *on short notice* is an example of such use, conveying that something occurred with little time to prepare.

From a drafting point of view, the terminological ambiguity may present a challenge, as one may want to have requirements that pertain to the specific communication, for instance that it be written and what information it must and may contain, but also requirements that pertain to abstract notice time. In the following, we will attempt to show how the various formulations achieve these effects.

3.2.2 The redelivery notice clauses

The rule on redelivery notices was originally introduced in Baltime 1908. In the latest Baltime edition, it reads as follows:

> the Charterers shall give the Owners not less than ten days' written notice at which port and on about which day the Vessel will be redelivered.[38]

The scope of information to be provided is defined with reference to both the place and time of redelivery. There is an *about* qualifier concerning the time of redelivery that may be understood as a permissive norm, allowing the charterer to qualify his communication with some flexibility. If one accepts that view, the effect of the about qualifier is to give the charterer some leeway as to how accurate notice must be. When the charterer is permitted to say that redelivery will occur

[37] Etymonline.com/word/notice

[38] Clause 7 Baltime 1939 (2001 revision). The formulation is essentially identical to Baltime 1908 except that the requirement for notice to be written has been left out in recent editions, cf. Jantzen (1919), p. 100. It is otherwise common to ask for written notice, cf. e.g., clause 55 NYPE 2015.

on about 11 January and assuming the qualifier permits at minimum a 1-day margin of error, it makes it so that there is no mismatch between notice and redelivery if the latter occurs on 12 January. If, however, that same notice takes effect on 1 January and redelivery occurs on 10 January, while still within the margin of error, the charterer will technically be in breach having given only nine days' notice, whereas the clause requires not less than ten days' notice.[39] For error to occasionally be permitted in one direction only is perhaps an oddity, but the drafters may have considered that the charterer had every opportunity to avoid that disparity by planning for longer notice e.g., 12 days rather than ten.

In NYPE 2015 the redelivery notice clause follows a slightly different tableau. Clause 4 (b) requires that the "Charterers serve the Owners with ___ days' approximate and ___ days' definite notices of the vessel's redelivery". Let us assume that two NYPE parties have agreed on ten days' approximate notice. Like in Baltime, there is flexibility here achieved with the term "approximate". Unlike in Baltime, the flexibility appears to extend not only to the accuracy of notice, but to the amount of notice time as well.[40] If the charterer issues an approximate notice on 1 January indicating redelivery on 11 January, following which the charterer redelivers on 10 January, the NYPE charterer is in contrast to the Baltime charterer not in breach.

It is common to refer to a redelivery notice requiring notice time, as we have done above.[41] We may define notice time as the amount of time that accrues between notice taking effect and until redelivery occurs. In the Baltime formulation, a notice time criterion emanates naturally from the text. The apostrophe linking the time parameter to the notice i.e., *ten days' notice* hints at an abstract and temporal quality. It is unnatural to say that the owners received ten days' notice only because the specific communication purported to be of that length, if the vessel was in fact redelivered on the day after receipt of the communication. The distinction drawn here is between *ten days' notice*, which by definition requires ten days of notice time, and *a ten-day notice*. The difference is that one may linguistically refer to a ten-day notice as such even if it is not followed by ten days of notice time, even if it may be accompanied with qualifications such as tentative, purported, inaccurate or proforma.

In some of the redelivery notice iterations, it is less easy to read into the wording a notice time criterion. One may observe that pursuant to NYPE 2015, the charterers are to *serve* the owners with approximate and final *notices.* The verb *serve* and the reference to notices in plural indicate that the clause describes the specific communications and what is required of them. The same

[39] Any such breach will likely be inconsequential.

[40] See also [2015] Lloyd's rep 315. Though Cooke J. ultimately disagreed on the loss perspective, he agreed with the arbitrators that 20 days' approximate notice was flexible enough to in effect require 18 days' notice time, cf. para 30 on p. 321.

[41] See e.g., Michelet (1997), p. 201: «notistiden».

can be said for when an amended clause requires a whole series of notices on the form "on redelivery charterer to tender 20/15/10/7 days approximate notice and 5/3/2/1 days definite notice".[42]

The question is whether this has material implications. It would be drastic to abandon the concept of notice time – or something that works essentially the same way – only because the clause describes the specific notices. Especially as the shift in formulation from Baltime is minor and follows naturally when the clause requires more than one notice. It is not a stretch to consider it inherent in a 20-day notice that it must – in order to be proper – be issued 20 days prior to redelivery. Alternatively, one can simply say that it is an implied requirement that a __-day notice is sufficiently accurate. The conclusion is therefore that it essentially does not matter whether the clause requires 15 days of notice time, or a 15-day notice.[43]

When, exactly, does notice time start to accrue? In this context, the notice functions as a *påbud* since it invokes the charterer's right to avoid breach through observance of the notice time. Consequently, notice takes effect at the time it reaches the recipient, but it does not depend on the recipient's knowledge.[44] For non-instantaneous communications such as mail and e-mail, this occurs when notice reaches the owner's mailbox or inbox without regard to the owner's knowledge of its content. Notice taking effect and commencement of 'notice time' need not occur simultaneously. Parties may for example agree that measure of time does not commence outside of the owner's business hours. In the absence of express regulation and considering the global nature of the shipping markets, the general rule is taken to be that commencement of notice time coincides with notice taking effect.

3.3 Redelivery notice – an obligation to inform, or a mechanism for redelivery?

3.3.1 Initial reflections

To understand the legal effect of a short notice, it is necessary to determine what a redelivery notice *does*. How does the rule of notice fit in the normative framework of the time charter? What is its role in the redelivery scheme?

If one looks at the landscape of contractual notices, two main classes emerge. We can distinguish between rules that ask for notice for the sake of notice so that it operates as a standalone obligation, and rules pursuant to which notice has a pre-defined legal effect outside of itself.

[42] [2015] Lloyd's rep 315. When a provision requires more than one notice, the *first* notice will often be the most important.

[43] But note that clause 7 Baltime requires *minimum* ten days' notice.

[44] Pursuant to *den avtalerettslige påbudsregel*, cf. Hov (2009), p. 109. The rule is consistent with clause 55 NYPE 2015.

The Norwegian EPC standard NTK 15 provides a good example as it contains notice rules of both kinds. There are a number of events and conditions that are the *company*'s risk, but upon discovery of which the contractor must notify the company, for example of an added regulatory burden pursuant to Art. 5.1 or intrusive behaviour from the company's representative pursuant to Art. 3.3. These notice duties have an effect beyond themselves, as the notification preserves the contractor's right to be indemnified through a variation order.[45] Differently put, absence of timely notice extinguishes that right. But the contractor also has a general duty pursuant to Art. 11.1 to notify the company whenever he has reason to believe that work will fail to progress as planned, whatever the reason for delay. A notice pursuant to Art 11.1 has no effect beyond fulfilment of that obligation to notify.[46] If the contractor does not comply, the company may under the circumstances claim damages for losses incurred due to the lack of notice i.e., similar to Jantzen's conception of a short redelivery notice, but it does not otherwise affect the contractor's primary rights and obligations.[47]

There is one duty to inform that is perhaps best understood to be sui generis, and that is the real debitor's pre-contractual duty of disclosure. When the real debitor neglects to give information about essential aspects of the performance that the creditor had good reason to expect, that neglect will transform the material requirements of performance so that it answers to the creditor's mistaken expectations.[48] Like in the short notice situation, the information is negatively flawed i.e., there is too little of it compared to what the norm requires. One could envision this rule as a solution model for the short notice situation, in the sense that the owner expects to get a properly long notice, and when he does not, that expectation is mistaken. The pre-contractual duty of disclosure is, however, not a liable analogy. It is based on a standard of honesty and good faith, as these values are greatly at play in the exchange of information prior to property changing hands.[49] A notice of redelivery occurs in contractu and is not subject to potential abuse in a comparable manner. While not a realistic fit for the short notice situation, the pre-contractual duty is mentioned here to complete a sketch of the various ways in which duties to inform work in contractual settings.[50]

We proceed to characterize what a redelivery notice rule may look like dependent on which of the two main classes of notice rules it belongs to. In the first alternative, the rule does nothing

[45] Kaasen (2018), pp. 272–273.

