Damages For Late Redelivery Revisited: Is The Achilleas Decision Bad Law?

I The Achilleas decision and important previous authorities

1. The Issue 2
2. No precedent
3. Summary of the decision 3
4. The Facts
5. First Instance decision 4
6. The Court of Appeal decision 5
7. Important previous cases 6

II The law on late redelivery and remoteness of damages

8. The law at present: is it watertight in terms of legal principles? 8

8.1 Is time of redelivery time of the essence?

8.2 When is a charterer in breach and can he be protected? 9

8.4 The final terminal date is a strict obligation

8.6 The law imposes strict liability on the charterer 10

9. Development of the law as to damages 12

10 Principle of remoteness of damages for breach of contract clarified 13

10.1 The basic rule

10.2 Modern Statement of the rule

10.3 Type or kind of loss 14

10.4 Reasonably foreseeable loss and actually resulting

10.6 Application of the rule to the facts of The Achilleas 15

11. Mitigation 16

12. What is the yardstick to be applied for assessing the damages?

III Criticisms of the Decision

13. From a commercial point of view 18

14. Is there certainty in the law? 20

15. Pragmatism and Policy 21

Damages for late redelivery revisited:
Is The Achilleas decision bad law?

My role in this seminar is to defend the case as I believe it is good law. Broadly, I shall, first, deal with the issue and the case, including some important previous authorities; second, state the law on late redelivery and remoteness of damages, as developed; third, counter the criticisms of the decision, including questions of certainty in the law, pragmatism and policy.

I THE ACHILLEAS DECISION AND IMPORTANT PREVIOUS AUTHORITIES

1. **The issue**:

Are damages for an overrun limited by the principle of remoteness to the difference between the charter rate and the market rate at the time of redelivery (if the latter is higher than the charter rate) over the length of the overrun period (namely, from the due redelivery to the actual redelivery date)?

OR

Can the owner claim damages based on the loss of profit suffered on a subsequent fixture caused by the late redelivery?

2. **No precedent:**

2.1 The authorities prior to The Achilleas [2007] EWCA Civ 901 dealt with damages on the basis of the first method of assessment, above. Loss of profit on a subsequent fixture was not an issue in the previous authorities. Therefore, as stated by the court, there had been no binding authority with regard to damages for loss of profit.

2.2 The owners in The Achilleas did not argue that the cases so far were wrong on the principle of measure of damages for an overrun, but merely argued that the cases did not deal with the issue of loss of profit.

3. **Summary of the decision:**

The majority arbitrators, Christopher Clarke, J. and the Court of Appeal (Rix LJ delivering judgment with utmost clarity), decided that the owners can claim damages for loss of profit on a subsequent fixture (their actual loss) caused by the charterers' breach to redeliver the ship on the final redelivery date. Such damages were not too remote on the basis of the principle in Hadley v Baxendale as interpreted by subsequent cases (see later 'the modern approach').

4. **The facts:**

4.1 By a charter party in the NYPE form dated 22/1/03, The Achilleas (owned by Mercator Shipping), was chartered for a period of about 5 to 7 months to Transfield Shipping Inc., at a daily rate of $13,500. By an addendum to the charter dated 12/9/03, the ship was fixed in direct continuation for a further period of minimum 5 months, maximum 7 months, exact period in charterers' option, at a new daily rate of $16,750. The extended period began on 2/10/03 and the latest redelivery date became 2 May 2004 (midnight). The vessel was actually redelivered over 8 days late on 11 May 2004.

4.2 The charterers (on 8th, 15th, 20th, and 23rd April) gave the due notices for redelivery between 30 April and 2 May. In reaction to these notices, the owners fixed their vessel for a period charter of about 4 to 6 months with Cargill, at a daily rate of $39,500, which was the then market rate. The cancelling date was 8 May latest.

4.3 In the meantime, Transfield ordered the ship to its last voyage to carry coal from Quingdao to Tobata and Oita, Japan; on 26 April they indicted that discharge at Oita was not expected to be completed until 6 or 7 May and on 30 April gave revised notice for redelivery on 8/9 May.

