This article takes as its starting point the normative framework surrounding charterparties and explores the limits and degree of flexibility of that contractual framework. While certain categories of charterparties are well established and universally acknowledged, it is also generally recognised, both judicially and in literature, that the parties are not bound by such categories but are free to develop their own terms, within a spectrum of hybrid contractual forms deviating from the entrenched typology. The example of trip-time charters is here considered in the context of contract certainty and predictability: while by no means a rare or recent phenomenon in chartering practice, and while textbooks and judicial dicta signal recognition in principle of this form of contract, this article argues that reality differs from such assertions. It will be argued that the absence of judicial and literary attention to these issues to date suggests a deeper unspoken truth: there are in fact no hybrid charterparties, and the endgame will always be a reversion to the binary model.

I. INTRODUCTION

The trope of certainty in commercial contract law and dispute resolution is well rehearsed. The parties expect, it is said, to labour in a commercial environment where the outcome of contractual stipulations is predictable and certain—this promotes commerce through clarity. Indeed, the predictability of the common law has been considered one of the beneficial characteristics of the law of England and Wales: the law does not intervene in the contract, and the parties are free to make their own contract. The courts will uphold
their bargain: party autonomy is said to be the pre-eminent strength of English contract law. Flexibility is the other virtue embraced: “the role of statute is primarily to lay down a balanced set of rights and duties that will apply in default of agreement; that of the courts is to respect and enforce reasonable mercantile practice …”. In the same vein, it has been argued that formalism at the dispute resolution stage is in the interests of commercial parties.

However, what will party autonomy and contract certainty look like on the fuzzy edges of the accepted framework, where there is assertion that law exists, but there is none in evidence? Is contract certainty really at hand, where the assertion or general belief over time has been that a body of law, type of contract or interpretive mechanism exists, but has failed to be evidenced or established in positive law? It may well be that the reason uncertainty has persisted over time is that it does not matter, or that parties have developed mechanisms to cope with it. But, if commercial practices are frequently based on a form of contract which does not enjoy the recognition of law, can it be said that the law falls short of providing certainty? Can a fallback mechanism be detected that permits the restoration of certainty? These questions arise upon a careful analysis of charterparties, a type of contract common in the shipping industry. While the law on time and voyage charters has been recorded in great detail, hybrid charterparties are, as will be demonstrated, an area of charterparty law that has enjoyed little cohesive attention and as a result is surprisingly nebulous.

The example explored in this article will be one particular form of hybrid charterparty: trip time charters. While some essential rules are supposedly well established, they contain inherent inconsistencies: leading authorities both in the form of textbooks and case law are laconically unassertive or even ambiguous. This article considers the available law on trip time charterparties and argues that it is an area of law that requires some caring attention by judiciary and commentators to support normative, and as a result also commercial, certainty. Where each case is decided on the basis of its own facts, and commentary is limited to descriptive endeavour, the law cannot evolve. The mere result of an individual, commercially sensible solution between parties to a litigation is not the optimal outcome from the perspective of the law as canon.

It will be argued that the absence of such attention to these issues to date suggests a deeper unspoken truth: there are in fact no hybrid charterparties. The endgame will always be a reversion to the binary model of time and voyage charterparties. This conclusion would in itself be surprising given that the binary model is not a statutory construct, but has arisen entirely from practice.

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3. Ibid., 10.
6. See literature references below post, under Part II(A).
7. The expressions “trip time charter” and “time trip charter” appear to be equally in use, and there is no doubt that they have the same meaning. Accordingly, the expression “trip time charter” is etymologically preferable, with the word “trip” providing a qualification of “time charter”. The preferable expression under English grammatical rules would be trip-time charter, using a hyphen for the two qualifying elements of the noun. This usage is adopted notably by P Todd, *Principles of Carriage of Goods by Sea* (Routledge, Abingdon, 2016), 152–153.
II. THE SOURCES OF LAW ON TRIP TIME CHARTERPARTIES

The chosen example merits a brief substantive introduction, before embarking on a review of relevant literature and case law. While English law is comparatively slow to categorise contracts according to types ascribed with preconceived qualities, maritime law in practice operates some distinct types of contract: bareboat (or demise) charterparties, time and voyage charterparties. A time charterparty is essentially circumscribed by a period of time, while a voyage charterparty is limited by geography. Time charters may in turn be concluded for a period, or for a trip. The latter form of time charterparty will contain some clauses more characteristic of voyage charters because, while similar in form to a time charterparty, the function of a trip time charterparty is that of a voyage charterparty in that it is designed to bring a specified cargo from point A to point B. The length of the trip time charter will be measured by reference to the performance of one or a specified sequence of trips. The outer limits of a trip time charterparty may therefore be both geographical and temporal.

The differences in the terms between time and voyage charters are distinctive: some are practical, some principled. As will be seen, literature presents a starkly binary image where distinctive characteristics are attributed to each of the two forms of contract. Thus, a voyage charterparty is considered a contract of carriage, whereas a time charterparty is a contract for the hire of the services of a vessel. A voyage charter contains provisions on freight, laytime and demurrage, whereas characteristic provisions for a time charter are hire, off-hire, anti-technicality clauses as well as redelivery instructions. Under a time charter, the charterer ensures that bunkers are taken on board which are then “sold” to the owner upon redelivery. Under a voyage charter, freight is earned rather than hire, and there is a rule against set-off for freight. Time charterparties instead obey the general rule that set-off under the same contract is permitted, although set-off under a time charterparty is limited. Trip time charterparties concern a voyage or a few voyages, and therefore a short-term commercial relationship, compared with period time charterparties, which may be concluded for periods of many years. The standard form in use, NYPE, is designed for the latter. Perhaps the most significant difference between a time and a voyage charter comes at the end of the performance, where a time charterparty ends with redelivery within a specified time, hire being due in the usual amount up until the final moment,

8. which will not be discussed further in this article.
10. A neat encapsulation, if not a definition or authority, can be seen in Wilson, 4: “In the case of a voyage charter, [the disponent owner] undertakes to carry a cargo between specified ports, whereas in a time charter he agrees to place the carrying capacity of his vessel at the disposal of the charterer for a specified period of time.” A demise or bareboat charter is also a contract for the hire of a vessel—the difference, in brief terms, is that the bareboat charter concerns only the vessel itself. Through the charter, the bareboat charterer takes possession of the bare vessel and has to insure, crew and maintain it, whereas a time charter also contains a service element including master, crew, ready bunkers and provisions and other matters enabling the vessel to serve.
14. It is an ancillary issue whether this standard form, designed for period time charterparties, is an ideal fit for trip time charterparties.
whereas the voyage charterparty will terminate with laytime and potentially demurrage—difficult to calculate and arguably more conducive to disputes. The distinction between time and voyage charterparties as having respectively temporal and geographical limits breaks down in hybrids, which may provide for a combination of definitions of the end point of the contract.

