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Some Questions on Contracts of Affreightment

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Summary

This work deals with Contracts of Affreightment (“COA”), a shipping contract for the transportation of a certain amount of cargo on vessels that are to be nominated. The standard agreements Gencoa, Volcoa, Intercoa and The Swedish Maritime Code, a joint Nordic legislation product, forms a base for the issues discussed, but not all issues raised here, however, are directly based on this sources of regulation.

Sammanfattning

Kvantumkontraktet är en kontraktsform inom området för godstransporter till sjös uppbyggt av ett ramavtal omfattande den totala kontraktstiden och innefattande funktionen att den specifika skeppningen regleras i förhållande till den enskilda nomineringen av fartyg, den enskilda resan regleras på detta sätt av ett underliggande kontrakt (t ex ett rese-certeparti).

Avtalskonstruktionen som sådan ställer krav på en avgränsning mellan ramavtalet och det underliggande avtalet och dess skilda ansvarsformer, en distinktion som i vissa fall kan väcka frågor och är samtidigt en inte obetydlig fråga i denna framställning.

Avtalet erbjuder flexibilitet för redaren då denne kan utnyttja det kvantumkontrakt dedikerade tonnaget även under andra kontrakt, lastägaren kan och sin sida under en bestämd tid för ett förutsett transportbehov reducera sina fraktkostnader.

Som en bas för framställning finns källorna; standardavtalen Gencoa, Volcoa, Intercoa och sjölagen som är gemensam för de nordiska länderna, samtidigt som en del frågor inte direkt utgår från dessa. Hävning av kvantumkontraktet diskuteras där fråga uppkommer om hel eller partiell sådan. Det finns också anledning att diskutera hur nominering av fartyg och last skall ske tidsmässigt i relation till avtalsförpliktelsen, ett resonemang som i denna framställning leder till frågan hur reklamationsinstitutet skall behandlas inom den aktuella kontraktsformen. Kvantumkontraktet ger också uppslag till att olika aspekter av skadeståndsansvaret diskuteras.

Preface

I would like to give my thanks to my supervisor Lars Gorton.

Jämshög, 2012.

Björn Axelsson

Abbreviations

Avtl	The Swedish Contracts Act
CIF	Cost, Insurance and Freight
CISG	The United Nations Convention on Contracts for the International Sale of Goods
COA	Contract of Affreightment
ETA	Estimated time of arrival
FOB	Free on board
mt	Metric tones
NMC	Norwegian Maritime Code
SEK	Swedish Crown
SMC	Swedish Maritime Code
SSC	Swedish Supreme Court
SSGA 1905	The 1905 Swedish Sale of Goods Act
SSL	The 1990 Swedish Sale of Goods Act
UP	Unidroit Principles

1 Introduction

This work deals with Contracts of Affreightment (“COA”), a shipping contract for the transportation of a certain amount of cargo on vessels that are to be nominated. However the issues addressed in this work and the conclusions made here are only a portion of that which can be discussed with respect to COA regulation in standard agreements. From a Nordic perspective, the same can also be said, although with a lesser emphasis, about the COA with respect to the Swedish Maritime Code.

The sources of regulation with respect to COA can be placed on a timeline with the first Intercoa introduced in 1980, Volcoa in 1982, the Swedish Maritime Code, a joint Nordic legislative product, in 1994 and Gencoa in 2004. This timeline brings into focus the developments in the regulation of COA, and can also act as a basis for comparison with the ambition of making the more relevant issues specific to the maritime business more transparent. Not all of the issues raised here, however, are directly based on these sources of regulation.

A distinction in the actual level of regulation within these instruments also exists, regardless of the fact that three are standard agreements, Intercoa, Volcoa and Gencoa, while one is legislation, the Swedish Maritime Code. The first two have to be described as containing detailed rules on COA, whereas the other two are on a more general level. Gencoa makes a reference to common law for portions of its regulation, and there is also a need to construe some clauses through contractual custom and usage. The Swedish Maritime Code to some extent uses principles that have to be discussed from the perspective of the Swedish 1990 Sale of Goods Act, while general principles of contract law may also come into play. The Swedish Sale of Goods Act of 1905 expressly contained such principles,¹ but whether the 1990 Sale of Goods Act is of the same legal stature is up for

¹ Gorton, Lars, Allmänt, 1998, p. 11.

discussion. Despite the fact that the 1990 act is based on CISG, and contains new legal principles, it nevertheless is commonly referred to in the search for general contract principles, something that probably² can be ascribed to the fact that sales agreements are central among the flora of contracts. The Rotterdam Rules are also used here for comparison. The Unidroit Principles of Commercial Contracts and the Principles of European Contract law may also be seen as sources of inspiration.

General contract regulation is of significance in the shipping business and for COAs, but as shown in this work, there is a need to look at other contracts within the more specific contract categories of carriage of goods at sea and also within the sale of goods acts in the form of sale agreements. The question then arises to what extent this regulation can be used within COAs, in other words, whether there is a need for analogy. Where such a need arises, I will try to proceed in a manner that to at least a certain extent justifies any analogy made.

There is a natural interest in international harmonisation within those areas where parties belonging to different jurisdictions interact on a frequent basis, for example, with respect to international sales transactions and transports. The sources, Intercoa, Volcoa, Gencoa and the Swedish Maritime Code, used in this work, can be said to be a part of this. The Nordic perspective is the starting point in this work. The contractual drafting technique from the international perspective, because of its paramount importance, is also invoked here.

The principle of “fairly-evenly-spread” referred to in Intercoa, Volcoa and Gencoa and used for the frequency of the nomination of vessels and cargo, does not have a basis in general contract law. Certain arbitration cases made available in the Nordic Association of Ship-owners³ member publications, and other case law, are included here. As to the relevant regulation in the

² Author’s translation of the Swedish word *torde*.

³ Nordisk Skibredereforenings.

Swedish Maritime Code, the ambition has been to make this condition transparent for its practical application within COAs, but also raise the questions it poses. Whether there exists an obligation to put forward a claim to secure the right of remedy is another question of interest here as there is no regulation of this in Gencoa, Volcoa and the Swedish Maritime Code. Within this area there is also a need to look at the 1990 Sale of Goods Act to see whether there are any principles that may be used as a source of inspiration.

Only certain questions related to COAs are addressed here, and consequently other questions are often omitted. I nevertheless have the ambition to discuss those matters displaying a difference among the chosen sources of regulation. Questions have also arisen as to that which is not regulated, and the scope of this work thus has the intent to present a perspective broader than those sources if mentioned on their own could have amounted to, all still chosen at my discretion. The interest of discussing the “fairly-evenly-spread” principle has then led to an interest of a further analysis of the institution of claim within COA.

1.1 Structure and Delimitation

Due to the perspective of different questions being discussed, something needs to be said about the structure and delimitation of this work. This *chapter one* contains the introduction. *Chapter two* gives a short presentation in which the COA is put into perspective within the maritime shipping business. I have chosen to use Gencoa, Volcoa, Intercoa and the Swedish Maritime Code as a basis for the presentation, and these are presented in *chapter three* under headings that also designate the issues chosen for discussion within those contracts. The reader can then under each heading compare the different sources with each other. Breach of contract at common law as referred to in Gencoa, is also discussed in this chapter. *Chapter four* examines the nomination procedure, beginning with the

solutions made in contract and the legislation, then moving on to a discussion within contract custom and usage. Further, the nomination of vessel (cargo) is discussed from the perspective of damage liability. This begins with the principle of objective impossibility, stipulated in the 1905 Sale of Goods Act, and then is discussed within COA, which also forms the basis for a further analysis on control-liability. Force majeure and hardship are also discussed in this chapter.

The subject of “fairly-evenly-spread” is discussed in *chapter five*, which is of interest not only for its importance with respect to COAs, but also from the subsequent questions this reasoning brings. The right to damages and the COA is then discussed, with some thoughts on the calculation of damages as inspired by an analysis by Lars Gorton, which can be seen as of minor importance in the cohesive sense of this work. I nevertheless deem it to be of interest in the attempt to put it a bit further into perspective within the COA.

Chapter six is about the cancellation of contracts, including a material discussion on the conditions for cancellation, which is further put into the perspective of the Swedish Maritime Code. Cancellation outside of specific contractual regulation and the Swedish Maritime Code is also explored, which brings up the question of partial or whole cancellation of COAs. This chapter is also about cancellation within common law as relevant to Gencoa. This means that repudiation, as well as frustration, is discussed. *Chapter seven* follows up the “fairly-evenly-spread” discussion in chapter five with its question of making a claim within a COA. With this, the work has also moved outside that which can directly be said to be based on the sources of Gencoa, Volcoa, Intercoa and the Swedish Maritime Code. However, the matters discussed in this chapter are by this author found to be of a sufficient enough interest to discuss at some length in this work. The conclusion is given in *chapter eight*.

As this work is based on different relevant questions under the regulation of COAs in a wider sense, some chapters may stand on their own. Conclusions are made where appropriate, but nevertheless, it is necessary to give a final conclusion, as some questions need to be placed into perspective for the cohesiveness of this presentation.

2 Contracts of Affreightment

2.1 The Chartering and Characteristics of a COA

A contract of carriage does not necessarily need to be tied to a specific vessel. The contractual obligation can instead set out that the carrier undertakes, through a framework contract, to carry a quantity of cargo on vessels to be nominated. When nominated, the voyages may be performed under some particular form of charter party. Other contracts of this general description may take the form of an undertaking to carry on the carrier's general terms for specific cargo, whenever called for within the contract period. In such cases, a booking-note, or even an oral agreement, is typically used. If the situation requires a contract covering several shipments, this can be arranged by time chartering and sometimes by voyage chartering for consecutive voyages. The voyages are typically performed with the same vessel and in a direct continuation, but frequently a COA is chosen instead. The question then arises, why is there a need for a single contract to cover a number of shipments?

Leaving that question aside for the moment, it may be reasonable from a pedagogical point of view to first establish that it is quite normal that a transport user may choose among different methods in connection with the chartering of a vessel. First, there is an option to charter the whole or a part of a vessel for one voyage, referred to as a *voyage charter*. If the need for transportation is of a limited quantity, or perhaps just one parcel, this can be sent as general cargo with a *liner* operator. Conversely, a whole vessel can be chartered where, the cargo owner needs transportation for large quantities, for a certain time, three months, six months or any period agreed, referred to as a *time charter*.⁴ There is also the possibility to charter a vessel

⁴ As stated above, there is also the possibility to charter a vessel without a crew and for an agreed time in the form of bareboat charter.

without a crew and for an agreed time, *bareboat charter*. In situations with a need for several voyages, there is an option for using the same vessel with one voyage directly after another, *consecutive voyages* or time chartering, and equally, but with different vessels upon the request of the charterers within the framework of an overriding contract, that is in the form of a contract of affreightment.

Having the above in mind, Williams⁵ describes the contract of affreightment as being legally very close to a voyage charter due to the fact that the main purpose of the contract is to “oblige a vessel to lift a fixed determinable quantity of cargo of a specified type over a given period of time”.

Consequently, in most respects this form of contract operates as a series of voyage charters, but can also be used for line-traffic.⁶ Hence, the freight accordingly is based on the quantity of cargo transported.⁷ Further, the COA is characteristically recognized as a contract covering specified, homogeneous cargo, large quantities, long periods, certain ports and several voyages. Though, as Gorton and Ihre⁸ also acknowledge, none of these features can separately provide a basis for a definition of a COA.⁹ A good starting point for a definition is simply that COAs diverge from other charter forms insofar as they contain, separately, both time and voyage elements. However, this requires some further elaboration.

A distinction can be made in regard of consecutive voyages, which also provide several voyages under the same contract, in order to further refine a definition of COAs. Consecutive voyages then differ in that the time factor is determined separately from the voyage element. This provides that the charterer and owner agree that the vessel, during a period (6 months, 12 months, 3 years, etc.), but not on a consecutive basis, is to perform a number of voyages (not in direct continuation) concerning the carriage of a certain

⁵ Williams, Harvey, *Chartering Documents*.

⁶ See legislative bill 1993/94:195, p. 137 for its use in line-traffic.

⁷ Williams, Harvey, *Chartering Documents*, p. 101.

⁸ Gorton, Lars and Ihre, Rolf, *A practical guide to Contracts of Affreightment and Hybrid Contracts*.

⁹ *Ibid.* at p. 3.

quantity (minimum/maximum) of goods of a specified nature or within specified classes between agreed ports. The distinction between these two contractual solutions can also be highlighted as that with consecutive voyages, the charterer is liable to employ the vessel for the consecutive voyages, while with COAs, the owner has a liability to employ the vessel during the intervals. The concept of “fairly-evenly-spread”, or words to a similar effect, is used to ensure that the charter will not require the owner to carry most of the cargo during a short period of time.¹⁰ In order to provide a basis for an understanding of the COA, the following examples given by Gorton¹¹ illustrate some typical situations in which COA are used:

- The owner undertakes to carry between X and Y tons of grain from A to B during 1999;
- The owner undertakes to carry all cargo shipped by the charterer from loading port A to the destination B during the period 1999 – 2003;
- The owner is to have the right to carry all crude oil imported by the charterer during 1999 and 2000; and
- The owner is to have the right and obligation to carry all vehicles exported by the charterer during the period 1999 – 2003, and the charterer to guarantee that he will have at least five shipments per year, each consisting of x-y vehicles;

These examples show the general significance of the time element (period) as well as of the cargo element. The transportation obligation varies, as the charterer undertakes to have a minimum or fixed quantity carried, or the owner undertakes to carry whatever will be available. The charterer may consequently have the right to substitute cargoes, and as a consequence of the latter, the owner will have a right and duty to employ the vessel with

¹⁰ Gorton, Lars; Hillenius, Patrick; Ihre, Rolf; Sandevärn, Arne; Shipbroking and Chartering Practice, pp. 297-298.

¹¹ Ibid. p. 297.

other charterers, while taking into consideration the terms and conditions of the COA.¹²

Further, the COA is structured differently than other forms of contract of carriage. It has the cargo, not the vessel, in the central position. The number of voyages is also decisive for the definition of the COA. Although it is true that a COA can be used for only one voyage, such a contract is hardly recognized as a COA. Equally, a contract can cover several shipments without actually being a COA, a situation that is at hand when a voyage charter-party is drawn up for consecutive voyages. This last contract form links the contract to a certain vessel with or without the right or obligation of the owner to substitute. The voyages covered by the contract are also consecutive, i.e., one immediately after another. The period covered by a COA cannot be shorter than other contracts of carriage, making this a less important characteristic as defining this contract form. In summary, a COA is usually a contract for the carriage of a specified type and quantity of cargo, covering two or several shipments, and running over a long period.¹³

Lastly, something needs to be said as regards the terminology used in connection with this form of transportation contract. It is commonly held that such a contract, in which the means of transportation is generically determined, has no satisfactory and universally accepted name. The basis for this can be in the fact that the contract of affreightment is closer to the cargo and the obligation to transport than other contracts of carriage that are also connected to a certain vessel. The use of the terms like Cargo Contract of Affreightment, Tonnage Contracts, Cargo Contracts, Quantity Contracts, Volume Contract (of affreightment), and Transport Contract would perhaps better describe such contracts. These terms are used, but the term now generally-accepted is Contract of Affreightment. It is thus important to note

¹² Gorton, Lars and Ihre, Rolf, A practical guide to Contracts of Affreightment and Hybrid Contracts, p. 3.

¹³ Gorton, Lars; Hillenius, Patrick; Ihre, Rolf; Sandevärn, Arne; Shipbroking and Chartering Practice, p. 298.

that this term is occasionally invoked as a generic term for all charter contracts (freight contracts).¹⁴

Perhaps a more pedagogical term describing the present contract form would be one clearly depicting its basic nature as being within the maritime context and a contract of transportation. This rules out some of the above-suggested alternatives. I also consider that in light of the ambition to make it less easy to mistake this contract form for anything else than the overriding contract it is, this should also be reflected in the term chosen. This would make it clear that it is, when at hand, used with an underlying contract (a charter party). The terminology presently seems to require certain knowledge of this contractual business, put into the maritime context, to correctly put it into perspective. On the other hand, perhaps this is just what is required in a conservative world like the maritime one, so maybe the entire term discussion here, as in the legal literature, is simply for its own sake and better postponed.

2.2 Preferences for a Contract of Affreightment

Transportation usually is required as a consequence of a sales contract prescribing different forms of trade terms, such as CIF, FOB and others. Depending on the trade term, it will be either the seller or buyer who will arrange and pay for the transportation, and the liabilities and responsibilities of the seller and buyer will affect the relation between the charterer and owner.¹⁵ Hence a situation can develop where the buyer is responsible for arranging for the transportation of goods, despite the fact that the buyer has no knowledge at all about the transportation market. Consequently questions may arise concerning what form of transportation is to be used, and what

¹⁴ See Gorton, Lars and Ihre, Rolf, *A practical guide to Contracts of Affreightment and Hybrid Contracts*, p. 5; Gorton, Lars; Hillenius, Patrick; Ihre, Rolf; Sandevärn, Arne; *Shipbroking and Chartering Practice*, p. 296; and *Scandinavian Studies in Law*, 1977, vol 21, p. 68.

¹⁵ Gorton, Lars and Ihre, Rolf, *A practical guide to Contracts of Affreightment and Hybrid Contracts*, p. 2.

will result in the best financial efficiency. If a COA is executed, this makes it possible for the buyer to hand these matters over to someone who is qualified to deal with them and ensures that the buyer gets transportation at predetermined rates. However, a contractual construction where the owner provides the transportation does not reduce the liability of the buyer against the seller, who is still responsible under the sales contract.

Gorton and Ihre¹⁶ deem it important for a cargo owner to consider a number of factors before deciding on what basis to arrange a relationship with a carrier when entering into a COA. Similarly, a owner will have to take into account several circumstances when choosing employment for his vessel. Firstly, when deciding the method of transportation, the cargo owner should make careful calculations. If the cargo owner is in a business handling a large quantity of goods over a period, he may choose to charter a vessel over a period of time, taking the benefit of a relatively lower freight (hire) but also taking on a number of operational risks, costs and duties. If the cargo owner does not want to take on these operational risks and duties, he may instead choose a COA with a owner. If the quantities of cargo are small but regular, the cargo owner may enter into an arrangement with a liner operator for partial shipments under a COA.

In regard to a COA, the Rotterdam Rules¹⁷ stipulate a protection of cargo interests through the “volume contracts” provisions¹⁸. These provide a series of conditions that must be met before the parties can derogate from the terms of the contract. It consequently is important, in order to achieve the best practical and economic solutions, that the parties understand how the costs, risks, etc. (basic components in contracts of carriage) are allocated in the traditional charter forms (bareboat chartering, time chartering, voyage chartering and carriage on liner conditions). It is clear that transportation and related handling costs are a considerable part of the final cost.

¹⁶ Ibid. at p. 2.

¹⁷ Article 6(2), see also Article 6(2)b on “demand carriage”.

¹⁸ Article 80.

Furthermore, between the seller and buyer, the party responsible may be held liable for consequential damages if he fails to arrange transportation as agreed. In accordance with these aspects, whether it is a seller or buyer or someone else who is responsible for the transportation, it is essential to ensure beforehand that tonnage will be available for the sea carriage. Gorton then states that among the different ways available for a shipper or receiver to arrange sea transportation; one of the most convenient is entering into a COA.¹⁹ It may also be advantageous for a seller or buyer to enter into such a contract in order to avoid fluctuations in the freight market and thereby make more accurate calculations and avoid devastating differences in costs. From the owner's perspective, economic stability might be gained with part of his fleet employed for a considerable period. In the eventuality of the spot market totally collapsing, he will still have an assured income.²⁰

¹⁹ Gorton, Lars; Hillenius, Patrick; Ihre, Rolf; Sandevärn, Arne; Shipbroking and Chartering Practice, p. 296.

²⁰ Ibid. at pp. 296-297.

3 Genco, Volcoa, Intercoa and the SMC

3.1 Programmes of shipment

A programme of shipment in its most ideal form would be as exact as possible in terms of both quantity and timing, but there are also reasons for the parties to give it a certain amount of leeway and flexibility. Precision entails that future disputes are most often avoided. On the other hand, a situation where the charterers are given a wide option with respect to the minimum/maximum volume of cargo to be shipped, allows for deviations. Such, a design must be regarded as highly practicable. Gorton and Ihre consider it almost inconceivable that a programme could be maintained without changes.²¹

The concept “fairly-evenly-spread” is often used to create the desired possibility for deviation in the shipping programme. This enabling of a certain degree of flexibility, compared to specifying a more rigid frequency of shipment, does not have a very clear conceptual analysis, and therefore has led to disputes about that which was exactly intended by these words. The concept does not require a mathematically even spread over the year, and is consequently difficult to quantify. This lack of precision can make such a clause difficult to enforce. Issues also arise, such as when is there a breach of scheduling shipments under “fairly-evenly-spread” and how is the damage assessment, if any, to be performed?

“Fairly-evenly-spread” refers to quantity but may equally refer to shipments. It is also argued that a similar obligation is to be implied if the contract is

²¹ Gorton, Lars and Ihre, Rolf, A practical guide to Contracts of Affreightment and Hybrid Contracts, p. 41 ff.

silent on this point, but that an express stipulation will perhaps give the owner less leeway.²²

3.1.1 “Fairly-evenly-spread” in Standard Agreements and the SMC

Unless otherwise specifically agreed, the programme of shipments by the charterer is to be “fairly-evenly-spread” over the period of the contract, Gencoa (clause 6.a), Volcoa (clause 5) and Intercoa (clause B). The Swedish Maritime Code provides a slightly different approach to the scheduling of the shipment. There the charterer is to ensure that the quantity of goods covered by the contract is suitably spread over the contract period, and that this is carried out in a way that the size of the vessels to be used is considered.²³

3.2 Scheduling and Nomination

In the nomination of vessel procedure, the interest gradually turns to a named vessel. With regard to the means of transportation, the owner has an abstract or generic obligation. In practice, this freedom can be more or less moderated depending on whether there is a great number of vessels satisfying the requirements of the contract, or if the number is very small. Gorton outlines that consequently from the outset, at least formally, there is a possibility of choice, but at some stage the owner has to make a decision, perhaps still with a legal and practical possibility to change his mind. Gorton continues that as the time of actual performance (tendering of notice) approaches, the owner’s freedom becomes, at least commercially, more or less limited. At a certain stage, the owner must also be regarded as legally bound vis-à-vis the charterer, and no longer has the right to use another vessel even if he would prefer to do so.²⁴

²² Falkanger, Thor, *Scandinavian studies in law*, p. 301.

²³ SMC § 14:44.

²⁴ Gorton, Lars; Hellenius, Patrik; Ihre, Rolf; Sandevärn, Arne, *Shipbroking and Chartering practice*, p. 308.

As shown above, it is difficult to agree beforehand exactly when the different shipments are to take place and what quantities are to be lifted for each shipment. Gorton sketches a scenario with a framework and procedure for more detailed planning, and explains that this is sometimes done, as discussed above under the heading “programme of shipment”, by using general expressions such as: “The 20 shipments under this contract shall be allocated as follows: 5 vessels to be presented load ready at a loading port during the period July – December. All shipments are to be evenly spread within each period”. There is also a need for a procedure affixing the specific terms. Gorton suggests that this can be done by a clause stipulating that the owner (or charterer) upon a certain date is to present a schedule including dates for loading and the names of the intended ships. This at times functions simply as a basis for a more detailed discussion between the parties. Once the scheduling is established, a system of notices often takes over. A clause dealing with such notices can have the following wording: “The owners or the vessel to give ETA-notices²⁵ 30, 15, 5 and 2 days prior to estimated time of load readiness at first port of loading. The owner are to keep the charterers’ informed about all changes in the vessel’s expected load readiness.”²⁶

Expressions such as “preliminary notices”, “definite notices” can be used without any clear understanding of what these different kinds of notices entail. To avoid misunderstanding, to what extent the owner has the right to change the vessel’s estimated time of arrival and to what extent a notice once given is binding should be established.

3.2.1 The Scheduling of Nomination in Contract and the SMC

The Gencoa provision (clause 7) in essence creates a scheme where the charterers initially nominate a spread of laydays at a given time before the first layday (the number of days to be filled in by the parties in the

²⁵ Estimated time of arrival.

²⁶ Ibid. at p. 309.

appropriate boxes). This initial spread is subsequently narrowed down by the charterer and after a further period (to be filled in), owners must nominate “a vessel or substitute”, with the “actual performing vessel” to be nominated at a given time thereafter. This scheme concludes by requiring charterers to advise as to their acceptance of the nominated performing vessel within 24 hours of the owners’ nomination. In the event a charterer fails to provide such notice of acceptance, the nominated vessel will be “deemed accepted.” Gencoa also gives a definition of the different notices to be given.²⁷

In Volcoa (clause 9), the owners are to nominate each vessel in the manner stated in the appropriate box giving reference to the contract, the vessel’s name, the appropriate quantity of cargo required and the first layday for such vessel. The cancelling date of each nominated vessel is to be the number of days stated in the appropriate box after the first layday.²⁸

In the Swedish maritime Code, the individualisation to a specific vessel is a two-step procedure. The charterer has an obligation to notify each shipment in reasonable time. The notice is to state the latest moment at which the goods will be ready for loading. This is followed by the owner’s²⁹ obligation to provide a vessel apt to perform the voyage in time, and within a reasonable time nominate a vessel that is to perform the voyage, stating her loading capacity and expected time of arrival at the port.³⁰

3.3 Breach of Contract

Falkanger³¹ describes contracts of affreightment as comprehensive and complicated. He also maintains that a reasonably successful execution of the contractual relationship to everyone’s satisfaction might require an intimate collaboration regarding a number of factors. These can be schematised in

²⁷ Gencoa clause 7.

²⁸ Volcoa clause 9.

²⁹ The SMC uses the term “carrier” instead of “owner”.

³⁰ SMC § 46.

³¹ Falkanger, Thor, Kvantum – Mislighold og Force Majeure.

that both parties must fulfil the contract and that the practical situation should not differ too much from that which has been presupposed.³²

In practice, one often has to make judgements taking into consideration the fact that the duties under COAs may be of a more general or a more specific type. As a consequence of this division, the duties and breaches may be related to the framework contract or the individual contract and sometimes to both.

3.3.1 Consequences of the Owner's Breach

A breach of contract by the owner may take many forms: The owner may fail to nominate a vessel (Volcoa clause 15, SMC § 14:49, Gencoa clause 11), may not meet the cancellation date of a particular voyage, the vessel used may not be covered by the contract, one voyage may fall out due to trouble with the vessel, the ship may be dirty in connection with the loading, etc. (Volcoa clause 15, 10 and 19, SMC §§ 14:47 and 14:49, Gencoa clause 15). Many of these problems are tied to individual voyages, but as we have learned from that stated above about breaches in relation to COAs, sometimes a breach may reach the level of the whole contract.

3.3.2 Consequences of the Charterer's Breach

The charterer may also be in breach in a number of ways. The charterer has a duty to present shipment plans, and to notify the owner of these plans in good time, and likewise regarding the individual shipments. He is also to supply the agreed quantity of the agreed goods in relation to the "fairly-evenly-spread" provision (Volcoa clause 14 and SMC § 14:48).

3.3.2.1 Delay in the nomination of a vessel

If the owner fails to nominate a vessel, this of course can be an indication of how future nominations will be handled. The problem then has to be dealt with according to the overriding contract.

³² Ibid. p. 19.

The owner's failure to nominate tonnage is solved in Volcoa by providing for a certain number of attempts at fulfilment. If the owner has failed to nominate tonnage more than three times, unless another number of times is provided in the appropriate box, the charterer is to have the right to cancel the remaining part of the COA. This is, not applicable to any vessels that already have been validly nominated (clause 15). The Intercoa uses the same three times solution but here there is no such provision on a delayed nomination of vessel (clause J).

