

# Analysis of Several Revisions of GENCON 2022

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**Abstract:** The changes in the shipping market have made GENCON 1994, the most widely used voyage charter party, no longer able to meet the balance of rights and obligations between the contracting parties, and also unable to provide sufficient guidance and assistance for businesses which are unfamiliar with British law to avoid legal risks. Therefore, BIMCO has developed GENCON2022 to meet industry needs, but the practical application of GENCON2022 needs to be based on the analysis of changes in GENCON 2022. This article selects clause 1, clause 2, clause 3, as well as the freight clause and strike clause, that have been modified in GENCON 2022, and compares them with the relevant clauses of GENCON 1994 to analyze the consequences of the changes in GENCON 2022 clauses and the new relationship between the rights and obligations of shipowners and charterers behind them, in order to provide some suggestions for the practical use of GENCON 2022. Specifically, clause 1 of GENCON 2022 sets a precedent for shipowners to avoid the confirmation of the Pacific Voyager case; clause 2 sets a new balance between the rights and obligations of shipowners and charterers; The freight clause cancels the payment method of prepaid freight; The strike clause simplifies the rights and obligations of both parties during a strike, provides more economic compensation to shipowners, and reserves the right to use the ship for the charterer in extreme situations where the strike lasts for an unreasonably long time. In conclusion, GENCON 2022 makes up the shortcomings of GENCON 1994, while maintaining the tendency of protecting shipowners' rights. Shipowners and charterers should pay attention to the changes in the terms of GENCON 2022 in order to avoid disputes.

**Keywords:** Voyage Charter Party, GENCON 2022, GENCON 1994, Format Contract

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## 1. Introduction

GENCON 1994 is world-wide the most widely used voyage charter party in the dry bulk sector. However, a lot has happened since 1994. The shipping industry has become much more complex and regulated, with both shipowners and cargo owners being subject to obligations that were never thought of in 1994 [3]. Therefore, The Baltic and International Maritime Council (BIMCO) initiated the revision of the GENCON in November 2017, which lasted for nearly 5 years. It was approved on May 18, 2022, and officially released GENCON 2022 on October 25, 2022. This is the third revision of the contract in 100 years since its first release in 1922.

Since GENCON 2022 has undergone significant changes and can basically be considered as a completely new form of charter, the parties need to take the changes into account

before applying it, so as to reduce disputes to the greatest extent [4]. What are the main changes to GENCON 2022, and what are the rights and obligations between the shipowner and the charterer reflected behind such changes? At present, GENCON 2022 has just been released for about a year, and there are relatively few practical cases of using GENCON 2022. Therefore, the analysis of the above content undoubtedly has certain reference value for the practical application of GENCON 2022.

## 2. Scope of Contract Voyages

The standard format of most transportation contracts stipulates that if the ship fails to arrive at the designated location and prepare for loading within the agreed period, the charterer has the right to cancel the contract, but cannot

demand that the shipowner bear other liability for damages, unless otherwise agreed in the contract or the charterer can prove that the shipowner was intentional. As the termination date is the point at which the charterer obtains the option to terminate the charter party, the shipowner will not assume any responsibility due to the charterer's exercise of this option and does not constitute any contractual commitment of the shipowner. However, this principle developed an exception in the judgement of *The "Pacific Voyager" [2018] EWCA Civ. 2413*, which placed an absolute obligation on the shipowner to start the preliminary voyage (also called "the approach voyage") within the specified time, even if the expected arrival or ready loading time was not mentioned in the charter party [13]. Failure to start the preliminary voyage usually violates the voyage charter party, and the charterer can file compensation for breach of contract and cancel the charter party.

In this case, Lord Justice Longmore quoted the judgement of *Monroe Brothers Limited v Ryan [1935] 2 KB 28* and upheld the judgment of Commercial Court in support of the charterer's request, which will be a welcome one for charterers [2]. The judgement of *Monroe Brothers Limited v Ryan [1935] 2 KB 28* established that where a voyage charterparty contains an obligation on an Owner to proceed with all convenient speed to the loading port and gives a date when the vessel is expected to load, there is an absolute obligation on the Owner to commence the approach voyage by a date when it is reasonably certain that the vessel will arrive at the loading port on or around ERTL or ETA (the "Monroe obligation") [9]. The usual charterparty exceptions thus only apply once the approach voyage is commenced and cannot avail an Owner prior to this point.