There is a high degree of standardisation in the law of charterparties, permitting incomplete negotiations and shorthand contract formation in the form of recaps (brief recapitulations). Established business practice along with a relatively limited number of standard forms, the main form for time charterparties being the successive iterations of NYPE, mean that various duties will be generally associated with each of the parties to the contract, such as bunkering, loading and discharge, or issuing bills of lading and the duty of seaworthiness. Like most forms of standard terms in the shipping market, NYPE does not conspire to produce contracts of adhesion—the terms are invariably adapted to the needs of the parties. This in turn is a function of a market involving a multitude of contracting parties—the familiarity and indeed standardisation of the standard terms here contributes to transactional predictability.

In reality, the standard categories of contract are only the beginning. In spite of the limited number of clear categories, there is a need for infinite variety and potential in contract-making; and, if the law were to operate strict immutable contractual categories, commerce would quickly be restricted to an unacceptable extent. Nor should the value of standard terms of contract be underestimated—they provide rules in a market where there may otherwise be none. Indeed, there may be a temptation for judges to think of the market as independently capable of resolving issues, so that as little intervention as possible is desirable.

The negotiation of a charterparty may be a messy and haphazard affair: the negotiating phase is characterised by shorthand contract-making following speedy negotiations, only rarely involving legal advice. This results only in a recap rather than a well-presented contract, and the settled terms and terminology employed will be indicative of the type of charterparty intended. Hybrids may consist of distinguishable elements, such as a voyage to a place, circulation for a period at that place, followed by delivery to a third place. In such a segmented contract the constituent elements could technically be assessed separately, albeit under a single contract. However, the scope for hybrids is infinite and it is perfectly


16. The classic time charterparty form exists in three iterations—NYPE 46, NYPE 93 and NYPE 2015—all in current use in the shipping markets, which are traditionally inert or conservative in their adoption of new standard forms.


18. Ibid, 42.

19. Eg, a port or a trade circuit.

20. In the insurance context, such segmentation between elements of the cover was the conclusion in *Printpak v AGF Insurance Ltd* [1999] Lloyd’s Rep IR 542, where only one part of the cover was affected by the breach of warranty and the rest remained intact. The conclusion was borne out by the wording of the contract, but the precise principled grounds for the approach are uncertain.
permissible for an orthodox period time charterparty to contain some of the idiosyncratic terms of a voyage charter. This complete freedom of contract is simultaneously an asset and a difficulty, supporting a nebulous approach to the negotiation, performance and commercial resolution stages, but providing less support at the litigation stage, where there may be little for the judge upon which to base a reasoned decision.

The following discussion considers and evaluates the positive framework available as evidenced by literature and judicial decisions, supporting the operation and interpretation of trip time charterparties. The conclusion will be that there is surprisingly little law surrounding and supporting hybrid charterparties.

A. Literature

As is the case with many highly specialised forms of contract, literature provides important authority by providing, in effect, a code for the form of contract, recognised by the parties as authoritative. Judicial decisions on charterparties in fact frequently cite a small number of well-respected specialised works. The reason may well be that it is perceived that these works offer otherwise unavailable insights into established market practice. That said, while the position of the central works on voyage and time charterparties is firmly established, there is a distinct shortage of even incipient, let alone developed, principled commentary in relation to trip time and other hybrid charterparties except on specific issues such as the measure of damages. This section aims to present the available literature and its approach to the subject.

Time and voyage charterparties are in practice highly standardised contract types, with characteristic terminology, types of clauses, standard terms and remedies for breach. The “Special Contracts” volume of the standard work Chitty on Contracts is silent on charterparties. The void is filled by well-established standard works, namely Wilford’s Time Charters, Cooke et al on Voyage Charters and Scrutton, which deals with both forms of charterparty. These standard works are all of the same character—they are descriptive in nature, summarising and evaluating case law with only the minimum of theoretical excursions beyond the law as established by the case law. The unequivocal purpose of these texts is to provide a reliable, normative source of, or guide to, authorities for the benefit of practitioners. Perhaps as a result of this distinctly descriptive, case-law


22. The difficulty of establishing market practice was considered by L Bernstein, “Custom in the Courts” (2015) 110 Nw U L Rev 63. The threshold is sometimes low: see Schenker Ltd v Negocios Europa Ltd [2017] EWHC B20 (QB), where expert evidence by submitted by one party was accepted as conclusive evidence of the market’s views.


25. These works are generally known under the name of an original author.

26. Wilford’s Time Charters.

27. Cooke et al, Voyage Charters.

28. Scrutton.

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derived approach, these works are of limited assistance where trip time charterparties are concerned. Cooke et al on Voyage Charters contains exactly one index entry for trip time charters.\footnote{29} In Wilford’s Time Charters, an introductory paragraph alerts the reader to the existence of hybrid contracts and notes some of the ambiguities that arise from contracts that define the services to be provided under the contract by reference to both a period and a trip.\footnote{30}

“Although, as in any other time charter, the owners’ remuneration will still be periodic (typically daily) hire, a trip time charter may in other respects have more in common with a simple voyage charter than with, for example, a long period charter for worldwide trading carrying all manner of cargoes. Whether all of the ordinary incidents of a time charter apply equally to a trip time charter for a fixed or narrowly-defined particular trip has not been fully explored in the cases.”

The only other index entry in Wilford’s Time Charters consists of two paragraphs that briefly consider four key cases and conclude with a counterfactual on the hypothetical result “had the contemplated trip been more precisely defined”,\footnote{31} in which case the authors consider that “it might have been more difficult to decide whether the trip or the period was intended to be paramount”.\footnote{32} It will be argued in the following that no such difficulty would have been experienced and that, on the contrary, a sterile binary approach has been adopted judicially.

The few paragraphs in Wilford’s Time Charters are thus mostly devoted to identifying, but not resolving, the issues said to arise from difficulties arising in the context of charterparties of a hybrid nature. The editors of Scrutton are more detailed, dealing with trip time charterparties in six of the 21 chapters of the work. The increased frequency does not result in a developed narrative: there are usually only a few words in each paragraph. Equally, Wilson’s well-known student textbook contains exactly one index entry of the expression “trip charters”,\footnote{33} referring to an introductory page offering a brief description of time charters and voyage charters, along with hybrids including trip time charters, consecutive voyage charters and long-term freighting contracts. Other literary works adopt the same approach.\footnote{34}

Similarly, academic and practitioner commentators’ attention has focused on individual points arising in case law, such as the interpretation of individual clauses, or assessment of revision of standard clauses.\footnote{35} This focus on individual points is in character with both case law and literature, but comes at the expense of the development of a more overarching, principled framework. It is not clear whether this is due to a lack of ambition, or because it is perceived that a framework adding nuance to the binary framework is surplus to requirements. However, it is fair to characterise the law and commentary on charterparties as descriptive—as opposed to prescriptive. The prevailing approach of commentary is binary, accepting a clear line between time and voyage charterparties. While the existence