[46] Kaasen (2018), p. 272.

[47] But may coincide with neglect of one of the particular notice duties.

[48] See e.g., Sales of Goods Act § 19 (1) and Real Property Sale Act § 3-7. The duty is a general principle that also applies outside the statutory context, cf. Hagstrøm (2011), p. 148.

[49] In Norwegian jurisprudence, the understanding of the duty as a standard of honesty is underlined by its close association with the Formation of Agreements Act § 33.

[50] While the real debitor's duty to inform is *pre-contractual*, the interesting feature is that it carries into contract.

more than lay down a narrow obligation to inform ahead of redelivery. Understood in this limited way, the rule on notice does not regulate the lawful time of redelivery. It is a standalone obligation that asks for notice only for the sake of notice. While it is redelivery that lets us ascertain breach, it does so only because it provides us with the factual input to conclude that there was a prior information deficiency, and not because there was fault in the timing of the redelivery per se.

In the second alternative, notice acts as the key that eventually opens the window for lawful redelivery. The obvious analogy is to notices of terminations in e.g., tenancies and employment agreements, wherein to issue notice is the act that initiates cessation of contract pursuant to a pre-defined procedure. If a notice of redelivery is to be understood correspondingly, it regulates the lawful time of redelivery in a layer above the charter period regulation.

Were one to ascribe to a notice of redelivery the same effect as *notice* in e.g., tenancies, it would entail that redelivery could not – with respect to its timing – lawfully occur prior to the end of a notice period of pre-determined length commencing from the owner's receipt of notice, no matter what it ostensibly communicated. If so, one could confidently assert that any redelivery prior to the full observation of notice time would be a breach *in the timing of the redelivery*, thereby answering the research question pertaining to the correct measure of damages. It is therefore pivotal to examine whether the time charter notice provision regulates the lawful time of redelivery in a comparable fashion.

3.3.2 Finite versus non-finite contracts

Provisions for *notice* to initiate cessation are especially relevant in non-finite contracts, as tenancies and employment agreements often are. When the contract period is not set in advance, it is sensible to have a procedure that considers the other party's expectation of continued performance *as well as* interest in preparing for what lies ahead after cessation. Commonly, there will be a pre-defined notice period between the notice and lawful cessation defined by the terms of the agreement or by default or mandatory background law. The Norwegian Tenancy Act § 9-8 provides a default period of 3 months commencing on the 1st day of the month following notice. Similarly, the Working Environment Act § 15-3 provides various default and partially mandatory rules on the length of such periods. Outside of the statutory context, it is probably a general principle that *non-finite* service and lease agreements can be terminated (when they so can) only after a period of reasonable notice (absent agreement to the contrary).

Time charters are finite i.e., they regulate in advance the duration of the parties' obligations to perform, commencing with delivery and ceasing with redelivery. Whether the charter is *flat*, *about* or contains express wide margins, the parameter for redelivery is pre-agreed. There is

therefore no inherent need to provide for another legal mechanism to regulate the lawful window of redelivery. The observation hints to a more limited role pertaining narrowly to an obligation to inform. Nevertheless, parties may of course agree on an additional rule layer, wherein notice takes part in addition to the charter period regulation. Whether that is the case, is a matter of construction.

3.3.3 The textual basis

It is said that one is to interpret commercial contracts objectively.[51] This means that one looks to what a reasonable person would infer from the agreement in its relevant context.[52] In that regard, the letter of the provision is naturally the central factor.[53]

Neither Clause 7 Baltime nor its relatives describe in express terms that notice acts as a procedural key. It does not expressly regulate anything other than the giving of notice itself. Contrast with Supplytime's clause on the charterer's discretionary right to terminate early:[54]

> The Charterers may terminate this Charter Party at any time by giving the Owners written notice of termination as stated in Box 14, upon expiry of which this Charter Party will terminate.[55]

The desired legal effect is achieved only *through* issuing notice, and it does not materialize prior to the expiry of the pre-defined notice period. It lays down a procedure for cessation. Any redelivery prior to the end of the notice period would not merely violate a right to information, but the timing of the redelivery would itself be premature.

Compare with Supplytime's Clause 2 (d) on redelivery notices:

> Redelivery – (…) The Charterers shall give not less than the number of days' notice in writing of their intention to redeliver the Vessel, as stated in Box 8(ii).[56]

The provision straightforwardly asks for notice without describing it as a key to open a legal window. It appears to ask for notice for notice's sake.

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[51] Unless there are grounds to use the 'inter-subjective' approach, but this is not relevant in a general exposition like here.

[52] Tørum (2019), pp. 23–24.

[53] See e.g., rt. 2002 p. 1155 *Hansa Borg*.

[54] Offshore forms come with an option to provide the charterer with a discretionary right to terminate early, which otherwise tends not to be a feature of time charters.

[55] Supplytime 2017 Cl. 34 (a).

[56] Supplytime 2017 Cl. 2 (d).

A difference in wording is indicative of a difference in meaning. If one intended for a notice of redelivery to have a comparable function, it would be straightforward to achieve that effect. The clause could have read: "To redeliver, the charterer must give the Owner ___ days' notice of redelivery, upon expiry of which this Charter Party will cease." Even without the last sub-clause, to pre-condition (lawful) redelivery on observation of notice would go some way in tying notice to the lawfulness of the timing of the redelivery.

The differential analysis given above is only valid for Supplytime, which is a relatively *recent* and specialized time charter. Outside that context, one cannot as easily draw negative inferences.

Maybe one simply did not think of or consider it necessary to spell out the link between notice and the lawful timing of redelivery. And it is probably true as *a general matter*, that when contextual factors indicate as much, there is a case to be made for drawing analogy to notice as a procedural key, even if the text does not expressly provide for such a mechanism. It may therefore be regarded as unsatisfactory to rule out that alternative without having considered other factors. In doing so, one ought to recognize, however, that a rule to that end would alter the *de jure* charter duration and thereby the extent of the main contractual obligations of the parties. An interpretation along those lines should therefore be well justified when the text does not speak in its favour.

3.3.4 The contractual scheme

The objective approach does not entail construing meaning narrowly from the wording alone.[57] It is a common-sense approach where one must pay regard to both textual and contextual factors. One such factor that is especially relevant here is the scheme of the contract i.e., its internal context. When there is a comprehensive agreed document, there is a strong common-sense presumption that the contract makes a coherent whole.[58]

In that regard, one may observe that a procedural interpretation does not easily fit with *flat* charters, wherein the pre-agreed cessation is in principle set to fall on a specific day. Outside the limited right to overlap, there is little space for an additional rule on the lawful time of redelivery. If the ship is redelivered on short notice prior to the day of expiry – so-called underlap –, a claim for missing charter hire will be based on the minimum charter period.[59] If the

[57] Rt. 2010 p. 961. para 44. Tørum (2019), p. 24: 2-029.

[58] See especially HR-2016-1447-A paras 43-44 as regards agreed documents.

[59] But note that unlike Norwegian and English law, American law recognizes the charterer's right (and duty) to redeliver early without liability if the last voyage's overlap exceeds the underlap, cf. Michelet (1997), p. 171.

notice time extends beyond the day of expiry, one would be pressed for an answer. Under what circumstances, if any, can a short notice lead to an owner's claim for hire *beyond* the pre-agreed day of cessation?