4.4 On 5 May, the owners, (fearing redelivery would be later than the cancelling date), renegotiated the terms of their charter with Cargill and an extension of the

cancelling date from 8 to 11 May was agreed but the daily rate of hire was reduced to $31,500 (the then market rate) a drop by $8,000 per day. The vessel was redelivered on 11 May by Transfield; the Cargill fixture commenced immediately and lasted for 191 days 11 hours.

4.5 The owners claimed damages for the loss of the original Cargill rate hire, at $8,000 per day over the period of the Cargill fixture, in the agreed sum of $1,364,584.37 (which was slightly less than the calculation on the basis of 191 days due to a credit given by the owners to charterers). The alternative claim was for $158,301.17 based on the market rate method of calculation over the overrun period.

4.6 The issue was not about whether or not there was a breach of contract but about remoteness of damages and the method of assessment. The majority arbitrators awarded the agreed sum of loss of profit to the owners. The charterers applied for and got leave to appeal against the award of the majority arbitrators.

5. **First instance decision** [2007] 1 Lloyd's rep 19:

5.1 Christopher Clarke, J. held: on the facts found by the majority arbitrators the owners' primary claim was not too remote. The majority had determined that, to the knowledge of the charterers, it was recognised and accepted as a hazard of late redelivery that the vessel would miss her cancellation date for the next fixture; that that was not something that was very unusual but, on the contrary, the kind of result which the parties would have had in mind.

5.2 That rapid variations in market rates in either direction were market knowledge; and that the kind of loss suffered by the owners, namely the need, on account of delay in redelivery, to adjust the dates for the subsequent fixture with a reduction in the previously agreed rate of hire, was within the contemplation of the parties as a not unlikely result of the breach.

5.3 The majority arbitrators had not erred in law. There was no authority which decided that there could be no recovery in respect of loss of profit on a subsequent fixture either under the first limb of Hadley v Baxendale, or at all. In the light of the findings of the majority arbitrators, the owners' loss of profit can legitimately be treated as "arising naturally i.e. according to the usual course of things from such breach of contract itself".

6. **The Court of Appeal decision [2007] EWCA Civ 901 (transcript)**:

6.1 Lord Justice Rix, having reviewed the relevant authorities, could find in none any statement of a relevant test, or principle, or any decision on the facts, which was inconsistent with the majority arbitrators' conclusion. "The refixing of the vessel at the end of the charterers' charter was not merely 'not unlikely', it was in truth highly probable".

6.2 The nature of the chartering market was at all times an open book to the charterers; it was their own business, in which they were experienced. It was of course a market which went up and down and could be volatile. Against that background of knowledge, which the charterers had always possessed, and in truth arose out of the ordinary nature of things, the charterers should have been cautious about the danger of late redelivery.

6.3 There is no finding that their last voyage was an illegitimate one, and therefore I assume that it was legitimate. However, in taking the risk of a delay on a last legitimate voyage, the charterers were of course seeking to squeeze the last drop of profit from what, in the light of the huge increase in rates since the time of their addendum, was a particularly strong market. If by misfortune a delay on the last voyage put them into breach, they knew, or ought to have known, what the risks were for themselves and their owners.

6.4 They may or may not have calculated that if the delay, which they had put in motion, caused their owners to lose their next fixture, this would happen just at a

time when there was a sudden crack in market rates. But if they had considered that possibility, they ought to have appreciated that, barring any unusual features of the subsequent fixture, the risk of that loss should fairly fall on themselves rather than the owners. Why should it fall on the owners?"[para 96 transcript].

7. **Important previous cases:**

7.1 The London Explorer [1972] A.C. 1: The last voyage order was legitimate. But there was an overrun in redelivery by 3 months due to strikes of labourers in New Orleans and Houston preventing completion of discharge of the cargo there. Strikes were not an exception to payment of hire in the c/p.