\footnotesize{29. In the introductory para.1.1. 
30. Wilford’s Time Charters, [I.17]. See also ibid, [4.99–4.102] and cases referred to therein. 
31. Ibid, [4.103] and [4.104]. 
32. Ibid, [4.104]. 
33. Wilson, 4. 
34. While those mentioned are the best-recognised works, there are further practitioner works as well as student textbooks, not least P Todd, Principles of Carriage of Goods by Sea (Routledge, Abingdon, 2016). 
35. Recent examples include Peel (2016) 132 LQR 177 and Todd [2016] LMCLQ 306.}
of developed literature means that there may not be any pressing need for principled reasoning on the main forms of charterparty, there is a striking lack of authoritative description, let alone principles-based theorisation, of the intermediate or non-binary forms. As will be seen, case law has yet to produce a convincing account of a truly hybrid charterparty. There is as a direct result little in literature supporting the application of anything other than either the time charterparty or the voyage charterparty framework.

Where literature is dominated by the approach of case law annotation or commentary, the result is that, while intermediate contract types are widespread in practice and their existence is acknowledged in literature, readers are left much to their own devices in seeking to understand the implications of the law to such a hybrid.

B. Judicial approaches

In this section, we will review existing case law on trip time charterparties. It will be demonstrated that, while, as in literature, lip service is paid to the concept of hybrids, there is little to support such a third framework in practice. The analysis here deliberately considers judicial decisions to the exclusion of arbitral awards. That is because, while arbitral awards are frequently reported in this sector, judicial decisions have the additional distinguishing characteristic of being designed not just to resolve the dispute but to establish or develop the law. The confidentiality and selective access to arbitrations makes them less suited in this regard.

Disputes in charterparty cases arise out of the modality of negotiation as well as the standard contents of such contracts. They are often negotiated in haste, typically have sparse contents and take the form of recap fixtures relying heavily on standard forms, especially where the purpose of the charterparty is only to carry a cargo from load port to discharge port. It should perhaps come as a surprise to any keen observer that contracts negotiated in haste, on poorly adapted standard terms, do not give rise to more litigation than the few cases at hand. The author attributes this fact to the mechanisms identified by Lisa Bernstein on the basis of empirical studies of the grain and feed market, resulting in concepts that will support the analysis that follows. Bernstein developed the terminology of relationship-preserving norms and endgame norms. Empirical research into the grain and feed markets led her to caution against the use of market practice and trade usages in judicial dispute resolution to quite the extent foreseen by the Uniform Commercial Code. She identified a number of reasons why the parties may wish to bargain on two levels: one for the purpose of maintaining a working relationship and another for the purpose of dispute resolution. Her distinction is essentially that the parties may have many unspoken intentions in negotiating and performing the contract. Such unspoken intentions may be a

36. It is conceded that academic edifices need not be underpinned by need.
37. Post, Part II(B).
38. Through the medium of Lloyd’s Maritime Law Newsletter, which has been summarising arbitral awards in the field since 1979 and is not infrequently relied on in argument and by courts for authority.
40. Ibid, 1796–1802.
41. The observation that judges attempting to apply “commercial common sense” in the resolution of a case are at a disadvantage as to commercial practice is a narrower, technical point.
tacit bargain or a permissive option as to performance left open to compromise by a party, which nevertheless does not wish to be held to the lower standard of the compromise. Intentions remain tacit, in part because they are not intended by the parties to form part of the endgame norms.  

Judicially, Lord Wilberforce put it thus in *Prenn v Simmonds*: “The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get ‘agreement’ and in the hope that disputes will not arise.”

Adopting the terminology of endgame and relationship-preserving norms, the endgame in the context of trip time charterparties is characterised by a collapsed commercial relationship, not reparable by commercial measures such as splitting the difference or more formal mediation. It is at this stage that Bernstein identifies the applicable norms as those present in the negotiated contract. The terms applicable between the parties are at this stage crystallised and formalised—the written terms of the contract were not necessarily those intended to be applied within the commercial relationship itself. Indeed, the parties may well have been prepared to demonstrate significant flexibility based on elusive business relationship factors such as market dominance, replacement spot rates and commercial relationships but did not wish to place themselves in a position where they could be held to such relationship-preserving norms. An important element of the characterisation of relationship-preserving norms is that they do not necessarily amount to a judicially identifiable, formal trade usage; or even established practice between the parties capable of binding effect. With norms of an intrinsically relationship-preserving nature, it is arguably a mistake for arbitrators and *a fortiori* judges to seek to base a decision thereon. At the endgame stage, where arbitrators and judges labour, the parties instead rely on an interpretation of the contract terms as agreed and set out, against a background of objectively identifiable interpretative factors. While the relationship preservation stage may be highly idiosyncratic between the parties, the endgame is standardised by near-universally accepted terms and acceptance of a legal framework that has arisen entirely from practice. One would therefore expect the judicial approach to these contracts to be comparatively standardised and formalised. As will be seen, these assertions bear out for trip time charterparties if seen in the light of distinct frameworks of relationship-preserving and endgame norms.

In the following, we will consider the position from the perspective of the law offering a blank canvas on which to create the contract; the approach that the parties have opted for a framework available to them; the effect of selection of standard terms, and finally, the

42. Another reason may be that the parties are disinclined to bargain certain points: see J Davey, “Claims notification clauses and the design of default rules in insurance contract law” (2012) 23 ILJ 245 with references. See also, for negotiating practices and contract formation in spot markets, J Hjalmarsson and K Wu, “Flexibility versus certainty: on classical contract formation and modern methods of trading”, in J Hjalmarsson and J Zhang (eds), *Maritime Law in China: Evolving Issues and Future Developments*. GB, (Routledge, Abingdon, 2016), 181.

43. [1971] 1 WLR 1381, 1385.

44. Bernstein (1966) 144 U Pa L Rev 1765 identifies an alternative endgame, where the parties wish some element of a longer business relationship to be adjudicated—this situation is assumed to be less likely in the trip time charterparty context.

45. For these assertions, see further in the following.
facts as sole guiding principle for dispute resolution. The *relationship-preservation* and *endgame* norm paradigm will be a recurrent theme in the discussion.

(i) *The blank canvas*

A starting point of English law is that it expects the parties to set out the parameters of their contract. But how open-textured is the law in reality? The blank canvas of the charterparty is painted under the light of commercial realities. There is authority in the trip time charterparty context for an approach that considers the balance of risks and identifies the party to which the contract seeks to allocate those risks. The emphasis accordingly is not on established frameworks or on classification, but on a more holistic commercial approach.