When the notice obligation was introduced in Baltime 1908, flat forms were standard. The original Baltime was drafted through and through to operate as a flat charter.[60] It seems close to inconceivable that the drafters would intend for a notice rule comparable in function to notices in tenancies without regulating in detail how this rule interoperates with the charter's pre-agreed day of expiry. This can likely be ruled out.

The modern trade favours express wide margins for the legal certainty they offer. And when there is e.g., a two-month window of redelivery, the contractual scheme does not *stand in the way* for notice to function as a procedural mechanism. However, the express wide margin charter would face a contradiction of its own. When the formulation, as it typically does in its modern iteration, asks for e.g., 15 days' approximate notice, the period in-between notice and lawful redelivery is defined with reference to an *approximate* number of days. This imprecise measure of time precisely lends itself to the kind of legal uncertainty that express wide margins are designed to avoid. What is more, when a provision requires an approximate and a definite notice as is common in modern charters, one would expect specific rules on how the two notices interoperate if they did in fact take part in a procedure for cessation.

In any event, it would be unfortunate if similarly worded clauses could yield one interpretation for flat charters and another entirely when there are express wide margins. When a similarly worded clause is used in related agreed documents like time charters, business common sense suggests that one sticks to one interpretation.[61]

3.3.5 Summary

The textual and contextual factors point in the same direction. It appears, that the clause means what it says, and it asks for notice for the sake of notice. It is narrowly an obligation to inform. International opinion does little to challenge that conclusion. *The Liepaya* based damages on a right to earlier notice, congruent with a pure obligation to inform.[62] Not even *The Great Creation* offers support for the mechanical interpretation. While the Judge did indeed hold that the owner in *some cases* were entitled to damages premised on a later redelivery, he would in other cases only have a right to damages based on earlier notice.[63] The procedural interpretation

[60] See Clause 1 on the period and Clause 7's regulation of overlap rights. Jantzen (1909), p. 100.
[61] Tørum (2019), p. 141 (4-042).
[62] [1999] Lloyd's rep 649 (p. 672).
[63] [2015] Lloyd's rep 315.

would not permit such variability, as the owner would always be entitled to redelivery at the end of the pre-defined notice period. What remains are the two American arbitrations *Transocean* and *Loreto Compania*. Absent persuasive value, they do not carry enough weight to alter our conclusion.[64]

Accordingly, we will prima facie infer that in case of short notice, the owner may only claim as damages his disposition losses from not having been given earlier notice – the Jantzen approach. When the breach lies in the information rather than the timing of the redelivery, damages rectify the owner's predicament by altering the information. One may look at it as redelivery controlling when notice ought to have been given, rather than the other way around. In chapter 4 we will look closer at how measurement principles apply to this situation given our interpretation of the contract and examine whether there are viable counterarguments to our initial inference. But first, we will look at one more aspect of the content of the obligation to inform.

3.4 Content of the obligation – result or effort?

3.4.1 Introduction

When the charterer redelivers on short notice, he will often be able to say that the underlying reason for the shortcoming was an unforeseen event or delay necessitating a sudden change of plan i.e., there was no longer time to employ the ship – at least not desirably – on another voyage within the timeframe of the charter, as became the case for the charterer in *The Great Creation*.[65] On account of everything that can go wrong in unexpected ways either at sea or in and around ports,[66] the charterer may want to say that it is unreasonable to require of him to predict the unpredictable. Is it not sufficient that he attempted to comply with all the diligence that can reasonably be expected?

The question is – does the obligation require a result or merely an effort of some quality?[67] If the charterer promised a result e.g., to issue notice approximately 15 days ahead of redelivery, it is sufficient to observe that he was not able to deliver on this promise to ascertain breach of contract i.e., the obligation is objective. On the other hand, if he only needed to apply an effort of some standard, he may be compliant if non-achievement was excusable under the relevant standard.[68] *Resultatforpliktelser* and *innsatsforpliktelser* as they are pronounced in Norwegian

[64] The decisions do not discuss the issue in any detail.

[65] Not to invoke associations to the doctrine of broken assumptions.

[66] The charterer typically bears the remuneration risk (pursuant to the off-hire rule) for loading operations, piloting, tugging and bad weather during the voyage.

[67] Hagstrøm (2011), pp, 126-130. Lilleholt (2017), p. 137. UNIDROIT principles, cf. art. 5.1.4.

[68] I.e., excusable already at the breach of contract-stage of analysis. Whether there is basis for liability in damages is formally a separate question.

terminology are merely labels given to interpretive results. Whether the requirement is one or the other (or a combination) is informed by ordinary interpretation. There have, however, been attempts to develop guidelines to assist in doubtful cases.[69] In the question at hand, the relevant factors can be summarized as the wording of the provisions on the one hand and the risk and difficulty associated with the charterer's compliance on the other.

3.4.2 The obligation to inform is objective.

When NYPE 2015 requires of the charterer to "serve '__ days' approximate notice", it describes a result and not merely an effort. The 'approximate' qualifier does not alter that impression. It merely helps to define the required result with some wiggle room. Baltime is even clearer in demanding "no less than ten days' notice". One can contrast these formulations with an indicated uncertainty as to whether the result should be achieved.[70] Textual principles therefore indicate that the charterer is obliged to achieve a positive result i.e., to give notice at the requisite time ahead of redelivery.

We may suspend our conclusion on account of the fact that notice duties universally *tend* to be obligations of effort. Consider for example NTK Article 6.3, which puts on the contractor a duty to examine and notify the company of errors and discrepancies in company supplied materials.[71] While he is required to notify of such errors actually discovered, he is not required to notify of errors that he did not discover and *should not* have discovered. Likewise, the realdebitor's pre-contractual duty of disclosure involves a standard of honesty and diligence.[72] The same holds true when loyalty in contract – inherently a subjective norm – requires notification.[73] This comports with an understanding that notice duties generally are duties of care – concerned with sanctioning and incentivizing a standard of behaviour inter partes. The legislative justification may be to promote honesty and fair practice, but it is also efficient for contracting parties to share at low cost information that is valuable to the other. Either of those justifications falls short in rationalizing risk allocation on a purely objective basis.

What is typical, however, carries less weight when specific indicators – above all the wording – is clear. The parties are of course free to allocate risk in a way that deviates from the typical as part of the bargain struck.[74] The redelivery notice provision presents as a specific and positive

[69] See UNIDROIT principles art. 5.1.5, cf. Hagstrøm (2011), pp. 128-129.

[70] As in rt. 2011 p. 670: "tar sikte på".

[71] Kaasen (2018), pp. 188-189.

[72] Hagstrøm (2011), pp. 162-165 for a discussion of the level of diligence generally required.

[73] E.g., notification of anticipatory breach, cf. Rt. 1938.602; Rt. 1970.1059. On duty of loyalty: Rt. 1988.1078.

[74] An example is the client who hires an attorney on outcome oriented 'no cure no pay'-terms, as opposed to the more common professional effort-requirement.

regulation thus operating independently of the general duties. When the parties regulate redelivery notices, it entails a positive allocation of risk, and this allocation of risk *may* follow a different logic than the one that usually applies to notice duties. If the logic that follows from a literal interpretation is plausible and reasonable within the contractual scheme, there is little justification to depart from it.

For the owner, a redelivery notice is crucial. To negotiate follow-on charter terms is potentially complex and time consuming, and the alternative cost of idleness is substantial. As the operator of the ship, the owner will often be in a fairly good position to deduce when redelivery will occur when everything goes as planned. From the owner's point of view, it may therefore be regarded as important to be left with a recourse also when notification becomes difficult.

