Preface

The idea to write this book came about when I taught bills of lading and, in particular, charterparties, at Erasmus University Rotterdam (EUR) for several years. During my time as a professional lawyer, I handled many cases related to bills of lading, but very few cases in the field of charterparties. Dutch shipowners and charterers often agree on English law and English arbitration in their charterparties. Then a Dutch lawyer does not get involved. Preparing for lectures at EUR, I spent a lot of time studying English charterparty law. Dutch textbooks on maritime law hardly pay any attention to charterparty law.[1] The study of English charterparty law aroused my interest in it, which resulted in the plan to write a book that would also pay attention to charter law.

The book is intended for those whose practice involves maritime transport, charterparties and bills of lading. It seeks to explain how the law works in reality. In practice, the law is reflected in judicial and arbitral decisions. This book therefore describes maritime law relating to charterparties and bills of lading on the basis of judgments. These judgments show how civil law (applied by Dutch courts) and common law (applied by English courts) work in practice. The summaries of the judgments of the Dutch and English courts give an idea of the different approaches to an issue and the rules applied by them. The discussion of numerous court decisions in this book usually summarises the facts that are the subject of the dispute between the parties and the judgment. The description of the factual background in the context of which the judgment was given leads to a better understanding of the judgment. One can see the judge's approach to the issues.

There is a difference in the structure of law between contracts of carriage under bills of lading and charterparties. Contracts under bills of lading are subject to written law, in general the Hague Visby Rules. Charterparties are only incidentally subject to written law. Charterparties are generally governed by the contract entered into by the parties, often using a standard form, such as the GENCON form for voyage charters and the BALTIME or NYPE forms for time charters. Those forms contain a number of standard provisions setting out the essentials of the relevant charter.

The common charterparty forms generally provide that disputes are settled by arbitration. Contracts of carriage under bills of lading are much less likely to contain an arbitration clause. In arbitration in the Netherlands, an arbitral award is generally the end of the matter. This is different in England. There is often the possibil-

1. However, Papis Seck did write a dissertation on voyage chartering and bill of lading transport, but this work largely concerns a description of French law.

ity to appeal an arbitral award in court. Many English court decisions concern appeals against an arbitral award.

What is also important here is that the highest English court, the House of Lords and now the Supreme Court, has jurisdiction to rule on the interpretation of a particular clause. This is different in the Netherlands. In the Netherlands the interpretation of contractual terms is a question of fact in respect of which the Supreme Court has no jurisdiction.

There is a difference between the Dutch and English systems of law. In the Dutch system, civil law is generally laid down in codes. For example, maritime law is laid down in Book 8 of the Civil Code. The English common law is generally composed of judgments handed down by English courts over time. Unlike in the Netherlands, an English judgment from the nineteenth century may be relevant to current law. The case law discussed in this book shows that English common law has concepts and structures that are unknown in Dutch law. Conversely, Dutch law has concepts and structures unknown to English common law. The English case law covered in this book shows examples of English judgments that sometimes differ fundamentally from the way the civil lawyer would approach the issue.

With regard to bills of lading, this book concerns almost exclusively Dutch judgments. Many Dutch judgments have been rendered in this field over time. In some judgments it is also paid attention to English law, even if it was not considered necessary in this book to pay much attention to English judgments in order to broaden Dutch law. However, some notable judgments of the House of Lords/Supreme Court with respect to bills of lading have been discussed. The situation with regard to charterparties is completely different. Book 8 contains only a few provisions specifically written for charters, and there are very few judicial and arbitral decisions in this area. One cannot describe Dutch charterparty law using only Book 8 and Dutch judgments. English law, on the other hand, contains numerous judgments on charterparties. Moreover, English law can be considered leading in the maritime field. This book therefore describes charterparty law mainly by means of English judgments. However, with respect to voyage charters, on topics other than laytime and demurrage, quite a few Dutch judgments are mentioned. In relation to English judgments, I have sometimes indicated in a separate section when a Dutch court would probably reach a different decision.

The strict application of common law rules by English courts sometimes leads to remarkable decisions. One example is the House of Lords judgment in the 'Kanchenjunga'.[2] The charterer had nominated a port (Kharg Island) in an area where a war was raging. It was therefore an unsafe port which the charterers were not entitled to nominate. The owners accepted however to sail to Kharg Island. After arrival the master gave notice of readiness. The berth was occupied. On a certain day the Iraqi Air Force carried out an attack on the oil installations in Kharg Island

2. *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India* (the 'Kanchenjunga') [1990] 1 Lloyd's Rep 391 (HL).

throwing bombs. The master decided to leave before the vessel could be loaded. The House of Lords decided three things: (1) the owners could not withdraw their acceptance of the unsafe port, and their sailing away amounted to breach of contract; (2) the master was entitled to leave Kharg Island in view of the dangerous situation; (3) if the vessel had been hit by a bomb at Kharg Island, then the charterers would be liable for the damage to the vessel. These three decisions seem somewhat contradictory to a civil law lawyer.

The English case law covered in this book shows more examples of English judgments that sometimes differ fundamentally from the way the civil lawyer would approach the issue.

As mentioned above, charterparties generally stipulate that disputes should be settled by arbitration. English law and English arbitration are often chosen. In a number of standard forms, this is also pre-printed. If one wants something else, this must be indicated. Two Dutch parties also often choose English law and English arbitration. This may be done out of convenience: it is simply pre-printed and dispute resolution is often not very interesting for the contracting parties. People do not realise that dispute resolution in England is very expensive. Litigation is not cheap in the Netherlands either, but in England costs are significantly higher. I recall a case involving a claim amounting about EUR 350,000. On the face of it, it concerned a reasonably strong claim. The English court had jurisdiction. An English solicitor informed that the costs in the event of a loss would be at least EUR 350,000. This was a reason to abandon litigation.

It is often said that a case is generally handled better in England than in the Netherlands. English judges are generally very good. A lot of attention is usually paid to an arbitration or court case in England. A case is dealt with very extensively at the hearing. This leads to a substantial increase in costs for the client. The circumstance that a lot of attention is paid to the client's claim is obviously satisfactory for the client. On the other hand, a lot of attention is also paid to the points put forward by the other party. In the end, one then gets a judgment in which the positions of both parties are given due consideration.

It would, however, at least for Dutch parties, be worth considering arbitration or jurisdiction in the Netherlands. In this country, the competent Dutch court for maritime cases is the Rotterdam District Court, with appeal to the Court of Appeal in The Hague. Both the District Court and the Court of Appeal have knowledgeable judges who are specialised in maritime law. Parties can therefore expect their case to be very well handled by competent judges in the Dutch courts.

This book consists of four parts: General Considerations, Carriage under Bills of Lading and Hague Visby Rules, Voyage Charters and Time Charters. A brief description of some of the topics found in these parts will now be given.

In Part I (General Considerations) one finds remarks on the dominant role of English law in maritime law, and a description of some English concepts encountered in English judgments and that are unknown in Dutch law. There is a description of

some rules of Dutch procedural law that are frequently encountered in maritime proceedings, such as rules relating to the arrest of ships, guarantees for the lifting of an arrest, and summary proceedings. Attention is also given to the regulation of contracts of carriage (under bills of lading and charterparties) in Book 8. It contains a summary of the provisions of Book 8 that relate to the matter, giving the reader an idea of what is regulated in Book 8 in this field.