The commercial difference between a voyage and a time charterparty was described by Rix LJ as follows in *The Doric Pride*,[46] where the question was whether a vessel was off-hire under the provisions of a trip time charterparty where her entry into the New Orleans Port had been delayed by instruction from US Coast Guard:

“under a voyage charter the risk of delay on an approach voyage is the owner’s risk, the charterer is only at risk once the vessel becomes an arrived ship and goes on demurrage, whereas under a time charter the risk of delay is fundamentally on the charterer, who remains liable to pay hire in all circumstances unless the charterer can bring himself within the plain words of an off-hire provision.”[47]

Appearing to take a global view of the parties' intended balance of responsibilities, the Court of Appeal criticised the judge’s description of the trip time charterparty as “essentially a voyage charter transaction”.[48] The Court went on to hold that, although this was a trip time charterparty and time charterparty rules therefore applied, the overall allocation of responsibilities intended by the parties was that delays upon approach to the load port should be upon the disponent owner—the same outcome as if the charterparty had been a voyage charter. That said, the judge at first instance had gone too far in stating that the transaction was “the use of classic time charter clauses in what is essentially a voyage charter transaction”,[49] and in describing the charterparty at issue as “in form as well as in commercial reality a voyage charter”.[50]

This decision appears to support an approach to each individual contract as *sui generis* with the balance of responsibilities and liabilities taking the paramount role in interpretation. This chimes with the blank canvas paradigm and the open-texturedness desirable at the relationship-preserving stage. However, the approach presents distinct difficulties at the endgame stage—although commercial parties are free to agree as they please and appear to enjoy the freedom that English law offers, it is also the case that

47. *Ibid*, [28].
50. *Ibid*.
a minimum of predictability in dispute resolution requires there to be an applicable framework available. An entirely blank canvas at least theoretically requires commercial parties to rewrite contract law, for the purpose of their one-off transaction—an unlikely outcome of sometimes chaotic negotiations.

The blank canvas does have some pre-existing texture. Distinctions are forced upon the contract in some contexts: time charters are contracts for the hire of the services of a ship, and voyage charters are contracts for the carriage of goods—a distinction not without importance for some purposes, not least the immutable and, unlike charterparty law, highly prescriptive framework for conflict of laws. Assertions that parties have the benefit of open-textured law in defining their charterparties, making hybrids possible, lose force where conflicts of laws are concerned: that body of law operates a small number of pre-defined categories conditioned upon a characterisation of the service to be performed by the vessel. Thus, in *Martrade Shipping & Transport GmbH v United Enterprises Corp (The Wisdom C)*, Popplewell J was tasked with the construction of a charterparty in the conflicts context. The contract in that case was a trip time charter. The owners had won an arbitration regarding payment of hire and had been awarded interest under the Late Payment of Commercial Debts (Interest) Act 1998. The application of that Act depended in turn on the application of Art.4 of the Rome Convention. The question before Popplewell J was whether a trip time charter was to be characterised as a contract for the carriage of goods—not an unreasonable question, given that that was certainly its function. If so, the presumption in Art.4(2) would be disapplied in favour of that in Art.4(4). The presumption in Art.4(2) is based—in brief terms—on the place of the party most closely associated with the characteristic performance under the contract. Article 4(4) disapplies that presumption and enters the place of loading or discharge into the equation. It provides:

“In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.”

Popplewell J endorsed the argument of counsel for the charterers that:

“it is not sufficient that the main purpose of the contract is the carriage of goods in this sense. … What matters is that the charterparty is not in nature an undertaking by the owner to carry goods, but an undertaking by the owner to make available to the charterer a vessel and crew for the latter to employ in transporting goods.”

The contract was therefore subject to Art.4(2) and the characteristic performance was that of the disponent owner. Accordingly, absent a choice of English law, the applicable law would not have been English law and the arbitrators had erred in awarding interest under the Late Payment of Commercial Debts (Interest) Act 1998.

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54. The Rome I Regulation provides in the preamble, item (22): “As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods.” It is entirely feasible that a trip time charter is an “other contract the purpose of which …”. The issue remains open, given that trip time charters have not yet been before the ECJ.
litigation aside, the judgment is clear in its assertion that a trip time charter is a contract for the supply of services in the context of the Rome framework, similar to a time charterparty, not one for the carriage of goods, like a voyage charterparty. It is a striking example of how important the characterisation of the contract can be, in the face of assertions of freedom of contract and the forced limits of “the ingenuity of chartering brokers and the ever changing demands of the market”. Given the nature of the question and the stark choices available in response, the option of deference to market practice or discussion of the nature of hybrid charterparties was not available to Popplewell J, who stated: “[T]he nature of the contract for the duration of the period remains that of making the vessel and her crew available to the charterers as a means for the charterers to transport goods, not a contract for carriage of the goods by the owners.”

A similarly stark choice arises in the context of incorporation of terms. The bill of lading example of a clause incorporating terms “as per charterparty” has been extensively discussed in literature. Similar issues of incorporation could be envisaged where the parties incorporate by reference some existing charterparty, and disagreement results as to which one. Bills of lading will usually refer to and incorporate the terms of a charterparty designated by its date of conclusion. There is extensive case law determining that the voyage charterparty highest in the chain is, as a matter of practice, more likely to be that intended for incorporation, to the exclusion of time charterparties, which are more likely to contain incompatible terms. The head voyage charterparty in a chain of charterparties may be incorporated even if neither party to that contract is also a party to the bill of lading, as seen in The Nanfrí. However, there is no rule against the incorporation of a time charterparty. In Southport Success SA v Tsingshan Holding Group Co Ltd (The Anna Bo) the bill of lading designated a charterparty by a date which corresponded only to the time charterparty. There was also a voyage charterparty, but bearing a different date. The judge, faced with an unequivocal contract clause including a clear date, held that there was no rule against incorporating the time charterparty, and that the words “freight payable as per charter-party” did not mean that only a voyage charterparty could be incorporated. Given that the argument for the incorporation of the voyage charterparty in preference to the time charterparty is that the terms of the former are more likely to be compatible with the bill of lading, it may well be that there is a distinction to be made between period and trip time charterparties in this regard, the terms of the latter being more germane to the individual voyage than a period charter.

55. The judge states that it is a contract for the supply of services as distinct from one for the carriage of goods, not as distinct from the hire of a vessel. The latter proposition is not negated by the case.
60. [1978] 1 Lloyd’s Rep 287.
What then is the reality of the supposed blank canvas? An early case, *Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia)*,62 concerned a “trip out to India via Black Sea” under a time charterparty. In the course of performance of the specified contract voyage, the ship was intercepted by the authorities due to the Suez Canal crisis. The owners contended that charterers’ order to proceed had placed them in breach of contract. The charterers’ contention was that, “although the charter-party was on a printed form applicable to a time-charter, nevertheless the ‘paramount feature’ of it was a voyage, and it was to be construed accordingly”.63 The Court of Appeal disagreed, siding on this point64 with Megaw J at first instance65 in holding that charterers were in breach in ordering the vessel into dangerous territory. The charterers’ argument, that they were entitled to order the performance of the specified contract voyage, was of little effect, in the context of a time charterparty where the ship was under charterers’ orders throughout. Here, the blank canvas was not a reality: by opting for the time charterparty framework the parties had declined any advantages or disadvantages associated with the liberty to contract.