A comparison can be made to another risk allocation rule employed within time charters i.e., the off-hire rule. It is important to stress that the off-hire rule concerns the *remuneration risk (i.e., is hire payment suspended or not)* and not the *performance risk (i.e., is there breach of contract or not)*, as we are discussing here.[75] The unforeseen events mentioned above may typically be bad weather causing delayed voyages, port side issues like strikes or queues, or problems in the charterer's commercial relations. These are typically all charterer risks i.e., the ship remains on-hire. While one cannot conflate one type of risk allocation with another, the observation in this regard must be that *it is not inconsistent* with the system of risk division in the contract, that the charterer bears the risk when such unforeseen events make it difficult to notify ahead of redelivery.

In assessing whether it is reasonable to assign to the charterer the objective performance risk, one must also consider the fact that the owner may not refuse redelivery and demand 'specific performance' of the notice obligation. The owner can only claim damages, with the rules and limitations that apply. All things considered; this seems a plausibly balanced arrangement. Consequently, there is insufficient reason to depart from the straightforward reading of the provision.

The charterer's obligation is objective, but it is not unlimited. It follows already from the formal definition of breach, that the debitor does not answer for irregular performances that can be traced to the creditor or circumstances for which he answers.[76] The latter criterion means that the doctrine extends beyond the classical instances of mora creditoris and into the owner's

[75] Hagstrøm (2011), p. 40 on the terminology.

[76] Hagstrøm (2011), p. 327. Krüger (1989), p. 736: (3).

sphere of risk. This is a specific determination–there is no automaticity in that the owner answers for any and all circumstances to which he is connected.[77] Most evidently, the owner answers for his own breaches of contract (e.g., issues with crewing, hull and machinery) and it is otherwise often thought that risk follows function.[78]

Consider the following example. The window of redelivery is 1 January–31 January. The charterer plans to complete unloading in port on 14 January, complete loading for a final voyage on 16 January and redeliver on 29 January. After unloading on 14 January, the engine malfunctions and it takes 5 days to repair. There is no longer time to complete the final voyage, and the charterer redelivers on short notice. Since the charterer's predicament can be traced to the engine malfunction, a clear owner risk, it seems likely that the non-performance does not constitute breach and the owner may consequently not claim damages.[79]

[77] See especially Lilleholt (2017), p. 261.

[78] Hagstrøm (2011), p. 333. But it turns on a concrete assessment.

[79] The answer is not obvious, as the charterer still makes a conscious choice to redeliver on short notice. One will likely have to determine whether it all in all is *reasonable* to ascribe the performance risk to the charterer in such instances, cf. also Lilleholt's (2017) remarks on p. 261. In construction law, creditor risks often yield deadline extensions. The instance here can be seen as the converse situation of a notice time reduction.

4 The applicable loss perspective in the short notice situation (1B)

4.1 Introduction

Consider a charterer that redelivers on a short 3-day notice on 25 January in contravention of a required 20 days' notice. Pursuant to our view of notice as a pure information obligation, we may simply deduce that he was objectively entitled to notice on 5 January, and that damages ought to be measured correspondingly, as was our prima facie inference. But one may also observe that there are numerous ways in which the charterer could have complied with the notice obligation–he could, for example, have postponed redelivery. That hypothetical will often be a more *realistic* scenario, since it does not presume that the charterer can know in advance what may have been unknowable at the time. Why, then, premise damages on the former loss – or causal – perspective rather than the latter?

The question concerns how to conduct the causal inquiry. We are asking losses due to *what*? Since the answer is *breach*, one may think of that inquiry in terms of the economic difference between what actually occurred with a hypothetical *non-breach scenario*. Of course, there is much more to the measure of damages than a descriptive comparison of worlds. It involves numerous judgments and modifications based on rules on mitigation, remoteness and *compensatio*.[80] Due to these complexities, some authors have questioned the utility of a difference approach. [81] To measure damages remains, however, at its core a causal inquiry.[82] The purpose of damages is compensatory; it responds to a breach. To that end, the difference approach is intuitive and in cases of doubt, it provides a structure for the thought.

The critique is helpful in reminding us that a non-breach scenario is only a means to an end. We need to be acutely aware that when we alter a parameter to create a non-breach scenario, we define and calibrate the setup of the causal inquiry, which is a highly norm bound exercise. If we are reckless, our method may turn into a source of error.

To avoid error, it is held that we must follow the normative reasoning as it flows from the purpose of damages i.e., to compensate for breach of a contractual norm. In other words, the basic premise is to give economic effect to the aggrieved party's contractual right. The non-breach scenario must therefore be set up to give effect to said right, whatever content it may have. If there are any subjective or other limitations that apply, they must follow from an analysis of the contractual right.

[80] Hagstrøm (2011), p. 538.

[81] See e.g., Hellner (1995), pp. 358-359.

[82] Simonsen (1997), p. 302.

Against that backdrop, the thesis will in the following first conclude that our initial inference finds solid ground. Thereafter, the thesis will address the argument put forth by *The Great Creation*, before it moves on to discuss some unusual characteristics of the causal inquiry. Having concluded on the main research question, we will round off by revisiting Michelet's critique.

When we speak of losses caused by breach, *cause* is not to be understood in its strictest sense. When the charterer fails to issue notice in time, the breach is an omission. The causal relationship therefore does not exist in the real world as a physical phenomenon, but rather in a thought experiment. The legal relevance of that causal perspective is, however, not in doubt.[83] Omissions can be considered characteristic of breaches of contract since they often take the form of *non*-performance.[84]

4.2 Jantzen's approach stands firm

Let us first create a context for the discussion by bringing attention to a classical situation known to raise questions of law concerning the calibration of the non-breach scenario: on what basis should we calculate damages, when one of the parties has a non-exercised right to choose the final quantum within a range? The optional range can be explicit, or implicit in language like *circa*. Let us first assume that the party at fault holds the option. Let this be a quarry that agrees to sell to a buyer 80–100 tons gravel, seller's option. What amount of gravel does one calculate damages on when the quarry cancels? Three solutions have been proposed 1) the minimum value as most favourable to the option holder 2) the mean value in the range or 3) the most likely lawful quantum.[85] There is consensus in case law and literature that the first solution is correct.[86] The quarry only has to answer damages for 80 missing tons. The outcome seems just. The innocent party is, after all, not entitled to more than the minimum level of performance. Still, it is interesting to observe, that as no lawful choice was made by the party at fault, there is an inherent inexactness to the seller's would-be lawful performance.

This feature is noticeable also when we let the innocent party hold the non-exercised option. Consider a sales agreement for 1000 tons steel +/- 10% buyer's option, and that the seller unlawfully cancels the agreement prior to the final order. As the market for steel goes up, the buyer claims damages and would naturally want it measured on the high end of the range. Observe that the seller's obligation in this contract is conditional – the exact amount of performance is a function of the other party's choice – and the condition is irrevocably *unknown*. In that situation, it is not logically possible to define compliance in the specific. There is a space

[83] Simonsen (1997), pp. 324-325.

[84] Hagstrøm (2011), p. 468.

[85] Iversen (2000), pp. 122–123.

[86] Rt. 1913 p. 849. Rt. 1924 p. 91. Falkanger (1965), p 175 (see also note 13). Rodhe (1956), p. 481 note 3. Iversen (2000), p. 130. ND 1919 p. 88 NSC is often seen as an outlier in preferring the mean value. Its distinguishing feature seems to be that it did not consider the "circa" qualifier to have full normative bite, but saw it as an evidentiary rule. The distinction thus lay in interpretation of contract.

of normative inexactness. According to the consensus rule, the buyer does get the top of the range. But one could also defend a level based on what the buyer *most likely* would have opted for – that seems a sensible way to give effect to his *right* to choose, but it is a technically difficult rule and perhaps not as just. The point of all of this is to say that when the condition is unknown, there is at least a theoretical space for equitable arguments concerning the setup of the non-breach scenario.