One further finds, inter alia,
- a discussion of the documents used in the context of carriage by sea, including in particular the bill of lading;
- a description of the essentials of a contract of carriage;
- an explanation of the differences between a single contract of carriage, a voyage charter agreement and time charter agreement;
- a discussion of the situation where a bill of lading is issued for a vessel under charter;
- a description of the carrier's right of cargo retention to secure its cargo claim;
- the questions that may arise when the provisions of the voyage charter are incorporated in the bill of lading;
- the importance of signing the bill of lading by or on behalf of the master;
- a discussion of the extent to which a stevedore or some other party who has been involved in the carriage, and caused damage, can rely on general conditions or bill of lading provisions limiting liability;
- in FOB sales, it frequently happens that the buyer enters into a contract of carriage, while the seller delivers the cargo to be carried to the carrier; attention is paid to the question as to who is then entitled to the bill of lading.

Generally, the discussion takes place with reference to Dutch statutory provisions and case law, but for a few topics English case law is invoked. For example, when discussing the differences between single transport contract, voyage chartering and time chartering, much attention is paid to English case law. English case law is also found in the discussion about the incorporation of charterparty provisions in the bill of lading. One sometimes finds a section reflecting the situation under English law.

Part II contains a detailed discussion of the Hague Visby Rules (HVR). The various articles are mostly discussed with reference to a multitude of Dutch judgments. Important English judgments covered are the 'Muncaster Castle', 'Amstelslot', 'CMA CGM Libra' and *Volcafe v Vapores*. The difference between the latter two judgments is striking. In the Volcafe case, the decision on the burden of proof relating to Article 3 paragraph 2 and Article 4 paragraph 2 (m) HVR was ultimately founded on the typical English concept of bailment and other considerations of English law. However, in the 'CMG CGM Libra' judgment, which was rendered a few years later, the Supreme Court went to great lengths to explain that the provisions of the HVR as an international convention should in general be interpreted by reference to broad and general principles of construction rather than any narrower domestic law principles. Reference was made to various articles of the Vienna Convention on the Law of Treaties 1969, and it was stated that international conventions should

be interpreted in a uniform manner and regard shall be had as to how they have been interpreted by the courts of different countries.

One further finds, inter alia,
- an explanation of the distribution of burden of proof between carrier and bill of lading holder in case of cargo damage;
- a discussion of the rules relating to the time limit for notification of damage and the time bar, as well as the provisions relating to the limitation of damage;
- the extension in Book 8 of the regulation in the HVR regarding compensation for loss or damage to cargo which applies to carriage under bill of lading, to charterparties;
- an explanation of the causation and application of 'overriding obligations'.

Chapter 11 deals with a number of clauses often found in bills of lading and sometimes also in charterparties. An important clause is the 'Paramount' clause, which governs the application of the Hague Rules or the HVR. The judgment of the House of Lords in *Anglo-Saxon v Adamastos* (The 'Saxonstar')[3] concerned a voyage charterparty for a number of voyages which contained a paramount clause. There were delays on voyages both on a non-cargo-carrying voyage and on cargo-carrying voyages, due to breakdown of engine-room machinery. The House of Lords held that the paramount clause means that the HVR also apply to charterparty provisions that do not cover loss or damage to cargo, and also to voyages in which no cargo is carried. It is suggested that this is probably viewed differently in the Netherlands.

An important clause is the FIOS clause. Dutch and English law differ on the consequences of this clause when the loading and stowage by the shipper leads to unseaworthiness of the vessel. Other clauses that are dealt with are the freight prepaid clause and the before and after clause. Another important clause is the Himalaya clause, which is fitted into the legal system differently in Dutch law than in English law. In Dutch law, the clause is based on Article 6:253 paragraph 1 (a contract creates the right for a third person to claim performance from one of the parties or to otherwise invoke the contract against any of them, if the contract contains a stipulation to that effect and if the third person so accepts). In English law such construction is not possible. The Himalaya clause ensures that provisions of a contract are made applicable in the relationship between two parties who are not both parties to that contract. However, the common law knows the doctrine of privity of contract, which means that a party cannot rely on or be bound by a provision in a contract to which he is not a party. In the 'Eurymedon' and the 'New York Star', the Privy Council found a way out for the applicability of the Himalaya clause in English law. The function of the Himalaya clause is to prevent cargo owners from avoiding the effect of contractual defences available to the carrier by suing in tort persons who perform the contractual services on the carrier's behalf, such as stevedore. The Himalaya clause does not have the effect of enabling the

3. *Anglo-Saxon Petroleum Company Ltd v Adamastos Shipping Company Ltd* (The 'Saxonstar') [1958] 1 Lloyd's Rep 73 (HL).

shipowners to take advantage of the exclusive jurisdiction clause in the bill of lading.[4] This is different in Dutch law.

Part II concludes with Chapter 12, which discusses title to sue under bill of lading and the question who is the carrier under bill of lading.

Part III deals with voyage charters. Much attention has been paid to laytime and demurrage. It is not always clear whether the charterparty is deemed to contain a safe port or berth warranty. One further finds a discussion of the cancellation clause and the question whether the exceptions laid down in the charter apply to the voyage of the vessel to the port where she is to be delivered under the charterparty. Delay, deviation and the English theory that deviation is a fundamental breach as a result of which the tortfeasor cannot invoke the bill of lading provisions, are discussed.

Chapter 3 discusses a number of clauses that are commonly found in charterparties, such as strike clauses and freight clauses. English law differs from Dutch law on the question whether the voyage charterer can offset the obligation to pay compensation for cargo damage with its obligation to pay freight. Where the bill of lading contains the clause 'freight payable as per charterparty', the question arises whether the carrier, who issued a bill of lading signed by the master, can claim the freight, if the parties under the voyage charter have agreed that the freight will be paid before the due date. Dutch and English law reach different answers. Much attention is paid to Dutch case law regarding the Owners' Responsibility Clause.

Part IV is titled 'Time Charters'. The case law cited herein concerns mainly English judgments.

In time charterparties, the requirement of seaworthiness plays in particular a role at two moments. An example is the Court of Appeal's decision in the 'Hong Kong Fir'.[5]

In this case, clause 1 of the applicable Baltime charter provided: 'the Vessel is delivered and placed at the disposal of the Charterers . . . she being in every way fitted for ordinary cargo service'. Clause 3 provided that the owners shall 'maintain her in a thoroughly efficient state in hull and machinery during service'. The vessel was chartered for a period of 24 months, and charterers had the option to add off-hire time to this period. The vessel was delivered to the charterers on 13 February 1957, and she sailed in ballast from Liverpool on that day. Subsequently, the ship had to interrupt its journey time and again due to ship defects. As a result, the vessel had been off hire for 66% of the initial seven months. Thereafter, the charterer cancelled the charter. The question presented to the English court was whether the charterer was indeed entitled to cancel the charter. The Court of Appeal

4. The 'Mahkutai' [1996] 2 Lloyd's Rep 1 (PC).
5. *Hongkong Fir Shipping Company Ltd. v Kawasaki Kisen Kaisha Ltd* (The 'Hongkong Fir') [1961] 2 Lloyd's Rep 478 (CA).

held that it was not. At the date on which the charterers purported to cancel the contract, the delay which had already occurred as a result of the incompetence of the engine-room staff and the delay which was likely to occur in repairing the engines and the conduct of the shipowners by that date to remedy these matters, were, when taken together, not such that they substantially deprived the charterers of the whole benefit which it was the intention of the parties they should obtain from the further use of the vessel under the charter party.

In the judgment it was found that the vessel was not fit for ordinary cargo service when delivered because the engine-room staff was incompetent and inadequate and this became apparent as the voyage proceeded. It was common-place language to say that the vessel was unseaworthy by reason of this inefficiency in the engine room. The charterer could have refused delivery of the vessel under clause 1. The judgment shows that after the vessel is put into service, dissolution of the charter is extremely difficult. It is probably easier under Dutch law.