Perhaps most starkly, in *The Democritos*,66 one of the issues before the Court of Appeal was the effect of some language typical for voyage charterparties in the context of a time charterparty. When the vessel was redelivered late, was freight owed, as under a voyage charterparty, or did hire continue to be payable on a day-to-day basis? This mattered because of the difference between the amounts. Lord Denning MR considered the nature of the contract:67

“It is on a time charter form. The words ‘Duration about 4 to 6 months’ are typical time charter periods. The only provision which might make it look like a voyage charter is in the words, ‘… for a trip via Port or Ports via the Pacific’. It is suggested that that provision makes it a voyage charter, or alternatively a hybrid charter. But it seems to me that those words are far too indefinite to indicate any specific voyage at all. They do little more than state the trading limits within which the vessel is to trade during the time charter. They only show that the vessel has to call in at the Pacific during its course of operations. There is an [option] in cl. 44 to carry a cargo from the west coast of the United States to Japan. But that cannot affect the duration period which is specified in the charter itself. It was to my mind clearly a time charter.”

Lawton LJ in his brief concurring speech added that the provision “for a trip …” would have come from the charterers.68 This judgment provides as clear an indication as could be wished for of a rejection of hybrid charterparties at the endgame stage: while the charterers had sought to build in flexibility at the performance stage, at the endgame stage, the contract would be ruthlessly mapped onto the binary model.

Ultimately, the canvas is not completely blank. The law operates categories and choices that result in the early adoption by the parties of some framework or other. The binary choice is mandated in the context of conflict of laws, where a trip time charterparty is a contract for the hire of a vessel for a defined period. The parties also decide the limits of

64. But reversing the outcome on the point of contract frustration.
68. Ibid, 154 col.1.
their contract with existing matrices in mind. A place of redelivery is stipulated. Are the geographical limits of the time charterparty of reduced importance, compared with the time limits? The placement of the vessel under charterers’ orders has pervasive effects on the distribution of liability between the parties. It appears that there is little or no scope for flexibility as to the subject matter, the limits and the allocation of liability under trip time charterparties. Perhaps the canvas is not quite as blank as contract freedom ideology would have us believe?

(ii) Choice of framework

Is it fair to say that the endgame stage is characterised by a general, if silent, judicial assumption that a framework has been chosen? At its lowest, the notional starting point is that the parties are free to agree the contract terms and that the court will not intervene, but that the choice of an existing framework will be respected by the courts. The judicial approach is neatly encapsulated by two quotations from the same judgment. In The World Symphony at first instance, Hobhouse J considered a final nomination under a period time charterparty, which had extended the period of the charterparty beyond the contractual duration. He sought to make the point that the parties are essentially in charge of the contract and can create its terms in any way they wish. Having noted the existence of hybrid contracts with brief descriptions of trip time and consecutive voyage charterparties, he went on to say:

“The variety of contractual structures that can be adopted by charterers and shipowners for any given transaction are as various as the ingenuity of chartering brokers and the ever changing demands of the market may determine. It is not for Courts to fit the parties’ transactions within a strict and limited frame-work which the parties themselves may have not chosen to adopt.”

In other words, the canvas is blank and the parties are the painters. As noted, English law is not prescriptive in terms of types of contract—the parties can generally identify the contract in the way they choose and apply existing standard terms to it as they see fit. This ethos offers a non-interventionist and non-paternalistic starting point and is considered a main attraction of English law as the chosen law of shipping and commercial contracts. However, with regard to trip time charters, is such a minimalist approach the optimum? A counterpoint to the open-textured approach can indeed be found within Hobhouse J’s reasoning in The World Symphony itself. Having made the above statement, the judge next went on to say the following:

69. However, there may also be clear geographical limits. In Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare) [2010] EWHC 903 (Comm); [2011] 2 Lloyd’s Rep 360, the geographical limits were Australia/China, meaning that a substitute time charterparty to South America was not within an “available market”.


71. As he then was.


73. For a discussion, see Morgan, Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law (2013), esp 184–186.

“Once it has been demonstrated that the parties have chosen to adopt a particular framework, then the Court can point out its legal consequences, as did Bingham LJ in the passage that I have quoted from [The Peonia], where the parties had expressly chosen to reiterate that their contract was a period ‘time charter’. But to state the consequence first and to argue from that to the nature of the bargain is to put the cart before the horse. (Cf the quotation from the arbitrators in The Black Falcon.)

The passage is characteristically flawless; indeed, it would not do to permit some extraneous judicial construction of the parties’ words and intentions to stand in place of the parties’ own arrangement. That said, the first few words of this quotation are notable. The position considered is that the parties have adopted a framework and intended that it should apply to the contract. In The World Symphony, the question was of a period time charterparty, the accepted framework of which has been extensively catalogued. That framework is prima facie equally applicable to trip time charters, but existing works do not consistently address issues arising where the framework of the contract that the parties have adopted may be different for a trip time charter and how to address variations to achieve consistency. Does this lack of detailed guidance cause uncertainty for prospective contractual parties? Does a judicial approach that takes its starting point in individually crafted terms of the contract “put the cart before the horse”, where the parties had in reality envisaged the adoption of a framework? Can the parties successfully signal that their contract belongs on a nuanced, hybrid scale, where the developed framework is binary in nature?

The answer may lie in the distinction between relationship-preserving and endgame norms. The parties may be perfectly content with the blank canvas and happy to populate it themselves, as long as the relationship-preservation stage is in operation, with a preference for the binary, predictable framework at the endgame stage. Such pragmatism commends itself if one subscribes to a narrow view of the judge as a resolver of disputes; but not if one also considers that the judge has a role in assisting the development of the law in an industry where most disputes are resolved through arbitration, and court litigation tends to arise only where an issue has been identified as being of general importance to the markets concerned. This is so, even acknowledging the limitations of judges as prospective, principled lawmakers. If the commercial need is accepted for clear default rules, from which the parties may easily opt out, what is the present role of judge-made law in relation to trip time charters? A tension arises from the proposition that the legal system is unbiased and does not adopt stringent categories as to types of contract, where the contracts used in practice do not conform to type. What does this mean for the judicial approach to hybrid charterparty cases? Where the parties fall back at the endgame stage on existing frameworks, should judges give effect to the existing, binary framework, or

75. Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd (The Peonia) [1991] 1 Lloyd’s Rep 100, 107. In the quoted passage from The Peonia, Bingham LJ pointed out in support of the adopted interpretation of the charterparty that a time charterparty by its nature is for a finite period of time; the suggestion is that this would tend to inform a narrower approach to the scope for permissible final voyages.