The question of the cancellation of the COA in the event of a prolonged failure to provide tonnage is dealt with in Gencoa in the manner of a given reference to the gap-filling law on repudiation and frustration. Gencoa also states that in the event of failure to nominate a vessel, this should not give rise to a requirement of an extra voyage at the end of the period. The respective cargo quantity is then to be deducted from the overall volume (clause 11). So compared to the Volcoa provision the point of the modification is merely that charterers are not entitled to require that owners ship the non-lifted cargo at a later stage. The Intercoa does not have any provision on how to handle the non-transported quantity.

If the owner does not nominate a vessel in time, the Swedish Maritime Code (§ 14:49) stipulates that the charterer may prescribe a certain additional period. If the period is not unreasonably short, and a nomination is not given within the additional period, the charterer may cancel the COA in respect of the voyage for which the additional period has been given. According to the second paragraph the charterer may cancel the COA for the remaining part if the delay gives cause to anticipate an essential delay in nominating vessels for later shipments.

The Swedish Maritime Code provision further stipulates as to damages, and according to its § 14:49, the charterer is entitled to damages unless the delay depends on such a hindrance outside the owner's control as the owner could

not reasonably have contemplated when the COA was concluded and the consequences of which he could not reasonably have avoided or overcome.

3.3.2.2 Cancelling a Shipment

A single voyage can be cancelled for many different reasons; obviously it can be due to a lack of cargo or the lack of nomination of vessel.

The Volcoa regulations can be schematised in relation to the consequences according to the reasons for the cancellation. If a shipment has been cancelled due to the owner's failure to nominate, the main rule is that the corresponding quantity of cargo is to be deducted from the outstanding balance. However, if the reason for the cancellation of the shipment is caused by force majeure, no deduction is to be made. There is also a detailed provision, linked to the force majeure exception, which gives the charterer the option of demanding shipment of cargo at a later stage (clause 15). The cancellation of an already nominated vessel, done in accordance with the applicable charter-party, has as an effect that the corresponding quantity is to be deducted from the outstanding balance. If the cancellation is caused by an incident within the owner's control, there is the option of the charterer requiring the shipment of the cargo at a later stage (clause 10). The charterer's refusal of tonnage has a regulation similar to the one concerning the owner's failure to nominate tonnage with the deduction of the quantity of cargo within the force majeure qualification, the charterer's option to postpone the shipment and the certain amount of times given to the charterer regarding the nomination (clause 16). Lastly, it is stipulated positively that in the case of force majeure, any event which cannot be guarded against by either party, quantities not carried cannot be required to be shipped or to be carried afterwards, and that the performance affected is to be suspended until the hindrance ceases to have effect. There are also provisions on the cancellation of the COA due to the continuance of a force majeure hindrance, and the equivalent to a non-responsible party regarding any hindrance of performance even if the interruption is not exempted (clause 19).

Genco stipulates that the cancelling of a shipment is to be done according to the appropriate cancelling provision of the attached charter party other than by default. The cancellation then applies to that shipment only and the corresponding quantity of cargo is to be deducted from the overall volume. If the charterer seeks to cancel the contract in the event of a prolonged failure to provide tonnage, this is left to the gap-filling law on repudiation and frustration. A missing nomination in any event is not to give rise to a requirement of an extra voyage at the end of the period (clause 11).

In the Swedish Maritime Code (§ 14:47), the charterer is given an option to insist on the carriage of the goods or a corresponding quantity of new goods, if the owner's duty to perform the voyage is cancelled through a circumstance for which the owner is responsible. In the event of a reason to apprehend that a later voyage may not be performed without essential delay, the charterer may cancel the COA in respect of the remaining part.

3.3.2.3 Delay in Notification of Shipment and Programmes of Shipment

In Volcoa, a charterer's failure to give a programme of shipment, in cases where he has undertaken to do so, results in that any expenses incurred or any losses suffered by the owner are to be refunded by the charterer, and any quantity not carried due to such a failure is to be deducted from the total contracted quantity (clause 14). The Genco standard COA is silent on this issue as is the Intercoa.

The Swedish Maritime Code (§ 14:48) gives the owner, in the event of a delay in notification of shipment, a certain additional period for notice. If the charterer still does not fulfil this obligation, the owner may himself report a shipment as per applicable programme of shipment plan or cancel the COA in respect of that voyage. If the delay gives reason to expect an essential delay regarding later shipments, the owner may cancel the COA in respect of the remaining part. There is a similar regulation regarding the charterer's failure to give shipment plans, but with the difference that there is not any possibility for the owner to himself give the notification.

3.4 Breach of Contract at Common Law

The issue of cancelling a shipment is not dealt with comprehensively in Gencoa, instead there is a reference made to the law on repudiation and frustration. It is stipulated that in a situation of the owner's failure to provide a vessel or the charterer a cargo, they are in default of the COA. Whether the charterer may make a claim for damages resulting from the default or seek to cancel the contract in the event of a prolonged failure to provide tonnage, is then to be dealt with according to the common law.³³

Some words should be given about repudiation at common law. A short description of this legal area is provided here against the perspective of carriage of goods by sea.

A breach of contract is committed when a party refuses or fails to perform that which is due from him under the contract. Such a breach can be divided into three forms: the party in default may either expressly repudiate liability under the contract, do some act which renders further performance of the contract impossible, or just fail to perform when performance is due.

These first two forms entail that a breach may occur not only during the course of the performance of the contract, but also before either party is entitled to require performance from the other. This kind of breach is categorised as an anticipatory breach, and entitles the party not in default to bring an action for breach immediately without the necessity of waiting until performance is due. But to be effective, the repudiation must be accepted by the other party to cancel the contract, repudiation on the one side and acceptance of repudiation on the other. The innocent party has the option either to accept the repudiation as determining the contract and sue for damages, or ignore or reject the attempt to determine the contract and affirm its continued existence.³⁴

³³ Gencoa, explanatory notes, cl. 11.

³⁴ Wilson, John F, Carriage of goods by sea. pp. 338-342.

3.5 The Rotterdam Rules

The Rotterdam Rules³⁵ is a treaty comprising international rules that revise the legal and political framework for the maritime carriage of goods with the aim to extending and modernizing the international rules already in existence.³⁶ There are twenty-four signatories to the treaty including Sweden, Norway and Denmark. These rules apply to contracts in which a carrier, against the payment of freight, undertakes to carry goods by sea from one place to another.³⁷ The places of receipt and delivery are to be in different states, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are also to be in different states, if according to the contract of carriage any one of the following places is located in a contracting state: the place of receipt, the port of loading, the place of delivery or the port of discharge.³⁸

It nevertheless is so that a COA may provide for greater or lesser rights, obligations and liabilities than those imposed by this convention. This is due to the fact that the Rotterdam Rules³⁹ stipulate a protection of cargo interest through the “volume contracts” provisions.⁴⁰ These provide a series of conditions that must be met before the parties can derogate from the terms of the contract. This mechanism then means that freedom of contract can be upheld.

³⁵ The final draft of the Rotterdam Rules by the United Nations Commission on International Trade Law, was adopted by the United Nations on December 11, 2008.

³⁶ It is also said that the convention has an aim to achieve uniformity within admiralty law.

³⁷ The Rotterdam Rules, article 1(1).

³⁸ The Rotterdam Rules, article 5.

³⁹ Article 6(2), see also article 6(2)b on “demand carriage”.

⁴⁰ Article 80.

4 The Obligation of Nomination – Legal Status, Function and Damage Liability

4.1 Introduction

There is a need to discuss the obligation of nomination, within COAs from the perspective of the transfer from the framework contract to the individual voyage, in which its legal status in legislation as well as in and outside standard contract solutions will be reviewed. There is also a need to discuss the liability for damages in connection with the obligation of nomination, an analysis that will also in some sense concern its function in the contractual construction of a COA.

4.2 The Nomination/Scheduling Procedure in Contract and Legislation

As far as the nomination of vessel is concerned, there are some important differences to comment on with respect to the sources of regulation at focus in this work, and also outside of these sources. The legal status of the nomination is not always clear, and the way this lack of clarity is dealt with varies.

4.2.1 Transferring from the Framework to the Specific Charter in the Standard Contracts and Legislation

The Swedish Maritime Code clearly stipulates that the provisions on carriage of general cargo or those of voyage chartering apply to the carriage to be performed when the nomination is made.⁴¹ This is further discussed in

⁴¹ SMC § 14:47(2).

the legislative preparatory works to the Swedish Maritime Code, which explain that the framework contract's abstract level is left to the specific individual contract on voyage chartering or carriage of general cargo.⁴² Volcoa stipulates that a voyage under this contract is to be governed by a voyage charter-party, and if none is issued, the nomination will nonetheless create one.⁴³ In Intercoa, the owner is to give the charterer information of each loading, and at the same time, the owner is to give sufficient information to fill in Part I of Intertankvoy 76, which I believe must be seen as an indirect use of the nomination for the transfer from the framework to the underlying individual contract.⁴⁴

If the starting point is that both the Swedish Maritime Code and Volcoa by the nomination of vessel stipulate a transfer from the generic to the specific obligations,⁴⁵ certain questions then arise. The Swedish Maritime Code must be regarded as creating a clear transfer after reading that stipulated in the applicable paragraph which states that when the nomination is done "the provisions on carriage of general cargo or those of voyage chartering apply to carriage to be performed".⁴⁶ There is also the clarification, or more accurately described as an elaboration, that is simply descriptive in the legislative preparatory works to the Swedish Maritime Code, as explained above, adding nothing to the first conclusion.

The Volcoa provision does not have the same transparency in creating a transfer from the generic to the specific obligation; instead it probably has to be construed as having that function. It then has to be assumed that when the nomination is made, and as a result of this, a voyage charter-party is issued, this also means that the underlying contract is applicable. Gorton and Ihre believe that the nomination of a vessel in Volcoa creates a "specific"

⁴² SOU Governmental Legislative Inquiry 1990:13, p. 199.

⁴³ Volcoa clause 13:1:2:3.

⁴⁴ Intercoa clause (B).

⁴⁵ Regarding "generic and specific obligations" see *infra* section 4.3.1, "The generic obligation".

⁴⁶ SMC § 47:1.

obligation as under a traditional charter-party.⁴⁷ As I understand it, this specific obligation will then also be applicable.⁴⁸ Accepting this, the Volcoa provision on nomination is to be regarded as being as clear as the one in the Swedish Maritime Code. When the nomination is done, creating a specific obligation, the generic obligation of the framework contract is left for the underlying rules of the voyage charter-party. Annica Börjesson⁴⁹ then explains that the idea with the Volcoa provision is that the nomination represents the transfer of the generic obligation into a specific one, with reference also made to Gorton and Ihre.⁵⁰ This all seems very good in the perspective of legal certainty, but something more can be said about this in the perspective of the present work.

Volcoa uses the term “valid”⁵¹ to explain that upon any such nomination of a vessel, and in the absence of a single charter-party, with the issuing of a letter of nomination there will be a contract regulating the single voyage. To my understanding, this is based upon that the nomination in Volcoa can be relied upon from interpretation to be one of the required legal statuses. The question is then to what extent the nomination done can be deemed to be within Volcoa’s definition. The lexical interpretation of “valid” according to the Longman Dictionary, then used in regard of a document, is given legal status. Thus a nomination possibly will only sometimes be regarded as commercial, because as will be shown below, not every nomination qualifies to be given a definition as legal, and consequently, will not be creating a transfer from the generic to the specific obligation. Having in mind that the nomination procedure in Volcoa⁵² is formed by the parties, it seems fair to suggest, and in line with that which is discussed below, that in the final analysis it will be down to the interpretation of its legal status. It nevertheless can be noted that the first layday in regard of the single

⁴⁷ Gorton and Ihre, *Contracts of Affreightment*, p. 59.

⁴⁸ As this follows from construing the statement in its context, the reasoning preceding their statement can be found in Gorton and Ihre, *Contracts of Affreightment*, p. 59.

⁴⁹ Kvantumkontrakt särskilt om 1994 års reglering.

⁵⁰ Gorton and Ihre, *Contracts of Affreightment*, p. 59.

⁵¹ See Volcoa clause 13.

⁵² Volcoa clause. 9.

nomination of vessel is to be filled in by the parties, which to my judgement, and in line with the reasoning below, may give some support for an interpreted legal nomination, as a programme of shipment, creating a narrowing of the transfer from the generic obligation to the specific one, is of importance for the determination of the nomination as legal.

The provision⁵³ on nomination in Volcoa creates a scheme that guarantees that there will be an applicable charter-party after a valid nomination.⁵⁴ We can also look at the provisions on nomination in the Swedish Maritime Code setting out the moment of transfer; when the nomination is made “the provisions on general cargo or those of voyage chartering apply to the carriage to be performed”⁵⁵. This is also made clear by the legislative preparatory works to the Swedish Maritime Code stating that by the moment of nomination these rules are now directly applicable, something that is presupposed in my previous reasoning.⁵⁶ The nomination, of course, has to follow the provision of nomination in the Swedish Maritime Code.⁵⁷

The elaboration given in the legislative preparatory works is not necessary to define the clear moment of transfer. It can be noted, however, that this was drafted and put into use almost a decade after Volcoa. If it then were to be seen as stating commercial practice, the ETA required in the nomination and also the requirement for the charterer to give shipment plans and notice of shipment would be in line with the reasoning of narrowing the spectrum of actions.

My conclusion of the legal function of a nomination in Volcoa is that it will not be certain that the transfer in question has taken place if the question of “valid” is one for a subsequent decision by a court. Another thought is that every issuing of the letter of nomination will per definition be one of the required legal statuses, something that I believe will give evident legal

⁵³ Volcoa clause 13.

⁵⁴ See Volcoa clause 9.

⁵⁵ SMC § 47:1.

⁵⁶ SOU Governmental Legislative Inquiry 1990:13, p 190.

⁵⁷ SMC §§ 14:46 and 14:47.

status for the narrowing reasoning as Volcoa has provisions creating such a scheme⁵⁸. There is a requirement for stating the first layday and one optional for a shipment programme. This first conclusion is of some interest. Ihre,⁵⁹ in his discussion of shipment programmes, within the perspective of the legal status of a nomination, finds it quite easy, if the total quantity of goods and the number of vessels to be used are given, to calculate a preliminary shipment programme. He then concludes that the narrowing is made by this first programme, and by that, later a definite notice is given. I finally note that the “valid” stipulation seems to refer to the discussed legal scholarship, and that this may then be the machinery that Börjesson as well as, Gorton and Ihre have in mind.

There is no stipulation in Gencoa of the kind described above. Instead, we have to look at the scheduling/nomination – procedure for answers, which will also give some elaboration to that which has already been discussed. This will be discussed further below.

4.2.2 Transferring from the Framework to the Specific Charter in Contract Practice

The nomination procedure is of essential importance in the perspective of generic and specific obligations, where the scheduling/nomination procedure in Gencoa demonstrates its contractual significance. The example given below, about the nomination procedure in a long-term contract for transportation of goods, is intended to be a starting point for this discussion:⁶⁰

“Not less than 90 days prior to each contract year, the charterer had to give the owner notice of “the estimated quantities for transportation during such year and charterer’s preliminary schedule of cargoes during such

⁵⁸ See Volcoa clauses 13 and 5.

⁵⁹ Ihre, Kvantum-kontrakt – programmering av enskilda resor, 1997, p. 14.

⁶⁰ This example has been used by Falkanger, Thor, Scandinavian Studies in Law 1977 vol. 21.

year”. This notice was to be followed by a further 90 days’ notice of “date of definite availability of each lot of 20,000 tons” thereafter the charterer was to “designate a port of loading”, not later than 60 days prior to the definite availability date. Within 10 days of receipt of such designation, the owner had to “nominate for transportation of the lot in question, within 30 day after such definite availability date:

(i) a vessel;

(ii) the expected loading date, which shall be within 30 days after the definite availability date; and

(iii) the expected quantity to be moved by the vessel nominated.

Let us assume that on May 1, the charterer gives notice of availability of cargo on August 1. He has to designate the loading port no later than June 2, and this he does, e.g. by telex on June 1. Then the owner must, no later than June 10, nominate a vessel which can be expected to be ready for loading some time between August 1 and August 30. In addition thereto the contract calls for notices by the owner 10 days, 5 days, 48 hours before the expected time of arrival at the loading port. And on arrival a new notice of readiness to commence loading is to be given with the effect that laytime begins to count 12 hours thereafter.”⁶¹

⁶¹ Ibid. at p. 401.

Falkanger⁶² has discussed this example at some length, depicting a situation that can create certain difficulties for the performance of a COA. He states that perhaps the owner, after having notified the charterer of the name of the vessel to be presented for loading a particular lot of cargo, decides that he would prefer to use a different vessel, perhaps because the named vessel has suffered damage or may be used more profitably under another contract. The owner then asks the question: Is he free to do so? And finds that a positive answer presupposes that the other vessel – the substitute – satisfies the requirement of the contract, with regard to the physical characteristics. Further, it must be in such a position that notice of readiness can be given within the dates stipulated in the contract or definitely fixed in accordance with the provisions of the contract, something that is not necessarily sufficient. If the notification in view of the terms of the contract can be assessed as a definite nomination of a vessel, the effect is that the name of the vessel has been written into the contract. Unless there are specific provisions to the contrary, a substitution requires the consent of the charterer. Falkanger refers to the example given above and explains that it is accepted that the owner is bound when he has given the notification required by the contract within 10 days of receipt of the charterer's designation of the loading port. Or to put it even more clearly, when the owner on June 10 has nominated a vessel for loading between August 1 and 30, he is bound to use the nominated vessel.

This reasoning by Falkanger can be used as a background for understanding the function in Gencoa of the transfer from the generic to the specific obligation. There it is explained: "On receipt of the charterers' definite notice the owners are obliged to accept the laydays by nominating a vessel or substitute". This is further explained by that it does not infer any substitution rights and that the naming of a vessel at this stage is intended to be meaningful from a commercial rather than legal point of view. The formal nomination of the actual performing vessel is placed at a later stage

⁶² Falkanger, Thor, *Scandinavian Studies in Law* 1977 vol. 21, p. 403.

of the procedure.⁶³ This is seen from the provision on scheduling/nomination: “The actual performing vessel shall be nominated...”⁶⁴ The transfer from the framework to the underlying contract in Gencoa must therefore, according to my understanding, be seen as clear from its contractual writing and also from the elaboration in its explanatory notes.

It can also be added that the clauses spelling out the nomination procedure are not always crystal clear. In such cases – as already mentioned – it is my opinion that the courts will take into regard the time span between a contended definite nomination and the loading date. If this is long, the courts may be inclined to construe the notification as a tentative one, since the other alternative is a serious restriction of the flexibility that is a general and characteristic feature of a quantity contract. Falkanger concludes that this general attitude may, however, be questioned when the nominated vessel is lost or heavily damaged after the nomination as to be rendered incapable of carrying the cargo in question at the correct time. In many cases, the charterer will raise no objection, even if the substitute arrives some time after the last contractual date, but may for various reasons – e.g. a failing freight market – be denied the right of substitution. It is also submitted that he is legally entitled to reject the substitute, with no obligation to give any reasons for doing so.⁶⁵

If we look at Gencoa in the perspective of the above discussion, it may be of further interest to discuss it in regard of nomination and substitution. The starting point for this is where the vessel breaks down or is lost during the voyage to the loading port, and the question concerns substitute performance. If the nomination is deemed as definite, the situation is to be assessed in relation to the specific charter-party. Consequently, as long as this contract does not state the opposite, there will be no obligation to substitute the incapacitated vessel. If no shipping program alters the

⁶³ The explanatory notes to Gencoa clause 7 – Scheduling/Nomination.

⁶⁴ Gencoa clause 7(c).

⁶⁵ Falkanger, Thor, *Scandinavian Studies in Law* 1977 vol. 21, p. 403.

procedure in Volcoa,⁶⁶ it is fair to conclude that the definite nomination,⁶⁷ compared to the example given above will take place quite early in time so that no substitution has to be performed. The same may apply for the Swedish Maritime Code.⁶⁸ A more rewarding perspective is provided by Gencoa, due to the fact that the formal nomination, as shown above, is placed at a later stage in the procedure.⁶⁹ This must mean that compared to the scheduling/nomination example of Falkanger, the Gencoa solution creates a greater scope for substitution within the Gencoa-form of a vessel that has not reached the cargo-harbour. This may also be regarded as recognition of the fact that the time-span between nomination and the loading date cannot be too long if the flexibility of a COA is to be upheld.

4.3 The Obligation of Nomination and Substitution

The contractual construction of a COA entails that a vessel has to be nominated in order to fulfil the transport obligation:

“With regard to the means of transportation the owner has...an “abstract” or “generic” obligation, even if there may be a number of restrictions. In any event, there is from the outset, at least formally, a possibility of choice, but at some stage the owner has to make his decision, perhaps still with a legal and practical possibility of changing his mind. As the time of actual performance (tendering of notice) approaches, his freedom becomes – at least commercially – more or less limited. At a certain stage he must also be regarded as legally bound vis-à-vis the charterer. He no longer has the right to use another vessel even if he would prefer to do so. There may exist a

⁶⁶ Volcoa clause 5.

⁶⁷ Volcoa clauses 9 and 13.

⁶⁸ SMC § 14:47.

⁶⁹ It should be noted that the parties are to agree on when in time prior to the opening layday the legal nomination is to be performed, see Gencoa clause 7.

duty to do precisely this if something happens to the originally named vessel. Such duty – if any – must in any case exist some time prior to the vessel leaving the loading port with a contractual cargo. The abstract obligation is gradually based to a specific vessel or, to put it differently, the abstract obligation to have a certain lot of cargo shipped at about a given date is transformed into a specific obligation.”⁷⁰

This passage as quoted from Gorton and Ihre,⁷¹ very much summarises that which needs to be discussed about nomination and substitution within the field of COAs, important issues, as will be shown, in regard of different legal and contractual solutions.

4.3.1 The Generic Obligation

The generic obligation entails, as will be shown if one follows the principles of the 1905 Sale of Goods Act and applies them to the COA, that the owner has a strict liability to nominate a vessel under the COA, with the exception of force majeure. When the nominated vessel becomes tied to the specific contract, within the field of COA this meaning the specific charter-party, the obligation is specific.

In regard of specific performance, Rodhe⁷² writes about its division on one side as definite, either as one or more individual objects, or as a certain quantity of a certain species and concludes that in the later case, a generic obligation is said to exist.⁷³ From this reasoning, it seems that the division into the specific or generic obligation is part of the general law of contracts as such, but also was codified in a clear manner in the 1905 Sale of Goods

⁷⁰ Gorton, Lars; Ihre, Rolf; Sandevärn, Arne; Contracts of Affreightment, p. 58.

⁷¹ Ibid.

⁷² Rodhe, Knut, Obligationsrätt.

⁷³ Ibid. at p. 26.

Act⁷⁴. In the 1905 act, there was a distinction between generic and specific sales as regards the prerequisite for the buyer's right to damages for the seller's contractual breach of delay of delivery. According to § 24 of the 1905 Sale of Goods Act, such a delay of performance of a delivery contract⁷⁵ rendered the seller liable in damages, even if the delay was not due to negligence. In regard of the purchase of specific goods, § 23 of the same act stipulated a liability with negligence. Rodhe further explicated as to the subject of these rules, that prominence was given to the seller's liability for performance of work that is part of the purchase. If the seller has undertaken to perform work on or to the transport of goods or take other related measures, such an undertaking should be assessed according to the same rules. In other words, it is either a purchase of specific goods or a delivery contract. This obligation of performance of work can, regarding both types of purchase, be of such a general contractual description that it should be assessed according to § 24, but can also be of such a specific description that it should be assessed under § 23. This means that if a contractual obligation of transport is to take place with vessel A, an obstacle attributed to this vessel is always to be assessed under the latter paragraph. If the transport according to the contract is to be done with either vessel A or B, an obstacle that is attributable to one of the vessels should be assessed under the first paragraph, while an obstacle attributable to both vessels should fall under the latter paragraph.⁷⁶ I conclude that § 24 of the 1905 Sale of Goods Act regulating delivery contracts is probably⁷⁷ by way of analogy relevant to the general obligation of transportation that is found in the COA. How the fact that this act is no longer valid affects this conclusion is discussed later in this work.

Applying the principles of generic or specific obligations from the general law of contracts does not answer the question of which liability should be applicable under COAs. On the strength of that expressed by Rodhe; that if

⁷⁴ The SSGA 1905.

⁷⁵ The SSGA 1905 uses the term *leveransavtal*.

⁷⁶ Rodhe, Knut, p. 537 footnote 537.

⁷⁷ This author's translation of the Swedish word *torde*.

negligence is not necessary for damage liability then strict liability is at hand,⁷⁸ § 24 of the 1905 Sale of Goods Act expresses such a liability. Rodhe also forms a rule from his above reproduced academic discussion in the way that strict liability is at hand regarding such performance, where the seller has the freedom to choose by himself within a certain framework and pay for his own performance and where a different decision could have led to a satisfactory fulfilment.⁷⁹ Rodhe also asks the question whether this rule is of relevance outside the area of the 1905 Sale of Goods Act, and finds that in most cases, this question is to be answered in the negative when it comes to specific performance. He further concludes that it is thus not suggested that one should go beyond a liability of negligence within, for example, a transportation agreement, even if the stated rule, based on the above discussion, nonetheless very well could be applied.⁸⁰

Regarding the previous maritime code and contracts for several shipments over a longer period, Jantzen states that it must be assumed that the owner has made a guarantee to self-secure the tonnage necessary to the performance of the obligations that he has undertaken if no vessel has been named in the contract. If he has neglected to do this, and later cannot get the necessary tonnage despite reasonable efforts, he should be responsible.⁸¹

Knoph⁸² finds that in cases of a non-named vessel in the contract, where the generic obligation is at hand, the owner will have the freedom to use a vessel of his choice but will not be free from this commitment as long as there is tonnage to procure.⁸³

⁷⁸ Rodhe, Knut, *Obligationsrätt*, p. 535.

⁷⁹ Lundstedt has proposed that in a situation where the seller has unlimited possibilities to fulfill his obligation, an investigation of negligence would be too complicated. This is something that he deems not to be the case when the seller, with normal care, has performed with respect to certain goods, which later are lost by accident and that therefore performance within the contracted time has been rendered impossible.

⁸⁰ Rodhe, Knut, *Obligationsrätt*, p. 537.

⁸¹ Jantzen, Johs, *Håndbok i Godsbefordring til sjos*, p. 53.

⁸² Knoph, Ragnar, *Norsk Sjørett*, p. 156.

⁸³ *Ibid.* at p. 156.

The 1990 Sale of Goods Act stipulates a control-liability⁸⁴ regulating damage liability in regard of the generic and specific obligations.⁸⁵ The division of a purchase into different contract objects was abandoned and instead a distinction is made between different types of damages, such as direct and indirect losses. An issue of some importance can be seen as arising considering this change of principles in the 1990 Sale of Goods Act. Assuming the status of the 1990 Sale of Goods Act as a codification to some extent of general contract law, a discussion of the relevance of this change in the law within the context of this work is relevant. Jan Hellner⁸⁶ comments that though the distinction between the specific and generic has disappeared from the text of the sales legislation, this does not mean that the distinction is without meaning within the Sale of Goods Act or the law of contract in general. Consequently, the question can be posed whether the principle of absolute impossibility is replaced, or on some level changed, by control-liability in the general law of contracts, an issue beyond the scope of this work. Hellner has stated that he finds no support for a general conclusion that control-liability is to be recognized as the modern form of contractual damages. However, this new legislation arguably is of importance due to the fact that the 1990 Sale of Goods Act can be a matter of choice of law. It can also be seen as important as the principle of control-liability is in addition found in the Swedish Maritime Code's regulation of nominations under COAs.⁸⁷

The paragraphs regulating control-liability in the 1990 Sale of Goods Act and the Swedish Maritime Code are based upon the same four prerequisites – hindrance, control, unpredictability and activity. It naturally is of interest to look into these prerequisites in order to try to draw up some boundaries for the application of control-liability where this may be possible. Of further major interest is the fact the 1990 Sale of Goods Act may also be of interest in regard to the COA regulation in the Swedish Maritime Code. Firstly, a

⁸⁴ The term *kontrollansvar* is used in the SSL.