Court of Appeal held that the focus of this case was on the need for commercial certainty when considering the risk allocation of the ship before the commencement of performance under the next charter party [1]. If the obligation to perform her service with utmost dispatch is to have any effect, the time of the voyage should be specified. The coverage of the previous voyage clearly helps to enable the parties to decide when it is reasonable to attach the obligation to dispatch as soon as possible. For example, in this case, such time point is likely to be the end of the reasonable unloading time of the previous voyage, so the ship is likely to go to the loading port. Therefore, even if there is no ERL/ETA date in the charter party, the shipowner still has an absolute obligation to start the preliminary voyage. If not done, it will constitute a breach of contract and require compensation for losses.

It can be seen that in this case, the shipowner had an accident that was not the fault of the shipowner before arriving at the port of discharge of the previous voyage, resulting in a delay in the timely delivery of the ship. One of the disputes between shipowners and charterers is that who will bear the risk of delay before the start of the preliminary voyage. The starting date of the preliminary voyage is the boundary point at which both the shipowner and the charterer begin to allocate risks and responsibilities for delays and other possibilities through the application of the terms of the charter party. Prior

to this, the clauses on delay risks and liabilities stipulated in the charter party did not apply; Before the next preliminary voyage, the shipowner has the right to hire the ship for other charter services in a profitable manner, and these terms are the result of bargaining with the other charterer. The subsequent charterer had nothing to do with the charter party [6]. Therefore, in the absence of clear language to the contrary, the allocation of the risk of accidents or delays during the previous charter period should fall on the owners themselves.

GENCON 2022 revised the wording of the contract voyage scope to exempt the shipowner from excessive responsibility.

From the description in clause 1 of the GENCON 1994 contract that "The said Vessel shall, as soon as her prior commitments have been completed, proceed to the loading port(s) or place(s) stated in Box 10 or .....", it can be seen that GENCON 1994 did not include the shipowner's actions before the preliminary voyage in the contract voyage. Generally speaking, the starting point of the shipowner's obligations under a voyage charter party is the beginning of the preliminary voyage. However, the standard format of most transportation contracts stipulates that if the ship fails to arrive at the designated location and prepare for loading within the agreed period, the charterer has the right to cancel the contract, but cannot demand that the shipowner bear other liability for damages, unless otherwise agreed in the contract or proven by the charterer that the shipowner was intentional.

Clause 1 (a) of GENCON 2022 which states "unless prevented or hindered by events beyond the Owners' control," provides the shipowner with an absolute exemption from the obligation not to start the preliminary voyage. That is to say, even if the shipowner obstructs or prevents the start of the preliminary voyage due to events beyond their control, it will not be deemed a breach of contract due to failure to fulfill the obligation of timely dispatch. Shipowners will no longer face significant amount of compensation due to their inability to apply the exemption or limitation clauses in the voyage charter party which happened in *The "Pacific Voyager" [2018] EWCA Civ. 2413*.

The shipowner is obliged to sail the ship to the loading port or to a nearby location where the ship can safely arrive and always remain afloat. In response, GENCON 1994 stipulated that after completing the previous contract, the ship should immediately proceed to the loading port. The description corresponding to GENCON 2022 states that "commence its approach voyage to the port or place stated in Box 10 as soon as its prior commitments have been completed". Compared to GENCON 1994's "immediate start", it is clearly advantageous for the shipowner to be able to complete the preliminary voyage as soon as possible at a reasonable speed. However, the statement of 'commence as soon as possible' also assumes that the shipowner cannot be at fault or unreasonably delayed, otherwise it is difficult to determine 'as soon as possible'.

However, both GENCON 1994 and GENCON 2022 link the obligation of the ship to dispatch as soon as possible to the performance of the previous voyage. Through *The "Pacific Voyager" [2018] EWCA Civ. 2413*, it can be seen that the shipowner's obligation to dispatch as soon as possible, that is,

the start time of the preliminary voyage, does not depend on the performance of the previous voyage contract, but rather on the reasonable time at which the ship can arrive before a certain point before the termination date, whether it is based on the estimated arrival time or the expected loading time, or based on the estimated itinerary of the previous voyage; The starting point of the shipowner's obligation to dispatch as soon as possible under the "Monroe Obligation" is a reasonable period of time inferred from the aforementioned time agreement in the contract, which is not related to the performance of the previous voyage. Here is the question: which is the higher priority between the starting point of due diligence obligations according to GENCON 2022 and the starting point of Monroe's due diligence obligations? The legal precedent above shows that if the shipowner wishes that the starting time of the obligation to dispatch as soon as possible in the current voyage charter party depends on the previous voyage, then clear words must be used to express it. Without clear words, the starting point of the "Monroe Obligation" agreed upon for the obligation to dispatch at full speed takes precedence. The statement in GENCON 2022 to link the ship's obligation to dispatch at full speed with the performance of the previous voyage is invalid.