Time charters generally include an arrangement of the duration of the charter period. In practice, it is difficult for the time charterer to schedule voyages so that the last voyage falls exactly on the last day of the agreed period. In practice, therefore, techniques are used to give the charterer some leeway as to when the ship should be redelivered back. Those techniques have been discussed. English case law distinguishes between legitimate last voyage and illegitimate last voyage. An illegitimate last voyage is a voyage in respect of which there is no reasonable ground to expect that after performance the vessel will be redelivered by the last permissible date (including any express or implied margin). It is accordingly an order which the charterer is not entitled to give. The owner need not comply with such an order, because he has never agreed to do so. A legitimate voyage is one in respect of which it was reasonably believed it would be completed within the charter period and any express or implied tolerance. In the 'Peonia'[6] it was held that even in the case of a legitimate last voyage the owners were entitled to claim damages for failure of the charterers to redeliver the vessel by the agreed date.

One further finds considerations on the assignment of the claim for hire by the owners to a third party, and on charter provisions relating to speed and bunker consumption. Attention is paid to some common and important clauses: safe port clauses, withdrawal clause, off-hire clause, employment and agency clause. Further topics covered include the clause 'Redelivery in the same good order and condition', the issue and consequences of an LOI (letter of indemnity) for delivery of cargo without presentation of the bill of lading, the Inter-Club Agreement, stevedoring damage, and possibilities of the shipowner to collect a hire claim in case of insolvency of the time charterer.

In the context of writing this book, I owe many thanks to Jac Rinkes for his inspiring interest, his practical advice and suggestions.

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6. *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd* (The 'Peonia') [1991] 1 Lloyd's Rep 100 (CA).

In this book, I have 'translated' the names of Dutch judicial colleges as follows:
Hoge Raad: Supreme Court
Hof Den Haag: Court of Appeal at The Hague
Rechtbank Rotterdam: Rotterdam Court
Kantonrechter/Rechtbank Rotterdam Sectie Kanton: County Court at Rotterdam

In recent judgments, England's highest court is also named Supreme Court. In general, there will be no confusion whether Supreme Court means the English highest court or the Dutch Hoge Raad. The mention of the publication (in England Lloyd's Register, in the Netherlands S&S: Schip en Schade) makes it clear whether the English court or the Dutch court is meant.

Articles of Book 8 Civil Code are represented as, for example, Article 8:450, generally without mention of Civil Code, etc. Article 6:200 is also generally rendered without mention of Civil Code. Article 6:200 means Article 200 of Book 6 Civil Code. In general, articles of the HVR are mentioned without the addition of HVR.

Book 8 was designed by Professor H. Schadee. Papers prepared as part of the parliamentary proceedings of Book 8 have been collected and arranged by M.H. Claringbould. In this book, the edition of these documents, which often summarise and clarify the drafted legal texts, is represented (especially in the notes) as PG (Parlementaire Geschiedenis: Parliamentary History). The relevant documents, such as Explanatory Memoranda, are sometimes referred to as Memoranda.

In translating into English from articles of Civil Code Book 8, I have made extensive use of 'The Civil Code of the Netherlands' by Hans Warendorf, Richard Thomas and Ian Curry-Summer, but at times I have slightly adapted the translation to the maritime terminology used in this book.

Judgments published after December 2022 are not included.

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Chapter 1

DUTCH LAW AND ENGLISH LAW

Dutch maritime law relating to carriage of goods and charterparties can be found in Book 8 Titles 1 and 2 Civil Code. However, the carriage of goods under bill of lading is essentially subject to an international convention (the Hague-Visby Rules, abbreviated as HVR), the rules of which can also be found in Book 8 Title 2. There are many Dutch court judgments regarding the interpretation and application of the provisions of the HVR. This is different for charterparties. There is no international treaty regarding charterparties, Book 8 contains very few rules in that area, and there are also few Dutch judgments in that regard.

In practice, charterparties are often concluded on the basis of standard contracts. Those standard contracts, which are mostly written in the English language, contain rules of great practical importance on a number of topics. Voyage charter agreements are often concluded on the basis of the Gencon form and time charter agreements on the basis of the Baltime or NYPE forms. English law contains a large number of court decisions relating to the interpretation and application of the various standard provisions contained in those charter forms. Since there are very few court decisions relating to charterparties in the Netherlands, Dutch courts, when faced with a dispute over a charter, will often refer to English case law for their decision.

English law has a number of concepts that are unknown in Dutch law. Therefore, for a proper understanding of an English judgment, some knowledge of those concepts unknown in the Netherlands is important. This chapter contains a brief discussion of some of those unfamiliar concepts.

The above shows that the content of maritime law is largely shaped by court decisions. Since Rotterdam is a large and very important port where many ships come to load and unload cargo. In the Netherlands, it is relatively easy to arrest a ship to obtain security for a claim against the owner of the ship. As a result, arrests and proceedings relating to maritime disputes are common here. This chapter therefore focuses on Dutch procedural law in the field of arrests and summary proceedings that is of interest to the maritime lawyer.

§ 1 The importance of English law

1. The dominant role of English law

The Dutch Civil Code contains only few provisions on charterparties, and nearly all of these provisions are of permissive nature. In practice, the parties use a standard charterparty as a template for their charter agreement. A standard form

contains a number of standard provisions, which are found, albeit with small alterations, in most of the other standard forms. These standard provisions contain the framework of the charter in question. They provide the basis of the nature and specifics of the charterparty in question.

The textbooks Voyage Charters[7] and Time Charters[8] deal with charter law on the basis of a particular standard charter. Each chapter begins with a clause or part of a clause from the standard charter chosen by the authors. For Voyage Charters it is the Gencon charter and for Time Charters, the NYPE form. This gives the impression that the provisions of a standard charterparty function, as it were, as provisions of law.

The following provides an example. In a voyage charterparty one would usually find provisions dealing with laytime and demurrage. Under a voyage charter the cargo is carried against the payment of a certain sum, called freight. The freight includes remuneration for a certain number of days, called laydays, in which the vessel is to be loaded and/or discharged.[9] If, however, the actual time used for loading or discharging exceeds the number of laydays provided in the contract, the charterer is liable to pay demurrage, for any day and/or part of a day by which the actual loading or discharging operations exceed the laydays. The basic system of laydays and demurrage is laid down in the standard provisions of the standard charterparty form. The various clauses may lead to a rather complicated system, but the basics of the system are to be found in nearly every voyage charterparty.

Having regard to the lack of (mandatory) legislative provisions, the law of charterparties is by and large based on the interpretation and application of standard provisions in standard charterparties by courts and arbitrators.

Standard charterparty forms often provide that disputes are to be decided by arbitrators in London and that English law is applicable. In many cases the contracting parties do not take the trouble to change this regulation. It follows that many charterparty disputes have been referred to arbitrators in London. English law may allow the parties in certain circumstances to challenge the arbitration award in court on the ground that the arbitration award violates the law. Under English law the interpretation and construction of a contract is a matter of law rather than a matter of fact, as in Dutch law. These factors provide an explanation for an abundance of English court judgments (including judgments by the House of Lords — or nowadays — the Supreme Court) on the interpretation of standard provisions in charterparties.