⁸⁵ SSL § 27.

⁸⁶ Hellner, Jan, *Speciell avtalsrätt II Kontraktsrätt*, Allmänna ämnen p. 40.

⁸⁷ SMC § 14:49.

hindrance for contractual performance has to be at hand. Secondly, this hindrance is not to be within the seller's control. Thirdly, the hindrance is to be of such a kind that the buyer could not be expected to reasonably have been aware of it at the time of the purchase. Fourthly, the seller is not to reasonably have been able to avoid or overcome the hindrance. These prerequisites are cumulative. The first prerequisite means that the delay constitutes an obstacle for performance within the right time. It is not sufficient that the performance becomes more difficult or costly. On the other hand, it is not a question of objective-impossibility⁸⁸ in the meaning that the performance within the contractual time should be excluded not only for the seller but also for every other person. It is not either a totally necessary condition that the performance is absolutely impossible for the seller. However, there can be such extraordinarily severe conditions that they according to an objective conclusion in fact have to be considered a hindrance.

4.3.2 Objective impossibility

Regarding the obligation of nomination of a vessel, one legal scholar has stated, "at the outset the liability is strict, with the exception of *force majeure*".⁸⁹ Falkanger⁹⁰ put the issue of a generic obligation and strict liability into a COA-perspective by reasoning that if it is impossible to procure tonnage, the owner will be free from his commitment. Falkanger also gives the example that if it is impossible for an owner to procure tonnage due to being blacklisted, while others are able to get a hold of suitable tonnage, in such a situation the owner will not be free. Instead, the impossibility has to be qualified as an objective one⁹¹ – which means that it

⁸⁸ Author's translation of the Swedish term *objektiv omöjlighet*.

⁸⁹ Falkanger, Thor, *Scandinavian Studies in Law* 1977 Vol. 21, p. 80. See also *Contracts of Affreightment*, Gorton, Lars and Ihre, Rolf, p. 59.

⁹⁰ Falkanger, Thor, *Kontrakter om skipning av et bestemt kvantum (transportkontrakter)*. See also Runesson, Eric M, with references, for a discussion about alternative forms of liability, pp. 196-198.

⁹¹ Falkanger, Thor, *Kontrakter om skipning av et bestemt kvantum (transportkontrakter)*, Falkanger uses the term *objektive umulighet*.

should not be possible for anyone to fulfil the obligation to nominate a vessel.⁹² Falkanger further states that this must in addition be qualified with a requirement to act with foreseeability, as in being in a situation of objective impossibility but not having acted in time to make the fulfilment of the obligation possible.⁹³

Rodhe⁹⁴ describes his view on objective impossibility, a discussion which I believe is important enough to give further account to in this work. He first comments that § 24 of the 1905 Sale of Goods Act has been interpreted to mean in the legal scholarship, and foremost by Almén, that it is subsequent objective impossibility that is to be assessed. After establishing that it is possible to ascertain that objective impossibility existed already when the obligation arose, this judicial term is defined by Rodhe as that the distinction is to be made at the time when, taking into account (possibly not yet known to the parties) the facts at hand and by invoking common experience, when it earliest can be stated definitely that it is impossible to perform. The remaining question then is at which point in time this hypothetical test is to be done.⁹⁵

In the case, ND 1919.81 NH, the court held the owner responsible for not having provided a tug in time. It was deemed to be of importance that the tug should be ready to sail as soon as the cargo was loaded due to the fact that it was not possible for the vessel to sail by itself. The court stated that the strictness of this reasoning was in relation to the specific situation, and further concluded that under the circumstances in question the owner should already when entering into the contract had made available a suitable tug to use under the contract at after the vessel had taken in the cargo. In the least, the owner ought to have made sure that there was a tug to get a hold of in proper time, if nothing unforeseeable occurred. The court also made obvious

⁹² Ibid. at p. 400. Falkanger also refers to Jantzen, and his statement that the owner is free if he is not able to procure the necessary tonnage despite reasonable efforts, and concludes that the severity of the liability is by that not emphasized sufficiently.

⁹³ Ibid. at p. 400.

⁹⁴ Rodhe, Knut, *Obligationsrätt*.

⁹⁵ Ibid. at p. 358.

that it must be seen as obvious that those possible obstacles created by World War I, and the weather conditions typical of autumn, had to have been in the owner's mind at the time. The facts of the case also included that the owner, by the time of the execution of the contract, had at its disposal a tug on time charter. This was later described by the owner as not built for gale, and therefore was not to be used anymore during the autumn. The court found that if a suitable tug, for the season and the weather conditions, had been used there would have been no hindrance for a fulfilment of the contractual obligation.

If one reads this case in the sense that the court analysed objective impossibility, the conclusion may very well be that the hypothetical test was applied at the point in time when the contract was executed. Falkanger's conclusion is that even if it is impossible to procure tonnage within the contractual time, the owner can nevertheless be responsible because he has not made the necessary preparations in due time.⁹⁶

If we bear in mind that initially stated above, where Gorton and Ihre⁹⁷ provided us with a description of the subjects for this chapter, the discussion in the legal scholarship becomes easier to put into perspective. The owner must be regarded to have from the outset, at least formally, a possibility of choice, but at some stage has to make his decision. In regard of this late moment in time of the nomination procedure, the situation was described as being limited in the choice that was practically possible for the owner. Håstad⁹⁸ gives an account of the criticism found in the scholarship that the division between specific and generic purchases is not suitable. The reason for this distinction was that the seller in cases of generic sales in principle has unrestricted possibilities to obtain a contractual item. This notion is often restricted, however, to a certain time after the contract has been executed. After this, the seller's efforts are often based on a specific object

⁹⁶ Falkanger, Thor, Kontrakter om skipning av et bestemt kvantum (transportkontrakter). In addition to this case Falkanger also refers to Jantzen 1.c. s. 53 and Augdahl 1.c s. 276, for his conclusion.

⁹⁷ Gorton, Lars; Ihre, Rolf; Sandevärn, Arne; Contracts of Affreightment.

⁹⁸ Håstad, Torgny, Den nya köprätten.

with the consequence that a hindrance occurring just before the time delivery is due cannot be overcome. Should not the seller then be liable under the rules of specific sales as he has structured his efforts in such a manner?⁹⁹

Almén has reasoned from a well-known example on how to assess objective impossibility. A merchant in Hamburg undertakes to deliver to Stockholm in May a shipload of South-Fruit of a kind that at the time of delivery is not available in Sweden. The vessel on the 30th of May hits unknown ground and sinks outside Sandhamn. It then is indisputably impossible for any person to procure a delivery of such a quantity of this fruit on the following day in Stockholm. Nonetheless, this is not a situation of objective impossibility; another vessel could have taken another route or successfully passed the dangerous passage.¹⁰⁰

We return to the question asked above; at which moment in time should we apply the hypothetical test? Almén maintains that when this assessment is conducted, in the meaning that the question is to be asked whether it would have been possible for anyone to perform such a contract as the one entered into by the seller and then in this way place another person in this role, one has to begin with the situation existing at the time of the purchase. No consideration at all is to be given to those arrangements undertaken by the seller for the performance of the contract as a consequence of some unpredictable circumstance that has gone wrong, and in which such a situation, maybe a last minute accident, it would be impossible for anyone to fulfil the obligation under the contract in time.¹⁰¹

Rodhe¹⁰² discusses this Alménian standpoint and finds that there is a contradiction in terms in applying objective impossibility this way. Consideration also has to be given to the main rule in the § 24. Rodhe does a

⁹⁹ Ibid. at p. 57.

¹⁰⁰ Almén, Tore, Om köp och byte av lös egendom, p. 288.

¹⁰¹ Ibid. at p. 287.

¹⁰² Rodhe, Knut, Obligationsrätt, p. 358.

hypothetical test, in accordance with Almén, at the time the contract is executed, just to find that an additional determination has to be performed. It would not have been possible for another person to deliver the South-Fruit cargo if he had sent it with the boat that was wrecked, but on the other hand, it would not have been impossible for the seller himself if he had sent the cargo with another vessel. Rodhe then adjusts the definition of subsequent objective impossibility in that it is to have been impossible for anyone to perform regardless of which arrangements had been made after the execution of the contract.¹⁰³ If the vessel had instead contained all the goods of the kind of the purchase, there would be a situation of objective impossibility according to Almén.¹⁰⁴ Rodhe concludes that if the above given definition is applied, the result will not be correct. The cargo could have been sent with another vessel and then escaped the destruction. Two definitions are then required in order to give expression to Almén's meaning of objective impossibility. The first is the one already given, and the second is to express the special situation where all the cargo has been destroyed. Rodhe makes an important distinction between the two, where the latter is to be done at the time the cargo is destroyed and not at the time the contract was executed.¹⁰⁵

The above discussion of objective impossibility could be left as it stands, as an area of conflicting standpoints in the legal scholarship. Nevertheless, the issue of objective impossibility is notably taken into consideration with respect to COAs by Falkanger.¹⁰⁶ He states that only if it is impossible to procure tonnage can the owner be exempted from his obligation to nominate. There thus is some room to address the conflicting views on objective impossibility in this work, or at least to show that this issue is also relevant in a discussion about the law of transportation. By using the example given by Almén about the South-Fruit cargo, it is possible to discuss the matter also in the meaning of nomination of vessels instead of

¹⁰³ Ibid. at p. 359.

¹⁰⁴ Almén, Tore, Om köp och byte av lös egendom, p. 288.

¹⁰⁵ Rodhe, Knut, Obligationsrätt, p. 359.

¹⁰⁶ Falkanger, Thor, Kontrakter om skipning av et bestemt kvantum (transportkontrakter), p. 400.

cargo. If we assume that a vessel nominated under a COA goes down just before a final nomination, an application of the adjusted definition as given by Rodhe would mean that no objective impossibility exists, the owner could have successfully nominated a different vessel. Accordingly, the result would be the same if all suitable vessels were occupied. The first situation may be that there are no vessels to procure within the stipulated time of nomination, and the second that all suitable ones may be unavailable for a foreseeable time. Nevertheless, there would be no discharge of liability because another vessel could have been nominated.

Almén suggests that the main-rule in the § 24 of 1905 Sale of Goods Act is probably no more than an expression for that the contract is to be seen as to contain a promise of warranty by the seller, that a certain amount of goods such as described is to reach the buyer at the stipulated time and place.¹⁰⁷ Runesson, however, is less sure and of the opinion that today, one should probably be less inclined to bind over the promisor liability only from that the seller has undertaken an obligation to perform.¹⁰⁸

While discussing objective impossibility, and its practical application, it can be mentioned that Almén in the first edition (1906) of the 1905 Sale of Goods Act commentary gave an example of such an exemption to the obligation to perform. It was there stated that if a hostile fleet blocked the entire Swedish East-Sea coast, it could not be required that a seller of tar in Vasa should deliver the tar from Vasa to Stockholm over land around the bay of Bottnia or by railroad over Petersburg to Berlin. This example was changed in the second edition. The railroad around the bay of Bottnia had by then been opened. Runesson comments that this evidently brought a need to sharpen the example.¹⁰⁹ It now stated that an Åländsk seller of wood could not be required to make delivery to Stockholm by railroad around the bay of Bottnia instead of what was contemplated, by sea from Åland.

¹⁰⁷ Almén, Tore, Om köp och byte av lös egendom, p. 286.

¹⁰⁸ Runesson, Eric M, Rekonstruktion av ofullständiga avtal, p. 196.

¹⁰⁹ Ibid. at p. 211.

However, in the third edition of the commentary issued in 1934, Eklund omitted the example.

Lundstedt¹¹⁰ argued that the South-Fruit scenario should have had a different outcome than the one recommended by Almén. Lundstedt states: “Is it possible for the seller to show, that the merchandise, on which he has based his performance, by pure accident has been lost and by that means that the performance is impossible, then it could scarcely be asserted that the exemption from liability for the seller would be in conflict with general notions of legal certainty and commercial interest.”¹¹¹ Lundstedt by this dismisses the distinction necessary in the Alménian standpoint, about objective impossibility and what lies outside of this, the subjective impossibility, and consequently also the warranty reasoning.¹¹² The correctness of this line of reasoning Lundstedt finds is reinforced by the fact that it is only temporary impossibility that is at question and that the buyer can continue under the contract. Damages will be paid if the seller is not performing as soon as the performance has become possible. Therefore there is scope to argue from a fairness point of view where such reasoning would be in the favour of the seller.¹¹³

Sandvik¹¹⁴ has commented upon a Norwegian case in which he introduces a milder application of § 24 than the one traditionally upheld, and remarks that this is the most important Norwegian post-war precedent¹¹⁵ for § 24 in the Scandinavian 1905 Sale of Goods Act. The case concerned a delivery contract regarding fishnets that relied on a sub-supplier, under which the

¹¹⁰ Lundstedt, Wilhelm, Kan härskande tolkning av 24§ köplagen anses riktig?

¹¹¹ Author’s translation of *allmänna rättsäkerheten* and *omsättingens intresse*.

¹¹² The last mentioned statement may have implications within the reasoning under the heading “Distribution agreements and damages”.

¹¹³ Runesson, Eric M, Rekonstruktion av ofullständiga avtal, pp. 199-200. Lundstedt’s reasoning was objected to by Supreme Court Justice Gustav Carlsson, who found that the reasoning of Lundstedt could result in the opposite, that the interest of fairness was to be overridden if the promisor/seller was exempted from liability. Ljungman supported Lundstedt, but confined it to apply to hindrance of transport. Ussing found the Alménian way to construe the § 24 possible, but that it would lead to an inappropriate result as it would be difficult to bring it to a conclusion if the seller had intended precisely that merchandise for performance that was lost. See pp. 201-203, and for further references.

¹¹⁴ Sandvik, Björn, Säljarens kontrollansvar.

¹¹⁵ Rt. 1970 p. 1059 “Knutelindommen”.

defendant was unable perform. He had entered into the contract at a time of high demand for fishnets and when his supplier could not deliver the required parts there was no possibility to obtain them elsewhere in Europe as production capacity was at a maximum level everywhere. So was also the defendant's production, which made him unable to perform all of the contract for fishnets he was under an obligation to perform. The Supreme Court found that there was a relevant hindrance to performance according to § 24. The more liberal perspective, according to Sandvik, lies in the fact that there was no subjective or objective impossibility. Instead, the seller had undertaken greater contractual obligations to deliver than he had capacity for. Neither was there a situation of force majeure instead as the reasons for the delay were only those non-performed deliveries of the sub-supplier, who had its own production problems. Sandvik then concludes that no prerequisites for an exemption from liability are fulfilled according to the § 24.

4.3.3 Economic Force Majeure, Economic Impossibility, Increased Costs within Control-liability and Hardship

Falkanger¹¹⁶ also refers to economic force majeure as a cause for discharge of the obligation to nominate a vessel under a COA, while stating that no real consideration for increased costs has been displayed in the case law.¹¹⁷ The ND-case, 1920.86 NH, is suggested as being of particular interest as it concerns a contract of transportation, where the issue concerned increased freight rates. The increase amounted to 10 shillings under the 20 year-contract that stipulated a freight rate of 5 shillings. The court did not find this sufficient for a release from the obligation to nominate under this freight contract, reasoning that the other shipping companies had continued to perform their charter-parties with unchanged freight rates. Further, the

¹¹⁶ Falkanger, Thor, Kontrakter om skipning av et bestemt kvantum (transportkontrakter), p. 401.

¹¹⁷ Falkanger refers to Norwegian case law without mentioning any specific case.

court noted that it had been possible to procure a favourable return freight. Also of material significance was the fact that the parties had discussed the question of a war-clause without it becoming a part of the contract.

Impossibility is a legal ground for cancellation of a contract by defendants. Hellner has made the distinction between the two doctrines, here discussed, as applicable to increased costs of performance: In older Swedish case law, rapidly increasing costs as a consequence of an occurrence that in itself constitutes an exception, has been regarded to amount to impossibility also when § 24 of the 1905 Sale of Goods Act is applied, and that it is reasonable that this is at hand even when the rule of control-liability is applied.

Economic force majeure is another issue he continues, a fast rise in costs that cannot be traced to such an extraordinary occurrence like war, export prohibitions and so on. The rise in cost further must be of such strength that the performance of the contract is totally beyond its conditions,¹¹⁸ or cause an economic sacrifice in an amount that can not find any support in the contract.¹¹⁹ It is often also said that the rise in cost is to be exorbitant, abnormal, excessive or the like.¹²⁰ An older example is the rise of costs during World War I, of grain, later examples have been about oil and uranium. The effect of the special rise in cost is often fortified by inflation and depleted natural resources.¹²¹ In the case, the court concluded that the changed conditions under which the contract was to be performed had a clear connection to the war. Hellner and Ramberg¹²² put forward that there is no case known to them, where the Swedish Supreme Court has accepted a rise in cost that has no connection to war or any other similar event. They are also of the opinion that there is no real justification for making a distinction between war or other exceptional rises of cost once it has already

¹¹⁸ See also NJA 1918 p. 20 and 1923 p. 20.

¹¹⁹ NJA 1925 p. 624.

¹²⁰ Hellner, Jan, *Köp och Avtal*, p. 222, and Hellner, Jan, *Speciell avtalsrätt II Kontraktsrätt, Allmänna ämnen*, p. 149.

¹²¹ Hellner, Jan, *Köp och Avtal*, p. 222, and Hellner, Jan, *Speciell avtalsrätt II Kontraktsrätt, Allmänna ämnen*, p. 74.

¹²² Hellner, Jan, Ramberg, Jan, *Köprätt, Speciell avtalsrätt I*, p. 148.

been accepted that this can lead to release of liability, as it will affect all sellers despite their individual circumstances.¹²³

Almén maintains that in situations of war and similar circumstances, the question of exemption from liability is to be assessed based on whether the seller, according to good commercial practices, should have kept the goods in stock.¹²⁴ This I deem to be difficult to apply in the COA situation. To require that any kind of physical supply of vessels is to be kept to be used under a COA cannot be an obligation consistent with the purpose of entering into such a contract. There would be no point in restricting the freedom of the owner to nominate suitable tonnage in such a way that the incitement for this type of contract would be lost. On the other hand, case law has held that if the seller has the item in stock he will be obliged to use this to fulfil his obligation to the buyer, despite any rise in cost of the replacement of the merchandise.¹²⁵ This of course is easier to apply to the COA.

In the initially discussed case, it was finally concluded that the fact that a war-clause had been discussed but had not become a part of the contract, could not solely be decisive for the obligation to remain under this COA. Even if war could be predicted, a war is a different thing because of its dimension and duration, something that has led to substantial changes in the way to predict such a situation. The court found that this could suggest a material situation of not absolute impossibility, but one of such difficulty that it could not be reasonable to require that the contract is to be performed under the same obligations. Based on this, the court reached the conclusion that there was no such situation present in this case. The situation had not been problem-free, but it had not led to that sea transportations had been affected generally, meaning that the owner in the present case could not be assessed differently. The court then based this finding on the perspective of

¹²³ Ibid. See also NJA 1946 p. 679.

¹²⁴ Almén, Tore, Om köp och byte av lös egendom, pp. 308-309. See also Runesson, Erik, M, Rekonstruktion av ofullständiga avtal, p. 217.

¹²⁵ Hellner, Jan, Ramberg, Jan, Speciell avtalsrätt I Köprätt, p. 149.

the increased freight market, which was done beginning with the statement that in reality, the question is about just this particular issue. The conclusion reached was that not even this circumstance could be found as exempting. Other owners had carried out their obligations under charter parties already in force under unchanged freight rates and it had also been possible to procure favourable return freight on the COA in question.

Almén further puts forward that consideration is to be given to whether the buyer has offered a higher remuneration that would have reduced the losses of the seller.¹²⁶ In this context, it can be said that in a case of increased costs for the seller under a long-time contract at a predetermined price, the court, while stating that the arising situation had to be seen to fall outside the parties' agreement, found that the compensation offered by the buyer kept the contractual obligations in place. Of interest is also that the damages calculated were based on the difference between the market value and the highest price that the buyer under the negotiations had been willing to pay.¹²⁷ This has been commented upon by Runesson, in that the Swedish Supreme Court seems to have been of the opinion that the buyer should carry the risk for any increase of costs, despite the fact that he had guarded against it with a contract for a predetermined price. The reason for this then seems to be that the seller had been in no position to predict this rise of costs.¹²⁸

The principle of this case was applied again in another case where the buyer had conceded displacement of deliveries that had made it possible for the seller to sell the product to other buyers for the current price on the market, and by that he could limit his losses. The seller had to pay full damages

¹²⁶ Almén, Tore, *Om köp och byte av lös egendom*, p. 290. This issue was discussed in the case 1920:86NH with a negative outcome, as the charterer had not been willing to add any payment for increased costs to the owner.

¹²⁷ NJA 1923 p. 20. In this case, the rise in costs for the owner was 168%.

¹²⁸ Runesson, Eric M, *Rekonstruktion av ofullständiga avtal*, p. 219. The author is also critical of this solution because the buyer's right to damages is reduced due to the fact that the seller has based down a concession. Also that, that which can be categorized as negotiation of settlement is put before the court, something that at least today is seen to contravene good lawyering-practice.

despite the fact that deliveries at the contracted price could not be construed as an obligation under those increased performance costs. Runesson also puts forward, according to the legal developments in Germany and Sweden, at least when the performance is generic, that there has been a change in the risk allocation. This has occurred in a way that the promisor should at times be free from liability despite the fact that performance is not impossible. In some sense, this is because the promisor does not deserve to be assessed liability at the same time as one in principle wants to assume a strict liability.¹²⁹

The reasoning about to what extent a rise in the costs of contractual performance will lead to an exemption from liability can also be seen against the background of a statement made in an ND-case¹³⁰ regarding economic force majeure within the perspective of the maritime business as such. It was stated that within this field, where fast changes in price often occur, it could hardly ever amount to an exemption from liability or an alteration of a contract. Any tendency by the courts to try to achieve, through adjustments of contractual obligations, a balance of the risks that are part of this kind of business, would lead to legal uncertainty within the contract field in question.¹³¹ Within this discussion, § 36 of the Swedish Contracts Act should also be mentioned. On the question of the limits of sacrifice,¹³² Sandvik¹³³ discusses this issue from the perspective of the difference between objective impossibility and control-liability, and clearly states that he does not believe that it is very desirable to take this to any real length. Instead, this Nordic provision deals with such situations in a better manner.

Here it can already be said about control-liability¹³⁴ that the seller cannot, as a rule, with any success invoke circumstances of an economic nature. The

¹²⁹ Ibid. at pp. 224-225.

¹³⁰ ND 1959.333.

¹³¹ Ibid. at p. 360.

¹³² Author's translation of *offergräns*.

¹³³ Sandvik, Björn, Säljarens kontrollansvar p. 99.

¹³⁴ Control-liability is discussed further under section 4.3.4.

starting point is that the seller has to perform the contract despite the fact that it becomes more costly than anticipated. On the other side, a hindrance to performance is often of an economic kind: It therefore is not a question of the total impossibility of the performance of the contract but instead one of the costs to overcome the occurred event or its effect. These must exceed in a clear manner the limit for that which from an objective perspective, can be said to be a conceivable effort regarding a purchase of the present kind.¹³⁵

Before continuing on, this perhaps is the best place to clarify that in a COA, the freight is determined for the amount of cargo transported, and therefore the owner assumes the risk of delay. This further means that the owner is the one who is adversely affected if the vessel cannot perform as many voyages as intended or if the transport is not performed as efficiently as contemplated.¹³⁶ This is not necessarily true, however, when it comes to unforeseeable conditions of a decreasing benefit in an international perspective as the development there within contract law is that the risk is to be shared instead of being placed on only one of the parties. The primary remedy is then the promisor's right of initiating renegotiation and if this comes to no result, the court has the discretion to reshape¹³⁷ the contract. At the same time, it cannot be maintained that objective impossibility has been abandoned. Hardship is employed where the increased cost of performance does not fall under objective impossibility. If this is the case, the risk is not to be shared through renegotiation or adjustment of the contract.¹³⁸ Instead, the promisee is faced with a breach of contract without any right to damages.¹³⁹

The doctrine of hardship was made part of the Unidroit principles. It is not found in Gencoa, Volcoa, Intercoa or the Swedish Maritime Code. At times, it is invoked to supplement such contracts. Because of its general description in the Unidroit principles, and the lack of such regulation in the

¹³⁵ The SSL legislative bill 1988/89:76, p. 109.

¹³⁶ Ramberg, Jan, Cancellation of Contract of Affreightment, p. 49.

¹³⁷ Author's translation of *omgestalta*.

¹³⁸ Unidroit Principles art. 7.1.7.

¹³⁹ Runesson, Erick M, Rekonstruktion av ofullständiga avtal, pp. 222-223.

sources discussed in this work, no comprehensive comparison will be made here. However, some interesting observations can still be given.

Hardship in Article 6.2.2 of the Unidroit principles is defined as:¹⁴⁰

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because a cost of the party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantage party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantage party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantage party.

Article 6.2.3 stipulates the effect of hardship¹⁴¹:

- (1) In a case of hardship the disadvantaged party is entitled to request renegotiations. The request is to be done without undue delay and is to indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,

¹⁴⁰ Unidroit principles art. 6.2.2 (definition of hardship).

¹⁴¹ Unidroit principles art. 6.2.3 (the effects of hardship).

- (a) terminate a contract at a date and on terms to be fixed, or
- (b) adapt the contract with a view to restoring its equilibrium.

From these renditions of the limits of sacrifice within these different principles, the conclusion must be drawn that it is advantageous if the COA is provided with an exemption clause for events from which the parties want protection. Otherwise, the threshold for an exemption from liability will be high. Gencoa, Volcoa and Intercoa contain such clauses, and with any discussion of war their war clauses should be noted. A number of countries are enumerated and the parties can specifically add others in the contract. These clauses¹⁴² give a right of cancellation without any causality between the war and the effect on the party's contractual obligations. The benefit of invoking such a clause will sometimes fall on the owner and sometimes on the charterer. The Swedish Maritime Code, on the other hand, requires essential effect on the contractual performance for the war clause to bring the COA to an end.¹⁴³ Then the hardship solution seems to be of interest in a situation of a non-applicable war clause or other exemption clause.

In any discussion at to war, Gencoa and Volcoa notably contain provisions on exemption for such occurrences. A number of countries are enumerated and the parties can specifically add others in the contract.¹⁴⁴

4.3.4 Control-liability

The 1990 Sale of Goods Act stipulates control-liability,¹⁴⁵ regulating the damage liability in regard of the generic and specific obligations.¹⁴⁶

Distinguishing purchases by the different purchase objects was abandoned. Instead, a difference is made between different types of damages as direct

¹⁴² See Gencoa clause 17, Volcoa clause 20 and Intercoa clause K.

¹⁴³ SMC § 14:51.

¹⁴⁴ Gencoa clause 17. and Volcoa clause 20.