The time charterer holds option rights concerning the duration of the charter within its lawful range.[87] He chooses when to redeliver within the lawful window of redelivery. The content of the obligation to notify ahead then becomes conditional on the exercise of this option. Before this condition is known, one cannot know the specifics of the required notice performance. When redelivery on short notice occurs, however, the condition cements itself into the course of contract between the parties. Pursuant to our construction of the clause, a short notice does not have the gravitas to pull on the lawfulness of the timing of the redelivery. The *fact* of the timing of the redelivery therefore does not constitute breach, and there is no legal basis to alter that parameter in the non-breach scenario. It was the charterer's free choice. The specifics of the owner's right to information must therefore be construed in relation to the redelivery that actually occurred.

Consequently, if redelivery on short notice occurs on 25 January and the charter demands 20 days' notice, the owner's right under the contract was to be given notice on 5 January, and this must be the perspective that applies for the measure of damages. If we assume as will be most common that the charter demands only 20 days' *approximate* notice, a 20-day notice on 7 January would be sufficient when we accept that the qualifier permits a 10% margin of error. Since it is the charterer that is given leeway, we base damages on the option most favourable to him i.e., 7 January pursuant to the consensus rule.

Our conclusion is not swayed by the fact that once short notice has been issued, there is only one way for the charterer to comply with the notice obligation–by issuing new and proper notice and keeping the vessel on hire for redelivery to occur later. The charterer cannot go back in time to issue proper notice. Indeed, if only the owner could refuse redelivery i.e., demand 'specific performance' of the notice obligation, there could be no other result than an extended period of charter hire.[88] As true as that statement is, it is merely descriptive. The owner is as we have ascertained not independently *obliged* to redeliver later; it just so happens that extended employment is the only possible way to achieve compliance. It is precisely the real-world consequences of specific performance that explain why parties may at times only claim damages.

[87] Falkanger et al (2017), p. 512.

[88] See supra note 1.

When that is the case, as here, the owner may only claim losses *caused by the breach* itself, not losses caused by the *choice to not rectify the breach*. That there might be a differential economic effect between damages and would-be specific performance is therefore a feature of the system.

The last point may be illuminated by examples from other areas of contract law. Consider a tenant who redelivers an apartment in a state of disrepair for which the tenant is liable. Consider that the owner either accepted redelivery, or that the law is such that the owner could not refuse redelivery. The owner may claim damages for the cost of repair and the loss of rent during the time allocated to such repair. Consider that the rent under the defaulted contract was much higher than the market rate at the time of redelivery. Will the owner be able to recover the higher rent of the contract during the time of repair since the only way in which the tenant could have complied with his obligations was to keep the apartment on hire and perform the reparations himself? The answer is quite clearly no. Loss of rent will have to be measured on market rates.[89] If not, the owner is compensated for more than the breach itself.

A debitor is to be compensated, *but no more.* These two sentences correspond with a positive and a negative aspect to causality as a measurement criterion.[90] Of these two aspects, there can be little doubt that the negative has the more rigid justification.[91] Were one to answer for more than the losses caused by breach of a contractual norm, it would undermine party autonomy and freedom of contract. In contrast, the threshold is lower for interfering with the positive aspect. It is not always reasonable for the creditor to receive compensation in the full technical sense. The rules on mitigation duty and foreseeability operate to reduce the amount yielded by a pure causal assessment.[92] Even if there is casus mixtus i.e., some qualified culpability on the debitor's hand, the creditor cannot claim more than his losses, but he may stretch the foreseeability limitation. Consequently, one has to be loyal to the contractual norm when setting up the causal inquiry. Jantzen's approach stands firm.

4.3 Addressing *The Great Creation*

The Great Creation held that proper performance of the notice obligation may look different in one instance than another depending on the facts of each case. For the case before the court, it

[89] Wyller (2023) note 751: «Det kan også være leietap ved at ***ny utleie*** forsinkes…» (emphasis mine). Norsk Lovkommentar. Commentary to The Tenancy Act § 10-3.

[90] Simonsen (1997), p. 299.

[91] Ibid.

[92] Occasionally, a creditor can keep an advantage caused by breach without offsetting it against his losses, for example if the advantage was not *adequately* caused by the breach. One could argue that this gives the creditor a windfall. But even in that case, the creditor cannot measure *losses* beyond that which is caused by breach. It is only a question of how to offset losses and advantages.

was held that damages ought to be premised on a later redelivery, rather than earlier notice. We will here examine whether the argument has merit when transferred to a Norwegian law context.

The short notice was precipitated by unforeseen delays and disrupted plans. At the time of proper notice in relation to the redelivery that occurred, the charterer had no intention of redelivering about 20 days later as required. Had they given notice at that time, the court reasoned, it would not be given bona fide and on reasonable grounds as required by implied terms.[93] Similar duties flow from the general covenant of good faith and loyalty in Norwegian law of contract. Cooke J thus rejected that damages could be premised on such earlier given notice:

> To posit a "non-breach" situation on the basis that a notice should have been given at a time when it, in itself, would be wrongful and represent a breach or anticipatory breach, would appear contrary to principle.[94]

A first observation is that the good faith duty works in the interest of the owner, [95] yet in *The Great Creation* the charterer was able to rely on that duty as a *shield* against the owner's claim.[96] The effect of the argument is that the *owner's right* to have notices issued in good faith *limits* the owner's rights in damages. This is a paradox that invites us to question the validity of the argument.

As a point of departure, it is not so, that it can never be relevant whether a required act under the contract appeared reasonable for the debitor at the time. If the obligation in question is merely one of best effort, then the creditor's right is limited to that best effort, and he cannot claim more in damages. There is, however, not much to indicate that the *The Great Creation* construes the notice obligation as one of best effort. And if it did, it seems the correct result would be to excuse the charterer for the missing notice time prior to the time when he could reasonably be expected to notify.[97]

If the argument put forward by the Judge is correct, it could cause issue whenever there is an outcome obligation, as it co-exists with the general duty of loyalty in Norwegian law. For is it

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[93] [2015] Lloyd's rep. 315 (321, para 29).

[94] Ibid. (321, para 30).

[95] In *The Zenovia*, it was invoked by the court as an effective bar against a hypothesized practice wherein an abusive charterer keeps issuing new notices only to keep their options open, cf. [2009] 2 Lloyd's rep 139 (para 22).

[96] It was the owner that asked for damages to be premised on earlier notice.

[97] This is not a logical necessity. One could interpret the required effort to include keeping the vessel on hire only to comply with the obligation, but if one considers the obligation a subjective one, it would at least merit a discussion of when, if ever, the charterer may be excused.

not true, that from time to time, when there is breach of an outcome obligation, what was realistically required of the debitor to avoid breach would have appeared irrational and therefore in breach at the time? This is perhaps most poignant in the hidden defect-cases. Consider a vendor that, realistically, would have had to destroy the contracted goods to discover a hidden defect. Consider the famous bamboo stakes case cf. rt. 2004 p. 675, wherein a vendor shipped fungus-infected bamboo stakes that went on to destroy a great many cucumbers. The infection was not visible – it was a hidden defect, and its detection would have required costly and timely investigations. The vendor had no reason at the time to suspect infection. It could be argued, that to initiate investigations, with risks of delays in their shipment, would be erratic behaviour absent a reasonable basis for suspicion. None of this can matter.[98] The buyer had a right to receive non-infected stakes, and the buyer was under no obligation to show in a claim for damages that there was a realistic, alternative path to compliance that did not subjectively appear erratic.