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7. Julian Cooke, Timothy Young, Michael Ashcroft, Andrew Taylor, John D Kimball, David Martowksi, Leroy Lambert, Michael Sturley, *Voyage Charters* (4th edn, 2014).
8. Terence Coghlin, Andrew W Baker, Julian Kenny, John D Kimball, Thomas H Belknap, *Time Charters* (7th edn, 2014).
9. Lord Denning in *Shipping Developments Corporation SA v V/O Sojuzneftexport* (The 'Delian Spirit') [1971] 1 Lloyd's Rep 506 (CA) at p 508.

This results in a dominant role of English law in this field. With respect to a lot of questions there is no authority by way of Dutch court or arbitration decisions available. It would not make much sense for Dutch courts or arbitrators to re-invent the wheel in every case and devise an interpretation of their own of a given clause in the English language, if there is an English decision available, unless of course there are reasons not to follow the English interpretation.

The importance of English court judgments on charterparties, which is noted in the Parliamentary History of Book 8,[10] is not typical of the Dutch attitude. In other West European countries, the same tendency can be detected. In Germany, Rolf Herber has pointed to the fact that the dominant position of England in shipping matters for centuries and the worldwide use of the English language have led to a large influence of English law, especially with respect to the provisions of bills of lading and charterparties.[11] For Norway, Falkanger, Bull and Brautaset have indicated that the accepted English view of the meaning of a clause would quickly become known in Norway and have an impact on its construction in Norwegian law.[12]

§ 2 Dutch law and English law

2. Different systems of interpretation

The strength of English law and the English system seems to be that the construction and interpretation of contractual provisions such as charterparty provisions is considered a matter of law,[13] and the meaning of a particular clause is hardly affected by the particular circumstances of the case. Furthermore, as mentioned above, in certain circumstances the interpretation of such provisions by arbitrators in their awards might be challenged in court.

The highest English court, the Supreme Court — formerly the House of Lords — has jurisdiction to entertain complaints about the interpretation of contractual terms, whereas the Dutch Supreme Court does not have such jurisdiction. In the past, quite a number of Dutch district courts, originally five courts and nowadays four Courts of Appeal rendered decisions on the interpretation of contractual terms, in respect of which a further appeal to the Supreme Court was virtually impossible. However, since 1 January 2017 the Rotterdam Court has exclusive jurisdiction in shipping matters, and the Hague Court of Appeal, which has jurisdiction to hear appeals against decisions of the District Court of Rotterdam, has the final say on the interpretation of charterparties and contracts of carriage.[14]

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10. See, for instance, PG p 451 (MvT Art 8:422, under 1) with respect to laytime and demurrage.
11. Rolf Herber, *Seehandelsrecht* (2nd edn, 2016) p 5.
12. Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *Introduction to Maritime Law* (1998)p 261. See further Hugo Tiberg, *The law of Demurrage* (4th edn, 1995) p 6-7.
13. *Scrutton on Charterparties and Bills of Lading* (22nd edn, 2011)p 23-24.
14. In Rotterdam Court 31 January 2018 S&S 2018, 38, Antelope Marine Ltd sued Spliethoff in the Rotterdam Court in respect of a claim based on the contract between them. Spliethoff argued that the Rotterdam Court had no jurisdiction for the contract contained a jurisdiction clause in favour

In England courts are bound by previous decisions of a higher court. It follows that English law provides certainty to the contracting parties as to the meaning of charterparty provisions, which have been the subject of judicial review. In this respect mention should be made of the high quality of the judges and the extensive dealing with all aspects of the case at the oral hearing.

Its strength is at the same time the weakness of the English system: in court decisions little attention, if any, is paid to views and legal decisions in countries with another system of law than the English one. Consequently, decisions of the English courts are often strictly based on English law and concepts without taking regard to views in other jurisdictions. In that respect English decisions lack an 'international' character. As far as legal proceedings are concerned, mention should made to the high costs of the detailed and extensive dealing with the case,[15] and the possibility that proceedings before an arbitration tribunal may be followed by proceedings in the courts.

3. Interpretation of contractual provisions under English law

As mentioned above, the construction and interpretation of contractual provisions in English law is a question of law. However, in Dutch law and a number of other systems of law, it is largely a question of fact. This leads to an importance difference in the way interpretation is carried out.

In English law the emphasis is on an objective interpretation of a contract. The interpretation[16] is primarily a matter of linguistic interpretation of written promises, rather than an investigation into the actual subjective intention of the contracting parties.[17] The contract document specifies what the parties have finally agreed

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of the Amsterdam Court. The Court decided that the Rotterdam Court had no jurisdiction and referred the dispute to the Amsterdam Court. As one was concerned with an international dispute, Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was applicable. Art 25 of the Regulation provides that if the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. The Regulation takes precedence over national law. It follows that the Amsterdam Court, whose jurisdiction was agreed in the abovementioned jurisdiction clause, has exclusive jurisdiction. For a critical review of the court's judgment see WE Boonk, (2018) TVR 63.

15. See a (rather extreme) example in *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA* (The 'Torenia') [1983] 2 Lloyd's Rep 210 (Commercial Court). The following days of treatment of the case were mentioned (in 1982): October 25, 26, 27, 28, November 1, 2, 3, 4, 8, 10, 11, 15, 16, 17, 22, 23, 24, 25, 26, 30, December 1, 2, 6, 7, 8, 13, 14, 15, 20 and 21. In *Canadian Pacific (Bermuda) Ltd v Canadian Transport Co Ltd* (The 'H.R. Macmillan') [1973] 1 Lloyd's Rep 27 (Commercial Court) Mr Justice Mocatta remarked that he was most grateful to Counsel for their extremely interesting and able arguments to which he had listened with pleasure and appreciation for some three and half days in dealing with the many points arising out of this somewhat unusual time charterparty.
16. In English legal writing and court judgments one often finds the term 'construction'. According to Baris Soyer in his contribution to *Legal Issues Relating to Time Charterparties* edited by professor D Rhidian Thomas (2008) p 17, note 1, in English law the word 'construction' is often used in the same sense as the word 'interpretation'; in the United States a distinction is sometimes made.
17. Geoffrey Samuel and Jac Rinkes, *'The English Law of Obligations in Comparative Context'* (1991) p 61-62. But see, more recently, Lord Clarke in *Rainy Sky SA and others v Kookmin Bank* [2012] 1 Lloyd's Rep 34 (Supreme Court) para 21: the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person

upon. Evidence of pre-contractual negotiations or of the parties' subjective intentions is normally not admissible.[18] Similarly, evidence of a course of conduct after the contract has been entered into is usually not admissible to explain its terms.[19] The obtaining of certainty in the construction and interpretation of charterparties is of primary importance.[20]

4. Good faith and duress in English law

In *Pakistan International Airlines v Times Travel*[21] the Supreme Court considered that the English law of contract seeks to protect the reasonable expectations of honest people when they enter into contracts. It is an important principle which is applied to the interpretation of contracts. But, in contrast to many civil law jurisdictions and some common law jurisdictions, English law has never recognized a general principle of good faith in contracting. Instead, English law has relied on piecemeal solutions in response to demonstrated problems of unfairness.[22]

The absence of these doctrines restricts the scope for lawful act economic duress in commercial life. The pressure applied by a negotiating party will very rarely come up to the standard of illegitimate pressure or unconscionable conduct. Therefore a court will rarely find lawful act duress in the context of commercial negotiation. There are to date two circumstances in which the English courts have recognized and provided a remedy for such duress. The first circumstance refers to exploitation of knowledge of criminal activity where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant's close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution. The second circumstance is about using illegitimate means to manoeuvre the claimant into a position of weakness to force him to waive his claims. Having exposed himself to a civil claim

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who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. See further Lord Hodge in *Wood v Capita Insurance Services Ltd* [2018] Lloyd's Rep Plus 13 (Supreme Court) at paras 10-11.