¹⁴⁵ The term *kontrollansvar* is used in the SSL.

¹⁴⁶ SSL § 27.

and indirect losses. A matter of importance arguably arises considering this change of the present principles as codified in the 1990 Sale of Goods Act. Assuming the status of this legislation as a codification, to some extent of general contract law, a discussion of the relevance of this change in the law within the context of this work should be pertinent. Jan Hellner¹⁴⁷ comments on the disappearance of the distinction between specific and generic performance of goods from the text of the sales legislation, alleging that this does not mean that the distinction is without any effect within sale of goods act or the law of contract in general. This discussion is of further importance due to that the 1990 Sale of Goods Act can be a matter of choice of law, and also due to the fact that this liability is codified in the chapter on COA in the Swedish Maritime Code.¹⁴⁸

The paragraphs regulating control-liability in the 1990 Sale of Goods Act and the Swedish Maritime Code are based upon the same four prerequisites – hindrance, control, unpredictability and activity. It naturally is of interest to look into these prerequisites in order to try to draw up some boundaries for the application of control- liability where possible. Firstly, it is to be a hindrance to contractual performance. Secondly, this hindrance is not to be within the control of the seller. Thirdly, the hindrance is to be of such a kind that the buyer could not reasonably have taken it into account at the time of the purchase. Finally, the seller is not to have reasonably been able to avoid or overcome the hindrance. These prerequisites are cumulative. The first prerequisite means that the delay constitutes an obstacle for performance within the right time. It is not sufficient that the performance becomes more difficult or costly, but on the other hand, it is not a question of objective impossibility¹⁴⁹ in the meaning that the performance within the contractual time should be excluded not only for the seller but also for everyone else. Nor is it a totally necessary condition that the performance is absolutely impossible for the seller. However, here can be such extraordinarily severe

¹⁴⁷ Hellner, Jan, *Speciell avtalsrätt II Kontraktsrätt*, Allmänna ämnen, p. 40.

¹⁴⁸ SMC § 14:49.

¹⁴⁹ Author's translation of the Swedish term *objektiv omständighet*.

conditions that they according to an objective conclusion in fact have to be found to be a hindrance.¹⁵⁰

The legislative preparatory works to the 1990 Sale of Goods Act suggest that it seems to be a common belief that the damage liability as regards the generic obligation, based on the doctrine of impossibility, is too strict.¹⁵¹ An express purpose of control-liability was to achieve a softening of the said doctrine.¹⁵²

4.3.5 Force Majeure

The doctrine of force majeure is not considered to be a homogenous in the Nordic countries, but its fundamental characteristics are always apparent and generally comprehensive. These can be expressed in three elements: (1) is to be based on an external hindrance; its cause should be outside the control of the party; (2) the occurrence should be rare, infrequent or exceptional; and (3) this occasion should have a certain force or character. The performance should be unattainable due to the occurrence and that this should be comprehensive or radical or of such a character. There is an exceedingly strict view to it in Swedish law and a more liberal approach in Norwegian one, and even within these nations, its definition has to be determined within its context.¹⁵³

4.3.6 Control-liability in comparison with

¹⁵⁰ *Unidroit Principles art.7.1.7 is given the heading “Force majeure” while in a material sense it can be compared to control-liability discussed in this work. The conditions for its application are: the non-performance shall be due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. There is also a provision on temporary impediments with a time-limited excuse for performance.*

The requirement to give notice of the impediment and its effect on the ability to perform can also be noted. Which also stipulates that this shall be the other party at hand within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, if not the party how fails to perform is liable in damages from such non-receipt.

¹⁵¹ Legislative bill 1988/89:76 p. 43f.

¹⁵² See Sandvik, Björn, Säljarens kontrollansvar, p. 93.

¹⁵³ Ibid. at pp. 99-102.

Force majeure

Force majeure is held to be close, if not corresponding, to the exception for control-liability.¹⁵⁴ Hellner and Ramberg¹⁵⁵ maintain that it constitutes probably more of a difference in degree than in kind.¹⁵⁶ The legislative preparatory works to the 1990 sale of Goods Act¹⁵⁷ state that control-liability does not have objective impossibility as a condition due to an event that in itself can lead to an exemption from liability, which often serves as the basis for the above statement.¹⁵⁸

Sandvik notes that the legislative preparatory works to the 1990 Sale of Goods Act do not define the requirement for the occurrence as needing to be comprehensive or radical¹⁵⁹ for an exemption to liability to exist. In a comparison with force majeure where these requirements are also found, Sandvik concludes that the occurrence should constitute such in a narrow application, which means that it should stand in relation to the activity and circumstances that it strikes. It therefore seems that those prerequisites that should be understood as extensive, something that originates in Sandvik's analysis. Otherwise the requirements of a hindrance would be too difficult to fulfil, and the purpose is to deviate from objective impossibility. Sandvik finally concludes that drawing up exact boundaries for the intended exemption, as seen in the legislative preparatory work, is not possible to do. Instead this assessment has to be done *in casu* and ultimately, one can always rely on the prerequisite of unpredictability, and then the boundaries of the liability become hopelessly vague.¹⁶⁰

Sandvik has analysed some situations that according to the Sales of Goods Act 1905 have not unambiguously been accepted as force majeure, and have

¹⁵⁴ Ibid. at p. 103.

¹⁵⁵ Hellner, Jan, Ramberg, Jan, *Speciell Avtalsrätt I, Köprätt*.

¹⁵⁶ Ibid. at pp. 157 and 188.

¹⁵⁷ Legislative bill 1988/89:76, p. 43.

¹⁵⁸ Sandvik, Björn, *Säljarens kontrollansvar*, p. 103.

¹⁵⁹ Author's translation of *omfattande och ingripande*.

¹⁶⁰ Sandvik, Björn, *Säljarens kontrollansvar*, p. 104.

then put these in relation to control-liability. I have chosen several of these that I consider important for this work.

Weather conditions constitute one of these, and here control-liability may give an exemption in more situations of a generic obligation than before.¹⁶¹ An example is the case, NJA 1970 p. 478 discussed below, in which it would be possible to accept that the seller as a defence refers to that he has based his efforts for fulfilment of the obligation on a specific object, which has thereafter become impossible to perform due to, seen on a local basis as special circumstances, exceptional heavy rain. Sandvik gives another practical example where the vessel with which the cargo is being transported is delayed or breaks down¹⁶² due to a hurricane. But he also makes the statement that it will only be exceptionally bad weather that can lead to an exemption from liability, not regular storms¹⁶³ or ice-blockades¹⁶⁴, yearly recurrent floods¹⁶⁵, or otherwise unfit weather in general. A situation where the vessel hits a beforehand-unknown ground has been discussed by Hellner above, and is as a principal starting point agreed upon by Sandvik, who in addition says that this surely must be based on that no navigational fault can be established. Further, this is not a culpa situation and the occurrence must be seen as exceptional, even if it is not of a traditional force majeure character.¹⁶⁶

A shortage of merchandise is another aspect that I find important to discuss in this work. The specific question is then whether the seller is responsible for a hypothetical engagement of a third party, when he for the performance of the contract has failed to go into a market? Sandvik puts forward that

¹⁶¹ NJA 1970 p. 478 will be discussed further below, see footnote 169.

¹⁶² See the South-Fruit cargo.

¹⁶³ Sandvik refers to legislative bill 1986:198, p. 37, which states an example that a storm constituting a hindrance for transportation can be accepted for exemption to liability. This is merely put forward only in relation to the condition of hindrance, but due to the condition of foresee ability it should be a rather heavy storm. In foreign case law it has been established that a 10 beauforts storm regarding carriage over the Atlantic does not constitute an occurrence of a major event. See Sisula-Tulokas, *Dröjsmålsskador* p. 189 footnote 61.

¹⁶⁴ See for example ND 1965 p. 263.

¹⁶⁵ Legislative bill 1986:93 p. 72.

¹⁶⁶ Sandvik, Björn, *Säljarens kontrollansvar*, p. 110.

both in Swedish theory¹⁶⁷ and in case law,¹⁶⁸ the risk to obtain merchandise has long since been regarded to rest with the seller. He then concludes that probably, essentially the same thing could be said regarding control-liability in § 27 of the 1990 Sale of Goods Act. It is the seller's responsibility to keep informed as to market positions and possible risks before entering into a contract.

4.3.7 A Further Analysis of Control-liability within COA

The possibility for an exemption from liability under control-liability within COA begins with a case¹⁶⁹ commented upon by Björn Sandvik.¹⁷⁰ There objective impossibility in regard to weather conditions was the question before the court, which I believe can be used as an exemplifying reasoning. A sales contract could not be performed; it was impossible to transport timber from the production area, which had the effect that the supplier could not perform the deliveries within the stipulated contractual time as the weather conditions were exceptionally violent and long lasting. The seller was found liable by the Swedish Supreme Court because he had not shown that as a result of the weather conditions it was purely impossible to deliver the contractual goods. Sandvik is then of the opinion that if one accepts that the weather conditions were of the kind as a prerequisite of unpredictability that admit exception to liability,¹⁷¹ there basically will hardly be any reason for such a strict view regarding control-liability as found in the present case. One could probably accept that the seller in such a situation as a defence, as a legitimate reason, will be allowed to refer to that he has based his efforts to perform on a particular performance, one that later has gone wrong due to qualified reasons (the exceptional weather). This, on the other hand,

¹⁶⁷ See for example Taxell, *Avtal och rättsskydd*, p. 125.

¹⁶⁸ See HD 1946 II 292.

¹⁶⁹ NJA 1970 p. 478.

¹⁷⁰ Sandvik, Björn, *Säljarens kontrollansvar*. See also Hellner, Jan, *Festskrift till Curt Olsson*, p. 124. There unusually bad weather can lead to exemption in more cases within control-liability than compared to force majeure.

¹⁷¹ Sandvik here refers to the fact that exceptional weather conditions have been accepted before as force majeure where the question was about a strict liability regarding fault in the water and drainpipes, HD 1963 and HD 1980 II 20.

Sandvik says, will amount to no more than that objective impossibility will still be needed if the exception to liability is to be permanent. Obstacles of a subjective nature (subjective impossibility) can only be pleaded for the time they last, which is as long as that they cannot be reasonably overcome.¹⁷²

A discussion about liability to deliver goods within an agreed time begins with the distinction between the specific and generic obligations. While a loss of specific goods naturally will constitute a hindrance, the situation is totally different if there are many objects which all fit the description in the contract. Even if the object with which the seller has intended to fulfil his contractual obligation has been lost, he will still be able to fulfil this obligation with another object.

The Sandvik notion above is of course of interest for his discussion about control-liability, which consequently also has material importance for the question of the nomination of vessel under a COA. This question can also be asked as one of the possibilities to alternative performance. As an answer to this, Stoll¹⁷³ claims that a loss of the goods that are designated for performance under the contract can be an excuse for a temporary delay during the wait for the redelivery to reach its destination.¹⁷⁴ Hellner also maintains that the time factor is a decisive factor in regard of the seller's obligation to deliver a substitute for the lost goods, and formulates the question in the following way. If time allows for the fulfilment of the contractual obligation with property other than the one originally chosen, the seller is not exempted from liability. In conclusion, this reasoning has to be construed as if the goods are destroyed just before the time of delivery has run to an end. The fact that the seller has based his performance of a generic obligation on a certain object that later fails, cannot according to Hellner lead to an exemption, a conclusion which he also deems will in most cases be in line with the current understanding. Referring to the Alménian south-fruit cargo example, Hellner finds that if the ground has

¹⁷² Sandvik, Björn, *Säljarens kontrollansvar*, p. 96.

¹⁷³ Stoll, Hans.

¹⁷⁴ Stoll, Hans, in: *Commentary on the UN convention on the Sale of Goods(CISG)*, p. 612.

previously been unknown, and in the absence of negligence, while the situation is extraordinary, the occurrence is to be considered to be outside the seller's control. This notion on the other hand, he states, must be qualified with the question whether the seller reasonably could have avoided the obstacle, and reasons that it can be discussed to what extent a seller can rely on one single possibility of delivery and also on the last contractual time of delivery for the fulfilment of such a difficult obligation.¹⁷⁵

Another question, also of importance regarding control-liability, is when in time the assessment is to be made establishing whether there is a hindrance outside the seller's control. Hellner means that the typical point in time must be when the contract is made. This constitutes that a seller cannot be given an exemption from liability solely because he has based his efforts on a certain object and this is wrecked or otherwise the performance goes wrong so that at the time for delivery it is impossible for him to fulfil the contractual obligation in time, but only if the reason for the non-performance when the entire period between the making of the contract and the delivery is taken as a basis for the assessment.¹⁷⁶

Hellner¹⁷⁷ also states of how to construe control-liability in the 1990 Sale of Goods Act, and his findings are based on two considerations. Firstly, the previous law may not serve the purpose given that a new formula has been chosen that is not in conformity with the prior one, and also that the objective was to make a change. After he concludes that the legislative preparatory works to the 1990 Sale of Goods Act do not give any answers, a freer method to construe is suggested, more in line with the purpose of the regulation. Hellner further argues that despite the fact that the legislative preparatory works do not give any support to build any reasoning on force majeure viewpoints, the 1990 Sale of Goods Act should be construed in the way that the buyer has to take the loss for the totally unforeseeable occurrences, while the seller has to take the loss when a small stone on the

¹⁷⁵ Hellner, Jan, *Köp och Avtal*, pp. 224 and 227.

¹⁷⁶ Hellner, Jan, *Festskrift till Curt Olsson*, p. 121.

¹⁷⁷ *Ibid.*

way overturns a great wain. This is because it has to be read into the control requirement that the seller will organise his activities in a way so that this does not happen. Thus the control requirement has to be adjusted to this activity.¹⁷⁸ The control requirement is called the seller's control sphere and constitutes a liability for both the seller's own activities as well as another party's activities.¹⁷⁹ Hellner¹⁸⁰ concludes that it is possible that control-liability exempts the seller in some situations there he would not been exempted according to the alternative principles. Unusually bad weather, which probably would not usually be accepted as force majeure, could be assessed to be outside the seller's control, but the prerequisite of foreseeability means that one also has to take measures of protection for the consequences. It therefore is possible that to some higher degree, compared to applying the other principles, consideration is taken as to what requirements could be reasonable to place on a seller in the same situation.

Runesson has discussed the notion of Hellner that the seller cannot escape liability due to the fact that he has based his performance of a generic obligation on a certain object and consequently fails. Almén found the seller liable in damages, something that was basically based on the fact that the objective impossibility should be assessed taking into consideration the situation at the time of the execution of the contract and not at the time for fulfilment, which Hellner took into account before reaching his conclusion. Runesson found it unclear how Hellner's argument should relate to § 27 of the 1990 Sale of Goods Act and reasons that it can possibly be based on the seller's behaviour in acting at the last minute, so that this in some part amounts to culpa. The negligence should then consummate the rule of control-liability. Runesson concludes that this nevertheless is not in line with the legislative preparatory works to the 1990 Sale of Goods Act, as this says that if the purchase concerns a standard item and the part the seller has sent is destroyed during its transport by an accident, the seller is perhaps not

¹⁷⁸ Ibid. at pp.119-120.

¹⁷⁹ What this constitutes will not be further analysed in this work.

¹⁸⁰ Hellner, Jan, Festskrift till Curt Olsson.

able to procure a transport in time. The accident should then be considered to be a hindrance outside of control-liability.¹⁸¹

According to Runesson, the question whether the occurrence has been outside the seller's control is the primary one with an assessment of control-liability. Hellner reasons that the vessel accident should be seen as one of no liability due to the fact that the shoal was unknown beforehand. Runesson means that Hellner has put the prerequisite of control and the prerequisite of foreseeability together, further stating that the occurrence is to be considered to be outside the seller's control, as there is no cause and that the occurrence in fact is extraordinary. Runesson is critical to this notion as he considers that it presupposes that an assessment of negligence must be made and that it is of material importance due to the prerequisite of control whether the hindrance is extraordinary or not, which seems to be a complicated and unnecessary assessment to make. He then gives his own view on how the South-Fruit case should be judged, arguing, in line with that stated above, about hindrance to performance and if it lies within the seller's control. The assessment should to be carried out by asking an initial question about the seller's possibilities to prevent the risk for the hindrance. The decisive factor then is whether the hindrance to performance will lead to that the performance cannot be carried out in time. Runesson reformulates and explains conclusively that it is not possible to prevent the risk for the vessel to run aground as such, but instead the risk whether this will complicate a delivery within the right time. He continues that this is less so, despite the fact that the distinction between the specific obligation and the generic one is no longer upheld in the legislation. The prerequisite of control should probably be understood in the way that the possibility of an exemption from liability will increase the more the promisor has been forced to concentrate his performance of a generic obligation on a certain object. Attention should then be paid to the fact that the seller is responsible for how his activity is organised. He therefore could have prevented the risk for delay of delivery caused by the vessel grounding if he had sent it off earlier. The seller is thus

¹⁸¹ Runesson, Eric M, *Rekonstruktion av ofullständiga avtal*, p. 253.

responsible because the hindrance was within his control. Runesson further concludes that if the situation had been of such a kind that the vessel could not have been sent off at an earlier stage because the time when the execution of the contract and the contractual delivery was short, the occurrence has to be seen as being outside the seller's control. Runesson finally concludes that an examination of the prerequisite of foreseeability and thereafter of the prerequisite of activity still remains.¹⁸²

Regarding the prerequisite of foreseeability, Runesson compares the requirement in § 24, "should have been taken into account", with the present statutory text, "reasonably counted on", and finds foremost that it seems to be a matter of holding the promisor responsible for risks that often are realized and typical for his activity. In addition, the promisor is liable for atypical risks only when they contain a certain higher degree of probability for a hindrance to performance occurring.¹⁸³ It then is important when in deciding whether the risk qualifies as typical or atypical, to make a distinction on the approach of such an assessment. Is it the risk for the specific hindrance that is to be at focus or should the assessment be made on a more general basis. As example, in regard of a transportation contract, there is a risk that some transport hindrance can occur. Such a hindrance on the other side can have many reasons, some typical, as the season for example can bring about an ice hindrance or a storm, or the present waters can lead to grounding, piracy etc. The international political situation can also result, for example, in a blockade or confiscation. A storm, grounding or blockade can at the same time be seen as an atypical risk depending on the circumstances in which the risk is being realized. Runesson takes his reasoning further in the South-Fruit case, where Hellner was of the opinion that the situation of the grounding was unpredictable, and concludes that if the seller can show that he could not reasonably have avoided or overcome the hindrance to performance, the risk goes over to the buyer. Runesson also finds, following the second notion, that a grounding instead can be seen as a

¹⁸² Ibid. at pp. 253-254.

¹⁸³ Ibid. at p. 259.

typical risk for transportation at sea. As both parties will be aware of these events, entering into such a contract contains all sort of risk for delays and accidents. He then concludes that it is natural to place the risk on the seller.¹⁸⁴

The remaining question to discuss is whether the promisor has done that which may reasonably be required to avoid or overcome the hindrance to performance or its consequences. It should be kept in mind that Hellner is of the opinion, regarding the South-Fruit case, that the hindrance (or more precisely, its consequences) could have been avoided if the seller had not relied on one single possibility of delivery. According to Runesson, this should instead be assessed as being inside the seller's control, which of course means that any assessment under the requirement of activity is not necessary. He is also of the opinion that the opposite conclusion can be reached if the question is solely decided upon the prerequisite of activity.¹⁸⁵

When invoking Hellner's statement, that it is questionable if one can rely on a single possibility of delivery and do this in the last minute of the claim period when reasoning about the prerequisite of activity, Runesson concludes that this implicates negligence by the seller. It therefore seems, according to Runesson, that this negligence as described by Hellner should be seen to have consumed control-liability as such.¹⁸⁶ If one accepts this interpretation, the conclusion may be reached that Hellner actually has made a comment in a way not specifically meaning that the prerequisite of activity is to constitute a hindrance for an exception to liability as such. Runesson, on the other hand, argues that the problem with such an exemption lies within just that prerequisite. For Runesson, it is the time between entering into the contract (or here, the notice of cargo) and the point in time when the obligation is due for performance (here, the nomination of vessel) that is decisive for a possible exception to liability under control-liability. This notion could also be well-founded for Hellner,

¹⁸⁴ Ibid. at p. 264.

¹⁸⁵ Ibid. at p. 269.

¹⁸⁶ Ibid. at p. 270.

one which I personally find reasonable, as he makes the statement that a condition for that the seller should have such a liability is that the time-factor admits performance with property other than the one originally intended for performance of the contract, something which I deem to be in line with the reasoning of Runesson. Otherwise, I believe that it means that a vessel has to be held in reserve where the first one is unable to perform. The described situation of a commercial shortage of vessels close to nomination has to be seen as an indication of that the practical situation in COA may look very different from these doctrinal requirements. Runesson's reasoning, based on the prerequisite of activity in that the vessel should be sent off earlier in order to avoid any delay of delivery, has to be seen as that the time perspective reasoning is here totally overlooked. On the other hand, Runesson acknowledges that the seller could very well have been in such a situation that he had no other choice but to rely on a single possibility of delivery, and acknowledges that there may be a shortage of time between entering into the contract and the delivery. He then concludes that in such a case, it seems strange if there is a requirement that a hindrance should be avoided if there was no possibility to foresee this before the vessel hit the ground. This requirement must be assumed as existing to catch those situations taking into account obstacles for performance after the contract has been executed. He then submits that if the question is decided only from the prerequisite of activity, the seller in the South-Fruit case ought not to have been liable for damages.

I conclude that the time perspective, in which the owner has had no option other than to manage the nomination of vessel in such a way that it could be seen, following the notion of Hellner, to constitute that a single possibility of nomination has been relied on and that this has been done in the last minute of the respite of claim period, can be relevant for an exemption from liability under the rule of control-liability in the Swedish Maritime Code according to both Hellner and Runesson.

Control-liability was introduced with an aim of softening the existing harsh regulation and, should be kept in mind for the following discussion of how the above reasoning is relevant not only for liability as such, but can also affect the liability of the parties under a COA. To begin with, it is reasonable to question how Runesson's criticism of Hellner's reasoning is to be understood. Hellner makes a qualification as to the conclusion about an exemption from liability in the South-Fruit case, the question of avoidance of the hindrance, and also questions the late time of performance and its concentration. This is something that according to my understanding had to have been done within the application of the § 27 of the 1990 Sale of Goods Act, under which whether the hindrance could have been reasonably avoided or overcome is to be assessed. Hellner is also of the opinion that if a hindrance has arisen that is of a type that is to be seen to be outside the seller's control, but the seller nevertheless could have avoided and overcome its consequences, it cannot probably be outside the seller's control. Of interest then is that Hellner believes that with the application of the prerequisite of "avoided", this is better assessed within the prerequisite of control only, and that the qualification of reasonable corresponds to the limits of sacrifice, which he deems is its actual function. Hellner discusses this from the perspective that there is in reality no room for an assessment within this prerequisite, and that the assessment of the prerequisite of "avoided" therefore is to be done within the prerequisite of control. This I deem to be quite a precise instruction for how to handle the prerequisites within control-liability, which may give a new perspective of interest in this work. If such an assessment begins in that Hellner qualified the obligation of fulfilment with other merchandise within a time, which to my understanding is of importance for the situation where a hindrance occurs just before the obligation for performance is due. This will perhaps make it possible to compare it to Runesson's reasoning about control-liability and his time-perspective. Tallon also notably comments in regard of the expression of "avoided" and "overcome" in CISG Art. 79, that the first is to be understood as the obligation to take measures to prevent that the hindrance occurs and the second, the obligation to take measures to

eliminate that the hindrance leads to consequences for the possibility to perform. Tallon remarks that the possibilities to avoid a hindrance often coincide with prerequisite of control.¹⁸⁷ Runesson adds that the requirement for the debtor to take measures to avoid any hindrance applies, according to the prerequisite of activity, also causes that fall outside the debtor's control.¹⁸⁸

Within the perspective of Hellner and the prerequisite of control, this will then mean that there will be a possible problem managing the situation of nominating a vessel in such a way that every hindrance can be avoided. Hellner makes an example in connection with this notion, in which a war situation or other force majeure brings the consequence, for the seller, that it is not possible to use his ordinary suppliers. If he then can overcome the hindrance by procuring the merchandise elsewhere, it is not possible to claim that that the delay was outside his control. But if my above notion were applied it would be possible to make the opposite conclusion. About overcoming the hindrance, it is further said by Hellner that this may comprise a requirement that goes beyond control-liability in the meaning that the seller will not escape liability if he has neglected to offer a similar item. In the perspective of COA the question then arises if this means that the limit of sacrifice is considered to be the threshold for an exemption from liability.

I am further of the opinion that Hellner's qualification of the occurrence as an "exceptional" situation, appears to be the same categorization that is made regarding the type of weather that according to the preparatory-work can give an exemption from liability under the control-liability. In this case it may be in the meaning that the ground was not known and that the occurrence therefore is exceptional. It can then be described as categorisation of special situations. This also means that there is no reasoning of negligence based on that the performance has taken place on

¹⁸⁷ Bianca & Bonell/ Tallon, p. 581.

¹⁸⁸ Runesson, Eric M , Rekonstruktion av offulständiga avtal, p. 269.

the last moment in time for performance. To rely on a single possibility for performance and at the same time perform just before performance is due, will then according to Hellner, create a difficult situation in relation to the prerequisite of foreseeability and not that it requires a separate assessment of negligence. Runesson's opinion that Hellner has put together the control and foreseeability prerequisites is something that I will not discuss any further, but on the other hand this may not, to my understanding, necessarily have any material significance, thus the assessment of the different prerequisites within control-liability seems to have a cohesive character. According to Hellner the correlation between those prerequisites are so strong that they cannot stand alone in the final analysis.

The standpoint of Hellner, that the concentration of the performance in itself cannot lead to an exemption from liability as developed above, leads to the conclusion that it nevertheless is possible to consider the situation occurring just prior the performance being due. To my understanding, this is done without completely setting aside that the prerequisite of foreseeability is to be assessed at the time the contract was made. A successive concentration of performance notably gives a possibility to an exemption from liability. But this has to be seen in light of the discussion of Hellner and Runesson, and that the discussion based on legislative preparatory works therefore may be regarded as somewhat unclear in an application.

This should mean, of interest for this work, that if a court places the transfer from the generic to the specific obligation later in time than the nomination has been done, which is a natural focus in the sense that effort has been made to name the vessel to be used under the contract that has been made, amounting to a possible an exemption from liability. This, I believe, shows that the principles of generic and specific obligations are still of importance within contractual regulation, at least in those cases where the nomination has not been made, the legal transfer between the COA and an underlying charter-party, i.e. two different principles of liability. To what extent such a

legal construction always will exclude an application of the reasoning of concentration of the obligation is, uncertain.

Volcoa is interesting within the field of contractual solutions, if the nomination is not seen as a clear transfer from the generic to the specific obligation. Further, Volcoa and Gencoa should also possibly be given some notice due to the fact that there is no stipulated respite of claim period in the contract. This practically means that the parties are to decide upon the length of such, something that may result in the application of the time-perspective within the reasoning of concentration.

The Swedish Maritime Code regulation regarding the obligation to provide cargo states that the charterer is to give notice of the shipment within a reasonable time, and the same applies to the owner and his obligation to nominate a vessel. The 1990 Sale of Goods Act also uses a reasonable time as a determination of the respite of claim period. In relation to the seller's obligation to deliver the merchandise, the legislative preparatory works state that this will vary according to the circumstances. Consideration is to be given to whether the merchandise is to be procured from a third party or be taken from the seller's supply. The interval can be relatively short, and without any further discussion about this prerequisite, I assume that the nomination procedure, the core of the COA, is to be put into perspective regarding these mentioned circumstances.

