



**LEGAL PROBLEMS ON DEMURRAGE IN
VOYAGE CHARTERS**

BY

MISS WEENA AKARACHOTIKAVANITH

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF
LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)**

**FACULTY OF LAW
THAMMASAT UNIVERSITY**

ACADEMIC YEAR 2015

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THESIS

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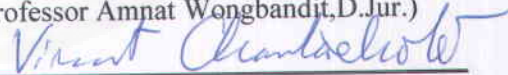
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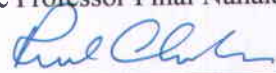
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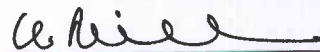
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ABSTRACT

Demurrage is a term concerned with delay during the terminal operations, and delays during the voyage, before the ship reaches her destination. The current view is that demurrage is liquidated damages for a failure to complete loading and discharging in the allowed laytime which constituted a breach of charter. Maritime transport has the importance to Thailand, however there is no specified Thai law concerning demurrage. Therefore, when an issue concerning demurrage arising from maritime transportation is submitted to Thai court, there are problems in Thai legal system concerning the application of charter contract, status of demurrage, difference of each legal status, burden of proof. In particular, the crucial problems are whether the Thai court is entitled to reduce demurrage agreed by the parties and why, whether Thai court is entitled to grant the interest, lastly, if the parties do not agree on demurrage, whether the charterer is entitled to ask for demurrage and why. Moreover, in this thesis, we will look at demurrage in an Unfair contract perspective according to Unfair Contract Act B.E. 2540. Whether the agreement of the parties to pay demurrage is deemed as an unfair contract. This new image of perspective will

reduce the burden of the consumer and the charterparty who has the liability to pay for demurrage.

Keywords: Demurrage, Voyage charter, Voyage, laytime



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Thank you,

Miss Weena Akarachotikavanith

Thammasat University

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CHAPTER 1

INTRODUCTION

1.1 Background

Demurrage is a technical term in maritime transportation which means a sum agreed by the charterer pay to be paid as liquidated damages for delay beyond a stipulated or reasonable period of time for loading or unloading.

The Demurrage concept is one of the aspects of the Maritime Transportation, particular, the law relating to *voyage charters*. For foreign law especially in English law, demurrage is becoming more important to maritime transportation all over the world. For these reasons, lawyers or those involving in Maritime transportation continuously pay more attention to demurrage both practically and legally.

The development of this branch of the law has been closely allied to the historical and social changes that took place as sail gave way to steam, and more recently as improved methods of communication have given greater central control to those controlling the commercial adventure, which voyage charter still represent. It is perhaps one of the few remaining areas of English common law in which there has been little intervention.

The establishment of standard forms of charter, the meaning of almost each word of which has been the subject of judicial interpretation, might have resulted in a statistic law, but fortunately that has not been so and the law continues to develop to meet present and future needs. The increasing use of additional clauses to charterparties, some of which are not always accidentally ambiguous, will also no doubt to be continued to provide much material for future litigation.¹

Whilst most of the cases relating to demurrage arise in the context of the charterparties, it must always be remembered that the law relating to these matters also plays an important role in contracts, such as sale contracts.

¹ John Schofield. **Laytime And Demurrage**, 1 (5th edition London Singapore. 2005)

Demurrage on English American law is always a contractual creation, while in other systems it may be provided by law.²

To understand the background of demurrage, we need to understand the principle of the Charter contract. Basically, there are two parties to the contract which are a freighter and a carrier. The carrier has a duty to carry goods from one place to another. The freighter's main obligation is to pay the freight. Anyhow, the freighter need not be the goods owner or the shipper who delivers the goods nor the consignee to whom the goods are consigned at the port of discharge, or even the receiver who has to pay for the freight. He may be the third party who charters the ship for carrying goods belonging to other persons.³

Under *Voyage charter*, a vessel is operated for a single voyage. The person who charters the ship is known as voyage charterer; the payment is called freight and the contract a voyage charter-party.

This form of charter is running within tramp traffic (free traffic).The charterer may be the person owning the cargo but may also charter the vessel for someone else's account. The "owner" of the vessel from whom the actual voyage charterer charters the ship may himself be a time charterer or even a voyage charterer who sub-charters (sub-lets) the ship. In case the owner is not the registered owner of the ship, he is normally described as "time chartered owner" or "disponent owner". Thus there may be a chain of charter parties which must all be regarded as separate and distinct.⁴

For a voyage charter, the owner retains the operational control of the vessel and is responsible for the operating expenses such as port charges, bunkers, extra insurance, taxes, etc. The charter's costs are usually cost and charge relating to the cargo.

From a practical point of view, a voyage charter means that the owner promises to carry on board a specific ship a particular cargo from one port to another. The vessel

² Hugo Tiberg. **The Law of Demurrage**, 530 (3rd edition London Stevens & Sons, 1979)

³ *Id* at 4.

⁴ Lars Gorton, Rolf Ihre, Arne Sandevam. **Shipbroking And Chartering Practice**, 82 (2nd edition, Lloyd's Of London Press Ltd., 1984)

shall arrive at the first loading port and be ready to receive the cargo on a certain day or within period of time.