18. Scrutton, 22 (1-064). See Baris Soyer in his contribution to *Legal Issues Relating to Time Charterparties* edited by professor D Rhidian Thomas, p 29 ff. for an exception to this rule. Custom can help to express the express terms of a charterparty, but cannot alter the contract concluded; customs that are inconsistent with the express terms of the contract are inapplicable. See *Carver on Charterparties*, p 277 (4-190).
19. Scrutton, pp 22 (1-063).
20. See Lord Hobhouse in *Shogun Finance Ltd v Hudson* [2004] 1 Lloyd's Rep 532 (HL) para 49: The rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document is fundamental to the mercantile law of this country; the bargain is the document; the certainty of the contract depends on it. … This rule is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty. See further Lord Salmon in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia* (The 'Laconia') [1977] 1 Lloyd's Rep 315 (HL) p 325, where he observed that certainty was of primary importance in all commercial transactions.
21. *Pakistan International Airlines Corporation v Times Travel (UK) Ltd, Ukraine and others (intervening)* [2021] 2 Lloyd's Rep 234 (SC).
22. Para 27.

by the claimant, for example, for damages for breach of contract, the defendant deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive his claim. In both categories of case the defendant has behaved in a highly reprehensible way which the courts have treated as amounting to illegitimate pressure.[23]

In *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*,[24] which was concerned with container demurrage, in the Commercial Court, Mr Justice Leggatt had referred to the recognition in the common law world of the need for good faith in contractual dealings.[25] In the Court of Appeal, Lord Justice Moore-Bick did, however, not agree. There is a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.[26]

5. Interpretation under Dutch law

On the contrary, in Dutch law the actual subjective intention of the parties is decisive. This explains why interpretation of a contract under that law is a question of fact.

The Dutch Supreme Court has provided a number of guidelines for the interpretation of contractual provisions. In Arbitration 30 March 2015 S&S 2017, 48 (The 'JB-14') the following overview of these guidelines is given:

The basic decision of the Supreme Court is its judgment in the Haviltex case dated 13 March 1981, NJ 1981, 635, in which it was held that a court or tribunal should in its interpretation of a contract consider all surrounding circumstances in order to assess what meaning each party could reasonably attach to the terms of the contract and what the parties could then reasonably expect from each other when concluding the agreement.

Later, in the Pontmeyer case dated 19 January 2007, NJ 2007, 575, it was held that when interpreting lengthy and detailed commercial contracts concluded by parties who were assisted by professional advisers, courts and tribunals are allowed to rely on the literal wording of the contract, unless such interpretation is proved wrong by the party who has an interest to show that the wording of the contract is at variance with the intention of the parties when they concluded the contract.

Other cases that are of importance include the decision dated 17 September 1993, NJ 1994, 173 (*Gerritse/Hygro Agri*), in which it was considered that in cases where

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23. Para 4.
24. *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] 1 Lloyd's Rep 359 (Commercial Court) and [2016] 2 Lloyd's Rep 494 (CA).
25. *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] 1 Lloyd's Rep 359 (Commercial Court) p 375 (paragraph 97).
26. *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] 2 Lloyd's Rep 494 (CA) para 45. See further David Foxton's article, 'A good faith goodbye? Good faith obligations and contractual termination rights', (2017) LMCLQ p 360 ff.

the parties affected by a contract were not privy to the actual contract negotiation, such as in the case of a collective labor agreement, a more literal interpretation is called for.

Finally, in its decision dated 5 April 2013 NJ 2013, 214 (*Ludiform/Mexx*) the Supreme Court was faced with the potentially contradictory approach of relying primarily on the wording of a contract or the intention of the parties. Moreover, this case involved a contract including a so-called 'entire agreement' clause, which had previously been considered a reason to rely more strictly on the wording of a contract. The Supreme Court amalgamated the various approaches and also held that if in the interpretation of an agreement significant weight should be attributed to the literal meaning of the contractual wording, the other circumstances of the case may bring about that a different meaning should be attributed to the contract, as the parties' intention and what the parties could reasonably expect from each other remain decisive.[27]

Further, under Dutch general contract law, Art 6:248[28] provides the basis for the interpretation and the effects of contractual terms in this country. It reads as follows:

1. A contract not only has the juridical effects agreed to by the parties, but also those which, according to the nature of the contact, apply by virtue of law, usage or the requirements of reasonableness and fairness.
2. A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to the standards of reasonableness and fairness.

6. Some practical consequences of the difference in interpretation methods

The difference between the English and the Dutch method of interpretation is of particular importance when one has to interpret provisions, which are not standard clauses, and which have not been dealt with by English case law, such as some provisions in the 'Rider' to a charterparty. In those circumstances, there cannot be any assumption that the parties intended to abide by the internationally accepted interpretation of the provision by the English courts, for there is no such interpretation.

The difference might even play a role when one is concerned with a standard provision in respect of which an internationally accepted interpretation by the English courts is at hand.

The difference between the interpretation methods under Dutch and English law may be illustrated by Rotterdam District Court 9 March 2000 S&S 2001, 27 (The 'Zwartemeer'). The 'Zwartemeer' was time chartered on the Baltime form by her owners. During discharging of a cargo of cast iron skulls in Bayonne (France) by

27. Paras 75-77 of the award.
28. Art 6:248 stands for Art 248 of Book 6 Civil Code.

stevedores, who, according to the charterparty, were appointed by the charterers, the vessel's tanktop was very seriously damaged. The owners commenced proceedings against the charterers for the recovery of these damages. Clause 56 of the Rider provided as follows: 'Stevedores, although appointed by Charterers, Shippers and/or Receivers shall be under the direction and control of the Master, who is responsible for a proper discharging of the cargo'.

The court held that according to its interpretation of clause 56 the master was fully responsible for the discharging. This decision was based on the literal wording of the clause. An English court would probably have stopped its reasoning here and would have dismissed the owners' claim outright. The Rotterdam court, however, did not do this. It went on to say that the owners were entitled to bring evidence for their stand that the court's interpretation was incorrect and that according to the parties' agreement the charterers were liable for the damages. Therefore, the owners were given the opportunity to prove that the court's interpretation of clause 56 did not correspond with the parties' intention of clause 56.

The example of the 'Zwartemeer' offers a nice illustration of the subjective interpretation by the Dutch courts, in which method of interpretation the focus is on the subjective intention of the parties, rather than on the literal meaning of the contractual provision under review.

The 'MSC Amsterdam'[29] may provide a typical example of the English method. A cargo of copper cathodes was carried on board the 'MSC Amsterdam' from Durban to Shanghai. The bill of lading provided:

1. (a) For all trades, except for goods shipped to or from the United States of America, this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX, or, if compulsorily applicable, subject to the 1968 Protocol (Hague-Visby) or any compulsory legislation based on the Hague Rules and/or said Protocols.
2. Any claim or dispute arising from the Contract of Carriage evidenced by this B/L shall be subject to the exclusive jurisdiction of the High Court of Justice in London, and English law shall be applied.

A question arose as to the law applicable to the contract of carriage. It should be mentioned that although South Africa had enacted the HVR, it had never signed the Visby Protocol and was, therefore, not a contracting State. Lord Justice Longmore made the following remark:

Since the Hague Visby Rules are part of directly enacted statute law in the United Kingdom in respect of carriage from any contracting State (Carriage of Goods by Sea Act 1971) and they are also part of directly enacted statute law of the Republic of South Africa in respect of carriage from South Africa (Carriage of Goods by Sea

29. *Trafigura Beheer v Mediterranean Shipping Company* (The 'MSC Amsterdam') [2007] 2 Lloyd's Rep 622 (CA).