76. Shipping Corp of India Ltd v NSB Niederelbe Schiffahrtsgesellschaft mbH & Co (The Black Falcon) [1991] 1 Lloyd’s Rep 77.

77. See supra, fnn 14 and 15.

seek to assist the development of a spectrum-based framework? As will be seen in what follows, the general approach of judicial reasoning in trip time charterparty cases tends to be limited to establishing the narrow meaning of designated contractual provisions without express consideration of the wider framework.

(iii) Choice of standard terms

As indicated above, standard terms fulfil a crucial function in charterparties, which must be considered next. One potential way for the parties to express that they “adopt a particular framework” is the deliberate choice of standard terms designed for and applicable to that and only that framework. In the context of trip time charterparties, what effect, if any, is given to the parties’ choice of standard terms? On the binary scale of orthodox time and voyage charterparties, the factor of the choice of standard terms is inevitably consistent with the nature of the charterparty. A choice of NYPE would indicate a time charter and—for example—Asbatankvoy a voyage charter foundation of the contract. However, where the parties intend to conceive a hybrid, is this a decisive factor?

Acknowledgement of the existence of hybrids ought logically to be followed by judicial acceptance of open-texturedness, with a paradigm where the standard terms are the starting point and the parties are taken to have wanted to modify them into their idiosyncratic contract. However, as will be seen, such open-texturedness is not evident. Nor is there principled judicial affirmation of the contrary position, that the choice of standard terms expressed in the contract is presumed to align with the binary framework. The result of this unspoken conclusion is a fiction that the choice of standard terms does not necessarily entail a choice of framework.

An example of judicial unease is in evidence in *Ispat Industries ltd v Western Bulk Pte Ltd (The Sabrina 1)*, where a direct question as to the effect of incorporation of the NYPE charter remained judicially unanswered. A trip time charter had been concluded with the specified load port habitually used by the charterer to export its cargoes. That port became unavailable due to insurgency. Under a voyage charter, where a nominated load port—whether nominated in the charterparty or subsequently—has unexpectedly become unavailable, the charterer has neither the right nor the obligation to make a different nomination. This rule that the determined load port is a final choice is referred to as the doctrine of election, and limits the voyage charterer to its initial choice.

In *The Sabrina 1*, it so happened that the charterer did not wish to nominate an alternative port and therefore argued that this voyage charterparty rule applied to the trip time charter—from a commercial and contractual point of view a perfectly feasible term. One of the questions of law upon which the right to appeal the arbitration award under the Arbitration Act 1996, s.69 had been granted was phrased as follows:

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79. Especially *post*, Part II(B)(iv).
81. [2011] EWHC 93 (Comm); 814 LMLN 3.
82. [2011] EWHC 93 (Comm), [35].
83. While the choice is final, the finality is subject to contractual terms such as “so near thereto as she may safely get” as well as to general rules on estoppel and waiver. See Cooke et al, *Voyage Charters*, [5.21].
84. [2011] EWHC 93 (Comm), [32].
“In relation to a charterparty contained in a fixture recap incorporating by reference an NYPE time charter form, is the form chosen by the parties determinative of the true nature of the charterparty and, in particular, to what extent can the background matrix, fixture recap and voyage instructions inform the construction of the charterparty.”

The appellant charterer’s argument was that “properly construed, the charterparty was ‘a voyage charter or at least a charter limited to a very specific trip only’, with the consequence that if the voyage or specific trip was not possible then performance of the charter was not possible”.\textsuperscript{85} “The judge considered the timing of the insurgency with reference to the termination of the charterparty and concluded that on the facts, “Since the charter was a time charter rather than a voyage charter …”,\textsuperscript{86} the charterer ought to have given new directions when the original load port became unavailable.

There was no further reasoning on the nature of the charterparty or the role of the standard terms—only the statement that this was a time charterparty. Given that the question of law asked was specifically to this point, a conclusion on the facts without reasoning in principle brings little closure in itself. However, with the assistance of the concept of endgame norms, the conclusion can be interpreted as one of principle: the assignation of the contract within the binary time/voyage charterparty framework is an example of an application of the stark endgame norms at the expense of the flexible relationship-preserving norms. There being no standard terms covering time and voyage charters alike, the use of one set of terms is a comfort-inducing indication that the parties intended to create just such a contract. Mistakes in the contract formation process are of course always possible—the parties could have erred in the reference to the standard terms, the contract making process might have been inconclusive on the point or the parties might have inadvertently omitted to include any terms at all.\textsuperscript{87} While such facts are rare, and will sometimes be resolved by means of rectification, they are not so rare as to be dismissed entirely and inevitably cause difficulties when they do arise.\textsuperscript{88} But is an automatic assumption based on the standard terms justified, where the parties have adapted the bargain by adding individually crafted terms?

Indeed, if hybrid charterparties are indeed real and not merely a figment confined to the stage of operation of relationship-preserving norms, the question would arguably have merited a reasoned judicial response. While the contract is being performed and at the relationship-preservation stage, the parties may not be particularly interested in a precise identification of the norms applicable—in \textit{The Sabrina 1}, perhaps both parties valued the flexibility of potential renomination. At the endgame stage, the position is the opposite.

\textsuperscript{85} Ibid, [33].
\textsuperscript{86} Ibid, [39].
\textsuperscript{87} In the insurance context, there have been cases where a term was included in the slip but not in the policy (\textit{Youell v Bland Welch (No. 2)} [1992] 2 Lloyd’s Rep 127) or in negotiations but not in the final policy (\textit{PT Buana Samudra Pratama v Marine Mutual Insurance Association (NZ) Ltd (The Buana Dua)} [2011] EWHC 2413 (Comm); [2011] 2 Lloyd’s Rep 655; [2012] Lloyd’s Rep IR 52).
\textsuperscript{88} For a case where it was argued that the parties had intended to include a jurisdiction clause in a charterparty, see \textit{Magellan Spirit APS v Vitol SA (The Magellan Spirit)} [2016] EWHC 454 (Comm), [2016] 2 Lloyd’s Rep 1. In the insurance context, the renewal of a policy of marine insurance has resulted in a claim for rectification as to the terms used: the insurers unsuccessfully argued that the deletion of a particular standard term had been intended to be accompanied by the addition of an exclusion of malicious damage: \textit{Kiriacoulis Lines SA v Compagnie d’Assurances Maritimes Aériennes et Terrestres (CAMAT) (The Demetra K)} [2002] EWCA Civ 1070; [2002] 2 Lloyd’s Rep 581.
The stark question of precisely what set of norms is applicable to a trip time charterparty is an intrinsic part of the endgame stage and the encroachment of individually crafted terms on the binary framework gives rise to undesirable uncertainty. The answer to the question of law asked in *The Sabrina 1* is not insuperably elusive, but if the fiction of flexible hybrids is to be preserved, the question of law asked in that case can be given no reasoned answer.