It should be clarified that the exemption statement " unless prevented or hindered by events beyond the Owners' control..." in GENCON 2022, subclause 1(a), refers to the commencement of the shipowner's actual obligation to dispatch as soon as possible, while the Monroe obligation and GENCON 2022's statement of "the Vessel now at the position...shall...commence its approach voyage to the port r place stated in Box 10 as soon as its prior commitments have been completed" refer to the commencement of the contractual obligation to dispatch as soon as possible. The difference between "actual" and "contractual" need to be distinguished. Therefore, from this perspective, there are still some issues for further discussion regarding regulations in clause 1 of GENCON 2022.

### 3. Owners' Responsibilities

Owner's responsibilities is one of the core clauses of the contract, and is one of the key points of the clause revision. Clause 2 of GENCON 1994 has not made much changes compared to the owners' responsibilities clause of GENCON 1922 [7]. Since 1931, with the entry into force of international maritime conventions such as Hague Rules, The Hague-Visby Rules, and the Hamburg Rules, there have been significant changes in shipowners' responsibilities. GENCON 1976 and GENCON 1994 have not been able to reach a consensus on the revision of this clause.

Clause 2 of GENCON 1994 cannot satisfy the interests of either the charterers or the shipowners: for the charterers, this article previously provided a very broad defense for cargo claims for the shipowners: the owners are not liable unless there is negligence on the part of the higher management of the company; for shipowners, in the case "*The Dominator*", a precedent was established that this clause only applies to the

loss of goods and delay in delivery, without providing protection for other types of pure economic losses, such as not loading goods or delayed arrival at the loading port. The reason for the dispute arising from clause 2 of GENCON 1994 is the expression in the first sentence "to be responsible for loss of or damage to the goods or for delay in...". In the case "*The Dominator*", the judge decided that the type of damage pointed to in the second sentence of clause 2 in GENCON1994 "the owners are not responsible for loss, damage or delay arising from any other cause whatsoever..." should also be interpreted in the same way [8]. The industry has tended to resolve this by adopting a rough and ready solution, simply replacing clause 2 with a paramount clause that introduces the Hague and the Hague-Visby rules. However, it is hard to apply them in the context of a charter party. Such rules were not designed to be incorporated in such a contract, but rather a very superficial approach that fails to provide a balanced solution. In some jurisdictions, it has also been determined whether to provide protection for shipowners to prevent pure economic losses, such as delays when arriving at loading ports or embarking on cargo voyages. GENCON 2022 deleted the expression in the first sentence of clause 2 of GENCON 1994 and stipulated in subclause 2 (b) that shipowners can enjoy the rights, defenses, exemptions, limitations, and limitations of liability of the carrier in the Hague-Visby Rules, and clearly applicable to "loss, damage, delay, or failure in performance of whatsoever nature".

Whilst GENCON 2022 still does not incorporate the Hague-Visby Rules, clause 2 is amended to provide owners with the benefit of the Hague-Visby Rules [10]. Firstly, the clause let the ship owner bear the responsibilities that are equivalent of those that the Hague-Visby Rules apply, provide senior leadership with due diligence, and treat the cargo properly and carefully, and restrict the applicability of the seaworthy obligation to two points in time that really matters: "at the commencement of loading Cargo at each loading port or place " and "at the commencement of each cargo-carrying voyage". Secondly, the ship owner can rely on the rights such as defenses, immunities, limitations that are available to all carriers under the Hague-Visby Rules. A new balance of rights and obligations between ship owners and charterers involves the relationship between the charter party and the contract of carriage of goods, and the charter party includes the contract of carriage of goods. At present, it seems that the ship owner and the carrier are in a balance and each takes what the party needs. For the charters, the exemption scope of the shipowners is narrowed, and the charterers is able to claim a wider range; For shipowners, although they need to undertake more seaworthiness and cargo control obligations, they can obtain a wider range of defenses, exemptions, time, prohibitions, restrictions, etc., which is more effective for protecting their rights.