Act 1986), a commercial man might not be surprised to be told that the contract of carriage contained in the bill of lading issued by or on behalf of the shipowners was subject to the HVR. Unfortunately, it is not as simple as that. In the end the Court of Appeal held that the Hague Rules rather than the HVR governed the contract.[30]

The above remark seems characteristic of the attitude of an English court with respect to the interpretation of a provision of a contract. Commercial men, who are working with the contract, and for whose behalf the law is operating, would probably have interpreted the contract in such a way that the HVR were made applicable. So, presumably the parties' intention when making the contract was for the HVR to become applicable. The court, however, was not guided by the intention of the parties, but by a literal interpretation of the contract viewed against the system of the incorporation of the HVR in South Africa and England.[31] Lord Justice Longmore further observed:

Whether that is an attractive way for a shipowner to do business 40 years after the Hague Visby Protocol was internationally agreed is a different matter and cannot be of any relevance to the construction of this contract of carriage.

By contrast the Dutch courts would probably have held that the HVR were applicable. See Court of Appeal at The Hague 25 January 2000, S&S 2000, 76 (The 'Theo C'). A cargo of fertilizer had been carried by the 'Theo C' from Ashdod (Israel) to Chili. The question arose as to the law applicable to the contract of carriage. The bill of lading contained the following Paramount Clause:

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August, 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation in the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of said Convention shall apply.

Chili had adopted the Hamburg Rules. Israel had the Hague Rules in 1926 and the HVR in 1992 incorporated in its legislation, although it was not a contracting party

30. The Commercial Court (Mr Justice Aikens) held that the HVR were applicable.
31. The reasons for the court's decision were the following: In clause 1 (a) the owners had only accepted HVR obligations if they were forced to do so. They can only be forced to do so if the proper law of the contract compels it (or if the place, where the cargo owners choose to sue them, compels it). Neither law compels it on the facts of the present case, and they are not contractually obliged further than the law compels. South Africa is not a party to the HVR, so that the possibilities of Art 10 (a) and (b) did not find application. So, the only feasible possibility would be (c) ''the contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract''. England is a contracting party to the HVR and the compulsory application of the HVR in English law is regulated in Art 10 HVR. But the HVR will only be 'compulsorily applicable' if some statute or other principle of law makes them so. So, this phrase in clause 1 (a) simply takes matters round in a circle (see also paragraph 79 of the decision in the first instance of the Commercial Court).

to the HVR. The court held that the term 'enacted' should be given a larger meaning than the mere formal incorporation of these rules in the national legislation. The court further considered that the reference to the Hague Rules in the Paramount clause was deemed to include a reference to the HVR as well.

Another example is provided by Rotterdam Court 15 October 2003, S&S 2005, 110 (The 'Theano'). The court was concerned with carriage from Argentine, which had not adopted the HVR, to the Netherlands. The bill of lading contained the following paramount clause: 'This bill of lading is to have effect subject to the provisions of the Carriage of Goods by Sea Act 1924, and of the Rules scheduled thereto, as applied by said Act'. The court held that the English COGSA 1924 was no longer in force, but as the present law corresponded with the HVR, the applicability of the HVR was postulated in the paramount clause. It followed that the paramount clause led to the applicability of the HVR. This decision was confirmed by the Court of Appeal at The Hague 20 December 2007, S&S 2010, 107 (The 'Theano').

The Rotterdam Court and the Court of Appeal at The Hague may better express the parties' intention than the English Court of Appeal. The draftsmen of the paramount clause in the 'MSC Amsterdam' would probably not have thought that it would be interpreted in the way the English Court of Appeal did.

7. Further discussion of interpretation in English law

In his well-known book on the law of demurrage Hugo Tiberg cautioned that one should not follow automatically the English interpretation of charterparty clauses. Although English law is rightly renowned for its consistency and for the great expertise of its judges, it has its shortcomings. According to Tiberg, the decisions of the English judges 'are not always the best solutions to achieve the kind of economic efficiency needed in a developed world. Moreover, the very expertise of these judges has resulted in refined distinctions and elaborations of clauses which all but defy ordinary legal analysis'.[32]

Sometimes an English judgment seems to reflect an interpretation, which can hardly be considered to be in line with what the contracting parties may have had in mind and has a too rigid legal character.[33]

An example of a rigid character may be found in the judgment of the House of Lords in the 'Chikuma'.[34] The time charterparty provided that payment of the hire was to be made in cash in US dollars, monthly in advance, failing the punctual and regular payment of the hire the owners shall be at liberty to withdraw the vessel from the service of the charterers. The instalment with which the court was concerned fell due on 22 January 1976. On 21 January the charterers instructed their Norwegian bankers to transfer the hire to the owners' Italian bank by means

32. Hugo Tiberg, *The law of Demurrage* (4th edn, 1995) p 7.
33. See for instance Hugo Tiberg, p 7.
34. *A/S Wilco v Fulvia SpA di Navigazione* (The 'Chikuma') [1981] 1 Lloyd's Rep 371 (HL).

of credit transfer, and the Norwegian bankers gave the appropriate instructions on that day. On 22 January the owners' bank credited the Owners' account with the amount of the hire, and under Italian banking law and practice the owners had the immediate use of the money, even though interest on the sum would not begin to run in favour of the owners until 26 January. The owners withdrew the vessel, and the question arose as to whether they were entitled to do this.

Lord Bridge, with whom the other members of the court agreed, held that the book entry made by the owners' bank on 22 January in the owners' account was clearly not the equivalent of cash, because it could not be used to earn interest. It could only be drawn subject to a liability to pay interest from 22 January until 26 January. It follows that on 22 January there was no 'payment in cash' by the charterers of the hire due, and accordingly the owners were entitled to withdraw the ship. This was a very harsh result, as the charterers' claim for damages resulting from the owners' withdrawal amounted to some USD 3 million.[35] It is feasible that a Dutch court would decide that the instalment was paid in time.

§ 3 *Different concepts of law; typical concepts of English law*

8. English concepts not known in Dutch law

The system and basic provisions of Dutch Civil law are contained in a code, the Dutch Civil Code, whereas English law does not have a code. The Dutch legal system is based on civil law. English law is generally based on common law (and for a small part: equity), which contains several legal concepts and doctrines, which are not known in the Dutch legal system. The English legal concepts which play a part in the reasoning of the English courts in charterparty cases, but are unknown in Dutch law, are, for example, frustration, privity of contract, consideration, different meaning of the concept of possession, the distinction between conditions, warranties and innominate or intermediate terms, bailment, implied terms, repudiation. A brief summary of these concepts will now be given.

a. Frustration

Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.[36] The principle of

35. However, in his article ''30 Years Before the Mast'' in (2013) LMCLQ 42 ff., Sir Bernard Eder expressed the opinion that the judgment in the ''Chikuma'' was one of the most interesting and important decisions over a period of 30 years.

36. The description of frustration by Lord Radcliffe as taken over by Lord Roskill in *BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA* (The 'Nema') [1981] 2 Lloyd's Rep 239 (HL) p 253. In Arnhem Court 20 April 1978 S&S 1978, 66 (The ''Apollont') 2 September 1983, S&S 1984, the court paid attention to the concept of frustration in American law. See further Rotterdam Court 11 March 1958 S&S 1958, 72 ('De Ruyter'): pursuant to a charterparty for the carriage of a cargo of coal from Swansea to Rotterdam dated 6 May 1940, the vessel was loaded on 10 May 1940. As a result of the

frustration is that the contract automatically comes to an end, irrespective of the wishes of either party.[37]

b. Privity of contract

The English common law doctrine of privity of contract entails that a third party is not entitled to rely on or bound by a contract to which it is not a party. This doctrine prevents the reliance on contractual defences against extra-contractual claims, if there is no contractual relationship between claimant and defendant.