If strict liability due to an objective impossibility is once again considered, the question materializes to what extent the notion of Rodhe, that such liability is at hand in situations where the seller has the freedom to choose within a certain framework and pay for his own fulfilments of preparation and therewith different decisions could lead to accurate fulfilments, can be said to have any relevance within the legal doctrine of control-liability. Further, it was earlier held that strict damage liability with an exception for impossibility followed from a generic obligation; the one to perform in principle had an unlimited number of possibilities for fulfilment if the party

simply performed contractually. Before putting this into perspective, it can again be mentioned that Hellner said that the fact that the distinction between specific and generic obligations has disappeared from the text of the sales legislation does not mean that the distinction is without meaning within sale of goods act or the law of contract in general.

In the situation in which the goods (vessel) are destroyed or where the performance went wrong just before the performance is due, a perspective relevant here, the difference between specific and delivery contracts still is evident. This is seen in that the obstacle for performance can be one outside of the seller's control, something that leads to the question of whether he can obtain another equivalent item for contractual performance. Under a contract of delivery, the seller will be able, even if the item of origin is unobtainable due to the reasons above, to procure goods (vessel) within the contractual time. As also has been discussed at some length in this work, when the assessment of that obligation is to be done is central. In contrast to that which has been posited before in legislative preparatory works to the 1990 Sale of Goods Act, this clearly shows that taking into consideration the seller's situation at that point in time the hindrance occurs, and not only at the earliest point in time when he had taken measures for the performance of the delivery. This means that it is acceptable that the seller successively concentrates his obligation of performance, so the nearer in time the obstacle for performance appears, the greater the possibility for that the prerequisite of hindrance is fulfilled. Further this just means that the seller is exempted from liability for the time it takes to deliver a new item due to the consideration of the prerequisite of activity, as discussed above.

To put the notion of Rodhe into perspective, the following can be said. If a possibility exists to take into account that a concentration has taken place before the time of performance is due, it can be reasoned that the distinction between the generic and specific obligation is not, within this perspective, upheld. If upheld in relation to objective impossibility, criticism was proffered about the generic obligation in regard of delivery contracts that

proceeded the 1990 Sale of Goods Act, thus the reasoning of Hellner, Runesson and my own, facilitates a conclusion that control-liability can give such a possibility of consideration.

If the starting point in relation to objective impossibility, is instead seen from the Knutelin-case that might lead to the opposite solution, then my above made-conclusion is the substantively correct one. Accordingly, the assessment of foreseeability in this case was made, not at an initial phase, but at the time hindrance to performance became apparent. Sandvik¹⁸⁹ comments as to this assessment; one could ask whether it is reasonable that a seller in a situation of forced production generally makes a sales agreement relying on a single source of delivery, and at the same time has used his own production capacity to a max. The practical conclusion from this reasoning should be that this form of liability also admits such a concentration as part of the assessment. This final conclusion is not necessarily any contradiction when advocating the notion of Rodhe at the same time as control-liability is applied.

As regards the question of whether control-liability is to be seen as the modern form of contractual damages, Hellner is of the opinion that there is no reason to give the 1990 Sale of Goods Act any status of a general application. He reasons that even if it is assumed that the 1905 Sale of Goods Act no longer can be used by analogy, at the same time it is uncertain as to what extent the 1990 Sale of Goods Act can be instead used.¹⁹⁰ Bengtsson puts forward that control-liability was received with some scepticism but has a strong position internationally within contractual law, and that this liability hardly is to be seen as a general contract principle within Swedish law.¹⁹¹

Control-liability, with regards to commercial transactions, only regulates damages for direct losses. For indirect losses, negligence is required. For the

¹⁸⁹ Sandvik, Björn, Säljarens Kontrollansvar, p. 98.

¹⁹⁰ Hellner, Jan, Köp och Avtal, pp. 250-251.

¹⁹¹ Bengtsson, Bertil, Allehanda om skadestånd i kontraktförhållanden, p. 27.

Swedish Maritime Code the opposite is true. Control-liability in the 1990 Sale of Goods Act also contains a liability for those engaged by the seller, to which the Knutelin judgment does not seem to correspond. Conclusively this must mean that the conditions for control-liability as applicable by analogy are not in consistent. The final conclusion must be that there is no real support for that this liability is to be seen as the modern form of contractual damages. In regard of CISG, and its application outside its scope of application, Ramberg has argued that in the event of a breach of contract that has been established after an analysis of the contractual promise and regardless of the nature of that promise, liability in damages follows automatically.¹⁹² In CISG, control-liability notably regulates both direct and indirect loses.¹⁹³

The Norwegian view on control-liability is that it is reasonable to posit that objective impossibility with an exception for force majeure in regard of the generic obligation has succeeded outside the field of legislation.¹⁹⁴

Something needs be said with respect to a total loss of a ship in comparison with the other legal doctrines where the doctrines of frustration and objective impossibility require for an exemption from liability that no other vessel is obtainable. Sandvik finds in his comparison with force majeure that the same will probably apply for control-liability. The fact that weather conditions, both for Hellner and Sandvik, are seen as one of those areas where an assessment based on the force majeure doctrine may be seen as narrower for an exemption from liability, will possibly create a scope of importance for the nomination procedure in COA. It also seems that the discussion by Rodhe regarding objective impossibility and at which point in time the assessment is to be rendered, may have been placed within the perspective of control-liability by Hellner.¹⁹⁵

¹⁹² Ramberg, Jan, Application of CISG outside its scope of application.

¹⁹³ CISG art. 79.

¹⁹⁴ Hagstrom, Viggo, Obligationsrett, p. 502.

¹⁹⁵ See Hellner's reasoning above as to control-liability.

5 Quantity Performance within COA

5.1 Introduction

Despite relatively few sources, quantity of performance is a question that can be discussed at some length within the contractual constructions of a COA, and also looking outside these, in the field of distribution agreements, with the ambition of making this issue to some extent more transparent.

5.2 The Obligation of Nomination and the Fairly-evenly-spread Principle

The fairly-evenly-spread principle creates a more narrow perspective in this work without a basis in general contract law. A few cases may give some guidance so that this provision may be handled with some foreseeability. There is not much case law on this subject, but the few cases at hand may answer some important questions. One of these issues, the spread over the year under the fairly-evenly-spread provision, is discussed in the following case.¹⁹⁶ The COA provided for shipments of a “minimum 400,000/maximum 800,000 mt – shipments to be fairly-evenly-spread over the contract period”. About 360,000 mt tons spread over ten voyages were shipped in the first half of the year. After this, one further shipment was carried out in July, which meant that slightly more than the yearly minimum quantity had been shipped during the first 6 – 7 months. The charterers then declared that they deemed their contractual obligations to be fulfilled and consequently that there would be no further shipments. The owner was not ready to accept this in light of the words fairly-evenly-spread. The dispute was finally settled amicably, but it provides us with some insight in the matter for this analysis.

¹⁹⁶ Reported in Nordisk Skibrederforenings Medlemsblad nr 553, p. 5675.

Gorton,¹⁹⁷ who reasons that the charterers had fulfilled their obligations in that part in that they had shipped the minimum quantity of 400,000 mt, has also discussed this case. As to the obligations created by the fairly evenly spread provision, nothing had been achieved. Consequently, giving effect to both obligations, as to an obligation to ship cargoes during the latter half of the year with the same frequency as those already opted for, would mean an obligation to ship more than the contractual minimum quantum.

In another case¹⁹⁸ and in a similar situation, the COA provided for shipments of a minimum 15,000/maximum 24,000 t – fairly spread over the year. During the first half of the year, cargo in the amount of 5,300 t was transported, then the owner stopped nominating vessels. The owner admitted liability for the charterer's economic loss as a consequence of not nominating vessels for the latter half of the year. In turn, the owner claimed damages for the shortage of cargo delivered for shipment in the first half of the year. During the last two months, the nomination of cargo had not been evenly distributed. The court found this to be not in accordance with the charterer's obligation under the contract. The calculation was done from the minimum quantum of 15,000 tons "fairly spread" during the year, which was divided by with the twelve months of the year. It was concluded that the owner must have wanted even nominations of cargo throughout the year, and in such quantities that approximately 1,250 ton was shipped a month.

These cases are similar in the sense that the question concerns inadequate quantities of performance under the contract, but, and which I consider to be of importance for this analysis, they differ in that the first one has a minimum quantity fulfilment. As the contract was subject to Norwegian law, § 364 of the Norwegian Maritime code¹⁹⁹ became applicable. Under the heading "Shipments Schedules", the code states: "The charterer shall see that the quantity covered by the contract is reasonably divided over the contract period." The comments to this provision in the legislative

¹⁹⁷ Gorton, Lars, *Contracts of Affreightment, some features and principles*, p. 81 ff.

¹⁹⁸ ND 1963.91.

¹⁹⁹ SMC § 14:44.

preparatory works (NOU 1993:36 p. 79) state: “A significant increase or decrease of the frequency of shipments towards the end of the period would not be compatible with a reasonable distribution. If the charterers have prepared schedules of shipments with a view to utilising the maximum quantity under the contract, their right to change view and instead opt for the minimum quantity may thus have been lost, and vice versa.” In this case, the contract did not directly provide for shipment schedules, but the charterers were required to give notice well in advance of each shipment. The conclusion reached was thus that under Norwegian law, it seems that the charterers would be required to continue nominating shipments at about the same frequency as in the first half of the year, which probably would mean in the region of seven to nine further shipments.²⁰⁰ Gorton on the other side deems it difficult to foresee whether such a duty would mean the maximum quantity²⁰¹ or something in between.²⁰² So let us look at what quantity this may be. In the ten shipments carried out during the first half of the year, 360,000 mt was transported. By the eleventh shipment, a slight excess over the minimum quantum was reached. I base this calculation on the quantity shipped in the first half of the year (360,000 mt) divided by the ten shipments in this period. The result of 36,000 mt will then have to have been transported every month. The conclusion reached of seven to nine further shipments in the second half of the year then gives a total quantity over the year of (36,000 x 7 or x 9), 252,000 – 324,000 mt. Adding the 360,000 and the rest up to the minimum quantity leaves us somewhere between 652,000 – 724,000 mt plus a slight excess.

The facts of the ND case tell us that the minimum quantity was not fulfilled; and the question about any excess liability, which became essential in the other case as a consequence of further transportation, did not arise. Here the two obligations, of a certain quantity being transported and the fairly-

²⁰⁰ Reported in Nordisk Skibrederforenings Medlemsblad no. 553, p. 5675.

²⁰¹ Falkanger has made the statement that it is the quantity and not the shipments that is to be divided according to the fairly-evenly-spread provision and that this can be of importance where vessels of different sizes are used, *Kontrakter om skipning av ett betemt kvantum (Transportkontrakter)*, p. 388.

²⁰² Gorton, Lars, *Contracts of Affreightment, some features and principles*, p. 96.

evenly-spread provision, did not create a problematic issue within that field. It was not established that the owner had during this time made a claim or put forward any complaints about the charterer's nomination of cargo. The neglected shippings did not lead to any complaints from the owner. The court's reasoning was that the owner had not shown any interest in requiring that the charterer should keep this programme and increase the shipments at the minimum quantity. Instead it seems that it has been of less interest which quantum of cargo the charterer has nominated as long as the owner has found it more profitable to use his own vessel under other contracts, and also that it has been possible to charter tonnage at cost-effective freight rates. The court found that this conduct amounted to a silent approval of the charterer's dispositions.

Upon a closer look at legislative preparatory works to the Swedish Maritime Code,²⁰³ keeping in mind the ND case, it can be said that the regulation creates a scheme in which what has been done under one period constitutes what is expected in the next coming one. The first paragraph dealing with increased or decreased shipments towards the end of the period does not necessarily seem to be connected with the second paragraph dealing with shipment plans.²⁰⁴ Firstly, the word "towards" has to be considered. "Towards the end of the period" should probably mean that in such a time-perspective we are in close to the end of it, and not anything which will actually solve the problem in the discussed ND case. At the same time, it qualifies that which is stipulated in the Swedish Maritime Code § 14:44 about the quantity being reasonably divided over the contract period, in that both the quantity and the frequency of shipments are mentioned. It is possible to construe the stipulation for not increasing the shipments as a safeguard for any situation where incitement could have occurred as a consequence of being in the latter part of the contractual period. The second paragraph's notion that scheduling the shipments in advance in a manner

²⁰³ SOU Governmental Legislative Inquiry 1990:13, p. 199.

²⁰⁴ See above that which is stated in the Norwegian legislative preparatory works. The Swedish SOU Governmental Legislative Inquiry does not mention this. But due to the Nordic relationships regarding maritime law, I find it relevant to discuss.

that maximizes or minimizes the quantity to be shipped constitutes how the quantity obligation is to be carried out under the contract, qualifies the “fairly-evenly-spread” provision in that the variance from a mere mathematical calculation is given limits.

I also want to examine the requirement of shipment plans somewhat further, as it seems, in the first discussed case, that shipment plans are being held to be of the same standing as a charterers notice, this specific contract had a requirement of giving notice well in advance. Looking at these two COA institutions is then warranted, as well as any possible questions that may arise in relation to these specific issues.

The initial question to ask is what constitutes a shipment plan? This perhaps can be answered conceptually with that it forms the basis for the COA, where the cooperation idea should be made clear. A quit narrow definition is given in § 14:44 of the Swedish Maritime Code:

*The charterer shall prepare shipment plans for suitable periods in relation to the total contract period and shall give the carrier timely information of the plans. The charterer shall ensure that the quantity of goods covered by the contract is suitably spread over the contract period. In doing so he shall consider the size of the vessels that are to be used.*²⁰⁵

Taking this as a basis for a discussion on the requirement of shipment plans, the legislative preparatory works give us an outline of its construction as well as its function in a wider sense. In this attempt to describe the function of these plans constituting how the contract is to be performed vis-à-vis the quantity obligation (or perhaps the frequency of shipments), it seems that a reasonable conclusion would be that the foreseeability created by shipment plans is of major importance. A shipment plan under this regulation will

²⁰⁵ The text of the paragraph is the English version of the publication of the SMC, p.151.

clearly show how a certain quantity is distributed in a certain order under a certain time frame. I therefore assume that this has been the important factor in the construction of this scheme. As seen, this will constitute an obligation to ship more than the minimum quantity under the contract.

The question of the legal status of a notice (an early notice), may be discussed further in regard of the ND case, which says that where the shipment intervals have been varied, the owner must have had a requirement of an evenly spread nominations of cargo. At the same time, it was not shown that the disregard of the shipping programme, in an in non-formal sense, had led to any kind of protest by the owner. So it is clear that a shipment-programme was not present in any formal meaning. Instead it was constituted from the shipment what had been carried out. From this it is reasonable to conclude that the court considered a fictional shipping plan like this useful for creating a scheme of which the owner should be aware and if necessary comment on any non-conforming contractual deviation from the fairly-evenly-spread provision. I have also come to the conclusion regarding the question of the legal status of a (early) notice, that this may have been answered indirectly by the above reasoning. If a fictional shipping plan is sufficient for constituting how the contract is to be carried out in the next coming period, a notice given will of course create such a shipping programme, and the earlier it is given, the sooner it will be established. But it should also be stated that the creation of this scheme does not depend on an early given notice.

Let us now turn to a case²⁰⁶ concerning the allowable minimum interval between shipments. The facts of the case are the following: The quantum to be shipped during the year was between 600,000 mt and 1.2m mt in the charterer's option, who also had the option as to the quantum for each shipment within lots provided for in the contract of 20,000, 25,000, 30,000, 35,000, 40,000 mt. These were "to be determined by (the charterer) from lifting to lifting". The contract was subject to Norwegian law. Regarding

²⁰⁶ Reported in Nordisk Skibrederforenings Medlemsblad nr 553, p. 5772.

nomination for the individual shipments it was stated: “(Charterer) to give (owners) about three weeks approximately and minimum two weeks’ definite notice prior to commencement of first layday. Laydays to be stipulated with 5-days spread”. The contract also provided for the annual cargo “to be shipped fairly-evenly-spread over the year”. During the first half of the year, the size of the lots shipped was usually 30,000 mt or 35,000 mt. Based on such lots, one could calculate the distribution of shipments to be about every ninth day. Apart from two tight shipments in April (to which the owners raised no objection), the different shipments had been nominated with approximately such a spread up until July. At this point, the charterers nominated three in time near shipments. Following one shipment of 25,000 mt with laydays 5-10 July, they nominated three shipments of 35,000 mt each, with laydays 24-28, 26-30 and 27-31 July. The owners disputed that the charterers had the right to do this under the fairly-evenly-spread provision in the contract. The problem for the owners was basically that such close nominations made it impossible for them to utilise their COA-dedicated tonnage for at least one of the shipments. This meant that they would need to charter tonnage at market rates, which were significantly higher than the freight rates of the COA. The charterers argued that the nominations were contractual.

Just as in the ND case, no objections or reservations had been put forward due to the varied shipments. So let us look into what a comparison between these two can tell us about the consequences of any deviation from a shipment-programme. Falkanger is also of the opinion that it is appropriate to construe the wording of the contract in light of the parties conduct during the first period of the contract. In the case, it was stated that:

Assuming that no dispute occurred concerning nominations during the first half of the year (resulting in complaints, reservation etc.), it seems that the provision for "fairly-evenly-spread" was applied fairly liberally ... This liberal approach – i.e. the acceptance of quite

significant departures from the mathematically even distribution – deserves in my view to be taken into consideration when construing the standardised provision of the contract. On the other hand, it would be going to far too state that something which has been acquiesced to once must thereafter be considered the contractual norm. To be specific, the fact that voyages 10 and 9 had first laydays 5 and 6 April, does not entitle the charterer thereafter to nominate two voyages on consecutive days. Such a nomination contradicts too strongly the principle of “fairly-evenly-spread” and there must be more than a single acquiescence for the contract to be so radically changed. The same must apply – but obviously somewhat less strongly – to two voyages with two days in between ... Moreover, two tight voyages can pose problems, but the problem greatly increases if – as in the present case – there are three voyages within such a short interval as 24-27 June. My conclusion is therefore that the three latter nominations for shipments in July do not satisfy the contractual requirement for the quantum to be transported “fairly-evenly-spread” over the year.²⁰⁷

One obvious difference in comparison with the ND case becomes apparent. In that case, the time-span between voyages had been stretched. In the present case, we are dealing with the opposite situation of a bunching-together, and it appears that the principle of “fairly-evenly-spread” creates the divergence between these two cases. The facts of the ND case²⁰⁸ tell us that two voyages were enough to alter the frequency of shipments. But we also know that this was not sufficient in the opinion of Falkanger. The two voyages in question were held to be a single acquiescence. Or in other words there was one situation of bunching-together, and that the same was

²⁰⁷ Ibid. at p. 5774.

²⁰⁸ For the facts of the case see footnote 198.

said to apply, but less strongly, to two voyages with two days in between. Therefore, there must be a decisive interaction between the principle of “fairly-evenly-spread” and any reasoning of silent approval, as assessed from that stated. What constitutes a change in the shipment-programme so that any deviation from a mere mathematical calculation is acceptable lies in this notion. I return to this below under the heading “claim” with a further analysis of the ND case.

5.3 Damages under Distribution Agreements within the perspective of COA

A Swedish case²⁰⁹ on a distribution agreement, also commented upon by Ramberg,²¹⁰ presents certain questions for discussion on the matter of quantity fulfilment and damages. The contract in question had a provision²¹¹ on a minimum-quantity, which stipulated that the distributor should each year buy a certain minimum-quantity of the products (SEK 600,000/year). Further, there were provisions on cancellation stipulating that if the distributor did not attain the contractual quantity, the seller had a right to cancel the contract to immediate termination latest on Mars 31 the subsequent calendar year.²¹² Another provision stipulated that a party had the right to cancel the contract to immediate termination if the other party was in breach of its contractual obligation and had not within 30 days, after receiving a notice of default from the other party, made a correction.

The Supreme Court found that such clauses on minimum-quantities are common in sole distribution agreements, just as the right of the principal to cancel the contract if the distributor does not attain the minimum-quantity. However, it is not usually seen as a breach of contract with a right to damages if the distributor does not retain the minimum-quantity. The

²⁰⁹ NJA 1992 p. 403.

²¹⁰ Ramberg, Jan, *Tolkning av klausul i återförsäljaravtal avseende förpliktelse att köpa viss minimikvantitet.*

²¹¹ Clause 3.

²¹² Clause 3.4.

conclusion reached was that there was no such trade custom and usage to fall back on.

This conclusion of the court may be used as an illustration for an analogy for the COA. The distribution agreement and the contract of affreightment have been compared by Gorton on the question of quantity fulfilment discussed elsewhere in this work, with a formal rationalization of what is important for one type of contract might be important for another. But as I understand his objectives, this is a matter of material reasoning. In the distribution agreement, the distributor has to buy a certain amount of a commodity and in the COA there is a minimum quantity that has to be transported during the contractual-time. Therefore I deem it possible to apply the court's conclusion on the obligation of quantity-fulfilment within COA, and also to use the further reasoning of the court on contractual rights of cancellation and damages.

The Supreme Court applied an interpretation based on the system approach of construing²¹³ contracts about the cancellation provisions as well as for contractual cancellation as described above. That to make both provisions of material importance, from the perspective of cohesiveness, this must mean that the first provision is of the matter that the minimum-quantity has not been achieved without any breach of contract being at hand and without any negligence of the distributor of the obligation to work from individual qualifications for the best market potential.²¹⁴ This was in order to maintain that a contract, in a situation of uncertainty, is not to be construed in such a way that some of its, at least central, provisions will be without any meaning.²¹⁵

The word "shall" was stipulated in the contract in regard of the condition for the distributor to perform without negligence, but this did not lead the court

²¹³ Author's translation of *systeminriktad tolkningsmetod*.

²¹⁴ Clause 5.1.

²¹⁵ Ramberg, Jan, *Tolkning av klausul i återförsäljaravtal avseende förpliktelse att köpa viss minimikvantitet*, p. 686.

to any certain conclusion on the matter. This is something that I deem of interest for this work as the Volcoa uses the qualification “shall” with respect to the owner’s obligation to nominate a vessel. So in regard of the cancelling provision of this COA, it stated: “Should the owner fail to nominate tonnage according to the applicable provisions of this Contract”,²¹⁶ which is to be read together with “the owner shall nominate each vessel...”.²¹⁷ According to the conclusion of the Supreme Court, this does not lead to a right to damages based on a “promise”.²¹⁸ Nevertheless, as will be shown, it is of further interest to discuss the reasoning that led to their conclusion. It was said that the word “shall” gave some support for that the minimum-quantity obligation constituted a warranty,²¹⁹ but also that this lexical interpretation could give support for the opposite conclusion. The court then turned to a widely spread standard distribution agreement that contained a corresponding clause, but which used instead the term “anticipated quantity”. The clause on cancellation of the contract in the case of a no quantity-fulfilment also used this term. The court concluded that the different writings gave some further support for the notion that the word “shall” should be construed as a warranty. It is my belief that this reasoning of the court can also be applied, for the interests in this work, to the provisions on nomination of vessel in Volcoa.²²⁰ The owner’s obligation to nominate a vessel is here qualified with the word “shall” and the question then arises about damages on a possible contractual ground. The provision on remedies for the owner’s failure to nominate tonnage gives a right of cancellation of the remaining part of the contract (COA), if this amounts to more than three failures, to nominate tonnage according to the applicable provisions of this contract.

²¹⁶ Volcoa clause 15.

²¹⁷ Volcoa clause 8. The word “shall” is used in the meaning that it is to be done in the manner stated in box 16. But this qualification I believe must also regard the nomination as such.

²¹⁸ Author’s translation of *utfästelse*.

²¹⁹ In the Swedish sense of *garanti*.

²²⁰ See Volcoa clause 9.

Compared to the reasoning of the court above, first it can be concluded that the word “shall” is one of assessment. Further, when interpreting the provision in Volcoa, it is possible to use the Swedish Maritime Code as a basis. Its chapter on COA has similar provisions on the nomination of vessel and cancellation, stating that the owner shall nominate a vessel,²²¹ and in the provision on delay of nominating a vessel, a right to damages qualified by an exemption from that outside the owner’s control is given. I deem this to be an indication of how the word “shall” is to be used in the Swedish Maritime Code. The interdependence of the stipulation of “shall” in regard of the minimum-quantity and the cancelling provisions as assessed by the court can then within the application of those provisions in Volcoa be said to strengthen the interpretation of “shall” as a promise (warranty). From the provision in the Swedish Maritime Code it follows that the owner has a right to damages independently of the fact that the voyage has been cancelled or not. Taken together with the status of the Swedish Maritime Code as legislation for the interpretation of unclear contractual provisions, the legislative preparatory works to the Swedish Maritime Code notably state that the default legislation of today does not have only the function to provide auxiliary rules for unclear or incomplete contracts. Instead, those comprehensive systems the default legislation contains, more and more are given the character of well-thought and balanced typical solution. Those political considerations of justice that this typical solution entails are then said to not be possible to set aside as easily as before, for example, with an interpretation of parties’ intentions. The typical solution instead is to be the one first invoked, if it is not apparent that the parties have agreed on a different solution.²²² It is of further interest that the Swedish legislation of carriage at sea to some extent is based on contract custom and usage, where the English one has been of great matter.

²²¹ The SMC uses the term “carrier” instead of “owner”.

²²² SOU Governmental Legislative Inquiry 1990:13 p. 85.

Eric Backlund in his work on sales clauses in distribution agreements²²³ comments on this conclusion of the court. He is of the opinion that it can be traced to the different clauses on cancellation of the distribution agreements, which partly overlap each other and therefore created uncertainty about their material status. If this had not been the case, the need to assess the contract from a comprehensive interpretation would have been considerably less. Backlund then asks the question of whether this could mean that if the two provisions on cancellation had not been part of the contract, there would have been nothing that pointed to a solution different than that the minimum-obligation gave a contractual right to damages. He admits that there was nothing in the contract that actually indicated a right to damages. But the absence of these clauses unquestionably would lead to a different basis for assessment, and he then concludes that a certain scope for the possibility for damages exists despite the fact that it was not made clear contractually.

Even if I agree with Backlund's conclusion, it may also be possible to argue that the Supreme Court's reasoning about the two overlapping provisions was not based on the fact that there was no breach of contract, but instead merely that there was no breach that gave a right to damages. This is also a conclusion made by Jan Ramberg.²²⁴ It then may have been important for the court, for the sake of argument, to reason from the provisions in question.

The minimum-quantity reasoning will also notably be of importance for the question of damages in the perspective of quantity-fulfilment. This is discussed elsewhere in this work from the perspective of the right to damages and its calculation within the span of the minimum and maximum quantity. But the question of minimum quantity fulfilment has not to my knowledge been the focus for any legal academic discussion. But if this field admittedly also includes the present case of distribution agreements

²²³ Tolkning av försäljningsklausuler i återförsäljaravtal.

²²⁴ Ramberg, Jan, Tolkning av klausul i återförsäljaravtal avseende förpliktelse att köpa viss minimikvantitet, p. 687.

and the discussion of the scholars referred to above, this may provide the drafting of a COA with some vital guidance. If the quantity is not fulfilled, as Gorton exemplified, but is within the scope of minimum fulfilment, it would be wise to provide the COA with the necessary provisions, in relation to that now been discussed, to ensure a right to damages.

5.4 Further on Damages and Distribution Agreements within the COA

Gorton²²⁵ has made an interesting comparison with distributorship agreements in order to illustrate questions in the area of cargo quantity in COAs. The initial question asked is about the contractual obligations, which are defined as two-fold: a minimum quantity but also an “evenly spread” undertaking. Gorton believes that because of similar contractual solutions, and that solutions chosen for one contract type may have importance for another one, this comparative analysis is of relevance despite sometimes individualistic contractual differences. Personally I comprehend this reasoning as polemic, and not an attempt to give a more specific solution to the COA issues at hand.