Let us recall the rationale for using non-breach scenarios and the difference approach. We held in the introduction that it must correspond with the purpose of damages, which is to provide compensation for breach of a contractual norm. In the short notice situation, there is an infringement of the owner's right to information prior to redelivery. The difference method's scope of inquiry is thus limited to exploring the consequences of that breach. If there are limitations in the range of contractual positions that the owner can recover, then those limitations must follow from an interpretation of the right. As the damages are not premised on breaches of good faith duties, those norms simply fall outside the scope of inquiry. For that reason, the argument brought forward in *The Great Creation* is not an example to follow for Norwegian arbiters.[99]

4.4 Unusual characteristics of the causal inquiry

4.4.1 Basis of liability

Detailed analysis of basis of liability-issues falls outside the scope of this thesis, but as we will soon see, the culpable act in short notice situations often occur *after* the owner's *real injury* from the breach of contract.[100] That is peculiar enough to warrant a closer look at whether this implicates the validity of our causal inquiry.

Norwegian law of contract has traditionally held that for liability in damages to incur, there must be negligence or other culpability in addition to breach of contract, unless there are grounds to impose a stricter rule of liability.[101] Over the last 50 years, the landscape has

[98] That is, of course, not to say that it cannot matter in the basis of liability-stage of analysis.

[99] *Internal critique* of The Great Creation falls outside the scope of this thesis.

[100] This a translation of the Norwegian term *realskade* corresponding to the infringement of one's protected interest, whether in torts or contract, see Simonsen (1997), pp. 295–297.

[101] Lilleholt (2017), p. 336. Hagstrøm (2011), p. 468. Strict liability with force majeure-exceptions typically applied to generic performances.

changed. Through statutory enactments the so-called control sphere liability has been given a broad scope. And it is increasingly debated whether it offers a basis for liability outside the statutory context.[102]

In the time charter setting, it is still prudent to assume no stricter liability than negligence, in large part because culpability is the liability model of choice in the Maritime Code.[103] Time charters being subject to freedom of contract, a possible line of argument is that standard forms written with a view to be applied mainly under English law silently incorporate a strict liability rule. That argument will likely not succeed. Any attempt to forego general rules on liability would need express basis.[104]

It will rarely present an issue to show culpability in short notice situations. If the charterer is not negligent by failing to issue notice when he objectively ought to, he will consciously opt to redeliver on short notice in *conscious* breach of contract. The mere fact that the breach is conscious can likely not, however, be seen as constituting *qualified* culpability, in the sense of a gross disregard of the owner's more *central* interests.[105]

4.4.2 The place of culpability in the causal inquiry

When assessing losses in the short notice situation, the causal chain begins when proper notice objectively ought to have been sent, leading to the owner's real injury. The nature of the injury is the owner's lack of information from that time onward, causing his passivity that eventually leads to a financial disposition loss in the time after redelivery, when he could have obtained better employment for the vessel had it not been for the missing notice.

Then, let us incorporate the subjective basis of liability-norm in the analysis. Consider the following practical scenario. There is little over one month left of the charter and the vessel is unloading in port. The charterer plans to utilize the vessel for a month-long voyage after unloading. Then, through no fault of his own, the charterer's vessel becomes heavily delayed in port. So much so that there is not enough time to perform the planned voyage. He decides to redeliver on short notice since the alternative is to keep the vessel on hire without a satisfactory commercial purpose. The culpable act in that instance is that he *chooses* to redeliver on short notice. It therefore occurs sometime after he objectively ought to have sent notice.

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[102] Lilleholt (2017), p. 347.

[103] E.g., MC §275 cf. §383 and §384.

[104] Falkanger et al (2017), p. 195. Selvig (1986), p. 26. See also cl.12 Baltime 1939 (2001).

[105] Hagstrøm (2011), pp. 479-481 on how criminal law's mens rea concepts do not translate directly to contract law.

As we can see, the owner's real injury transpires before the culpable act. Therefore, the injury and losses cannot be considered as caused by the culpable act. The situation evokes known past losses-problems from other areas of law. An example is when the innocent party wants to recover negotiation costs incurred prior to reaching an invalid agreement, wherein the other party acted culpably. Culpability in relation to invalid agreements sorts as a tort in Norwegian law.[106] In torts as in contract, there must be causality between the breach (*rettsbrudd*) and the losses, and in torts the breach and basis of liability is one and the same. The culpable act therefore constitutes a limiting causal criterion. Unless the culpable reason underlying the invalidity existed prior to the negotiation costs, they will fall outside the traditional scope of the innocent party's right to recover.

In contractual damages, it is breach of contract that constitutes the breach (*rettsbrudd)* and defines the causal perspective. The short notice situation therefore does not have to grapple with the culpable act as a limiting criterion in the causal inquiry. That said, the basis of liability must of course *cover* the breach in contractual damages. *That* criterion is fulfilled as there would have been no breach had the charterer not chosen to redeliver on short notice.

4.4.3 The objective norm – breach of contract

Not only does the owner's injury occur before the culpable act, but it is also antecedent to the act that lets us *ascertain* the breach–the redelivery. Rix J. observes that the short-given notice can be considered an anticipatory breach until redelivery occurs:

> If the charterers had relented and given proper notices, any actual breach would have been avoided.[107]

There appears at first sight to be a real problem with our causal inquiry. We have said that the causal inquiry is to be set up to examine the effects of breach of a contractual norm. And we have said that the real injury is the owner's state of information onwards from the time when he objectively ought to have been given notice. If breach is to be assessed at redelivery, then how can the preceding injury be caused by it?

The contradiction is, however, only apparent. We must distinguish between the fact of breach itself i.e., missing notice and the fact that as a practical matter lets us determine that there has been breach. The redelivery reveals the prior deficiency. What occurs is an ex-post assessment

[106] Hov (2009), p. 312. Simonsen (1997), p. 306. It is a typo when Simonsen writes «blitt båret frem av den alminnelige kontraktsretten». Elsewhere on the same page, he refers to rules in tort *deliktsretten*, see also p. 332.

[107] [1999] Lloyd's rep. 649 (672).

of breach. Such assessments are neither unknown nor problematic in contract law.[108] The parties are free to agree on a norm with a retroactive element. The short notice-situation illustrates that breach of contract may not always be accurately described as a *natural occurrence*, but it may always be described as a discrepancy between descriptive reality and a normative standard.

In *Transocean v Western Shipping* the arbitrators did not accept an ex-post assessment of breach. It is not clear from the ratio whether the arbitrators' decision follows from a particular construction of the charter norm, or the notion of a general principle as relates to breach assessment. Given how we have construed the redelivery notice obligation in this thesis as a right to information, it is the time of redelivery that determines when the redelivery notice ought to have been sent. In that regard, it makes no difference that the specific short notice may be the first naturally occurring projection of a breach. The formal definition of breach is an objective deviation from fulfilment of a contractual obligation.[109] This is the understanding of breach that our causal inquiry must rely on, as it brings forward the content of the contractual right.

The quote from Rix J. above was made in context of deciding when the duty to mitigate begins, and he concluded that it could not begin prior to when breach becomes (ex-post) effective i.e., at the time of redelivery. It seems uncertain whether this view on the duty to mitigate can be upheld under Norwegian law. It is clear enough that the owner must be aware of (or ought to have been) of the likelihood of breach, but it is likely sufficient for the breach to be anticipated, cf. Hagstrøm (2011), pp. 582–582. As argued below in chapter 5, a genuine notice will likely have to be considered at least to some extent binding under Norwegian law, so that the charterer cannot at will retract and issue new notices without the owner's approval. Considering that, the owner will be in a good position to mitigate following a genuine short notice.

4.5 Michelet's critique

4.5.1 Introduction

Having reached a conclusion, we can take a step back to review Michelet's two concerns on the viability of the owner's remedial position under the traditional Jantzen approach. One being that the owner would rarely be able to show a disposition loss, and the other being that even if he did, one could easily claim that such a loss would be unforeseeable.[110]

4.5.2 Proving a disposition loss

To be sure, if short notice had transformed into a redelivery obligation, it would be straightforward for the owner to make his case. There would likely also be fewer disagreements, so long

[108] Krüger (1989), p. 138. For English law, see [1996] 2 Lloyd's rep 66 (73) *The Nizuuru* concerning the converse situation of a laycan narrowing provision and notice of delivery. Note that the Judge's finding in this regard was entirely obiter, as he had already found that the charterer (unlike the owner in the redelivery situation) had a right of refusal. Quoted in *The Liepaya* [1999] Lloyd's rep 651 (672).