(iv) The facts as refuge

What role may be ascribed to the framework adopted by the parties? The underlying factual situation of a ship’s journey from A to B may appear to be of little assistance: it is identical in a voyage and a trip time charterparty. The trip time charterparty’s function in itself therefore provides little guidance to an understanding of the form of risk allocation within the adventure. The form must arise less from the facts of the adventure itself than from the (judicially inferred) approach of the parties to that adventure. The identification of the chosen framework might therefore be expected to be the consistent starting point in deciding any case: including assertions as to the precise composition of considerations supporting any hybrid status of the charterparty. Such discussion, however, is surprisingly rare in reported case law, which tends instead to home in on individual contractual provisions for a narrow, black-letter interpretation.

The issue in *SBT Star Bulk & Tankers (Germany) GmbH & Co KG Cosmotrade SA (The Wehr Trave)* contrasted the principles and nature of a trip time charter against a black-letter interpretation of its express terms. The charterparty was for “one trip” and made on the NYPE46 time charterparty standard form. The term describing the trip under the time charter named a range of load ports and a range of discharge ports. Upon completing the stipulated circuit, the charterer had issued an order to return to one of the permitted discharge ports to load further cargo—an order which the owner asserted was illegitimate. Illegitimate last orders are a characteristic feature of time charterparties: the charterer has freedom to order the vessel within the time limits of the agreed period, but not to exceed them. Under a voyage charterparty, the voyage is predetermined in the form, typically, of designated load ports and discharge ports or a range thereof. The question of law was phrased as follows:

“On the true construction of the Charter, was the respondent charterer under a ‘one time charter trip’, after the vessel had discharged the entirety of all previous loaded cargo, entitled to order the empty vessel to another load port (Sohar) and discharge port to perform a further trip/voyage or only to order the vessel to proceed to the agreed Charter redelivery place having completed the agreed one time charter trip?”

The importance of the question is that, while the confines of a standard time charter are determined by a period of time, those of a voyage charter are determined in geographical terms, with arrival at the port of discharge marking the end point of the contract. What,

90. Ibid. [5].
if any, was the influence of the chosen trip time charterparty framework, and to what extent was a hybrid nature achieved? The owners argued that the ship ought not to have exceeded the time allocated. The arbitral tribunal, it was argued, had overemphasised the distinction between time and voyage charter parties, with the effect that the “one trip” time charter party could in practice be extended indefinitely, paying the agreed daily rate of hire. The charterers for their part argued that the agreed geographical terms took precedence and, as long as they remained within those confines, they were within their rights. Both interpretations were consistent with a hybrid charter party based on a time charter party form—prompting consideration of the precise scope of the applicable framework.

There were a variety of options available to resolve the case: one could limit the solution to a weighting of the importance of the words “one trip” against the specification of geographical range, for a purely textual approach. Alternatively, one could decide on the basis of the parties’ chosen time charterparty framework without consideration of the finer points of hybrid forms: a strict or orthodox approach. Finally, one could determine to what extent the parties had achieved modification of the standard time charterparty framework into a hybrid and consider the voyage provision in context. Given that the existence of hybrids, and in particular trip time charter parties, is well recognised, the latter approach is arguably that most supportive of further development of clear endgame norms on this point.

Eder J commenced with the observation that the contract was undoubtedly a time charter. He went on to note that “This is not the place to perform an exhaustive analysis of the differences between the various types of charter”. The judge also noted that “from the charterer’s perspective one of the advantages which a time charter (including a time trip time [sic] charter) has over a voyage charter is that voyage orders under a time charter do not constitute an irrevocable election” presumably to support a contractual intention of granting charterers some liberty in their voyage orders. Further support was derived from The Aragon, to the effect that the concept of a time charterparty was that it “entitle[s] the charterer upon paying the hire to call upon the vessel to visit any port or ports which he wishe[s] within trading limits”. Accordingly, the question was whittled down to “whether this specific charter contains sufficiently clear words to exclude Sohar as a loading port”.

This narrow approach relied heavily upon the applicability of time charter party norms, where no specification of load port is expected or necessary and the charterer is free to order the vessel as it pleases within the time available to it. However, having concluded that the time charterparty framework was determinative, was it logically consistent with that framework that the charterer was at liberty to exceed its allotted time by giving further orders? The decision arguably recognises the validity of hybrid terms, without incorporating them in the reasoning around the applicable endgame norms.

91. Ibid, [8].
92. Ibid, [11]. It will be apparent that this author respectfully disagrees.
93. Ibid, [11]. It has been noted ante that this is not necessarily an advantage for the voyage charterer.
94. Segovia Compania Naviera SA of Panama v R Pagnan & Flli of Padova (The Aragon) [1975] 1 Lloyd’s Rep 628.
96. [2016] EWHC 583 (Comm); [2016] 2 Lloyd’s Rep 170, [14].

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Development of firm hybrid norms would rely on well-phrased questions of law reaching the courts for authoritative determination. With reference to the question of law asked (above), the judge rightly observed that:\footnote{At [14].} “it seems to me that the question of law in the present case does not involve any general point of public importance but turns on a rather narrow question of construction of this specific charter …”

The unfortunate conception of broader definitions and characteristics of hybrid forms of charterparty, including trip time charterparties, as lacking broader interest is perhaps what is holding back the development of a legal framework of any conceptual profundity. While the judge’s decision is a reasonable decision on the facts of the case, there was little scope here to address the wider issues, as a result of the manner in which the question was asked. The position arguably remains that a binary framework of time and voyage charters applies.

### III. Analysis

Clarity in the endgame norms and predictability in the judicial resolution of commercial cases are of value to the contracting parties, who can foresee at the relationship-preservation stage what the endgame will be, and can decide whether repudiation is the appropriate route. This is particularly so as most of these cases end at arbitration so that published judgments are scarce. That being the case, judicial interpretation—and academic scrutiny—of trip time charterparties is an important endeavour which has received surprisingly little attention. In spite of frequent assertions to the contrary, it appears that what is available to contracting parties at the endgame stage is a binary choice between time and voyage charterparties. Where, in general, contract law respects the capacity of the parties freely to determine the norms that will bind them, the options are narrowly limited in negotiating a charterparty.