7.2 Mustill QC, as he then was, argued for charterers that the c/p had come to an end on the expiry of the c/p term; having withheld the vessel for longer, the charterers were in breach and should pay in damages what **the owners actually lost** and not the charter hire up to the actual redelivery; the market rate had dropped; had the owners got the ship back they would have found a charter at the then market rate.

7.3 Lloyd QC, as he then was, argued for the owners that they were entitled by clause 4 of the c/p ("hire to continue until redelivery") to receive hire until actual redelivery and it was irrelevant whether or not the charterers were in breach of any provisions of the charter; the last voyage was not unreasonable.

7.4 The owners' contention was upheld by the Arbitrators and all the courts to the HL and on the facts of this case the charterers were liable to pay the charter hire whether or not there was a breach. The charter rate of hire was higher than the market rate. There was no finding that the charterers were in breach. The voyage was one on which the vessel was reasonably sent. The continued use of the vessel was within the owners' concurrence. This did not involve any new contract but the owners treated the charterers as entitled to give orders.

7.5 Lord Reid raised two important questions: first, was the last voyage legitimate? Second, if that was so, should unexpected delays be paid at the charter rate? In his view, unless the parties agree otherwise, it must be presumed (because it is business like) that the charter is intended to continue in operation until the end of a legitimate voyage unless one of the parties was responsible for the delay. On the construction of this c/p this presumption was fortified by the provision of clause 4.

7.6 Lord Morris (and the majority) held: the terms of cl 4 imposed an obligation on the charterer to pay for the use and hire of the vessel at the contractual rate until the date of her redelivery; the obligation existed whether or not there was a breach by c/ers in failing to redeliver when they should have done. With a clause similar to cl 4, a charterer would be liable to pay hire at the contractual rate up to the time of actual redelivery and in addition (if the current market rate is higher) to pay damages in respect of his failure to redeliver within a reasonable time.

7.7 In The Dione [1975] 1 Lloyd's Rep 115, Lord Justice Browne and even Lord Denning MR (albeit that he was inconsistent in other parts of his judgment) held in effect that whether the last voyage is legitimate or illegitimate, once the final terminal date has been overshot, the charterer will be bound to pay extra. There was no issue of a loss of a fixture in this case either.

7.8 In The Peonia [1991] 1 Lloyd's Rep 100, the period of the charter clause provided for 'about minimum 10, max 12 months; exact duration in charterers' option, with a further option to complete last voyage'. Had the last voyage order been performed, it would have resulted in an overrun of one month and 8 days. It was illegitimate. As the owners had the benefit of increased market rates, they requested a new order which was refused by the charterers and the owners accepted the refusal as repudiation of contract.

7.9 Although the case involved an illegitimate last voyage order, the CA had to consider the effect of the option 'to complete the last voyage'. It analyzed the authorities as to whether or not there was a breach of contract when, on a legitimate last voyage, there was an unexpected delay extending the redelivery date beyond the final charter date. The CA had an opportunity to interpret the meaning of what was said in The London Explorer. Preferring Lord Morris' view, it held that there is a breach when a legitimate last voyage overruns and the option is relevant only to a legitimate last voyage. Until this case, it had been thought, in view of Lord Reid's view above, that there was no breach for an overrun when the last voyage order was legitimate.

7.10 The Gregos [1995] 1 Lloyd's Rep 1 HL, was again concerned with an illegitimate last voyage. The parties signed a without prejudice agreement which sought to mimic the position as though there had been a lost fixture by the performance of the illegitimate voyage. In the circumstances of the W/P agreement, the case did not concern the award of damages at common law for late redelivery, but compensation under the agreement.

II THE LAW ON LATE REDELIVERY AND REMOTENESS OF DAMAGES

8. The law at present: is it watertight in terms of legal principles?

8.1 Is the time of redelivery of the essence?

There is no definitive ruling that the time of redelivery is of the essence, so as to be a condition of the contract, without any specific language in the contract making it of the essence. In The London Explorer, Lord Morris thought that the time of redelivery had not, in that case, been made of the essence. He further stated that the continued use of the vessel after the stated time will not at once have the result that such continued use will be in breach of contract, but it will be

necessary that redelivery should be within a reasonable time; the charterer will pay damages in respect of his failure to redeliver within a reasonable time.

