

# THE EMERGENCE OF GREEN NORMS IN CHARTERING

Dr Pia Rebelo

City Law School, City, University of London



**THE CITY**  
**LAW SCHOOL**  
CITY, UNIVERSITY OF LONDON  
— EST 1894 —

# Introduction:

- Times of uncertainty: regulatory risk and climate risks
- Shipping actors require a decision-making framework
- Marketing science and economic literature: cooperative norms are needed to enhance performance in times of transactional uncertainty (Ulf Bernitz, 'Commercial Norms and Soft Law' (2013) 58 Scandinavian Studies in Law 29-43).



# Questions posed:

1. Environmental norms in the existing regime governing charterparties.
2. How are contractual norms established?
3. Private actor initiatives and norm emergence.
4. Green clauses and the establishment of a green normative framework in contracts.



## One: Green norms within the existing regime governing charterparties?

- Charterparties are not governed by international conventions but by the common law.
- Furthermore, the Hague and Hague Visby Rules, the Hamburg Rules, and the Rotterdam Rules, explicitly exclude charterparties.
- Nevertheless, even if incorporated by way of a clause paramount, there is no direct link between the standards of contractual performance for the carriage of goods and environmental risks posed by the carriage operation
- This has prompted calls for a deeper consideration of environmental factors in contracts of carriage: Ellen Eftestøl-Wilhelmsson; the Norwegian Maritime Committee.



## Two: Where do contractual norms come from?

1. International conventions and binding rules.
2. Environmental norms may also be driven by illegality of contract.
3. The “Law of Standard Agreements”: Standard form agreements are, ‘generally speaking, the most important instrument nowadays for norm creation in business’ (Ulf Bernitz, ‘Commercial Norms and Soft Law’ (2013) 58 Scandinavian Studies in Law 29-43).

Key examples in maritime contracts: salvage and wreck removal standard form contracts; RECYCLECON; The New York Produce Exchange (NYPE) form.





## Three: Private-actor driven norms

- The implementation of green clauses into their contracts.
- Giving hard legal effect to green norms in the absence of an international maritime convention that imposes green cooperative values between shipowners and charterers.
- Prevalence of climate clauses throughout all sectors.



SEA CARGO  
CHARTER

# The Chancery Lane Project

## Fuel Reporting Clause for Shipping Charterparties

### Aiden's Clause

A clause to be inserted as a rider to time and/ or voyage charterparties combining 'green' fuel use, reporting and disclosure obligations with a levy for using fuels with a higher carbon content.

## Energy Efficiency in Shipping

### Otto's Clause

A contractual duty in charterparties for both parties (charterers and owners) to take all reasonable steps to maximise energy efficiency.

## Maximising the Laden Ratio of Vessels in Shipping Charterparties

### Bradleigh's Clause

A charterparty clause encouraging the parties to consider opportunities and cooperate to maximise the laden ratio of the vessel and minimise repositioning voyages in ballast during the charter period.

## Climate Clauses for Shipping



## Incentivising Fuel Efficiency Investments In Time Chartered Vessels

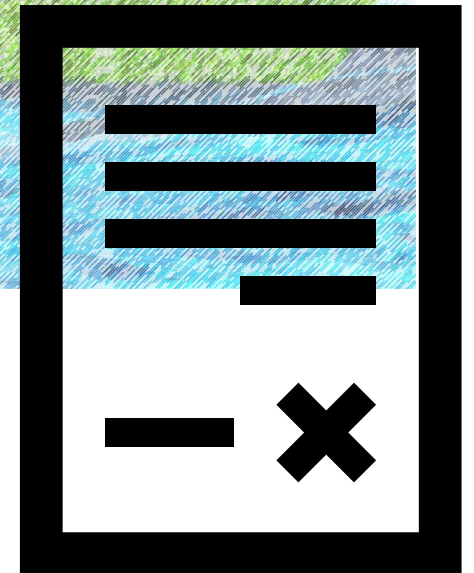
### Ariel's Clause

An optional mechanism for time charterparties, to share the cost (between owners and charterers) of upgrades which improve the fuel efficiency of time chartered vessels.

# Value of these clauses for the emergence of green norms in charterparties:

## 1. Contractual interpretation and construction of express terms

- The courts have recognised that even where contracts are professionally drawn, ‘the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement’ - *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.
- By stating an objective in the contract it becomes admissible evidence as an objective fact and is elevated beyond the mere pre-negotiation positions of either party.





## 2. Implied Terms

- Elevation of green principles to **legal norms and customs**, providing a strong basis for the implication of terms.
- *Hutton v Warren* (1836) 1 M & W 466: ‘[i]t has long been settled, that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts on matters on which they are silent’.
- Lady Hale in *Geys v Société Générale*: two types of implied terms in contracts:
  1. **Implied by Law**: inherent to types of contracts
  2. **Implied by Fact**: satisfying the “officious bystander” and “business efficacy” tests.





### 3. Enforcement



The creation of a 'legitimate interest' thus enabling green damages clauses.

Thus determining a penalty clause is two-fold: 1) it imposes a detriment which is 'out of all proportion', and 2) the detriment needs to be compared with any 'legitimate interest' of the aggrieved party in enforcing the contract

*Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67 has given contracting parties a greater level of freedom in setting a damages amount to be payable upon breach of a contract.

# Conclusions and Further Remarks:



Practically, creates a shift in the values and norms that inform how lawyers and law firms conduct themselves and view their role in, and impact on, society and the environment.



Green/climate clauses contribute to norm creation through the law of standard forms and clauses.



The elevation of “greenness” as a principle for shipping more generally.



The challenge for lawyers will be to persuade clients that there are real benefits to the use of such clauses.