[109] *…that cannot be traced to circumstances for which the creditor answers*, cf. Hagstrøm (2011), p. 327.

[110] Michelet (1997), p. 202.

as both parties accepted that interpretation. All the same, it may be that Michelet overemphasizes the owner's difficulties. The core challenge for the owner is to show that he would have employed the ship earlier (or otherwise more favourably) if he had received earlier notice. If one approaches that evidentiary question in the same manner as Rix J. did in *The Liepaya*, much of the difficulty evaporates. He accepted without further ado, that the owner was entitled to say, absent evidence to the contrary, that he would use as much time to fix the vessel had he been given earlier notice as he ended up using. Let us consider an example. The owner receives short notice on 12 January prior to redelivery on 15 January. He was entitled to notice 11 days earlier on 1 January. After receiving notice, he starts to work on the next employment, being able to fix the vessel on 30 January, 18 days following notice. If we assume that he would have used the same amount of time to fix the vessel, had he been given earlier notice, the vessel would have been fixed 11 days earlier on 19 January. The owner would be able to recover damages for as many days as notice was missing. This will, however, not always be the case. If in the same example, the owner was able to re-employ the vessel on 23 January, there is only an 8-day window in which the owner could have made better dispositions. So, for the owner to recover all the lost notice time, there must be enough space of idleness following the redelivery.

The owner's disposition loss belongs to a category of losses that by their nature may be difficult to assess. This is because we are really asking what the owner would do, had he been in a different information state–a psychological evidentiary theme that is inherently unavailable. In such instances, one has in the Scandinavian literature proposed to let the causality assessment be informed by more rules-based criteria, rather than the pure descriptive exercise that normally informs a causality assessment.[111] Within this category, however, the short notice situation cannot be considered especially hard. This is because there really is not much one can expect the owner to do with a notice, other than using it to plan the vessel's future employment.

Any such rule of thumb as the one used by Rix J. must be used with caution. The evidentiary assessment is a concrete one, but it seems generally safe to assume that if a professional actor is given more time to take care of his interests, he will use that time productively.

4.5.3 The issue of foreseeability

A creditor cannot recover any and all losses caused by the breach. The causation must be sufficiently adequate. This means that the losses must *be reasonably proximate to the breach; the loss cannot be too remote, derivative, or unforeseeable*.[112] One may ask if the debitor could foresee the loss as reasonably probable on account of what he could be expected to know. One may apply a normalized assessment, asking whether the losses fall within the usual range of

[111] Simonsen (1997), p. 325 with further reference.

[112] Rt. 1983 p. 205 (p. 212).

outcomes. One may think of it as the scope of the reasonable, commercial risk undertaken by the parties considering the contract's object and purpose.[113] Strict foreseeability is, however, just one element in a holistic assessment. Even a foreseeable loss can be disregarded if it is too distant and derived in such a way that it is not just and reasonable to ascribe that burden to the debitor.

Disposition losses are often subject to foreseeability-scrutiny. Since they are consequential and depend on the innocent party's *use*, the outcomes may greatly vary with the individual circumstances and opportunities.

As far as disposition losses go, the ones typically suffered by the short notice-owner does not appear to be among the most problematic. This is because the purpose of prior notice transparently and precisely is to give the owner time to prepare for the vessel's further employment. When the owner loses such time to prepare, it is a natural consequence that disposition losses may ensue in the form of a delayed fixture. This type of loss, where there is a delay in the fixture that the owner would otherwise be able to avoid, seems to be in the core of the owner's remedies.

Moving outside of that core, one may be closer to encountering a foreseeability issue. An example is when sudden and dramatic market movements occur in between the time of proper notice and the actual time of notice. Let us for example say, that rates in the long market are 15 000 USD/day at the time of proper notice, while they slump to 11 000 USD / day at the time of actual notice. If the owner fixes the vessel on a 12 month-long time charter on the lower rate, arguing he would have obtained the higher rate on an equally long charter, if only he had received earlier notice, the purported losses would amount to 30*12*4000 ~ 1 440 000 USD. These losses would have to be disregarded as too remote and distant. Market movements are foreseeable, but extreme market movements in a small frame of time present like a chance occurrence. The observation is, that while *fixture delay* is a natural and foreseeable consequence, the question of whether there is a difference in the conditions of trade at the real and hypothetical time is much more random. It must also be regarded as unreasonable to let the time charterer carry losses extending far into the future. The missing time of notice seems like a natural limiter in that regard. When the owner loses 15 days of notice time, he may claim disposition losses as they accrue at least up until the 15 days he has lost, but not much longer. In conclusion, it seems that Michelet's concerns are exaggerated.

[113] Hagstrøm (2011), p. 548.

5 When redelivery occurs in contravention of notice (1A)

5.1 Introduction

		Actual notice time		
Compliance with given notice		**1) Short**	**2) Contrac-tual**	**3) Long**
	A) Early	1A	2A	3A
	B) On time	1B	2B	3B
	C) Late	1C	2C	3C

Table 4.

The issue to be considered in this chapter is *whether* the charterer's positively communicated notice has binding effect and if so, *how* it binds the charterer. When the obligation to notify is an independent obligation to inform as we found in chapter 3, it becomes a nuanced question whether and in what way the owner's reliance on the notice is legally protected.

Pursuant to the research question, the main purpose is to determine whether the 1A owner unlike the 1B owner has grounds to apply the early redelivery-perspective. It is natural to also comment shortly on the owner's remedies when the charterer overstays notice i.e., typically a 3C situation.

5.2 Redelivery notices as legal dispositions

5.2.1 Initial reflections

In one sense, there is no doubt that a redelivery notice has a legal effect i.e., to ensure that the charterer can redeliver in compliance with the notice obligation. What we are interested in here, however, is whether the notice also has promissory effects or is otherwise binding upon the charterer.

Since the notice is unilateral and responds to a contractual obligation to notify, it can only be understood through the lens of the charter. But the effect is not *explicitly* regulated therein.[114] It is therefore not unnatural to seek guidance in the general criteria for legal dispositions as adjusted to this context.[115] Even if one considers it an *agreed matter* for notice to be binding, one will have to take account of the specific circumstances. An owner can likely not rely with legal effect on a notice understood to be proforma (i.e., not genuine, or real) any more than a recipient of bad information can rely on it when he knew better.[116]

[114] Except NYPE 2015, see below.

[115] *Disposisjonskriterier*.

[116] Krüger (1989), p. 271: § 13.4 b.

5.2.2 Is notice binding at all?

The theme underpinning the general criteria for legal dispositions is the recipient's *justified expectation* that the disposition is made with binding effect.[117] When the criteria is applied in its ordinary context i.e., formation of agreements, a central indicator is whether the owner could reasonably infer that the charterer intended for his statement to be binding. As the charterer would have little reason to *want* to bind himself, this approach is not instructive here. A party's justified expectations is a general theme in the Norwegian law of obligations, including in contractu.[118] In that regard, a better indicator is whether the owner has a justified expectation for notice to be binding in light of the contractual obligation from which it derives. The visible purpose of a notice of redelivery is to allow the owner to prepare for the ship's further employment. If notice is not binding, the owner cannot well rely on it and the purpose would significantly falter. The owner is justified in expecting otherwise.