Lord Mustill (and the majority) in The Gregos were inclined to the view that the redelivery date is an innominate term, while Lord Templeman was of the view that it is of the essence.

8.2 When is a charterer in breach and can he be protected?

A charterer will not be in breach if he orders a final voyage which is reasonably expected to end beyond the charter period but within the implied margin (Gray v Christie (1889) 5 TLR 577). But he will be in breach if redelivery exceeds the allowable tolerance, or the margin implied by law, or the maximum period of 12 months, even if the last voyage order is legitimate but accidentally overruns. There will be damages unless a contractual term shields the charterer against a claim for the overrun of a legitimate voyage by words such as "charterer has option to complete last voyage". Such a clause protects charterers only in the event of a legitimate last voyage (unless the delay was caused by the charterers' breach of contract,(The Peonia).

8.3 Such protective clauses usually provide for the rate of hire payable during he overrun (The Black Falcon [1991] 1 Lloyd's rep 77). Other specific clauses, such as Baltime cl 7, Shelltime 4, cl 19, deal with overruns of last legitimate voyages.

8.4 The final terminal date is a strict obligation:

Every time charter must have a final terminal date by which the charterer (in the absence of an exonerating clause) is contractually obliged to redeliver the vessel (per Bingham LJ in The Peonia). The terminal date and the true extent of the charter depend on the words used in the charter. There are various possible expressions and precedents in decided cases providing for a tolerance, in the

absence of which the law will imply a reasonable margin considering the overall length of the charter. Once the contractual tolerance or implied margin is ascertained, the charterer has a contractual obligation to perform his promise to redeliver the ship by the final terminal date failing which he will be in breach of contract in the absence of a frustrating event (The Peonia).

8.5 Thus, the obligation to perform the promise is strict and the charterer will only be excused if the delay is due to the fault of the owner, or if a contractual term exonerates him from the breach. But the breach is not of a term going to the root of the contract. The owners' right is to damages only and he has no right to treat the contract as at an end so as to entitle him to cease to perform considering the impractical effect of that upon sub-charters and the bill of lading contract (The Peonia).

8.6 The law imposes strict liability on the charterer

The weight of the appellate opinion is that there is a breach by the charterer even if the overrun of the last legitimate voyage is not caused by the charterer's fault – despite reasonable expectations - provided it is not through some fault by the owner.

This is thought by critics to be unsatisfactory and not in line with the analogous situation of a safe port warranty where the charterer will be excused from liability if an unexpected or abnormal occurrence makes the port unsafe (The Evia No 2 [1983] 1 AC 736).

8.7 The issue of no fault by the charterer was examined in detail in The Peonia. Three theoretical solutions were examined by Saville J at first instance, namely: is the obligation a fundamental term so that a failure to comply with it would automatically bring the contract to an end? This was rejected as unattractive and impractical; could a term be implied, if there was no express term, permitting the completion of a legitimate last voyage beyond the final terminal date? He held

that there was no room for such an implication either on the basis of business efficacy or necessity. The obligation was not qualified by an expression such as 'best endeavours' or the like, so the charterers had taken the risk of not being able to perform this part of their bargain. When the parties' obligations are expressed in absolute terms, each party takes the risk that he will be able to perform and if that risk is unacceptable, it is open to each party to qualify the obligation by inserting qualifying terms. The third and acceptable solution was that the owners are entitled to claim damages for the charterers' failure to redeliver by the final terminal date and the voyage will be completed.

8.8 Lord Justice Slade also concluded that the risk of unexpected delays, save for those which are due to the fault of the owners, should fall on the charterers. He found no authority supporting the proposition that the court will be prepared to imply a further term, beyond any margin or tolerance, in ascertaining the final terminal date, which will have the effect of rendering charterers' obligation to redeliver by the final terminal date an obligation merely to use their best endeavours to do so by that date.