The basis for this discussion is as selected by Gorton, the case of *Paula Lee Ltd. v. Robert Zehil Ltd.*,²²⁶ introduced by Gorton as illustrating questions similar, although not identical, as between distributorship agreements and COAs. I will then try to put these questions a bit more into perspective for the sake of the purpose of this work. That being said, the facts and issues of the case at hand are as follows. A company of dress manufacturers entered into a distribution agreement with the defendants, under which the defendants were to buy at least 16,000 of the manufacturer’s garments every season giving them sole discretion on marketing and selling policy in the territory covered by the agreement.

²²⁵ Gorton, Lars, Contracts of affreightment, Some Features and Principles.

²²⁶ (1983) All E.R. 390.

The defendants cancelled the contract with two seasons left to run without legal cause, and the question then became how damages should be calculated. The contract stated a minimum quantity to be purchased by the defendants but did not stipulate anything as to the style or size of the dresses to be ordered. It was nevertheless accepted that the plaintiffs' profits would be greater on the more expensive styles than on those at the lower end of the market.

Gorton conveys, in line with the reasoning of the court, that in a situation where the defendant has some latitude as to the manner of performance of an agreement, the general rule could maybe be based on a statement by Scrutton L.J. in *Abrahams v. Herbert Reiach Ltd.*:²²⁷ "A defendant is not liable in damages for not doing that which he is not bound to do." Gorton then concludes that the courts have used this notion in situations where the breach of contract has allowed for a number of methods of performance. The courts have then chosen as the basis for the damage assessment that method of performance which would be least unfavourable to the defendant. The defendants contended that damages should be limited to the manufacturer's loss of profits on 32,000 (16,000 x 2) of their cheapest garment. The court found that there were two alternative modes to establishing how the contract should be read, either precisely as written with an obligation for the defendants to buy not less than 16,000 garments per season. Following the contended rule, damages should then be calculated on the basis of the cost of the cheapest dresses in the garment range. In the alternative, it must be subject to an implied term that constitutes an order of choice built on a reasonable selection in all the ranges (i.e. covering the full range). Qualified by *Abrahams v. Herbert Reiach*, the method of performance which should be selected would be the one which is the least unfavourable method of performance consistent with a reasonable performance of the contract. It was decided that the agreement should be construed as subject to an implied term, stating that the garments would be selected in a reasonable manner.

²²⁷ (1922) 1 K.B. 477.

Gorton outlines, in line with what the judges in the case state, that the analysis that the merchandise was to be selected in a reasonable manner was sprung from the court's aim to make commercial sense of the agreement. This leads to the question of what extent a corresponding reasoning can be used within the field of COAs, and taking the issue at hand as a basis for such a reasoning, to what extent it can be applied (or of any guidance) when the judgment contains a valuation of a minimum quantity fulfilment read together with a "fairly-evenly-spread" provision. In the Paula Lee case, the question was how a minimum obligation to buy garments should be fulfilled, where those purchases should be varied. I will therefore construe the notion presented by Gorton as one that can be analysed under those circumstances, at least to the extent that a basic understanding of its applicability is given. The dual obligation consequently will create a basis for the further discussion.

A central point in the reasoning of commerciality, as a guiding factor for an interpretation of the purchase obligation, is that the greater the price difference between the commodities, (for this reasoning it is assumed that this also means a greater net profit for the seller), the more important it is to look at the situation with a view of a businesslike interpretation of the agreement:

There is in my view no justification for distorting what would otherwise be a businesslike-like interpretation of the agreement, by assuming that the defendant would want, and should be allowed, to carry out the performance in a way which would do nothing but harm to the joint interest of the parties, and which in a case of full performance would never fall due.²²⁸

²²⁸ P. 397 in the case.

Before continuing this discussion from an international perspective, let us look at a Swedish provision in the chapter on court proceedings.²²⁹ Section 35:5 of the Swedish Code of Judicial Procedure (“RB”)²³⁰ stipulates as to damages that if the occurred damage cannot at all, or only with difficulty, be evidenced, the court has the right to make an estimation in order to assess the damages at a reasonable amount. How the assessment is made is not a question that will be discussed in this work, and it is to my knowledge seldom demonstrated by the courts. An international discussion can perhaps be of some inspiration also within a Swedish perspective.

In the above case, “the implication of terms must be assessed on the assumption of performance, not breach.”²³¹ This is commented upon by Gorton, “the judge, in imposing a term, *seems*²³² to have looked at the performance rather than at the breach.”²³³ This is taking the reasoning of commerciality as a basis for the courts conclusion in Paula Lee, and the assumption that the price difference is of major importance. Answering the question about the relevance of the Paula Lee doctrine within the field of COAs may make the second notion the initial question.

When the question is about quantity fulfilment in regard of a COA it has often arisen in a situation of changes in the freight-market. Either the freight has gone up or down and in both cases it can generate incentive for one of the parties to cancel the contract, and of course also to act contrary to this. Are then those changes equal to the variations in prices of the merchandises in the Paula Lee-case? Is this what Gorton has in mind discussing the issue at hand? If the freight market changes substantially this will of course bring a considerable profit or loss to the affected party. So if the price difference is regarded as a major factor for solution in the Paula Lee case this can perhaps mandate the use of the same reasoning for the matter in this work. Further, whether the requirement for the contract to be construed in a

²²⁹ Author’s translation of the Swedish term *rättegångsbalken*.

²³⁰ Rättegångsbalken § 35:5.

²³¹ P. 396 in the case.

²³² Italics added.

²³³ Gorton, Lars, Contracts of affreightment, Some Features and Principles, p. 95.

reasonable manner can also be applied in the COA situation should also be discussed. Or in Gorton's words: how will we make commercial sense of the agreement.

In a situation of a characteristic COA dispute, the owner could claim that a certain quantum above the minimum quantity must be shipped if an implied term of a "reasonable selection" is to be considered. This due to the fact that the parties had entered into the contract under the premise of securing their transport obligations for a certain time. The fact that the freight market can develop in both directions is commonly known, which the parties should be aware of when entering into such a contract. An absent nomination of cargo can give a smaller income for the owner is forced to use the dedicated tonnage on a declining spot-market. It is perhaps just such a situation where the contract should be construed from the notion of making commercial sense of the agreement. Thus the question of the "implied" term remains.

In the choice between two alternatives, either to read the contract as it stands or insert an implied term, the judge looked at the objective of the agreement, as quoted above, further stating that:

*I find it hard to accept as being in the contemplation of the parties, when the agreement was made, that the defendant could permissibly order 16,000 garments of the same size, style and colour, and no others at all, a configuration which would alienate their wholesalers, deprive the plaintiffs of anything but a ludicrous presence in the territory, and kill the market not only for the current seasons but for those which were to follow.*²³⁴

Applying an implied term of a "reasonable selection" on the COA situation will perhaps find its justification if the focus is placed in the centre of such a

²³⁴ P. 396 in the case.

typical dispute. The changes in the freight-market will create a division in prices for the shipping service in the event of non-performance of nomination of vessels or nomination of cargo. This division of less profit or higher costs may be the basis for an application of the rule in question. The initial focus in the matter easily will be on the party given the power of choice of alternative performances. The principle of *Abrahams v. Herbert Reiach* as in the *Paula Lee*-case was found to express solely the defendant's obligations, considered in the abstract:

*That inquiry always involves a comparison between the plaintiff's actual position in the face of the breach, and the position which he would have occupied if the contract would have been performed. This must involve an identification of the promise, followed by a valuation of its promised worth to the promisee. Each part of the inquiry may involve considering a choice which would have been open to the promisor.*²³⁵

The *Paula Lee*-rule, in common law, qualifies the basic rule of the party in breach of performance, as damages are then assessed on the assumption that he would have performed in the way that is least burdensome to himself and least beneficial to the other party. The qualifying rule will then be applied to prevent that the party in breach would have exercised his option in a manner which would have been impossible in practice²³⁶, or which would have been so unreasonable as to involve a breach of an express or implied term of the contract.²³⁷ The purpose of the main-rule is to reduce the damages, so that the greatest legitimate disadvantage of the claimants is reached. But this does not require an investigation of what would have been to the advantage of the party in breach, in the situation of performance.²³⁸ Or, as I find obvious, neither an investigation by the plaintiff showing, in a mirrored

²³⁵ P. 393 in the case.

²³⁶ *Thomas v. Clarke* (1818) 2 Slack 450.

²³⁷ *Paula Lee v. Zehil* (1983) 2 All E.R. 390. See also Treitel, *The Law of Contract*, p. 1029, and Cooke, Julian, *Voyage Charters*, p. 557.

²³⁸ *Ibid.* at p. 557.

perspective, the least burdensome method of performance for the defendant, or further, as a conclusion in the negative showing the least profitable method of performance for the plaintiff, will necessarily take place.

As seen from the conflicting reasoning above, the question of an evaluation of the defendant's promise to the plaintiff is of major importance for any solution within the field of quantity fulfilment in regard of COA. This analysis makes the question of performance a part of the investigation. The defendant's right of election is of course a difficult evaluation when made in casu. Following the principle of *Abrahams v. Herbert Reich*, if applied as explained by Gorton, this would obviously lead to the apparent result, one which would seem to ignore an evaluation of the defendant's promise to the plaintiff. But as it stands, this rule will constitute an order that in many situations will be of great accuracy, because if the starting point is the least unfavourable performance for the defendant (or in the other dictum), it will bring a result that nevertheless can be based on the notion of an evaluation of the defendant's promise to the plaintiff, with the justification that the plaintiff has entered into the contract accepting the minimum performance to be the defendant's least unfavourable mode of performance. This will also be the true from the defendant's point of view.

Is it the qualification based on an expressed or implied term in the contract that gives a basis for Gorton's reasoning? If the "fairly-evenly-spread" provision is considered to be the expressed term in this situation, then this could also form a ground for an application of *Paula Lee*. Otherwise, the application will be based on the notion of commercial sense.

6 Discharge by Breach and the COA

6.1 Introduction

The legal institution, discharge by breach, a central issue of interest in this work and in the construction of COAs, is a forceful remedy, which introduces to the wronged party a possibility of protection against the other party's breach of contract. If a contractual obligation is not performed or deviates in its performance, this may give the remedy of cancellation, a notion that in the present perspective needs to be further developed. With COA, and other forms of contracts, where the interest of profit is of central importance, this remedy, discharge by breach, is not in itself adequate in giving the wronged party the profit of a good deal, though it can protect him from the loss of a bad one.²³⁹ Hellner,²⁴⁰ while explaining the issue of the dysfunction of discharge by breach, states that it is possible for a party, if the legal rules admit it, to discharge himself from his contractual obligations due to the other party's contractual breach, and therefore be liberated from a contract that was not beneficial to him from the beginning or has become such owed to fluctuations in the world market. He then states that this is widely accepted in business containing strong elements of speculation where the slightest breach of contract can amount to a discharge by breach, but that the tendency in the legal development is to reduce the elements of speculation dominating in a hazardous way. Cancellation of contract is like many other contractual concepts primarily built on the circumstances of sales, and therefore what applies for sales also, to a great extent, applies to other short-term contracts.²⁴¹

The remedy discharge by breach is primarily one bringing pressure on the party obliged to perform under the contract to avoid the other party invoking

²³⁹ Hellner, Jan, *Speciell avtalsrätt II, Kontraktsrätt, särskilda avtal*, p. 178.

²⁴⁰ *Ibid.* at pp. 178-179.

²⁴¹ *Ibid.* at p. 180.

it. This is also the case after the breach of contract has occurred, giving the wronged party a favourable situation when trying to reach a voluntary settlement with the party in breach of the contract, which involves that the performance can be carried out for example with a price reduction. It also gives the wronged party a possibility to liberate himself from an unfavourable contract²⁴²

6.2 The Prerequisite of “Essentiality” for Breach of Contract

The 1990 Sale of Goods Act restricts right to for cancellation in the manner that the buyer can cancel the purchase if the breach of contract is essential²⁴³ for him and the seller was aware of this or should have been aware of it.²⁴⁴ The Swedish Maritime Code’s provision on cancellation, in the chapter on voyage charters, leaves out this prerequisite of insight in regard of delay and other breach of contract by the owner. CISG also provides a specification of how the assessment of essentiality is to be carried out and gives a right to cancellation when entitled contractual expectations have substantially not been fulfilled.²⁴⁵

The question is how delay is assessed from the requirement of essential importance. It is then said that it will occur first after some time. If delivery of merchandise is to be made within a specified time or a specific day, the delay can by way of an exception be of essential importance already at the end of this day, but in general the measurement of delay will follow the first notion. This usually will be a discretionary assessment. If no performance has been tendered at the time of the legal process, it will seldom be of any doubt that the delay has become essential.²⁴⁶ I will nevertheless below try to show some parameters for the assessment of essentiality in regard of delay within COA.

²⁴² Ibid. at p. 179.

²⁴³ Author’s translation of *väsentlig betydelse*.

²⁴⁴ SSL § 25.

²⁴⁵ CISG art. 25.

²⁴⁶ Hellner, Jan, *Speciell avtalsrätt II, Kontraktsrätt, särskilda avtal*, p. 181.

The requirement of “essentiality” is to be assessed taking into consideration the interest of the wronged party. As to the requirement of insight of the party in breach of contract, it can be said that the “essentiality” is to have been evident.

Hellner²⁴⁷ puts forward that there is hardly any reason to support a principle that the “essentiality” has to be noticeable by the party in breach. He reasons that where the law does not mention this, it is not clear whether there is such a requirement, something that also creates uncertainty for contracts lacking regulation in law.²⁴⁸ Regarding contracts of transportation at sea, the Swedish Maritime Code notably does not, in contrast to the prior maritime code, given an explicit requirement of awareness of the breach of contract being essential to the wronged party.²⁴⁹

6.2.1 “Essential delay” within the SMC

The Swedish Maritime Code uses “essential delay”²⁵⁰ to determine whether there is a breach of contract in the specific situation. To render a comprehensive analysis for the benefit of this work, I will also discuss the former maritime code,²⁵¹ a regulation on delay and other negligence by the owner that was not in conformity with the rule found in 1905 Sale of Goods Act.

The legislative preparatory works to the Swedish Maritime Code²⁵² stipulate that the breach of contract should be “essential”, and explain that the rule of cancellation has changed from the strict condition of the previous maritime code, which contained a provision on cancellation of voyage charter-

²⁴⁷ Ibid. at p. 183.

²⁴⁸ Ibid. at p. 183.

²⁴⁹ See SMC §§ 14:49 and 13:14 and for the previous maritime code § 126.

²⁵⁰ Author’s translation of *vesentlig mislighold* or *väsentligt dröjsmål*. SMC § 14:49.

²⁵¹ This is based on the Norwegian version of the previous SMC.

²⁵² See SOU Governmental Legislative Inquiry 1990:13, p. 186 and SMC § 13:14.

parties,²⁵³ to the present requirement of essentiality as is in line with common civil law. The specific requirement of awareness of the breach of contract on the part of the shipper has been omitted. Conclusively, it is yet said that the difference in a practicable sense will not be great.²⁵⁴

Initially, it may be worth giving some examples with the aim of creating a picture of how the previous rule of breach of contract was intended to work. Situations are described in the legal scholarship putting the focus on the side of the more ordinary ones. For example, a vessel is intended to carry fuel, empty cask or other equipment to a fishing fleet, and is delayed resulting in the cargo being delivered after the end of the season. Further, situations when the use of certain products is limited to certain periods for example fasting or church or nationwide celebrations.²⁵⁵

The current conception of discharge of cargo is, as already seen in this work, primarily built around the circumstances of sales. The main rule is then that discharge by breach is allowed only if the breach is “essential”. The Nordic Sale of goods act in turn follows CISG, which uses “essential significance”²⁵⁶ as a pervading characteristic.²⁵⁷ It also has a determination of “essential breach of contract”:

*A breach of contract committed by one of the parties is fundamental²⁵⁸ if it results in such detriment to the other party substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.*²⁵⁹

²⁵³ The previous SMC § 126.

²⁵⁴ SOU Governmental Legislative Inquiry 1990:13, p. 186.

²⁵⁵ Jantzen, Johs, Håndbok i godsbeholdning til sjøs, pp. 264-265.

²⁵⁶ Author's translation of *väsentlig betydelse*.

²⁵⁷ See art. 49 (1) (a), 51 (2), 64 (1) (a), 70, 72, 73.

²⁵⁸ Essential is used here instead of “fundamental” as used in CISG.

²⁵⁹ CISG art. 25.

Håstad argues that from a lexical perspective, this suggests a greater disadvantage for the wronged party.²⁶⁰

Several modern law texts contain the qualification that the party in breach of contract needs or ought to have been aware of the essentiality for the wronged party. This requirement on one side results in a party in breach of contract not facing the remedy of discharge if he is not aware of that the breach of contract is of essential importance to his contracting party. On the other side, this wronged party, to whom the breach of contract would be essential in consideration of the individual situation, must make sure that this is visible to the first party.

We again have to turn to Falkanger's work on consecutive voyages, which initially states that Scandinavian contract law requires essential breach for discharge or cancellation. He further reasons that this and the cancellation rule in the Swedish Maritime Code 1891, described above, do not have any real material difference.²⁶¹ More precisely, there is a little or irrelevant difference between the § 126 of Swedish Maritime Code 1891 – lexically construed – and the general contract principle, in reality.²⁶² Those special circumstances at hand in the maritime business must be considered when determining the essentiality, with or without an insight criterion. Falkanger considers it reasonable to construe it as far as possible to be in accordance with the general contract rules on discharge by breach.²⁶³ He further reasons, when discussing weather obstacles, that as a starting point one has to look at the idea of the parties. So if the parties have then entered into the contract knowing of the weather conditions that one has to count with, should this risk totally be the risk of the owner, with the consequences that any delay due to such a hindrance gives the charterer the right to cancel the contract. He then comes to the conclusion that this cannot generally be

²⁶⁰ Håstad, Torgny, *Den nya köprätten*, p. 52.

²⁶¹ Falkanger, Thor, *Consecutive reiser*, p. 135.

²⁶² *Ibid.* at p. 155.

²⁶³ *Ibid.* at p. 136.

supposed to be the case. Certain grounds for this can be found in the legislative preparatory works to § 126 stating that the owner should not alone bear the risk for those delays on a sea voyage that the charterer also can and should have been aware of when entering into the COA.²⁶⁴

The question must then be asked whether this reasoning of Falkanger is compatible with the regulation in the 1990 Sale of Goods Act. The condition of essentiality then is to be assessed objectively taking into consideration the special situation of the buyer, but how this is to be carried out is not very clear. One opinion, predominantly support in the modern academic discussion and in the new legislative preparatory works, is that the assessment should be made on a free hand basis²⁶⁵ and be of a general character. The legislative preparatory works state that the time factor can be decisive in that it sometimes is of lesser importance and sometimes of more than the merchandise being subject to price-fluctuations.²⁶⁶

In the Norwegian sale of goods act, the above-discussed condition of insight has notably been left out to show that the assessment should be of a more comprehensive nature.²⁶⁷ Kruger is of the opinion that a total assessment is to be done, for example, including that which will be the consequences for the seller in the case of cancellation.

If we compare this to the 1990 Sale of Goods Act, the assessment of essentiality is to be done from the buyer's point of view.²⁶⁸ Of further interest for this discussion is the reasoning of Rodhe, who states as a main rule that the starting point for such an assessment should be the individual situation of the buyer. If there is no satisfactory investigation showing this, one must fall back on that which is the common understanding of the

²⁶⁴ Ibid. at p. 154.

²⁶⁵ Author's translation of *skönmåsig*.

²⁶⁶ Legislative bill. 1988/89:76, p. 104.

²⁶⁷ OT prp nr 80 (1986-87) Kjopslov, p. 69.

²⁶⁸ Rodhe, Knut, *Obligationsrätt*, p. 430.

question of essentiality within a commercial sense.²⁶⁹ Rodhe further formulates that, as essentiality is concretely required for cancellation of contract, essentiality in the abstract is consequently supposed to give essentiality in the concrete.²⁷⁰

Rodhe develops his reasoning according to the fact that certain law texts on essentiality stipulate that cancellation is not at hand if that which is to be held against the seller is to be assessed as being of minor²⁷¹ significance. This, he says, seems to mean that there is no right of cancellation if the breach of contract indeed, generally speaking, is essential but in the concrete should be unessential for the buyer. Essentiality both in the abstract and in the concrete should be required, thereby essentiality in the abstract is supposed to give essentiality in the concrete.²⁷²

In answering my own question, I begin with the 1990 Sale of Goods Act and the fact that the assessment of essentiality is to be partly made objectively. If we then look at the 1905 Sale of Goods Act and how Rodhe describes the method of assessment, the individual situation of the buyer may be seen as balanced against a common understanding within a commercial sense. This can be compared to that said about the 1990 Sale of Goods Act, that the assessment is to be made objectively taking into consideration the special situation of the buyer. This may appear to be two different starting points for the assessment of essentiality, and it also can be noted that the general assessment within the 1905 Sale of Goods Act may sometimes only be made as a substitute one to the first one. But Rodhe also puts forward that essentiality in the abstract is supposed to give essentiality in the concrete. This is something that I believe is easily comparable to the method described in regard of the 1990 Sale of Goods Act. That further said by Rodhe, about the requirement of essentiality both in the abstract as in the concrete, also seems correspond to the 1990 Sale of Goods Act. That said in

²⁶⁹ Rodhe uses *handel och vandel*.

²⁷⁰ Rodhe, Knut, *Obligationsrätt*, p. 431.

²⁷¹ Author's translation of *ringa*.

²⁷² Rodhe, Knut, *Obligationsrätt*, p. 431.

regard of the 1990 Sale of Goods Act about the assessment being carried out in a comprehensive way also seems possible to compare to Falkanger's reasoning above concerning absolute and relative factors. Conclusively, there seems to be a relation between the two ways of assessment, seen from the buyer's perspective or in a more general or objective way. To what extent Falkanger's notion that the starting point should be the parties' conceptions is still relevant, I deem to be more uncertain.

Falkanger's analysis on the discharge condition in relation to the general contract principle includes measuring the importance of the delay to the charterer: Does the charterer have a reasonable ground to be liberated from the contractual obligation? In this connection it may be emphasized that the charterer cannot initially rely on that a time-schedule can be kept, unaffected by factors like the weather. But a certain margin of consideration should be taken for these kinds of factors, meaning that the assessment will be to establish how far the charterer will have to accept delays before it can be said that he has a reasonable or legitimate cause for termination of contract. This probably is not possible to establish, so it will depend on the circumstances in the specific situation; but it will be possible to establish that in the situation where the charterer has special needs requiring a rapid performance of the voyage – and the owner knew or should have known of these circumstances – this will be an important factor that will permit discharge in situations where it otherwise would not be considered as relevant. At the same time, it should be emphasized that many factors are involved, and the strength of those – absolute and relative – can vary from time to time. It should therefore not be excluded that discharge can be admitted in situations where the owner does not have any knowledge about the special needs of the charterer, or in situations where it is not at hand to talk about special needs of the charterer in that meaning.²⁷³

Falkanger's analysis on essentiality as a prerequisite for discharge by breach is to a large extent, as shown above, based upon the contractual construction

²⁷³ Falkanger, Thor, *Consecutiva resor*, p. 155.

of consecutive voyages. The remaining question is then to what extent this can be used in a discussion about COAs. To begin with, it is clear that COAs and consecutive voyages have to be seen as different in that the first mentioned is for voyages in direct continuation with the same vessel. The COA is based on the nomination procedure for each voyage and the issuing, for example, of a voyage charter-party. In connection with this, from a subjective perspective, when considering whether a party has been aware of that the breach of contract has been of essential importance to counter-party. The more specific the object for performance is, the more the individual contractual situation has to be considered. Seen in the perspective of a COA, it is possible that the description of the vessel will bring a need to consider the situation as above, the more narrow the obligation of nominating, a contractual vessel, the more important the present contractual situation becomes.²⁷⁴ Hellner is also of the opinion that the assessment of “essentiality” will probably²⁷⁵ be affected by a precise observance of time stipulated in the contract or of a particular interest for the charterer.²⁷⁶ Hellner concludes in regard to the Swedish Maritime Code that it is possible that the prerequisite of “essentiality”, even if it is not stipulated in the law, can be affected by the fact that the owner has realized or should have realized the importance of the delay. From this I conclude that it is uncertain whether there is any change in contract law regarding this principle. Within this discussion, in both consecutive voyages and COAs, the risk allocation is notably the same. This means that the owner assumes the risk for delay.²⁷⁷ He then in a practical sense is the party affected if the vessel cannot perform as many voyages as expected, or if the transport of the agreed goods cannot be performed as efficiently as contemplated.

One case can be mentioned here, a Norwegian arbitration case (NDS 1949 p. 312), in which the rule of essential breach regarding cancellation of contract within contract law was given some attention. There the owner had

²⁷⁴ Hellner, Jan, Ramberg, Jan, *Speciell avtalsrätt I Köprätt*, p. 134.

²⁷⁵ Author’s translation of the Swedish word *torde*.

²⁷⁶ § 126 of the previous SMC.

²⁷⁷ Ramberg, Jan, *Cancellation of Contracts of Affreightment*, p. 49.

specified a higher speed of vessel than it could perform in reality. The rule applied was construed so as to give a scope for a balance of interests. In regard of the cancellation, the charterer's loss could be compensated for by damages or a reduction of the freight. Those disadvantages the remedy would inflict on the charterer with regard to the falling market were consequently considered.

Lastly, the Swedish Maritime Code has the same type of cancellation rule²⁷⁸ with a cancellation of a framework contract, with a basis on the notion of successive deliveries, which is also found in the 1990 Sale of Goods Act.²⁷⁹ But there is an important distinction to be made in regard of that the rule in the Swedish Maritime Code that cancels the remaining part of the COA, whereas 1990 Sale of Goods Act individually turns to the remaining part deliveries for cancellation. The prerequisites for cancellation are different; give cause to "count upon" in Swedish Maritime Code and give cause to "conclude" in the 1990 Sale of Goods Act²⁸⁰ as connected to the assessment of future essentiality. The Swedish Maritime Code has later shipments as a focus for the prerequisite above, however, how many is not made clear. This in summary must mean that the condition for cancellation of the remaining part of the COA must be seen as different from the rule in the 1990 Sale of Goods Act.

6.2.2 The Prerequisite of "it is clear" within Anticipated Breach of Contract

On the question of breach within framework contracts on specific deliveries, each underlying contract has to be considered separately and the rule of anticipated breach in § 62 1990 Sale of Goods Act of interest here. This rule requires that "it is clear"²⁸¹ that a breach of contract will occur giving a right

²⁷⁸ SMC §§ 14:47, 14:48 and 14:49. The SMC legislative bill 1993/94:195 makes a reference to SSL § 44 on the cancellation of successive deliveries.

²⁷⁹ SSL § 44.

²⁸⁰ CISG uses "good grounds to conclude".

²⁸¹ CISG uses this while the SSL § 62 uses *står det klart*.

to cancellation regarding the next contract in the series.²⁸² Hellner states that if the contract lacks applicable provision in legislation, the principle of anticipated breach of contract will probably be applicable within numerous other types of contract.²⁸³

This must be of some relevance for the contractual construction of no provision of a delayed nomination of vessel, which is the case in *Intercoa* as it does not provide a possibility for such cancellation. This also leads to the question of whether anticipated breach can be successfully used to cancel the specific charter-party. The prerequisite of “it is clear” marks that it is not sufficient with “strong reasons to presume” that a breach amounting to a right of cancellation will take place in the future²⁸⁴. The general prerequisite of “essentiality” must also be fulfilled as well as the prerequisite of insight. But the possibility for cancellation can to some extent be defined as increasing the closer one comes to the contractual time for delivery,²⁸⁵ which can also be true when it comes to merchandise that has been adjusted especially for the buyer.²⁸⁶ There are notions that I believe are possible to discuss within COA.