In contrast, *The Zenovia* concluded that under English law, there is no implied term that a redelivery notice is binding on the charterer. The issue was whether the charterer was in his right to retract 30-day approximate notice after 10 days and issue a new one only because he considered it opportune to squeeze in another voyage in a rising market.[119] When the charterer communicated his renewed intention, the owner had already arranged for the vessel's follow-on employment. The owner decided to withdraw the vessel from service at the conclusion of the original last voyage, and for that he was made to pay damages to the charterer.

There are a few reasons why *The Zenovia* is not instructive in a Norwegian law context. First and foremost, it turned on stringent English doctrines on implication of terms and promissory estoppel. As held in the methodological discussion, a Norwegian arbiter of law would be amiss to import points of view that are at odds with – in the sense of being alien to – Norwegian jurisprudence. Secondly, the decision has faced internal criticism, not least from the authors of Time Charters:

> "Pending further case law on the point, we respectfully adhere to the view that the gist of a redelivery notice is a statement or promise that there will be no further employment orders under the charter that are inconsistent, when given, with redelivery in accordance with the notice."[120]

[117] See e.g., HR-2017-971-A. Hov (2009), pp. 85-86.

[118] See e.g., Bjørge and Førland (2007).

[119] [2009] 2 Lloyd's rep. 139 (p. 139)

[120] Coghlin et al (2014), Ch. 15. 18. See also Semark and Andrews (2009).

The Judge sought to alleviate concerns about potential abuse by pointing out that there is a bona fide requirement when issuing notice. Yet, that requirement falls short in preventing a charterer from *subsequently* prioritizing his own interest in complete disregard of the owner's. When the charterer is permitted to do so, a redelivery notice may effectively become a trap for the owner. Alone the requirement of loyalty in Norwegian law of contract would likely preclude the charterer from such conduct.

It is a case-specific fact that the notice in question was qualified by no less than six reservations, having an impact on the Judge's ability to spell a promissory estoppel out of the notice that was in fact given. Accordingly, even if *The Zenovia* remains good English law, different facts may yield a different outcome.

5.2.3 A redelivery notice is not a promise to redeliver on or about a specific date.

Having concluded that under Norwegian law a redelivery notice is capable of binding the charterer, it remains to determine how. Is the redelivery notice to be treated akin to a promise to redeliver on or around the projected date, or does it have a more limited binding effect? We can observe from the outset that there is a tension between the charterer's employment rights in the charter period, and the owner's interest in building on the notice received. We have to balance both parties' justified expectations.

To illustrate the conundrum, one may consider a charterer that intends to redeliver when there is one month left of the window of redelivery. Since there will per notice be a month left of the charter, the owner will presumably fix the vessel on a voyage or time charter *beginning in a timeframe in which the previous charterer by contract has employment rights*. In that regard, the proposal is that notice is binding upon the charterer to the extent necessary to secure its purpose, but not further.

If one superposes the charterer's employment rights on the owner's justified interest in notice, one observes that the collision is complete when charterer overstays notice. This is the period of time where the owner is justified in planning the vessel's next employment, and this is where the owner risks a potentially costly conflict of engagements. While it may be inconvenient for the owner if the charterer ends up redelivering *prior* to the announced date, it does not undermine the undertaken effort to re-employ the vessel.

The owner may want to say that if he had been given correct notice at an earlier time, he would have been able to re-fix the vessel sooner; that the gap in-between is wasteful, and that the charterer bears the risk. In that regard, the 1A owner may pursue damages to give effect to his *information rights*, similarly to the 1B owner. It is still a short notice situation. But the purpose

of the notice clause does not justify treating the 1A owner preferentially by giving him a separate ground, which would effectively push the date of redelivery forward. The conclusion is that a redelivery notice does *not* amount to a promise to redeliver on or around that date. The proposal is that the obligation is negatively oriented and aims to prevent the charterer from overstaying notice.[121] A further question is whether this obligation is objective or subjective i.e., whether there is breach if the charterer overstays notice through no fault of his own such as a weather delay.[122] Since the obligation is borne by loyalty, one is probably closer to view it as a subjective obligation.

We have held earlier, that there is a functional similarity between the 1B situation and a *failure to inform* and the 1A situation and *stating wrong information*. The latter phenomenon of contract law is labelled *information risk* in Norwegian terminology. [123] In context of the 1A situation, the question would be if the charterer carries the risk for the information offered in the notice. The doctrine of information risk is mainly applied to information given about a performance *prior* to reaching agreement. Krüger goes far, however, in positing a more general information risk doctrine proposing that parties to a contract will often incur some legal risk when it provides information that it knows is valuable to the other party.[124] We will not consider the doctrine directly applicable, but can observe that it offers a better analogy here than the *failure to inform*-doctrine did in chapter 3.[125] This is because the information risk doctrine draws on a wider array of concerns, including risk allocation based on business common sense and pragmatism (i.e., control, prevention and reliance), rather than being narrowly tailored to a standard of honesty. If we explore the analogy, we may fist note that there is differentiation in the legal effect of giving wrong information.[126] The difference can be understood to lie in whether the norm violation was to fail to perform in accordance with the information given,[127] or whether it was to give the wrong information in the first place. [128] The point in this regard is to observe that while information may give rise to a binding legal effect, it does not necessarily entail treating the outlined information as if it also outlines a positive promise on part of the debitor. The question will turn on the creditor's justified expectation and associated equitable concerns. In that regard, our conclusion above is consistent with the information risk doctrine.

5.3 Remedies

5.3.1 1A

Pursuant to our conclusion above, the 1A owner is in the same remedial position as the 1B owner. Consider a charterer that issues a 15-day approximate notice on 15 January only to redeliver on short notice on 20 January. The owner in that instance may claim compensation by way of damages premised on a correctly given earlier notice.

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[121] A further possible support for this conclusion is the about/approximate qualifier typically permitted in a redelivery notice. When the communication is so qualified, it may appear less like a positively oriented promise. It is, however, not considered necessary to draw upon this point, and it is also questionable whether it is decisive, as many contractual promises do contain a wiggle room.

[122] The charterer would in any case be exempt from damages when there is no fault.

[123] *Opplysningsrisiko*. Not to be confused with information liability (*informasjonsansvar*).

[124] Krüger (1989), p. 268.

[125] *Misligholdt opplysningsplikt.* See ch. 3.3.1.

[126] Krüger (1989), p. 296.

[127] Common in the sale of goods-context.

[128] See e.g., rt. 1930 p. 1462 on wrongly stated size of an agrarian property. Gram (1977), pp. 212–213 for charter law examples.

5.3.2 3C

A primary question is whether the owner has a right to refuse an order that is incompatible with the already communicated date of redelivery. It is easy to sympathize with the notion that the owner is equally within his right to refuse as when the similar question arises in relation to the charter period.[129] This is an important remedy for the owner to ensure his interest in being able to rely on notice, as illustrated by the facts of *The Zenovia*. There are many nuances to the question of under what precise circumstances the owner is in his right to withdraw, with respect to the state of loading, where the vessel is and where it is on its way.[130] It is beyond the present scope to discuss these matters, but it seems appropriate to rely on already developed concepts akin to legitimate and illegitimate final voyage orders. This is also the solution in clause 4b NYPE 2015.[131] The clause obliges the charterer to refrain from giving orders incompatible with notice and is probably best understood as a response to *The Zenovia*.

Finally, it can probably be ruled out that the principle in MC § 389 second paragraph applies by analogy to overstays of notice, so that the owner in any case must base his *remuneration* on the charter rate until redelivery. MC § 389 second paragraph corresponds to the concept of additional performance under a contract,[132] where the debitor performs beyond the mutually pre-agreed boundaries. An overstay of notice does not call upon that principle so long as redelivery occurs within the lawful charter period.

[129] Michelet (1997), p. 186 in relation to charter period extensions.

[130] See in particular the discussion in Michelet (1997), pp. 186–191.

[131] NYPE 2015 Explanatory notes, p. 6.

[132] Alvik (2014), pp. 242–243.

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