8.9 Rix LJ in The Achilleas (para 96) also dealt with the matter of unexpected delays (obiter) as a matter of allocation of risks between the charterers and the owners and said: when charterers are seeking to squeeze the last drop of profit from what was a particularly strong market they are taking the risk of delay on a last legitimate voyage. If by misfortune a delay puts them into breach, they ought to have known what the risks were for them and for their owners.

8.10 Reverting to The 'Evia 2' analogy, the risk of an abnormal occurrence which renders an otherwise prospectively safe port to an unsafe one is put upon the insurers of the owners. Similarly, in the case of unexpected delays on a legitimate last voyage, the charterers can obtain insurance for such a risk, or protect themselves with contractual terms.

9. **<u>Development of the law as to damages</u>**:

9.1 Assuming there are no contractual terms excluding liability for the breach and that the charterer's breach caused the loss, what are the damages to be awarded?

9.2 In cases of a **legitimate last voyage**, which overruns, the owner will normally be awarded as damages: Either

- The market rate of hire, if higher than the charter hire; or
- The charter hire, if higher than the market rate, until final redelivery, (<u>The London Explorer as interpreted in The Peonia in 1991</u>).

9.3 In cases of an **illegitimate last voyage** (ordered when it is reasonably expected to overrun the charter period, including the tolerance or margin), the owner (who elects to perform it but does not waive the right to claim damages) is entitled to:

- The charter hire until actual redelivery
- Plus damages for the overrun period
  - being the difference between the charter rate and the market rate, if higher, (<u>The Peonia</u>).

9.4 The above method of assessing damages under 9.2 and 9.3 is the same but expressed differently; it is known as the 'overrun period measure'.

9.5 Until <u>The Achilleas</u> the courts were basing the damages for late redelivery upon the overrun period measure, since the question of loss of profit had not previously arisen in this context. <u>The Achilleas</u> offers an alternative method of assessing damages which is on the basis of loss of profit suffered on the subsequent fixture. If there is proof that the charterer's breach caused loss of profit on the subsequent fixture, damages will include **all the losses of <u>a type</u>, which at the time of the contract could be foreseen as not unlikely to follow by reason of the breach.** Whether or not the <u>extent of the loss was foreseeable is not examined</u> (see below). Damages are ascertained at the date of the breach.

9.6 There is in essence no difference in the assessment of damages between a legitimate last voyage which overruns and an illegitimate one. Charterers may find this an unfair application of the law but, as discussed, in both situations there is a breach of contract. A distinction between legitimate or illegitimate order is very relevant to the owner with regard to the option which he has in the case of an illegitimate voyage order as to whether or not to perform it. He has no such option when the order is for a legitimate voyage which later overruns. He simply has to perform. Thus, he can not reasonably be expected to take the risk of even an accidental overrun. If that was allowed by law, the charterer would arrange the last voyage as it suited him and upon an overrun of the final terminal date he would be able to say to the owner: 'it was not my fault mate'!

10. **Principle of Remoteness of damages for breach of contract clarified:**

10.1 The basic rule: Hadley v Baxendale (1854) 9 Exch. 341

Damages that a claimant may recover for breach of contract are: such as may fairly and reasonably be considered as either (a) arising naturally, that is, according to the usual course of things from such breach of contract itself or (b) such as may reasonably be supposed to have been in the contemplation of the parties, at the time of the contract, as the probable result of the breach.

10.2 Modern Statement of the rule

The basic rule was interpreted and restated by the CA in Victoria Laundry (Windsor) Ltd V Newman Industries Ltd [1949] 2 KB 528 and by the HL in The Heron II[1969] 1 AC 350. It has been accepted that the combined effect of the restatement of the rule by these cases is this: the court will look for a type or kind of loss which is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely

result of that breach (denoting the degree of probability);(see Chitty on Contracts par 26-047 – 26-051).