The English law doctrine of privity of contract causes a number of practical problems. English courts and legislators have, however, found a number of ways to get around the problems created by the privity doctrine. A few of the solutions, which are applied in practice, are mentioned:

i. Title to sue under a bill of lading

English law has struggled a long time with the transfer of the contractual rights (and liabilities) of the carriage contract to the third-party bill of lading holder. Traditionally, the endorsement and transfer of the bill of lading was capable of transferring the endorser's right to the possession of the goods to the endorsee. The third-party bill of lading holder was entitled to demand delivery of the goods from the carrier. But the law merchant did not recognize a similar transfer of contractual rights.

This situation was dealt with in the Bills of Lading Act 1855. Section 1 provided that the consignee named in the bill and the endorsee to whom the property in the goods shall pass upon or by reason of such consignment or endorsement, shall have transferred and vested in him all rights of suit, and be subject to the same liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with himself. Section 1 was, however, only applicable to the passing of property upon or by reason of the consignment or endorsement, while property could pass in other ways.

Another remedy was provided by common law. It was decided that the dealings between the shipowner and the endorsee at or about the time of discharge could give rise to an implied contract between them. In *Brandt v Liverpool*[38] it was held that the presentation of the bill of lading in exchange for delivery of the goods could give rise to an implied contract on the basis of the bill of lading and its provisions. Prior to 1924 there had been a number of cases, in which the shipowner had a lien for freight and/or demurrage, which he had released by delivering the cargo to the receiver. In such a case it could reasonably be inferred that he would

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German invasion into the Netherlands on 10 May 1940, the voyage was not carried out. English law was applicable and the court held that the contract was frustrated.

37. See about frustration also *J Lauritzen AS v Wijsmuller BV* (The 'Super Servant Two') [1990] 1 Lloyd's Rep 1 (CA) p 8 ff (Question 2: general); see No 160.

38. *Brandt & Co and FW Vogel & Co v River Plate Steam Navigation Company Ltd* (1923) 17 Ll.L. Rep 142 (CA).

not have done so except on the tacit agreement of the receiver to pay such freight and/or demurrage as was due. The existence of an implied contract need be proved as a matter of fact. In a number of cases, which had some similarity to the Brandt case, the courts have not accepted the coming into being of an implied contract.[39]

The Bills of Lading Act has been replaced by the COGSA 1992, which solved the problem of the transfer of contractual rights (and liabilities) to the third-party bill of lading holder.

ii. A significant reform to the doctrine was effected by the Contracts (Rights of Third Parties) Act 1999.

A contract falling within the 1999 Act is enforceable by third parties to the extent that the contract evidences an intention of the contracting parties that it should be so enforceable. The 1999 Act does not apply to certain types of contracts. Charterparties are fully within the 1999 Act.

iii Where the COGSA 1992 and the 1999 Act do not apply, the matter remains governed by common law. The doctrine is, however, subject to development.

The development in the context of the carriage of goods by sea, which falls outside the 1999 Act, was described by Lord Goff in the 'Mahkutai'.[40] He noted a swinging of the pendulum. The Elder, Dempster judgment of the House of Lords[41] provided an opening for a lessening of the effect of the doctrine. In Midland Silicones v Scruttons[42], the pendulum swung back in the direction of the full effect of the doctrine. Then, in the 'Eurymedon' and in the 'New York Star' the pendulum of judicial opinion swung back again.[43] Lord Goff said that the time might well come when, in an appropriate case, it should be considered whether the courts should take the final step in this development and recognize a full exception to the doctrine

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39. See *Mitsui & Co Ltd v Novorossiysk Shipping Co* (The 'Gudermes') [1993] 1 Lloyd's Rep 311 (CA) p 318, where reference is made to the judgment of Lord Justice Bingham in the 'Aramis' [1989] 1 Lloyd's Rep 213 (CA) p 218-225, in which the requirements for the implication of a contract were set out. It is fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract. In the 'Guderme' the Court of Appeal held that on the facts there was no implied contract. See about the 'Aramis' and the 'Gudermis' R Zwitser, 'Lossings- of afleveringsovereenkomsten; Brandt v. Liverpool', (2009) TVR p 129 ff, p 135-136.
40. The 'Mahkutai' [1996] 2 Lloyd's Rep 1 (PC).
41. *Paterson, Zochonis & Co Ltd v Elder, Dempster & Co and others* (1924) 18 Ll.L Rep 319 (HL).
42. *Midland Silicones Ltd v Scruttons Ltd* [1961] 2 Lloyd's Rep 365 (HL).
43. In *The New Zealand Shipping Company Ltd v AM Satterthwaite & Company Ltd* (The 'Eurymedon') [1974] 1 Lloyd's Rep 534 (PC), and *Salmond and Spraggon (Australia) Pty Ltd v Port Jackson Stevedoring Pty Ltd* (The 'New York Star') [1980] 2 Lloyd's Rep 317 (PC), the court had to decide on the question whether stevedores, who were sued in tort by the cargo interests, could rely on the exemption provisions of the bill of lading, to which the stevedores were not a contracting party. The stevedores' reliance on the exemption clauses was based on the Himalaya clause in the bill of lading. A Himalaya clause generally provides that a servant or agent of the carrier cannot be held liable by the cargo interests for loss or damage resulting from his act or default, and that in any case the servant or agent is entitled to rely on the exemptions in the bill which are applicable to the carrier. In the two decisions it was held that the stevedores were entitled to rely on those exemptions.

of privity of contract, thus escaping from all the technicalities with which courts are faced in English law.

iv. Bailment on terms

An application of the concept of bailment on terms may be found in the Elder, Dempster case.[44] The 'Grelwen' had carried cargoes of casks of palm oil. The cargoes arrived at destination in a damaged condition. The cargo interests sued the owners. The damages were to be attributed to bad stowage rather than unseaworthiness. The bills of lading were held to contain a contract with the time charterers. They excluded liability for damage caused by bad stowage. One of the questions was whether the owners were protected by the exclusion of liability in the bills of lading. The House of Lords held that they were. The basis for the protection of the owners has given rise to a lot of dispute and uncertainty. In the 'Mahkutai'[45] the Privy Council considered that the preferred grounds for the decision were the views of Lord Sumner that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading.

c. Consideration

Under English law, no contract shall be enforceable unless each party can show that, by entering into the agreement, he either confers a benefit upon the other or brings some detriment upon himself. The benefit conferred, or the loss suffered constitutes 'consideration'. The essence of consideration is mutuality. It is the element, which distinguishes gratuitous promises ('I will give you my watch'), which are not actionable, from contractual ones. It consists of a promise in return for a promise, which may also be constituted by the doing of an act. Although the consideration must be real, it need not be adequate. If I promise to pay someone €500 in the event of his losing a leg in an accident, and I charge no premium or other consideration for my promise, there is no contract, and he has no right to sue me for €500 if he loses his leg.[46]

The consideration must not be past. For instance, A bought a horse from B. Some time after the sale, B confirmed that it was sound. However, it was not. A sues B upon the affirmation that the horse was sound. The action will fail. The reason is that although A had given consideration in the form of payment of the purchase price at the time of the sale, he had not provided consideration for the affirmation that the horse was sound.[47] Past consideration is no consideration, since it has not been given in exchange for the promise sought to be enforced. *Carver on charterparties*