In addition, the difference between the provisions of the charter and the bill of lading issued has always been a problem. The charter and the bill of lading are not the same contract. The parties of the contracts are different, but the objects of transportation involved are the same. Therefore, when a

dispute occurs, all three parties will be involved. Different regulations will lead to disputes, which is not conducive to the settlement. GENCON 2022 balances the responsibilities between the shipowners and the charterers according to the Hague-Visby Rules, which can reduce the difference between the charter and the bill of lading. For the nominal charterers and the actual carriers, the rights and obligations of both parties to the consignee are consistent. This avoids the inconsistency of rights and obligations, and is conducive to the settlement of disputes.

#### 4. Freight

In GENCON 1994, the freight is paid in cash according to the specified rate and the quantity of goods loaded [12]. The charterer can choose either of two ways to pay the freight. If freight is prepaid, the freight shall be deemed fully earned and shall be non-returnable whether the ship/cargo is lost or not. Unless the freight has been paid to the owner, the owner or his agent need not issue a freight-prepaid B/L. If freight or part thereof is payable at destination, it shall not be deemed earned until the cargo is thus delivered, and if freight or part thereof is payable on delivery of the cargo, the charterers shall have the option of paying the freight on delivered weight or quantity. GENCON 2022 stipulates that the freight shall be paid in full and shall be paid in readily available and transferable funds and free of bank charges except as imposed by the shipowners' bank.

Compared to GENCON 1994, GENCON 2022 requires readily available and transferable funds to ensure uninterrupted payment of shipping costs. In addition, an agreement on lump sum freight has been added, providing a ready-made reference for both parties. It can be seen that GENCON 2022 has changed the way of how freight is earned, and freight can be obtained fully after loading, instead of making a choice between prepaid freight and freight payable at destination like GENCON 1994. In the case of freight payable at destination, if the cargo is lost or damaged during transportation, resulting in loss of commercial value or inability to meet commercial purposes, and cannot be called the original goods, the shipowner has no right to request freight, therefore the risk of freight payable at destination to the shipowner is greater than prepaid freight. Once the prepaid freight is issued, it will be recognized as the income of the shipowner. The earned freight cannot be refunded, and even if the goods or the ship are lost during transportation, the charterer cannot request the shipowner to refund the freight [14]. The regulation of GENCON 2022 is equivalent to canceling the payment form of freight payable at destination, which is more advantageous for shipowners. The shipowner can guarantee their own interests and obtain all of them after the cargo is loaded, ensuring their right to earn freight.

In practice, although shippers choose to prepay the freight, they often pay the freight in full after the carrier issues the bill of lading, and even delay the payment of freight for a long time after holding the bill of lading. This puts the carrier in an awkward situation where the freight cannot be collected. As

for the bill of lading, it has been stated that "freight prepaid". In response to the carrier's freight request, the shipper will defend based on the content of the bill of lading, which is unfavorable to the carrier; If the bill of lading is transferred by endorsement to a third party, even if the carrier has not actually received the freight, according to the provisions of the bill of lading, the carrier has no right to claim the freight from the holder of the bill of lading. Although there is a lien clause on the bill of lading, there is a lack of conditions for exercising the lien, such as the ownership of the goods is transferred to a third party with the transfer of the bill of lading, and it is difficult to exercise the lien on the shipper, etc. To this end, GENCON 2022 subclause 7 (e) solves this problem by giving shipowner or master the right not to issue or endorse a bill of lading showing freight prepaid until the freight has been paid in full [11].

#### 5. Strike

With respect to the shipowner's right to cancel the charter party due to strike, clause 17 (a) of GENCON 2022 stipulates that only at the first or only port or place of loading, If the charterer fails to confirm in writing within 24 hours, the shipowner shall have the option of cancelling the charter party, and Notice of Readiness ("NOR") does not affect this right of the shipowner. Subclause 16 (a) of GENCON 1994 stipulates that the shipowner shall have the option of cancelling the charter party "...when the vessel is ready to proceed from her last port or at any time during the voyage...or after her arrival there." Compared with subclause 17 (a) in GENCON 1994, the application of the shipowner's option of cancelling the contract in GENCON 2022 strike clause is restricted. Moreover, it avoids the problems and difficulties that can arise if the vessel has cargo on board at the time of cancellation. This is obviously beneficial to the charterers and restricts the conditions for the shipowners to exercise the right to cancel the charter party.