10.3 ’Type or kind of loss’

In The Heron II, Lord Reid spoke of ‘type or kind of loss or damage’ for the test of remoteness of damages. It was further explained in subsequent cases (see Chitty para 26-050) that the claimant does not have to show that the contract breaker ought to have contemplated the precise detail of the damage, or its extent, provided the kind of damage was contemplated as not unlikely at the time of the contract. (There is a similar formulation in the test of remoteness of damages in tort. However the test in tort is applied by reference to a reasonable man at the time of the wrongdoing. The Wagon Mound [1961] AC 388) and The Sivand [1998] 2 Lloyd’s Rep 97, 105).

10.4 Reasonably foreseeable loss and actually resulting

What is recoverable is the part of the loss actually resulting which was, at the time of the contract, reasonably foreseeable as liable to result from the breach; what was reasonably foreseeable would depend on the knowledge then possessed by the parties, or the party committing the breach; Knowledge is understood to be of two kinds: knowledge possessed in the “ordinary course of things” and knowledge of “special circumstances” (Victoria Laundry).

10.5 The majority of their Lordships in The Heron II approved of these propositions and Lord Reid (at 384) added what the court meant in Handley v Baxendale, thus: “a result which will happen in the great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility, would only happen in a small majority of cases should not be regarded as having been in their contemplation”.

10.6 Application of the rule to the facts of The Achilleas

Applying these principles the court held that 'Special knowledge of the subsequent fixture' was not necessary for the purpose of limiting the damages to the loss of the current market value during the overrun period. It was sufficient to show (and it was conceded in this case) that the loss suffered was not unlikely to occur in order for the damages to fall within the established rule of remoteness of damages. The nature of the market was well known to these experienced charterers, whose knowledge arose out of 'the ordinary nature of things'.

The owners' loss was not improbable or unpredictable, as was the loss incurred under the special dyeing contracts in Victoria Laundry, so as to be too remote, or to amount to a complete indemnity for all loss de facto (see distinction between indemnity and damages in The Eurus [1998] 1 Lloyd's rep 351).

10.7 The insistence by charterers that the second rule of Hadley v Baxendale was not satisfied in this case was rejected. The court emphasised that the rule is no longer stated in terms of two rules but rather in terms of a single principle, although the application of the principle may depend on the degree of the relevant knowledge held by the defendant at the time of the contract in a particular case (para 95).

10.8 "A charterer of time chartered tonnage knows that a new fixture is very likely to be entered into by the owner of his chartered vessel so as to follow as closely as possible to the redelivery of the vessel"(per Rix LJ para 93). "The charterers would also have known that , if the vessel did not become available to the owners at the due time, there was no market in which she could be bought in, and that the owners would have to be able to deliver into the new charter that vessel and her alone" (para 110 transcript).

10.9 The strict test of "reasonable certainty" in the foreseeability of an event regarding the remoteness rule was rejected by the HL in the Heron II and the smaller degree of probability that is "not unlikely to occur", was preferred.

10.10 The 'loss of use' versus 'loss of profit' distinction - put forward by Counsel for the charterer - was rejected by the court as not existing in principle or in previous decisions. "The refixing of the vessel at the end of the charterers' charter was not merely "not unlikely", it was in truth highly probable (barring other possibilities)" (per Rix LJ para 96, transcript). Furthermore, the argument that the loss should not be recoverable because the owners' third party transactions were irrelevant (res inter alios acta) was rejected as being an issue of causation and not of remoteness.

11. **Mitigation**:

11.1 In this case it was common ground that the Cargill fixture was made at an appropriate time in relation to the expected redelivery date and at the then market rate. The amendment to the laycan days and the reduced hire rate were similarly made in an appropriate manner and at a market rate. What happened was in direct reaction to the charterers' breach. The owners acted in reasonable mitigation (paras 106-108).

12. **What is the yardstick to be applied for assessing the damages?**

12.1 If the contract does not provide for the rate of hire to be paid in the event of an overrun, the court will decide what is suitable in each case. The question is what is a reasonable yardstick?:

- The market rate for a period charter? (such as the original c/p e.g 4/6 months) or
- The rate of a trip charter? (e.g a single voyage on time charter terms), or
- The rate of the next fixture? (which might have been lost due to the delay), or
- The rate of a hypothetical next fixture? (which might have been fixed)

- Where is the line to be drawn about the length of the next fixture in the last two questions?