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44. *Paterson, Zochonis & Co Ltd v Elder, Dempster & Co and others* (1924) 18 Ll.L Rep 319 (HL).
45. The 'Mahkutai' [1996] 2 Lloyd's Rep 1 (PC).
46. Roy Goode, *Commercial Law* (3rd edn, 2004) p 68.
47. Philip S James, *Introduction to English Law* (10th edn, 1979) p 284-289.

notes that where there is already a binding contract, any additional obligation will only be binding if that obligation itself is supported by consideration.[48]

d. Possession

Under English law, the concept of possession differs from the meaning of possession under Dutch law. Possession in English law is based on possession in fact. It consists of certain rights *in rem*, which arise when a person assumes control of a thing with intent to exclude others. Possession is usually acquired by delivery from the owner, either with intent to pass the ownership or in order that the transferee may use it for himself or render some service in respect of it. Roy Goode[49] explains that the common law concept of possession is much broader than it is under French law or civil law systems based on French law (such as Dutch law), where a person holding goods for another is considered to be a mere 'détenteur', having custody but not possession of the goods. Under English law a voyage charterer and a time charterer do not have possession of the ship. A bareboat charterer, on the other hand, obtains possession of the ship.

Dutch law is based on French law. According to art. 3:107 paragraph 1 Civil Code possession is the detention of property for oneself. In most cases it is the proprietor who is at the same time possessor. A thief is also a possessor, but a possessor in bad faith. Under Dutch law, a charterer, whether a voyage, time or bareboat charterer, is not a possessor, he is simply a 'détenteur' (or holder, custodian).

e. Conditions, warranties and innominate or intermediate terms

In English law a distinction is made between conditions, warranties and innominate or intermediate terms.[50]

A condition is a basic term, non-performance of which would render performance of the remaining terms something substantially different from what was originally intended. Consequently, the breach of such a term would entitle the party not in default to treat the contract as repudiated and itself as discharged from performance of all outstanding obligations under the contract.

Conversely, a warranty is a minor term, the breach of which can be adequately compensated by an award for damages. The breach of such a term will not therefore release the innocent party from performance of its contractual obligations.

Intermediate or innominate terms are neither conditions nor warranties. Where an obligation of this type is broken, the right of the innocent party to treat himself

48. *Carver on Charterparties*, p 43 (2-025).
49. Roy Goode, p 42.
50. See Lord Justice Gross in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* (The 'Spar Capella', 'Spar Vega' and 'Spar Draco') [2016] 2 Lloyd's Rep 447 (CA) p 450-451 (paras 16-22).

as discharged depends on whether the breach is sufficiently serious to go to the root of the contract.[51]

Repudiation occurs where a party intimates by words or conduct that he does not intend to honor his obligations when they fall due in the future.[52] In such a case the other party (the innocent party) has an option: he may accept that repudiation and bring the contract to an end and sue for damages for breach of contract whether or not the time for performance has come; or he may, if he chooses, disregard or refuse to accept it and then the contract remains in full effect.[53] If, in the knowledge of the facts giving rise to the repudiation, the other party to the contract acts (for example) in a manner consistent only with treating that contract as still alive, he is taken in law to have exercised his election to affirm the contract.

While it may be easy to recognize the above-mentioned distinctions in principle, it may be more difficult to apply it in practice to the facts of a particular case. See, for instance, the judgments in the 'Arctic'[54], in which the question arose whether the classification-obligation in the bareboat charterparty was a condition of the contract or an innominate term. The arbitration tribunal held that it was not a condition. Mr Justice Carr decided that it was a condition, but the Court of Appeal allowed the appeal and held that the clause was to be regarded as innominate term.

Lord Justice Gross in the 'Spar Capella', 'Spar Vega' and 'Spar Draco'[55] gave the following classification of breaches of contract which entitle the innocent party to treat the contract as at an end:

i. Breach of condition.
ii. Repudiatory breach. This as an actual breach of an innominate term where the consequences are such as to entitle the innocent party to treat the contact as at an end.
iii. Renunciatory breach. This is an anticipatory breach of contract (ie, in advance of the due date for performance), where the party makes clear to the innocent party that it is not going to perform the contract at all or is going to commit a breach of a condition or is going to commit a breach of an innominate term and the consequences will be such as to entitle the innocent party to treat the contract as at an end; in each case here, the innocent party has an election to accept the renunciatory breach at once and to terminate the contract, without waiting for the due date of performance.

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51. Scrutton, p 111 (7-001).
52. Cheshire Fifoot & Furmston's *Law of Contract* (11th edn, 1986) 522. See further No 8 h.
53. *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL) as per Lord Reid.
54. *Silverburn Shipping (IOM) Ltd v Ark Shipping Co Ltd* (The 'Arctic') [2019] 1 Lloyd's Rep 554 (Commercial Court); [2019] 2 Lloyd's Rep 603 (CA).
55. *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* (The 'Spar Capella', 'Spar Vega' and 'Spar Draco') [2016] 2 Lloyd's Rep 447 (CA) p 451-452 (paras 21-22).

f. Bailment

Recent considerations on bailment are found in the Volcafe judgment of the Supreme Court.[56] It was stated that bailment is a transfer of possession giving rise to a legal relationship between the bailor and the bailee, which is independent of contract, although in practice it is commonly contractual, and the terms of the contract will commonly modify its incidents. Two principles of the common law of bailment are fundamental. The first is that a bailee of goods is not an insurer. His duty is limited to taking reasonable care of the goods. The second principle is that although the obligation of the bailee is thus a qualified obligation to take reasonable care, at common law he bears the legal burden of proving the absence of negligence. He need not show exactly how the injury occurred, but he must show either that he took reasonable care of the goods or that any want of reasonable care did not cause the loss or damage sustained.

According to Girvin,[57] bailment involves the delivery up of possession of goods by one person, the bailor, to another person, the bailee, for some purpose, express or implied, and may be enforced against strangers by the bailee. Although frequently founded upon contract, contract is not essential for bailment. He quotes the following passage from a judgment of Lord Justice Diplock in *Barclays Bank v Commissioners*:[58]

The contract for the carriage of goods by sea, which is evidenced by a bill of lading, is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners.

The non-contractual liability of a bailee may be modified by the doctrine of bailment on terms, which was asserted by Lord Denning[59] and favoured tentatively by Lord Justice Salmon[60] in *Morris v Martin and has now been accepted by the Privy Council in the 'Pioneer Container'*.[61] Under this doctrine a bailee may, in answer to the owner's non-contractual claim for loss of or damage to goods, rely upon the terms on which he voluntarily accepted the goods from his immediate bailor, if the head owner expressly or impliedly consented to the goods being bailed to the bailee on such terms.[62]

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56. *Volcafe Ltd v Compania Sud Americana de Vapores SA* [2019] 1 Lloyd's Rep 21 (SC) paras 8-10.
57. Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, 2011) p 124 ff.
58. *Barclays Bank v Commissioners* [1963] 1 Lloyd's Rep 81 (Commercial Court) p 88-89.
59. *Morris v CW Martin & Sons Ltd* [1965] 2 Lloyd's Rep 63 (CA) p 72.
60. *Morris v CW Martin & Sons Ltd* [1965] 2 Lloyd's Rep 63 (CA) p 79.
61. The 'K.H. Enterprise', also named the 'Pioneer Container' [1994] 1 Lloyd's Rep 593 (PC).
62. Lord Justice Mance in *East West Corporation v DKBS 1912 and Aktis Svendborg* [2003] 1 Lloyd's Rep 239 (CA) p 250 (para 30).