For the remedies in the event of a strike, subclause 17 (b) of GENCON 2022 stipulates that the ship owners will be entitled to claim to half demurrage of the agreed rate for the first 10 cumulative days on the demurrage, and thereafter, at the full agreed to demurrage rate. Previously under GENCON 1994, demurrage will be incurred at half rate until the conclusion of the strike [15]. If the delay whether occurring when the vessels on late time or on the demurrage exceed 25 cumulative days, the ship owners will be entitled to claim compensation that is equivalent to the agreed to demurrage rate or the ships then open market value plus bunkers consumed, whichever is the higher for any demurrage that exceeds the 25 cumulative days. The sum of demurrage in the strike clause of GENCON 1994 depends on the location of the ship. If the vessel arrives at or off the port of discharge and the preventing of the discharge can not be settled within 48 hours, the charterers shall have the option of keeping the vessel. Thus will lead to payments of half demurrage until the strike terminates. Then full demurrages shall be payable until the completion of discharging. Or the charterer may, within 48 hours, issue an

order to discharge the goods at a safe port. The vessel shall receive the same freight and all conditions of the charter party and the bill of lading shall apply. If part cargo has been loaded at loading port, the shipowners must proceed, with freight payable on loaded quantity, but can have the liberty to complete with other cargo on the way for their own account.

By comparison, remedies of GENCON 1994 seem to be more diversified. Shipowners can find other cargo to be loaded by himself as a remedy, and the charterer can also change the port of discharge in order to avoid massive time loss and demurrage cost. The strike clause of GENCON 2022 abolished these remedies and replaced them with economic compensation. In terms of the amount of compensation, it is obvious that the amount of demurrage in GENCON 2022 is higher than that of GENCON 1994, which seems to be a balance for the reduction of shipowners' remedies. However, the subclause 3(c) in GENCON 2022 allows the shipowner to load additional goods, or shipowner's own goods, or other charterer's goods in the natural division area of the vessel when the vessel is not fully loaded, and all of which form part of the voyage charter. That is to say, GENCON 2022 originally contains the remedy in GENCON 1994 that only allows shipowners to contract other goods under the strike clause, and the scope of application is wider.

On the whole, GENCON 2022 has streamlined the rights and obligations of both parties when strike occurs, the allocation of risks is determined by the time of occurrence of risks and the time of delay, and ensures that in the extreme circumstances of extremely long strike incidents, the charterers are able to retain use of the vessel, while the shipowners are protected against losses caused by excessive delay, making the clauses more in line with modern industry practices.

## 6. Main Features of GENCON 2022

GENCON 1994 aroused criticisms from the industry for its ambiguities in some of its clauses and expressions [7]. GENCON 2022 clarifies the division of rights and obligations, such as systematizing the clauses, for example, clause 1 arranges the main contents of the charter party into three stages: delivery to the loading point, loading of goods and transportation to the unloading port; Or to adopt a new risk allocation method, such as clause 17, of which modification avoids the uncertainty of its existence.

At the same time, GENCON 2022 will contain a wider range of contents and will be substantially expanded in length. The aim is to translate a large number of English law rules into specific and clear clauses to guide the parties to the lease to conduct negotiations and drafting of the charter party on the basis of standard contract clauses [5]. GENCON 2022 highlights the importance of preventing contract disputes in advance and provides favorable conditions for those enterprises not familiar with British law to negotiate fully and agree in detail on terms to maximize the effectiveness of negotiations and benefits.

Moreover, the revision increases the operability of clauses by respecting and adopting rules formed through long-term

practice and adopting familiar expressions that have been tested through practice, such as the wording of clause 2 of GENCON 2022 on seaworthiness obligations which retains the expression in the Hague-Visby Rules.

## 7. Conclusion

As the most widely used voyage charter party in the industry, GENCON has always been regarded as a standard contract favoring the protection of the interests of shipowners. From the analysis of this article, the amended GENCON 2022 expands the scope of voyages, balances the responsibilities between shipowners and charterers with the Hague-Visby Rules to reduce the difference between charter parties and bills of lading, reforms the calculation of freight and the strike clause compensates shipowners more. These amendments cover the shortcomings of GENCON 1994, clarifies the rights and obligations of shipowners and charterers and still tend to protect the rights of shipowners. As the industry has undergone tremendous changes in regulatory and operational standards, and shipowners have now assumed greater responsibility for the environment and safety, it is reasonable in protecting the rights of shipowners. When negotiating, shipowners and charterers should pay special attention to the scope of application of seaworthiness obligations, the form and calculation of freight payment, and the risk distribution of strikes, so as to avoid disputes arising from the changes in the terms of GENCON 2022.

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## Conflicts of Interest

The authors declare no conflicts of interest.

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