12.2 **"Compare like with like":** In The Johnny [1977] 2 Lloyd's Rep 1, a period charter of minimum 11, maximum 13 months, cl 7 of Baltime form c/p provided for damages in the event of an overrun at the market rate. There was 29 days delay in redelivery. The parties were unable to agree whether the rate of hire should be the rate for a time charter trip (owners' argument) or the rate for a period charter of 11/13 months (charterers' argument). The umpire found in favour of the owners but stated his award in a form of a special case for the court to decide the issue. Donaldson J. held that what had to be ascertained was the daily rate for an identical charter to the one in which the parties had been engaged. On appeal to the CA, the majority, agreeing with the judge, held that the yardstick was a period charter, while Lord Denning MR preferred the trip charter yardstick. (The distinction is important because the trip charter rate can be higher than the period market rate, depending on where the ship is ordered to go on the last trip. In this case Karachi was an unpopular port, so the trip charter rate was high).

12.3 In The Achilleas, the hire rate of the next fixture (period charter) was applied. According to expert evidence this rate was the market rate at the date of the breach (2 May). From this rate the hire rate of the renegotiated Cargill fixture was deducted, which was the then market rate around 11 May. The result was applied to the length of the Cargill fixture which was similar to the period charter in which the charterers were involved.

12.4 However, Rix LJ said, obiter, that "as a rule of thumb a charterer should not, without further knowledge, be held liable……for the loss of a new fixture of longer length than that which he had himself contracted for. If need be, and the market feels that such a question should be determined by contract, a standard form or even special provision could be agreed. But as a matter of principle, the

claimant should not be kept out of compensation because of an argument about the length of the new fixture." Each case will be judged on its own facts and a general line cannot be drawn.

12.5 The court has discretion and it will exercise it within the bounds of proportionality.

12.6 The Achilleas decision has alerted charterers to redraft special provisions by which overrun situations are dealt with including the rate of hire over the period of the overrun.

III CRITICISMS OF THE DECISION

13. **From a commercial point of view:**

13.1 The judgment imposes a heavy liability on the charterers even in cases in which the last voyage is legitimate, but it overruns without the fault of the charterer.

An answer to this has been given in this paper. What transpires from the majority award, the judgment of Clarke J., and of Rix LJ in The Achilleas, is that it is all about allocation of risk between the parties and what choices the parties have to make (under the law of election) when they are faced with a last voyage order.
The parties are knowledgeable of the market trends and have an understanding of the value to be placed by each of them on the performance of a voyage which overruns the stipulated redelivery date under their charter. Like in The Gregos, the charterers may consider that, in some circumstances, it is worth taking the risk of being obliged to pay a large scale of compensation to owners because they have already committed themselves to their own sub-fixture, (per Rix LJ in The Achilleas para 59, transcript).
"A contract breaker may find the consequences of a breach are multiplied to a surprising degree by adventitious factors" (Lord Mustill in The Gregos).

13.2 <u>The liability to the owner may bear no relation at all to what the charterer is likely to be receiving under the sub-charter for the last voyage.</u>

The answer to this is that, as the risk of an overrun is upon the charterer, it is up to him to protect himself as discussed in this paper. His contract down the line is not a relevant consideration in determining the actual loss caused to the owner by the charterers' breach.

13.3 <u>The charterer may be unable to recover such damages down the line.</u>
That is also irrelevant to the application of the principles of remoteness of damages.

13.4 <u>The Achilleas is likely to extend itself into claims based on evidence from shipbrokers about the fixture which the owners could have made, if they had not known that the charterers were going to redeliver late, and hence they had not fixed a subsequent charter.</u>

Each case will be looked at on its own facts and not on hypothetical basis (<u>The Achilleas</u>). The court will look <u>at the actual loss suffered by the owner</u> and not at hypothetical ones. Evidence provided by shipbrokers about a likely fixture which could, hypothetically, have been made, had it not been for the overrun, will be considered in the context of the contract and prevailing circumstances at the time. As Rix LJ indicated, in such situations, the charterer should not, without further knowledge, be held liable.