A more certain situation is where the seller announces that he has no will to be bound by the contract any longer, which ought to mean that the breach is always to be assessed as essential. But if this is altered to a declaration of no possibility to perform within the contractual time, an assessment of essentiality must be made.²⁸⁷

Hellner puts forward, regarding a contractual provision setting aside the prerequisite of essentiality, that there may be strong reasons to assume that a non-essential breach of contract also can give a right to a prior cancellation. However, this requires an interpretation of the contract, or else an assessment

²⁸² Ramberg, Jan, Herre, Johnny, *Allmän köprätt*, p. 165.

²⁸³ Hellner, Jan, *Speciell avtalsrätt II, Kontraktsrätt, särskilda avtal*, p. 181.

²⁸⁴ Ramberg, Jan, Herre, Johnny, *Allmän köprätt*, p. 166.

²⁸⁵ Hellner, Jan *Speciell avtalsrätt II Kontraktsrätt, Allmänna ämnen*, p. 180.

²⁸⁶ *Commentary to the International Sale of goods act*, p. 482.

²⁸⁷ Hellner, Jan *Speciell avtalsrätt II Kontraktsrätt, Allmänna ämnen*, p. 180.

of the circumstances in the specific case. It cannot be generally assumed that a contractual provision of this kind can be combined with a legal provision, with a basis in a default rule that is not in conformity with the contractual provision.²⁸⁸ My conclusion is that it is possible that anticipated breach could be used within COA where the specific contract gives a right of direct cancellation for late delivery of vessel.

6.3 Discharge by Breach of One or All Contractual Obligations

Discussing the issue of incomplete contractual regulation in regard of cancellation of a COA also leads to the question of whether the discharge is of all or simply one of the contractual obligations. Falkanger initially state that cancellation of the whole contract due to delay regarding a single voyage can only be accepted as an exception. Two possible avenue are defined. Firstly, it may be argued that there is such a close connection between all the voyages that it would be commercially unreasonable to cut out one voyage, this due to the fact that the contract may be more or less destroyed if the total quantity is not shipped. Reaching a conclusion on this may involve a very close interpretation of the contract. With Scandinavian law as a choice of law, a number of factors outside the contract itself will have an impact on the interpretation, i.e., the negotiations leading up to the final contract. If it is then found that the contract is to be considered indivisible, a delayed but eventually performed voyage will not likely amount to sufficient grounds for cancelling the contract. Secondly, delays as to voyages to come can be an indication of and act as a basis for citing an anticipated breach on the one hand. This can be the case when the performed part of the contract shows that the owner does not have the necessary skills or organisation to perform the contract in conformity with its obligations.²⁸⁹ This has to be qualified by the modern notion discussed in the legislative preparatory works to the Swedish Maritime Code, default legislation today does not only have the function to provide auxiliary rules

²⁸⁸ Ibid. at p. 180.

²⁸⁹ Falkanger, Thor, *Scandinavian Studies in law* 1977 vol. 21, p. 154.

for unclear or incomplete contracts. Instead, the comprehensive systems default legislation contains, more and more are gaining the character of a thought-through and well-balanced typical solution. It is then said that those political considerations of justice that this typical solution entails cannot be set aside as easy as before, for example by an interpretation of the parties' intentions. The typical solution is to instead be the one of first use, if it is not apparent that the parties have agreed on a different solution.²⁹⁰

Of interest is also the doctrine of impossibility, one of equal legal status to cancellation, that is discussed at some length elsewhere in this work. Impossibility, can be applied to both the whole contract or just part of it, something that leads to the question of whether there is a right to cancellation in the part of the contract where impossibility has not been applied. Rodhe²⁹¹ states that this must undoubtedly be answered in the positive to the extent that if impossibility were not present, he would have had the right of total cancellation. On the issue of partial or total cancellation, the doctrine of anticipated breach of contract is also of some importance, as it often is a breach of contract regarding partial performance that gives a right to cancel the rest of the contractual obligations. A right to partial cancellation can then be expanded to a right to total cancellation.

6.4 Repudiation in English law within Gencoa

The provision in Gencoa regulating cancelling of shipments is based upon the notion that the overriding contract (COA) is distinct from the contract regulating the single voyage (often a voyage charter-party). The explanatory notes to Gencoa leave part of the cancellation function to the gap-filling law on repudiation and frustration at common law. In order to create the necessary understanding for this cancelling provision, these legal institutions at common law have to be applied to this provision. The owner's failure to provide tonnage or the charterer's failure to provide cargo must be

²⁹⁰ SOU Governmental Legislative Inquiry 1990:13 p. 85.

²⁹¹ Rodhe, Knut, *Obligationsrätt*, p. 443.

due to reasons falling within the exceptions clause of the underlying charter-party. Otherwise, they are in default of the contract, so depending on this, clause 11 regulates whether the cancellation is to apply to that shipment only. If not, it will be assessed according to default law.²⁹²

The reference to English common law regarding cancellation of contract in Gencoa can of course be altered to refer to Swedish law. This means, for the perspective of this work, that all provisions are to be construed against Swedish law. The provision on nomination of vessel in the Swedish Maritime Code²⁹³ should be applicable to Gencoa's procedure on nomination. This also contains a nomination of non-legal status but only commercial. From that stated above about nomination of vessel and its legal function, it should be the definite nomination in the same provision that is the basis for the application of the current the Swedish Maritime Code provision. A possibility to cancel the specific charter-party for a delayed nomination consequently exist. If common law is to be applicable to Gencoa, it is possible to cancel the Gencoa-form if the delay of nomination has accumulated to a right of repudiation.

Something should also be said about a failure of the owner to nominate a vessel, or for his delay in doing so, in regard of Gencoa and the common law, which entitles the charterer to claim damages, but as the charterer still has the goods he must, from any damages, deduct the value of the goods.²⁹⁴

In regard of the default situation in the Gencoa provision on cancellation, the cases recited next provide some guidance as to the issue of what amounts to a delay of repudiation of the Gencoa-form. In the first, a long-term contract for provision of free time management and grounds

²⁹² See Gencoa clause 11 and its explanatory note.

²⁹³ SMC § 49.

²⁹⁴ Schmitthoff discusses the nomination of vessel procedure explaining that the owner may be entitled to treat the contract as repudiated should the charterer fail to nominate within the stipulated time, as it has been held that the requirement to give such notice was a condition. See Schmitthoff *The Law and Practice of International Trade*, pp. 26-28 and *Bunge Corporation v. Tradax Export SA* (1980) 1 Lloyd's Rep. 294, CA.

maintenance services to the community for a four-year period did not give a right to cancel for every breach. The court held that it was relevant to look at the performance of the contract over a full year and ask whether the council was deprived of the whole benefit of what it had contracted for over that period. The breaches were relevant not only for their own sake, but also for what they showed about the future. The question can then be asked as whether the accumulation of breaches was such to justify an inference that the contractor would continue to deliver a sub-standard performance, thus leading to the council being deprived of “a substantial part of the totality of that which it had contracted for that year”. The starting point of the court’s reasoning seems to have been that a lack of at least 25 per cent of the overall benefit of the contract would be necessary, and applied to this case this meant one out of the contracted four years.²⁹⁵

In the *Maple Flock* case,²⁹⁶ the sellers had contracted to sell one hundred tons of rag flock to the buyers. The sixteenth of the first twenty loads delivered was defective. The court held this not to amount to a repudiatory breach as it related only to one delivery and only one and one-half tons out of the whole contract. In this case, the assessment was made quantifying the breach in regard to the whole and also the probability that the breach would occur again.²⁹⁷ It was then established that the supplier had a good quality-control system and that it was very unlikely that this problem would arise again, and therefore there was not a sufficient breach to justify termination. In the *Ra Munro*-case,²⁹⁸ 1,500 tons of meat and bone meal were to be delivered, in 12 lots of each 125 tons. But after 768 tons had been delivered, it was found that all were contaminated and thus not in conformity. This was held to amount to a repudiatory breach by the court. In the *Warinco AG*-case,²⁹⁹ where a buyer of oil deliverable in two lots without justification refused to accept one of them, it was held that the seller was entitled to

²⁹⁵ *Rice v. Great Yarmouth BC* (2001) 3 LGLR 4.

²⁹⁶ *Maple Flock Co Ltd v. Universal Furniture Products (Wembley) Ltd* (1934) 1 KB 148.

²⁹⁷ *Maple Flock* at, p. 592.

²⁹⁸ *RA Munro & Co Ltd v. Meyer* (1930) 2 KB 312.

²⁹⁹ *Warinco AG v. Samor SpA* (1979) 1 Lloyd’s Rep. 450.

cancel. In the Hongkong Fir case,³⁰⁰ a vessel was employed under a 24-month charter-party. During the contractual time she was found to be unseaworthy in the need extensive repairs which took altogether twenty weeks to complete. The charterers purported to cancel due to the delay. The court's rejection was partly based on that the vessel was still available, after the completion of the repairs, for 17 out of the original 24 months of the charter-party. It was further said that once the repair had begun there was no reasonable ground for believing that the vessel would not be available for use under the contract within a fairly short and predictable time.³⁰¹ In *Bradford v. Williams*,³⁰² the defendant's vessel was chartered for one year from May to May, but in September the charterer wrongfully refused to provide a cargo. The court found that termination was justified as "no cross-action for damages would have fully compensated him".³⁰³ In such a cross-action, it was also likely that there might be a problem concerning the duty to mitigate the loss by finding substitute employment, because it would be difficult for the owner to know for how long such employment should be sought in the perspective that the original charter-party had remained in force. If the charterers then later would require further performance, the owner then would have been bound to have his ship available in response to such a requirement. Conclusively, the factor for the assessment is the breach in regard of the whole, on the ground of instalments and quantity. Another factor is what the breach shows about the future, an assessment that seems to have been based on two different grounds. Firstly, as seen above, it can be done in the manner of the "accumulation of breaches". Secondly, it seems also to include the circumstances surrounding the breach.

As to the notion that during a long term contract one of the parties may be under an obligation to carry out a series of acts, there is one further issue of interest, here in the form of a time charterer who is required to pay hire semi-monthly in advance throughout the charter-party. This will rarely,

³⁰⁰ *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* (1962) 2 Q. B. 26.

³⁰¹ (1962) 2 Q. B. 26, per Salmon J., whose judgment on this issue was simply approved by the Court of Appeal: see (1962) 2 Q. B. 26 at 61, 73.

³⁰² (1872) L.R. 7 Ex. 259; *The Sanko Iris* (1987) 1 Lloyd's Rep. 487.

³⁰³ (1872) L.R. 7 Ex. 259 at 269.

however, if ever, lead to a repudiatory breach for the failure to pay one instalment on time, provided that this is not regulated by a contractual provision stipulating such: “The reason for this is, that such delay in payment of one half-monthly instalment would not have the effect of depriving the owners of substantially the whole benefit which it was the intention of the parties that the owners should obtain from the charterer.”³⁰⁴

Wilson explains that only where the circumstances surrounding the non-payment indicate a clear intention on the part of the defaulting party to be no longer bound by the contractual obligation will the breach be regarded as repudiatory. He then defines two factors as important for asserting such an intention. The first one is the ratio of the breach to the contract as a whole – is the proportion unperformed trivial or vital to the main purpose of the contract? The second is whether there is any great likelihood that the breach will be repeated. From this Wilson reaches the conclusion that the late payment of one out of forty-eight instalments of hire could not likely be treated as a serious breach of contract, whereas an express refusal to pay any further instalments would demonstrate a clear intention to no longer be bound by the contractual obligations.

The above discussion is invoked here despite the fact that it is about payment as it nevertheless can be seen as relevant for the discussion on repudiatory breach of contract within this work. The passage that when “the circumstances surrounding the non-payment indicate a clear intention on the part of the defaulting party to be no longer bound by the contractual obligation will the breach be regarded as repudiatory” is a clear statement. From Wilson’s reasoning the doctrine of anticipatory breach is applicable to the COA and can give a right to repudiation. This occurs where a party repudiates his obligations in advance of the date fixed for performance of the contract, where a party either renounces the contract, or disables himself from performing it. The party not in breach is then entitled to bring an

³⁰⁴ Diplock LJ in *The Afivos* (1983) 1 Lloyd’s Rep 335 at p 341. In this case, the owners had withdrawn their vessel without complying with the notice requirement in the charter withdrawal clause and so had to justify their action on the basis of common law principles.

action for breach immediately without the necessity of waiting until performance is due.³⁰⁵

6.5 The Doctrine of Frustration in English law

The reference in Gencoa made to the doctrine of frustration at common law requires an elaboration of this subject in regard of the question discussed. Its legal meaning has been commented upon by Lord Radcliffe in *Davies Contractors Ltd v. Fareham UDC*:³⁰⁶

Frustration occurs whenever the law recognises 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. Non haec in foedera veni. It was not this I promised to do.

Consequently, it is the appearance of circumstances which might make the performance of the contract more difficult, onerous or costly than was foreseeable by the parties when the contract was entered into. Such circumstances may be constituted by a sudden, even abnormal, rise or fall in prices or the loss of a particular source of supply, something that can in itself create a more costly performance. To apply this within the doctrine of frustration must mean that only circumstances of a so fundamental character that the parties cannot perform the contract they have made can create a situation of frustration.³⁰⁷

Frustration must not be due to the fault of either party to the contract, otherwise the other party may have the option to treat the contract as

³⁰⁵ For further reading on the doctrine of anticipatory breach see Treitel, *The Law of Contract*, 12 ed., p. 845.

³⁰⁶ *Davies Contractors Ltd v. Fareham Urban District Council* A.C. 696 (1956).

³⁰⁷ *Schmitthoff's Export Trade*, *The law and practice of international trade*, p 105.

repudiated. The burden of proof in such a case is on the party who alleging it.³⁰⁸ Self-induced frustration entails that in an event that otherwise would discharge a contract by frustration, and it is introduced by default of one of the parties, the other party is entitled to rescind the contract as in an event of breach of condition. If there is no right for one party to rescind the contract because the breach of contract does not amount to a breach of condition, the ground of the breach must be that the commercial object of the adventure is frustrated.

Of importance for this work is the question of loss of vessel (just) before the generic obligation has become specific, and in English law frustration may be of interest in such a situation. In one case,³⁰⁹ a nominated vessel caught fire on her way to the loading port and the charterer requested that the owner send a substitute vessel. The owner refused and held that the loss of the vessel had made it impossible to perform. He also put forward that the relevant cargo should be deducted from the total quantity. The owner only pleaded the force majeure clause in the framework contract and not the cancellation or exemption clauses of the specific charter-party. The arbitrators disagreed with the owner, “the intent of the contract was not frustrated by the constructive loss of the vessel”. The force majeure clause further did not provide any possibility for release from liability.

Further in the legal scholarship it is maintained as to contracts for a named vessel, that the loss of a ship will frustrate the charter, but a situation where the voyage is to be performed by one of a number of ships to be nominated by the owner, the charter will not be frustrated unless all of the ships to be nominated are lost. This will be the case even if the owner’s other contractual engagements make it impossible for him to perform the charter without breaking other contracts.³¹⁰ Treitel also puts forward that if the goods are generic, the contract is not frustrated merely because the

³⁰⁸ T.G. Carver, p. 398.

³⁰⁹ AMC 1974 p. 2533. This case has also been used for illustrative purposes in *A Practical Guide To Contract of Affreightment and Hybrid Contracts* by Gorton, Lars and Ihre, Rolf.

³¹⁰ Cooke, Julian, *Voyage Charters*, p. 617.

particular goods that the seller intended to supply under the contract were destroyed before the risk has passed.³¹¹ In connection to this, the transfer from the generic to the specific obligation can, depending upon which moment in time this takes place give a possibility or not to frustration. If then the court finds a specific transfer after the nomination in time, there will consequently be no possibility for frustration before that moment in time.

The doctrine of frustration can also be used where the method of performance has become impossible. Whether the contract is to be seen as frustrated or not depends on whether the substituted method of performance differs fundamentally from the one originally undertaken. In *Tsakiroglou & Co. Ltd v. Noblee Thorl GmbH*,³¹² the performance became more difficult when the Suez Canal was closed as a result of hostilities in the Middle East. The contract was made for the sale of Sudanese groundnuts which included the carriage to Hamburg. The question for the court was whether the contract should be considered frustrated because of the closed Suez Canal. The contract did not specifically stipulate that carriage would be made through the canal, but by the time of the execution of the contract this was the only route to Hamburg. It was nevertheless still possible to make the delivery through the Cape of Good Hope, something that would lead to a loss for the seller. However, it was established that the parties had contemplated whether the transport should be carried out through the canal, something found to be no problem because there was no interest of the buyer that the delivery should not be made just because the ordinary route had been closed. The extended time of delivery was neither a problem for the buyer, although this would have taken two and one-half times as long and would have doubled the cost of carriage. The court found that the difference between the two methods of performance was not sufficiently fundamental to frustrate the contract. Julian Cooke then comes to the conclusion that if the difference would have been such that frustration had

³¹¹ See also Treitel, *The Law of Contract*, p. 810.

³¹² (1962) A.C. 93.

been assessed by the court, this could have been even if a method of performance was not specified in the contract but only contemplated by both parties.³¹³ Cooke continues that if there is no such fundamental difference at hand, the contract may stand even if it does provide for performance by a method that became impossible, something that is supported by a number of cases.³¹⁴ Specifically as to the increase in cost for the owner, this had to be seen as a possible ground for frustration. The significant difference between the route over the Suez Canal and the one around the Cape of Good Hope lay in the price. But such changes regarding the performance will not easily lead to an exemption from obligation. And in this case, Viscount Simonds states: “Freight charges may go up or down. If the parties do not specifically protect themselves against change, the loss must lie where it falls”.³¹⁵

Increased costs seem to be another of those occurrences that can produce frustration of contract. However, the fact that it had become much more expensive for one party to perform than he had reason to expect when he entered into the contract will hardly, if ever, produce frustration. If frustration is to be assessed to be at hand, the extra expense must be such that it can be said to alter the nature of the obligation undertaken.³¹⁶ It has been held that a contract cannot be frustrated because it has been commercially impossible to perform. Such an impossibility can only be liberating if it has been made part of the contractual solution.³¹⁷ In the British case, *Movietonews Ltd. V. London District Cinemas Ltd*,³¹⁸ Viscount Simon states that unforeseen changes in price, even such of an abnormal character, are among those factors that the parties have to deal with, and that

³¹³ Cooke, Julian, *Voyage Charters*, p. 618. See also *Tsakiroglou* (1962) A.C. 93 at 112; *Congimex Companhia General etc. v. Tradax Export S.A.* (1981) 2 Lloyd’s Rep 687 at 692 (affirmed (1983) 1 Lloyd’s Rep. 250).

³¹⁴ E.g. *The Captain George K* (1970) 2 Lloyd’s Rep. 21; *The Washington Trader* (1972) 1 Lloyd’s Rep. 463; 453 F. 2d. 939.

³¹⁵ See (1962) A.C. 93. at p. 113.

³¹⁶ Cooke, Julian, *Voyage Charters*, p. 617. *Larringa v. Société Franco-Américaine des Phosphates* (1923) 14 Ll.L.Rep 457, 464, and *Davies v. Fareham U.D.C.* (1956) A.C. 696, at p. 729 and *The Eugenia* (1964) 2 Q.B 226, at p. 239.

³¹⁷ See *Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd* (1971) 33 TLR 454.

³¹⁸ (1952) A.C. 165.

this in itself will not frustrate the contract.³¹⁹ A case where a statement in the positive, regarding frustration in the meaning of higher costs, is made is *Brauer & Co (Great Britain) Ltd v. James Clark (Brush Materials) Ltd*.³²⁰ Lord Denning there said that if a brought export licence entailed a rise in cost for the seller by one hundred percent higher than the cost of the merchandise, then this situation could lead to frustration.³²¹

This discussion about frustration, with impossibility as cause, is included here in regard of objective impossibility, and more specifically, the above discussion of the obligation of transport when conditions have changed and the route has been longer and /or different.³²² The reason why this example has been abolished by Eklund is not known to this author. But the fact that a developing infrastructure, as well as a technical development, may make it difficult to uphold such a concrete example seems, in my view, a reasonable conclusion. It can be further noted that in the altered example by Eklund, the changed conditions were as seen in relation to that which had been contemplated by the parties, something according to my understanding may need an interpretation of the contract, and it also may be possible to compare to the above reasoning on frustration.

As shown, it is both the difference between the methods of performance as well as the rise in the cost of performance that are discussed for the question of frustration. This is also the same with respect to objective impossibility. Jan Ramberg has also made a statement in regard of the unavailability of a route, that “the doctrine of frustration would apply if the closure, for example, prevented a voyage from the east coast of Africa to a Mediterranean port from being performed via the Suez Canal.” He argues that the prolongation would appear to completely upset the contractual balance between the parties. Jan Ramberg finds that there probably is no

³¹⁹ Ibid. at p. 185.

³²⁰ (1952) 2 All E.R. 497.

³²¹ Ibid. at p. 501.

³²² See footnote 109.

difference between Anglo-American and Scandinavian law in this respect.³²³

6.6 Cancellation, Non-nomination and Quantity of Performance

One further question is how to deal with the quantity of performance when one voyage is not performed. To begin with, when no such provision exists one should be somewhat careful in formulating general rules as the facts the courts may consider relevant may differ very much from case to case.³²⁴

Falkanger maintains that a decisive factor in the determination of whether the total quantity of obligation remains might be the question of when and how the unshipped quantity should be shipped. He then suggests that the reason for non-performance can provide some guidance. So if a vessel is not presented within the date (directly or indirectly) fixed in the contract, the charterer will then be able to choose how to exercise the option from a market perspective; he can now perhaps obtain tonnage at a lower rate. Based on this, Falkanger concludes that there will be no reason for not making a deduction from the total quantity.

Falkanger gives an additional reason for the same conclusion, which I deem to be of importance. In this situation, it will be physically impossible (e.g. because of ice) or commercially purposeless to perform a voyage. The question is then if the charterer may demand an additional vessel during the next shipping season. The already given conclusion is reached from the fact that the charterer has to rely on his claim for damages based on the situation when the voyage should have been performed. This then implies that an offer by the owner to provide an additional vessel later on, depending upon the circumstances, may be regarded as a reasonable means of mitigating the damages. The effect of this in many instances would be that the owner in

³²³ Ramberg, Jan, Cancellation of Contract of Affreightment, p 352.

³²⁴ Falkanger, Thor, Scandinavian Studies in Law 1977 vol. 21, p. 403.

fact paid damages based upon the situation not in the first but in the second season.

In comparing the above reasoning of Falkanger with the regulation in law and contract, it can initially be said that Volcoa,³²⁵ similarly to Gencoa and the Swedish Maritime Code in regard of quantity of performance, is based on the case of a fall out of voyage, a regulation where the reason for non-performance has been given effect. If the owner fails to nominate tonnage, the main-rule is that the corresponding quantity is to be deducted from the total contracted quantity. If the reason for this failure is of a force majeure character, no deduction is to be made. If instead a nominated vessel is cancelled, a deduction is to be made, but only if the cancellation is caused by an incident outside the owner's control. Compared to Falkanger's first reason for deduction, this seems to have a somewhat inverted purpose in that it leads to a deduction in those circumstances where the owner has had no possibility to perform the contractual obligation. Thus the possibility for what I understand to be an opportunity for speculation for the charterer remains, something that is supported by the regulation of Volcoa giving the charterer one month to give notice for its decision. This will only be possible, however, when the same is true for the owner. If the charterer has failed to give the shipping-programme, a deduction is to be made. The charterer's refusal of tonnage is regulated in a similar way.

Under the Swedish Maritime Code (§14:47), the corresponding quantity is to be deducted from the total contractual quantity if the cancellation is caused by an incident for which the owner is not responsible. Gencoa (clause 11) stipulates in the same way that a deduction is to be made in regard of cancellation other than by default. It is clarified that a lack of nomination should not give rise to a requirement of an extra voyage at the end of the period, thus creating the basis for double compensation, i.e., damages and an extra voyage.³²⁶ This will probably be construed as if the

³²⁵ Volcoa clause 10.

³²⁶ Gencoa explanatory notes to clause 11.

option to have the quantity transported is exercised by the charterer. He is not also to be able to get damages because of negligence by the owner.

7 The Institution of Claim within COA

7.1 Introduction

The ND case of the lack of a nomination of vessels and a shortage of cargo delivered by the owner Solheim and the charterer Kier³²⁷ gives rise to an important question of whether an obligation to put forward a claim exists in order for the remedy to be given,³²⁸ and if such is the case, how the claim is to be presented. As the judgment in the case was based on the doctrine of late claim,³²⁹ there was no need to answer these questions. Yet these are important issues. I will therefore investigate somewhat further into this in order to examine the scheme of “fairly-evenly-spread” and related questions. There is also a need to answer these questions because of the absence of contractual and statutory solutions regarding COAs.

7.2 Notice of claim

As to the question of whether a general principle of making a claim exists, Christina Ramberg maintains that such a duty must be construed from the individual contract. She also refers to the duty of good faith³³⁰ in contractual relations (see, for example, § 70 1990 Sale of Goods Act and art. 77 CISG). The duty to make a claim can be seen as a manifestation of this latter principle. She continues that the duty of good faith is to be categorized as a secondary obligation in relation to the main obligation in a contract, something that leads to that the intention of the parties or a lexical interpretation many times will be of no use.³³¹

³²⁷ ND 1963:91, for the facts of this case see footnote 198.

³²⁸ In Swedish *reklamation*.

³²⁹ This author's translation of the Swedish word *passivitet* (in English; passivity). See the further discussion under the heading "The omission to make claim".

³³⁰ "Good faith" is used here for the Swedish legal term "loyalty" (Swedish: *lojalitet*).

³³¹ Formerly Hultmark, see Hultmark, Christina, *Reklamation vid kontraktsbrott*, p. 204.

In the interpretation of the specific contract, a starting point can be whether common obligation exists to provide a notice of claim that the other party's performance is non-conforming. If neglected, the breach should at least be sanctioned in the way that the neglecting party's liability for any remedy is adjusted with the damage that the neglected claim has caused the party in breach of contract. Further, the duty of making a claim is restricted by the fact that the wronged party may have been aware of the breach. When there is a risk for speculation on the part of the party in breach of contract, the right to cancel the contract may be lost.³³²

Let us revisit the ND-case,³³³ in which the contracting party in the second instance³³⁴ argued as regarding the trial court's judgment³³⁵ that there exists no obligation to put forward a claim in order to secure a right to compensation, something that the other party had argued. In addition, it was argued that any such claim does not have to be made immediately after each of the voyages for which there was an obligation to perform and were dropped off. The court's reasoning was that when the owner during the spring of 1960 became aware that the charterer had not provided the minimum quantity according to "fairly spread"³³⁶ as stipulated in the COA, he should have made the owner aware of this and his possible demands for compensation. If not, any subsequent demand was to be considered expired. In the second instance, the question was resolved from a reasoning of late (or omission of) claim.

This question nevertheless is relevant in the COA perspective, not only from this case, but also as has been pointed out in an opinion rendered later by Falkanger³³⁷ – "the shipments within this half year – as it seems to me – were varied without objections or reservations as regard the contractual

³³² Ibid. at p. 205.