The outcome of the binary choice will be determined by choices made by the parties, and by the balance of powers they wish to achieve. Unlike with a prenuptial agreement, where no one wishes to consider the termination of the agreement, the end-point of the contract—discharge or redelivery—is of paramount importance from the outset. Thus, under a time charter, the vessel is redelivered at the end of the period by notification from time charterers to shipowners. There is no redelivery of the vessel under a voyage charter, because the vessel has remained at all times under the control of the disponent owner. Instead, at the end of a voyage charter, once the vessel is an arrived ship, laytime starts to run, immediately followed by demurrage, should laytime expire. Dispensing with laytime and demurrage, a time charter for one trip will cover cargo operations at the discharge port end, with hire being due for the duration, and terminate as soon as these operations are completed. It appears likely that this is the impetus behind the development of trip time charterparties: hire commends itself over demurrage by being more straightforward to predict.

On a binary scale, when the parties narrow down the scope of the time charter to encompass just one trip, the contract will in function or factual essence, although not in form or nature, be a voyage charterparty. The result for the charterers is that achieving the status of an “arrived ship” is of much reduced importance, without the spectre of demurrage...

\footnote{At [14].}
looming at the terminus. Although the doctrine of election will not be available to liberate the charterers from the contract, such a bargain may present few advantages to them.

One way or another, the need in practice for a more nuanced scale of charterparty types is evident and has never been disputed. But perhaps the binary framework in the endgame is desirable for its clarity and simplicity? The adoption of the time charterparty framework surrounds trip time charters with certainty in practice. In a time charter, we expect to see all the usual clauses consonant with such a contract—a clause on payment of hire, an employment and indemnity clause, redelivery provisions and so forth. We would interpret the contract in accordance with the nature of a time charterparty as a contract for the hire of a ship with associated services against payment of daily hire, uninfluenced by the function of the contract which is to ship cargo from one port to another. All in all, there would appear to be very little that is contentious about them—at least judging by available case law. This, along with contractual flexibility, is undoubtedly a feature that recommends them to disponent owners and charterers alike.

Where contention arises, the judicial approach is arguably neither decisive nor unambiguous. Some contexts demand definition of the contract: the example of the Rome Convention, and subsequently Rome I, categorising contracts into those for the supply of services and those for the carriage of goods, and giving different outcomes for each is one, and a reference in a bill of lading incorporating terms “as per charterparty”, is another. On this basis alone, there is a need for certainty as to characterisation. In judicial practice, there is a preference for determining cases based on the facts and clauses applicable in the instant case, rather than to defer to the nature or framework of the trip time charterparty and place the clauses and facts in context. While there is judicial deference to the balance of responsibilities the parties are taken to have been seeking to achieve, there is no real ambition in evidence of development beyond the binary standard framework. That approach, while legitimate in each case, is less helpful in developing the law on trip time charterparties, and other hybrids, to a point where their distinctiveness is well understood and idiosyncrasies are given their proper space. Trip time charterparties, among all potential hybrids, are arguably capable of recognition as a distinctive and independent type of contract, with its own nature, standard terms and principles of construction; but there is little evidence of judicial assistance underpinning development in that direction.

Although, undoubtedly, simplicity in the endgame has its virtues where parties intend to default back to that framework, this does not apply to all contractual relationships. Given the frequent assertions that hybrid charterparties are a distinct phenomenon, commercial parties, content with the blank canvas that they require at the relationship-preservation stage, may well find themselves surprised at the lack of fluidity in the endgame. If certainty as to the contents of the law is one of the features of English law that recommends itself to parties to commercial contracts, it may be time for a principled approach to trip time charters, assisting such contracts and other hybrids in becoming an accepted phenomenon at the judicial stage. The distinction between relationship-preserving norms and endgame norms implies that it would be a mistake to think that judicial intervention and elucidation are universally unnecessary in such an independent marketplace: but that is not universally so. Clarity as to the endgame demarcates and delineates the scope for flexibility at the relationship-preservation stage.  

Not least, an approach relying on typified contracts as a starting point would still have to recognise the existence of true hybrids, where the parties have indeed sought to establish their own idiosyncratic framework of liabilities. A starting point for interpretation embracing such bird’s-eye views is arguably of assistance in interpreting the specific provisions—or the absence of expected provisions—in the charterparty. Insofar as typical time and voyage charters are concerned, it very much remains the case that the two types of contract are distinct and separate. This has been a constant assumption, in spite of the ubiquitous literary assertions that some contracts should be considered hybrids.

If it is true that the law is not as settled as it ought to be, this adds weight to the onus on judges to set out the principles according to which cases are decided. Instead of considering the expectations of the parties, reasonable or otherwise, reasoned and assertive explications of the law will not only contribute to a clear and comprehensive statement of the law—to a legal academic, in itself a thing of beauty—but may also encourage innovation. There is currently no standard form of terms designed for trip time charterparties. Perhaps judicial attention and more forceful and principled judicial dicta in trip time charterparty cases could lead the way towards a strengthened framework in this area of law.

On the other hand, judges have thus far been demonstrably reluctant to elaborate on the nature and principles of hybrid frameworks. In the final count, must the conclusion be that hybrids are purely a figment of the contracting parties’ frenzied contract-making imagination? Are they a feature of relationship-preserving norms only, but crystallise mercilessly into the binary endgame norm framework as soon as a dispute arises? If so, that is contrary to what all the textbooks say—but case law appears to bear out the conclusion by actions, if not as a matter of reasoned theory. If not, judicial reasoning on the construction of hybrid charterparties, admittedly along with academic commentary, has some work to do. But a conclusion that endgames are binary should not be a source of unnecessary worry to the judiciary and commentators. As Bernstein reports, the markets may well be on board with this conclusion already: 99

“There is empirical evidence from a variety of contracting contexts that suggests that merchants behave in ways that reflect an implicit understanding of the distinction between end-game and relationship-preserving norms and that they do not necessarily want the RPNs they follow during the cooperative phase of their relationship to be used to resolve disputes when their relationship is at an end-game stage.”

IV. CONCLUSION

The degree to which charterparty norms developed in practice have crystallised into set models appears to be a unique feature within contract law, as is the judicial diffidence observed in recognising a framework idiosyncratic to the parties at the expense of such models. Trip time charters, while recognised in contract-making practice as a distinct phenomenon, appear to have no developed legal framework of their own. They are, in the final tally, merely a quirky form of time charterparty to which in the endgame

the law developed for period time charterparties will be applied. Judicial practice and descriptive academic commentary have been reluctant to recognise them as a third species of charterparty with its own principles and norms, let alone a contract form on a spectrum of hybrids. This is consonant with evidence from other markets where merchants have been observed to recognise that the norms applied in the performance of the contract are distinct from those the parties expect to be applied at the dispute resolution stage. The paradigm offers certainty and clarity, but may be at odds with the expectations of some contract parties who had genuinely expected to operate on a blank canvas and to conclude a hybrid contract. To accommodate such parties, the existing framework would need significant judicial focus and development. At present, such hybrids, including trip time charterparties, are little more than a profession of faith. Can they, with Paul, be justified by faith alone, or will the markets, with James, require them to be justified by works?