13.5 <u>Why should the charterer bear the liability of loss on a subsequent fixture if the owner fixed the laycan of his next fixture too close to the redelivery date?</u>

This would be a matter of causation and remoteness; Rix LJ dealt with it, thus: "There may be cases in which the loss of fixture is not caused by the delay in redelivery when, for example, the fixture was made with a laycan limited to the

day of redelivery itself. Alternatively, it might be said that that is something which the charterer could not have anticipated".

Similarly, if the rate of a new fixture is in excess of the market rate it could not have reasonably been anticipated (paras 98-99 transcript).

13.6 The Achilleas ruling on damages should be limited to the cases in which the charterers' order was illegitimate

As discussed under para 9.6 above, it is trite law that in case of an illegitimate last voyage, the owner has a choice, whether or not to accept the order, or to demand a new order. Rix LJ observed (at para 50) that if the owner accepts the order, without prejudice to his claim for damages, he will be unlikely to have another fixture which he allows to be imperilled by permitting the illegitimate voyage to proceed. If, on the other hand, the owner asks for a new order and the charterer refuses to change the illegitimate order to a legitimate one, he will be in repudiation. The owner can accept it as such and be free to charter at the market rate. There will be no issue of late redelivery and, hence, no loss of fixture claim could be made (para 114).

14. **Is there certainty in the law?**

14.1 The issue of loss of profit had not arisen before and the case does not undermine certainty in the law. The criticisms about difficulties posed by the case are perhaps exaggerated, because future cases on different facts will be dealt with on their own merits. Proportionality will be a factor in the exercise of the court's discretion. But the parties also can ensure certainty by inserting appropriate clauses in their contract.

14.2 The length of the new fixture here was not extravagant or unusual. [Rix LJ added obiter that a charterer, without further knowledge, should not be liable for the loss of a new fixture of longer length than that he had himself contracted for. But as a

matter of principle, a claimant should not be kept out of any compensation because of an argument about the length of the new fixture (para 112)].

14.3 "if the shipping industry…feels that it cannot live with this result [of this case], clauses can be created to regulate the situation: such clauses have come into being to regulate last voyages, such as Baltime cl 7, Shelltime 4 cl 19" (per Rix LJ, para 120).

15. **Pragmatism and policy**

15.1 The Achilleas develops the law on an issue in which there was no previous binding authority. "Its development should be in accordance with principle; its refusal to develop would not be in accordance with principle" (para 118). The contention that "damages for late redelivery should be limited to the overrun period measure unless the owners can show that, at the time of the contract, they had given their charterers special information of their follow-up fixture, is both undesirable and uncommercial" (per Rix LJ para 119).

15.2 "It is undesirable because it puts owners too much at the mercy of their charterers, who can happily drain the last drop and more of profit at a time of raised market rates, taking the risk of late redelivery, knowing that they will never have to pay their owners more than the current market rate for the overrun period, a rate which will never in truth properly reflect the value to the charterers of being able to fit in another spot voyage at the last moment".

15.3 "It is uncommercial, because, if it is demanded that the charterers need to know more than they already do in the ordinary course of events, when they already know that a new fixture, in all probability fixed at or around the time of redelivery, will follow on their own charter, then the demand is for something that cannot be provided. All that an owner will be able to tell his charterer in most cases is that he plans to fix his vessel anew at the time of redelivery. To which the charterer might well reply: 'well I know that already! But don't expect that your

telling me that is enough to put me on notice for the purpose of claiming loss of fixture damages, if I deliver the vessel late and you turn out to lose your fixture!'" (Per Rix LJ para 119).

15.3 Such dicta show the commercial insight of Lord Justice Rix and that - principle apart - commercial considerations have been taken into account. That is an additional reason why The Achilleas is a balanced decision.

© Aleka Mandaraka-Sheppard (LLB, LLM, PhD)

Solicitor, Risk Management Advisor
Visiting Professor of Maritime Law, UCL
Founding Director, London Shipping Law Centre

15 November 2007