³³³ ND 1963:91.

³³⁴ Frostating lagmannsrett.

³³⁵ Trondheims Byrett, 13 September 1962.

³³⁶ "Fairly spread" is used in this COA instead of "fairly-evenly-spread", the term used in this work.

³³⁷ Shipments to be "fairly-evenly-spread" under the COA, p. 5772.

timing.” This issue is discussed without any reference to the legal scholarship, as is also the situation with respect to the reasoning of the court in the ND-case. There it is said that the deviation of the shipment-programme that the owner must have had a claim for did not lead to any protest by him. This indicates that such situations of late claim may act as incentive for a discussion as to the claim institution in regard of the contractual solutions of COAs.

The issue of claims in Sweden has been given special consideration by the legislator in the 1990 Sale of Goods Act and the act concerning general agents. These rules have strongly influenced the practice of law in other areas, sometimes to such a degree that they have been given the character of general contract principles, or in an event, copied, sometimes at least so that a longer time of a late claim regarding neglected fulfilment has been considered to result in that no remedy is available.³³⁸ In several statutes on sales,³³⁹ the solution is that if in cases of neglect of a claim beings made, the party may then lose the right to adduce the breach of contract.

One good reason for a discussion about the question of claim is the contractual function of nomination of vessels or cargo, important functions in regard of what can be seen as the heart of a COA arrangement, which many times are more or less determined in a shipping programme. How this is practically carried out may of course vary, but a lack of communication, or other reasons, can easily lead to consequences as to the smooth running of the COA. The ND-case will be the focus also for this discussion.

As the COA chapter in the Swedish Maritime Code does not contain any direct codification of the claim institution, for the situation here discussed, an analysis must be carried out by a comparison to other legislation, legal

³³⁸ Rodhe, *Obligationsrätt*, p. 205.

³³⁹ For example in § 29 combined with § 23(2) of the SSL, § 15(1) combined with § 12(3) of the Consumer Sale of Goods Act, § 32 of the SSL, § 23 of The Consumer Sale of goods act, § 46(3) of the Consumer Sale of Goods Act, § 4:19 of the Land Code (Swedish: *Jordabalken*) and § 52(3) of the SSL. See Hultmark, Christina, *Reklamation vid kontraktsbrott*, p. 148.

scholarship and case law that can be used to create a scheme in which the issue will be to some extent become more transparent.

The Swedish Maritime Code contains, in its chapter on chartering, a provision on delay and other breach of contracts.³⁴⁰ This stipulates that in the event of the owner cancelling the contract, the claim is to be put forward within reasonable time³⁴¹ after that he must be alleged to have gained knowledge about the contractual breach. Otherwise, the right of cancellation is lost. This is partly in line with 1990 Sale of Goods Act that uses the stipulation – gained knowledge – on cancellation and damages for delay of delivery of goods.³⁴² The COA chapter contains a war provision,³⁴³ which codifies the claim institution, stipulating that if a party wants to leave the contract he is to give notice in reasonable time, if not, the damage that otherwise could have been avoided must be compensated. There is also a provision on notice in cases of delay of cargo in the Rotterdam Rules, which stipulate that this is to be given within twenty-one days of delivery of the goods, otherwise no compensation is payable.³⁴⁴

In the ND-case, the question about the default as to a nomination of cargo was solved on the basis of late claim,³⁴⁵ but the trial court solely used the doctrine of claim as a basis for its judgment.³⁴⁶ The conclusion reached was that as soon as Solheim (the owner) became clear as to the fact that Kier (the charterer) had not nominated the minimum quantity “fairly spread” in order to fulfil this obligation of the COA, Solheim had to make Kier attentive of the default and their possible demand for damages. The court held that this demand must have been put forward immediately after each of the single journeys that Solheim was under an obligation to carry out had expired. As

³⁴⁰ SMC § 14:29.

³⁴¹ Author's translation of *inom skälig tid*.

³⁴² SSL § 29.

³⁴³ SMC §14:51.

³⁴⁴ The Rotterdam Rules, article 23.4.

³⁴⁵ See the judgment of Frostating Lagmannsrett, 2 July 1963.

³⁴⁶ See the judgment of Trondheims byrett, 13 September 1962.

Solheim did not act accordingly, the possibility to make any demand for a remedy must be considered lost.

Before continuing, I want to clarify that the case is examined here without prejudice to any valuation of its legal status as a first instance judgment and the fact that it is about nomination of cargo and not vessels. The conclusion of the court has to be discussed a bit further to let us see how the issue of claim was dealt with in relation to this COA. The stipulation for “immediately” make known any demands of course is crucial to put into perspective. In addition, clarity is necessary as to what the court means by its qualification in regard of the time prerequisite; “after each of the single journeys that there was an obligation under the COA for the owner to perform – had expired.”³⁴⁷ When is the exact moment in time from which the respite of claim period starts to run? The court held that the owner must have been able to count on the minimum-quantity 15,000 ton being delivered for shipment fairly evenly with 1,250 ton a month. Based on this, it would perhaps be easy to assume (by the parties to the contract and others), that the quantity calculated from the contractual provision “fairly evenly”, 1,250 ton a month, also stipulates the time for the shipments to be performed. Then the end of the month should be considered the time when the claim period commences due to the court’s contention that a certain amount of cargo was to be shipped during each month. The later opinion of Falkanger³⁴⁸ suggests otherwise. In the case discussed by him, the charterers argued that the nomination was to be seen as contractual mainly due to the fact that the quantum as a whole for the month in question was in accordance with the preceding six months, therefore the quantum as such had been “fairly-evenly-spread”. If instead the various shipments were those to be spread, it was argued that the wording “fairly-evenly-pread over the year” inferred that there was no basis for an application of the clause to such narrow intervals as each respective week within a month, as long as the total

³⁴⁷ ND 1963.91, the author’s translation.

³⁴⁸ Shipment to be “fairly-evenly-spread” under COA, p. 5773.

of shipments within one month was in accordance with the number of shipments to be “spread” over each month. Falkanger reasoned:

*According to the [clause] it is the quantum which is to be so spread...not the number of shipments. However, when, as in this case, the cargoes throughout the year 2000 have consisted of 30,000 and 35,000 mt (with two “anomalies” of 25,000 mt), it does not really matter whether the one or the other is being relied on.*³⁴⁹

The distribution of shipments was found to be about every ninth day. From this I conclude that the month is not a given factor in the application of the “fairly-evenly-spread” provision. Instead, the number of days between shipments determines the allowable flexibility in regard of “fairly-evenly-spread”. If we take the flexibility as such given the charterer by the lot option, it seems that the following perspective may be created. If the charterer makes use of his option of cargo lots, for example, in the way that the one of 20,000 and of 40,000 had been variously used, the time between shipments had consequently been altered. In this case, the ratio could be determined at 2:1, which means that two shipments of 20,000 mt had to be carried out within the time of one shipment of 40,000 mt, in order to fulfil that these shipments have been carried out “fairly-evenly-spread”.

Yet, it seems like this reasoning has to be considered as only of an illustrative status, since it follows from the reasoning of Falkanger’s opinion that the option of lots, in this specific COA, is also subordinated to the provision of “fairly-evenly-spread”. Which means that tolerable variances in shipments are not based on the whole spectrum of these lots, nevertheless it of course still has to be determined.³⁵⁰ The point is merely that the quantum, or the shipments, has to be distributed throughout the year, (if this is the

³⁴⁹ Shipment to be “fairly-evenly-spread” under COA, p. 5773

³⁵⁰ If my analysis had been adopted the conclusion of the case could have been on another ground. If we submit that the quantity transported during the first half of the year was 600,000 mt, which gave, calculated on 32,500 mt (if presumed equal lots of 35,000 and 30,000), the spread of nine days between shipment.

contractual time or the time stipulated in the contract), thus in the way that has been calculated above.

If we then compare this to the requirement in the ND-case for the claim to be made “immediately” after the obligation to carry out the single journeys had expired, it seems that this works with shipments to be spread despite the fact that it was the quantum that was to be “fairly spread”.

7.3 The Commencement of the Claim Period

Before looking closer at the captioned question; when does the time period for a claim commence – it can be said that in various laws on delay, the claim period general does not commence at the time of the contractual breach, the contractual day for performance, but from the time of actual specific performance. According to the 1990 Sale of Goods Act, the right for the buyer to require performance by the seller because of delay is waived if the buyer waits an unreasonably long time to make such a demand.³⁵¹ Christina Ramberg reads the statement in this act’s legislative bill that the buyer is not to remain passive after the delay has occurred to indicate that the claim period starts running on the contractual day for performance.³⁵² Regarding delay and the remedies of cancellation and/or damages, the 1990 Sale of Goods Act stipulates that claim is to be made within a reasonable time from when a party has gained knowledge of the delivery of the goods.³⁵³ This is in principle in accordance with the notion of the time of actual performance. The Swedish act concerning general agents works with an elaboration of that claim in regard of a delayed delivery of goods is to be made without unreasonable delay after the goods have reached him or he has been informed about shipment delivery.³⁵⁴ The European Principles of

³⁵¹ SSL § 23.

³⁵² Legislative bill 1988/89:76, p. 102. See also Hultmark, Christina, Reklamation vid kontraktsbrott, p. 52. The fact that she talks about the late claim by the seller I take as a misprint.

³⁵³ SSL § 29.

³⁵⁴ The Swedish Act on general agents § 23.

Contract Law stipulate that a claim regarding cancellation does not have to take place before the delivery.³⁵⁵ However, Christina Ramberg also deems that the general principles to mitigate the losses of the other party and the requirement of “good faith and fair dealing”, can constitute together an obligation to make a claim before any tender.³⁵⁶

Christina Ramberg³⁵⁷ is of the opinion that outside the field of the 1990 Sale of Goods Act, the general principle of the obligation to mitigate the damages to the other party, will probably result in that the claim period starts to run as soon as the party affected by the delay perceives the contractual breach and has the intention to demand compensation, under the condition that the claim contributes to limiting the losses of the party responsible for the damage caused to the other party. This is something which is mostly comprise of the possibility to use the right of recourse backwards among the contractual parties.³⁵⁸

In the ND-case, as soon as the owner became aware of that the charterer had not provided the cargo “fairly spread” as his obligation was according to the contract, the court found that he had to make the owner aware of the breach of contract³⁵⁹ and his possible demands for compensation. This I understand to express that the claim period starts to run from the time of the contractual breach, the contractual day. There may be other interpretations to be made, which will be discussed later.

7.4 The Length of the Claim Period

When the claim period is determined, the practical possibilities for the affected party to make the other party aware of the contractual breach are to

³⁵⁵ European principles art. 9:303 (a).

³⁵⁶ European principles art. 1:201 and 12:106.

³⁵⁷ Hultmark, Christina, Reklamation vid kontraktsbrott, p. 71.

³⁵⁸ Ibid. at p. 29.

³⁵⁹ In the case, the term *misligholdelsen* was used. In regard of Norwegian law this is defined as: the seller is in present ”misligholdelse” of the contract, after that the seller’s performance is due. The main rule is that the buyer has a right to cancel the contract if the breach amounts to ”vaesentlig misligholdelse”.

be considered. In cases where the failure to present a claim brings a loss as to making the contractual breach effective, which we have seen in the 1990 Sale of Goods Act, the fact that the possibility of the party in breach of contract to limit his own losses has been independent of when in time the claim has to be put forward and constitutes that the claim period can be extended. It can also be prolonged if the breach of contract is of such a nature that the party in breach of contract has no possibility to make a regress demand or in any other way limit the damages resulting from the breach of contract. In other cases where a neglected claim period only brings loss of cancellation of contract or gives rise to damages, only the affected parties' practical possibilities to make a timely claim will be considered, which has as a consequence that the claim period in such cases typically becomes very short.³⁶⁰

In regard of the ND-case, it is worth commenting on that the terminology changed from the previous 1905 Sale of Goods Act to that used in the 1990 one in force today. In the 1905 act, the term "immediately" was used for commercial transactions. This Christina Ramberg³⁶¹ deems to indicate that the judgement should be one-sided so it would only be about the buyer's practical possibilities to make claim and not the seller's need for a timely claim. The purpose of the 'within reasonable time' in the 1990 Sale of Goods Act was to be able to modulate the claim period in different situations and perhaps to prolong the claim period in commercial situations.³⁶² CISG does not contain a rule of presenting a claim in order to preserve the right to damages in regard of delay, as such a situation described as completed and there is no need to consider the seller's position.³⁶³

The legal principle of claim is based on several objectives, one which is illustrated in the ND-case is the argument of speculation. The remedy of

³⁶⁰ Hultmark, Christina, Reklamation vid kontraktsbrott, pp. 59-60 and 71.

³⁶¹ Ibid. at p. 60.

³⁶² Ramberg, Jan, Köprätt, kommentar, p. 388; Bergem och Rognlien, Kopsloven kommentarutgåve, p. 192.

³⁶³ Ramberg, Jan, Herre, Johnny, Allmän köprätt, p.199.

damages does not require a claim to be made immediately, this due to that the purpose in question does not apply when this demand is not connected to cancellation. It then has to be discussed solely on the state of dubious circumstances³⁶⁴ of rights, which means that the situation is uncertain as to whether the wronged party wishes to make a claim or accept the performance in a situation of breach of contract, and also due to which remedy this party wishes to put forward.³⁶⁵ The possibility to speculate only appears when it is uncertain if the price will fluctuate. In such situations, where the price only develops in one direction, it is not possible to speculate in price changes by waiting with a claim for cancellation, but still uses the knowledge for example of a drop in price by cancelling.³⁶⁶ Christina Ramberg³⁶⁷ concludes that if the object of the contract is one under the influence of price-fluctuations, the presumption is that there has been a risk of speculation in the individual case. This gives that in the opposite situation of no price fluctuation, there is no need for an immediate declaration of cancellation.

7.5 Legal Consequences of Untimely Claims

There are several legal consequences for untimely claims; shifting of the burden of proof, loss of the right to contractual damages, an obligation to pay damages (a reduction of the claim corresponding to the damage which the failure to make a claim brought) or the loss of certain remedies, cancellation, demand of performance or the right to damages. Christina Ramberg has come to the conclusion that the legal effect varies within the different laws. It thus is not possible to speak about a general principle with any certainty stating this effect if it is not made clear in the applicable paragraph. In order to establish this, she describes how the obligation of claim is sanctioned in different laws and provides an analysis of why the regulations appear as they do. Regarding sales of goods, it often is found in

³⁶⁴ Author's translation of *haltande omständigheter*.

³⁶⁵ Hultmark, Christina, *Reklamation vid kontraktsbrott*, pp. 35. and 69-70.

³⁶⁶ *Ibid.* at p. 33.

³⁶⁷ *Ibid.* at p. 66.

the legislation that if a claim has not been made in time, this gives the consequence that all remedies are lost. According to Christina Ramberg,³⁶⁸ the 1905 Sale of Goods Act had as a main ambition to codify trade custom and usage but that this trade custom and usage was then uncertain and not established. She continues to say that even if the relevant legislation has been in place for almost one hundred years,³⁶⁹ and therefore we can talk about an established and accepted norm, due to its origins it is not the same as “freely” established trade custom and usage.

The judgments in the ND-case in both instances were based on that the failure to make a claim showed that the affected party did not have any interest in requiring full quantity. Consequently, it is not advantageous to stay inactive, but it seems preferable to make clear what demand one wishes to put forward. This in turn is the basis for a distinction between what kinds of legal effects a late claim may bring. It then has to be made clear if it is the omission to make a claim in itself that gives the legal consequences or if the legal consequences only are a sanction intended to prevent an unwished late claim. The first notion requires that the late claim has given rise to reliance by the party in breach of contract, that the affected party has approved the breach of contract. Such a construction of approval will give a rigorous legal effect – loss of the right to make the breach effective. If instead the purpose is to prevent late claims and give an incitement, every tendency to an unwished behaviour can be sanctioned. Here the sanction should be varied and in proportion to the degree such an omission is unwanted and also in regard of necessary incitements strengthening (or preventive) sanctions. The party’s own interest in making a fast claim entails that there is no need for exerting pressure to stimulate fast claims.³⁷⁰

From that said above, the ND-case has to be classified with the reasoning of late claims as giving the legal consequence that the possibility to make any

³⁶⁸ Ibid. at p. 149.

³⁶⁹ Today more than 100 years.

³⁷⁰ Hultmark, Christina, Reklamation vid kontraktsbrott, p. 156.

demand for a remedy must be considered forfeited, a loss of the legal right to make the breach effective. So there is still a question as to how the principle of claim can be applied in such a situation and there the second notion would be of guidance. Christina Ramberg³⁷¹ reasons that if the party in breach of contract has had reasonable cause to assume that the affected party, due to his behaviour (for example a late claim), does not wish to put forward any claims, but instead has given his approval to the performance, it can be fair to consider the reliance of the party in breach of contract instead of the affected party's interest in making consequences effective, which is also a conclusion in line with that discussed above. But apart from this situation she does not consider that there are any convincing reasons for the failure to make a claim to lead to a loss of making the contractual breach effective. She also concludes, based on the diffuse picture given in legislation and case law, and despite the difficulties in getting an idea of the formation of trade custom and usage, that there is a general contract principle meaning that a neglected claim brings a loss of right to make the contractual breach effective.³⁷²

The owner in the ND-case claimed compensation (damages), and it is also clear that this is the remedy available in such a situation. The right to claim damages then follows the notion of approval within the doctrine of late claim described below. But apart from this, Christina Ramberg³⁷³ finds no theoretical explanation for why a failure to make a claim should lead to a loss of a right to damages, provided that the damages are adjusted by a counterclaim regarding the damage that the non-presented claim has caused. It also constitutes that the affected party rarely loses the right to claim damages when the party in breach of contract has had knowledge of the breach. This is due to the fact that in such a situation, he will be able to secure his claim of redress and limit other damages independent of the claim.³⁷⁴ This seems relevant in regard of the ND-case where the shipping-

³⁷¹ Ibid. at p. 162.

³⁷² Ibid. at p. 162.

³⁷³ Ibid. at p. 159.

³⁷⁴ Ibid. at pp. 159-160.

programme is the basis for the owner's knowledge of any delay on the part of the charterer, which I consider fair to suggest, will work equally reversed. In such cases, the purpose of the claim will be that the affected party wishes to put forward a demand for a remedy (or remedies). The party in breach of contract is in less of a need of protection the more he understands the likelihood that the other party will make demand. Consequently, this reduces the obligation to make the claim. It can then be appropriate to find the party in breach of contract under an obligation of interpellation – as to say a duty to ask the affected party if he regards the performance as conforming.³⁷⁵ This notion has been codified in the Swedish Consumer Sale of Goods Act, and is motivated in the legislative preparatory works by that tradesmen generally are aware of their own delays and by questions to the consumer can become aware of the consumer's attitude to the delay.³⁷⁶ Christina Ramberg also adds that this knowledge will further lessen the reason for recognition of the affected party's late claim as an acceptance of the performance.³⁷⁷ The reasoning of the act however is merely used for illustrative purposes within the commercial perspective of this work.

In regard of cancellation and the potential problem of speculation, a division into two categories can be made. It can then be discussed within the perspective of knowledge or otherwise of no knowledge on the part of the passive party. In the first situation, there is reason to limit the right to cancellation, and there is also reason to assume that a general principle on the loss of the right of cancellation exists if the party affected by the breach of contract does not in reasonable time from that he became aware of the breach inform the other party that he wishes to cancel the purchase. This is to further be qualified with a requirement of actual risk for speculation,³⁷⁸ and also has to be seen as corresponding to that which has been exemplified in regard of the regulation in the Swedish maritime Code.³⁷⁹

³⁷⁵ Ibid. at p. 135.

³⁷⁶ Legislative bill 1984/85:110 p. 253.

³⁷⁷ Hultmark, Christina, *Reklamation vid kontraktsbrott*, p. 136.

³⁷⁸ Ibid. at pp. 158-159.

³⁷⁹ SMC § 14:29, see footnote 340 supra.

In the second situation, the question of a general principle on the loss of the right of cancellation if the affected party is unaware of the breach of contract, but because he for example should have examined the contractual object or should have had knowledge of the breach of contract, is more uncertain. The practical situation of establishing the possible knowledge speaks for a loss of the right to cancel. On the other hand, it is difficult to explain theoretically why the affected party should lose the right to cancellation if he has no actual possibility to speculate, before he has gained any knowledge of this possibility.³⁸⁰

The law of sales contains a rule developed in the case law; the buyer can still make a claim to the seller even if the period for making the claim has come to an end when the latter has begun to negotiate damages or other remedies. The courts have sparsely applied such rule. The seller must more or less indirectly in the negotiation have admitted liability for the fault committed. But when the demand has been rejected as being without a legal basis, the courts have found that the possibility has been lost to make the objection that the buyer made the claim too late.³⁸¹ There is also an ND-case in which the court concluded that because of correspondence that had gone on for a long time between the parties without the shipping company even once having made clear that the right of claim regarding contractual shortage was forfeited, then the objection that the claim period had expired, could not be valid.

7.6 The Late Claim

The ND case displays the effect of the late claim in the form of a silent explanation of will. Karlgren³⁸² has described the basic mechanism of the doctrine of late claim, which I believe provides the necessary understanding. It is commonly accepted that a manifestation of will within private law does not have to be explicit to bring legal effect. Even performance that falls

³⁸⁰ Hultmark, Christina, Reklamaion vid kontratsbrott, pp. 158-159.

³⁸¹ NJA 1993 p. 436. See also Lastskadekravet, Johan Schelin, p. 24.

³⁸² Karlgren, Hjalmar, Passivitet, p. 7.

within the doctrine of assumption³⁸³ is enough, but also, which is the matter of interest for this analysis, a contracting party's omission to make claim.³⁸⁴

It thus brings a perspective where the omission to make a claim is, taking into consideration the circumstances, to be construed as a manifestation of will. Such omission to make a claim seldom or never will be decisive, it has a substantial value but almost always only as a strengthening factor.

Karlgren maintains that the court would base its interpretation on positive factors as well as the omission to make claim. Most commonly, this factor constitutes one positive act of one kind or another.³⁸⁵ In the ND-case, the court's reasoning was that the owner had not shown any interest in making a demand that the charterer should keep this programme and increase the shipments to the minimum quantity. Instead, it had been of less interest which quantity of cargo the charterer had nominated as long as the owner had found it more profitable to use his own vessel under other contracts, meanwhile tonnage was chartered in to the right freight rates. The court found that this conduct amounted to a silent approval of the charterer's dispositions.

Karlgren also focuses on those situations where one of the parties makes a concession of rights, claims and also where there is a great scope for the consequence of a late claim. A party wishing to achieve that kind of change of right has seldom any reason to direct a message of this to the other party. He will instead achieve this by letting the existing situation remain.

Karlgren concludes that it will therefore be natural to say that the contracting party has shown by the late claim that he accepts the change of rights.³⁸⁶

Another case that I have chosen to examine, and especially in relation to the two cases described above about making claims in time and where negotiations have begun before the claim period had expired. In this case,

³⁸³ Author's translation of the Swedish terms *konkludent handlande* or *realhandlande*.

³⁸⁴ Karlgren, Hjalmar, *Passivitet*, p. 7.

³⁸⁵ *Ibid.* at pp. 10-11.

³⁸⁶ Karlgren, Hjalmar, *Passivitet*, p. 12. See also NJA 1961 p. 334.

NJA 1908 p. 501, the late claim based on to the circumstances that the buyer had declared the intention to make the seller responsible for the loss due to the contractual breach. But no claim was put forward during the continued business between them. Not even when the buyer should have been able to calculate the loss had he before the trial put forward any claim.

8 Conclusion

I have above dealt with various questions on the law of COA taking also into consideration three standard agreements and now it is time to recapitulate the main issues. The discussions above have as shown already included conclusions as part of my undertaking to bring some transparency to these subjects. There is nevertheless a need to make some final comments on the different issues discussed.

If the distinction between the generic and specific obligations is still admittedly of importance for contract law, and of even more interest for this work about COAs, it may need some further comment. If control-liability is not the new general contract-principle, there is a question of the right to damages for those situations not provided for in the law of contract. The principle of objective impossibility in this work is not found to be a general contract principle, but the question of whether it still could be applicable is unanswered.

The starting point for such discussions may be the notion of that the division between the generic and specific obligations can still be of interest within contractual law, which is the opinion of Hellner. As shown I believe that this notion is given some relevance in the reasoning of concentration of the obligation to nominate a vessel under a COA. If this substantiates the above-notion, my opinion is that objective impossibility would still be applicable in those situation in which there still is a scope for its applicability, a conclusion that requires elaboration. Control-liability is made applicable within different legal circumstances, and in the Swedish Maritime Code, it is based on the legal construction of a clear separation of the framework contract and underlying contract. It may then be fair to conclude that the solution with two contracts can be seen as tailor-made to suit the form of liability here discussed. The fact that this liability is also in the Swedish

Maritime Code coupled to both direct and indirect losses, which is not the case in 1990 Sale of Goods Act, also speaks for this. The principle of objective impossibility was connected with the generic and specific obligations, and according to that which has been discussed there may be reasons to consider this rule as being or having been transformed into a general principle of transportation law. On the other hand, this is not a conclusion which I believe can be stated with any real certainty, but control-liability is made applicable in the legislation on a broader basis including the regulation in the Swedish Maritime Code without amounting to a general contract principle. And if we then consider the 1905 Sale of Goods Act, which to some extent had the legal status of giving expression to such a principle, and if this is the case regarding objective impossibility, the principle can still be relevant and we do not have to consider the problematic issue of making an analogy from legislation that is no longer there. At the same time, it must be emphasised that this work does not in any meaning have the ambition to discuss the origins or transformations of these kinds of principles, this has been outside my concern and judgment. But nevertheless, it deserves to be discussed in a manner where the reasoning will provide sufficient transparency to create a basic understanding in which the above shows that objective impossibility may be of importance within the field of COA. Finally, and on the balance, the principle of objective impossibility must *de facto* be seen as have underlying the entire general law of contracts. Control-liability within the legislation now creates a broad perspective for its application, in which objective impossibility may still be justified.

The reasoning above concerning repudiation that amounts to a breach of the framework contract may perhaps serve the purpose of being to some extent inspirational for the similar question within the Swedish Maritime Code. The question of the right to damages within COA can be outlined as follows. The Swedish Maritime Code stipulates such a right in regard of the single nomination as well as the whole contract, and the same must be said, from a material perspective, about Gencoa. But in regard of Volcoa, this

cannot be stated as certain. If a principle of objective impossibility admittedly is applicable for the COA, the following can be said.

The failure of a single nomination of vessel would give a right to damages based on this principle. But Volcoa also has its own contractual construction for cancellation of the whole contract, and I understand this to be there will then be no right to damages based on objective impossibility, the cancellation leading up to a right to cancel the rest of the contractual shipments will provide damages, but those future shipments cannot find any justification in this reasoning. The question is then about damages on different grounds. If the minimum-quantity is to be deemed a guaranty has to be seen as unsure from the conclusion made on sales agreements and damages.

The discussed “fairly-evenly-spread” provision and its importance as one of two obligations for damages when the minimum-quantity is fulfilled can be brought up here, but there is a question of further obligations of shipments, that this should not be of any relevance unless the other obligation is fulfilled.

From the reasoning about claims I finally conclude that it cannot be said with any certainty that there is a requirement of making a claim and otherwise a forfeit of remedy. But I believe that I have made the issue of how such a claim should be put forward to some extent more transparent. The conclusion on the omission to make a claim must also be seen as uncertain. When looking at how the COA has carried out the scope for applying the omission to make claim, it is notably clearly widened.

Appendix A

Gencoa

Appendix B

Volcoa

Appendix C

Intercoa

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