Where the charterer carries out the loading and/or discharging, the parties generally agree that he will have a certain period of time at his disposal for the loading and discharge of the vessel, the so called *Laytime*. The laytime is a reflection of the basic idea of voyage charter, that the owner, who is operating the ship, will be liable for delay in connection with the transit, whereas the charterer may be liable (or partly liable) for delay in connection with the loading and discharging. If the charterer fails to load and/or discharge the vessel within the laytime specified, he has to pay compensation for the surplus time used, this so-called *Demurrage*. On the other hand, if the charterer saves time for the ship by carrying out of his undertakings more quickly than agreed, he may be entitled to claim compensation, which is called *Despatch Money*.⁵

Demurrage, in its strict meaning, is a sum agreed by the charterer pay to be paid as liquidated damages for delay beyond a stipulated or reasonable period of time for loading or unloading. Where the sum is only to be paid for a fixed number of days, and a further delay takes place, the shipowner's remedy is to unliquidated "damages for detention" for the period of delay. The phrase "demurrage" is sometimes loosely used to cover both this meaning.⁶

The practical functions of demurrage are for the shipowner's immediate benefit and for the charterer's benefit. The whole purposes of demurrages are⁷ (1) a reparative function for the carrier when his ship has suffered delay, (2) a retentive function (that of the preventing the premature abandonment of voyages) and (3) a punitive and incentive function for the charterer to pursue duties diligently.

⁵ Lars Gorton, Rolf Ihre, Arne Sandeværn. **Shipbroking And Chartering Practice**, 81-84 (2nd edition, Lloyd's Of London Press Ltd., 1984)

⁶ Stewart C. Boyd, Andrew S. Burrows, Davidp- Foxton. **Scrutton on Charterparties and Bill of lading**, 298 (20th edition London: Sweet and Maxwell 1996)

⁷ Hugo Tiberg. **The Law of Demurrage**, 40-41, 95 (3rd edition, London Stevens & Sons, 1979)

1.2 Objectives

In Thailand, there are not any laws or regulations stating or governing demurrage. However, any person involving in maritime transportation has to abide by the clauses of the charter contract, bill of lading, or intention of the charter parties, for which demurrage is normally mentioned. Also Thai Supreme Court has rendered the verdict relating demurrage for years. Therefore, the objectives of this thesis consist of the following;

Firstly, to explain demurrage in various contents which are (1) charter parties, (2) laytime, and (3) late layday, including legal status, enforcement legal procedure and effect of demurrage in foreign laws, which This thesis will focus on USA , UK , and Europe comparing to Thai legal system.

Secondly, to analyze and criticize legal principles and legal procedure relating to demurrage in Thai court, including legal status of demurrage for Thai legal system whether it is penalty, or damages. Also study the legal consequences of earnest, penalty, or damages comparing to foreign laws.

Lastly, to find a solution and legal procedure in order to apply demurrage in Thai court.

1.3 Hypothesis

The laws remain unclear as to (1) the status of demurrage whether it is penalty, or damages and (2) legal treatment of demurrage in relation to fairness to contractual parties. So, I propose this is solution that would help Thai court solve the problems.

1.4 Scope of study

The study of this thesis will cover the application of demurrage in Thai court which Thai law is applied. By analyzing and criticizing legal principles, legal procedure and legal status of demurrage in Thai court comparing to foreign laws for example England, America and Europe.

This thesis will focus on legal principle and legal procedure relating to demurrage in Thai court, including legal status of demurrage for Thai's legal system whether it is earnest, penalty, or damages. Also study the legal effect of earnest, penalty, or damages, in order to understand legal consequences of the demurrage concept in Thai court.

1.5 Methodology

This thesis will be conducted based upon documentary research which includes articles, books, and electronic data. Domestic and foreign laws and court decisions of certain countries will be mentioned to the extent of necessity of comparative aspects.

1.6 Expected Results and Recommendations

1. To provide information and legal analysis concerning demurrage.
2. To provide legal procedure in Thai courts in relation to demurrage.
3. To provide recommendations and suggestions in order to apply Thai law to demurrage.

CHAPTER 2

HISTORY, DEFINITIONS AND NATURE OF LAYTIME AND DEMURRAGE

When the shipowner, either directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose, the arrangement is known as a contract of the affreightment. Such contracts may take a variety of forms, although the traditional division is between those embodied in the charterparties and those evidenced by the bills of lading. Where the shipowner agrees to make available the entire carrying capacity of his vessel for either a particular voyage or a specified period of time, the arrangement normally takes the form of the charterparty. On the other hand, if he employs his vessel in the liner trade, offering a carrying service to anyone who wishes to ship the cargo, then the resulting contract of carriage will usually be evidenced by the bill of lading.

2.1 History of Laytime and Demurrage

In olden times freight contracts were not constituted as elaborately as present with clauses precisely regulating the responsibility for all delay. Time was not a significant factor which it has since become, and shipowners were familiar to have to wait for the favourable winds or tides as well as for the receivers of the cargo who were late in making themselves known. Liability for delay to the ship caused the damages in much the same way as delay in delivering the goods or in leaving the port might render the carrier liable for delay caused to the freighter.⁸

However, the characteristic of loading and discharging situation was recognized in some early codes. The so-called *Code of Rhodos*, dating from seventh or eighth century, allowed the freighter a ten days period of grace beyond the moment fixed for the departure in the charterparty. In *The statue of Duke Zenon*, from 1225, it was

⁸ See e.g. Christian Danish Code, Chapter II, section 3. Cf. also Judgements d'Oleron, article 22 and 23

provided that for the port of discharge, the merchant who did not collect his goods within the day following upon *notice of readiness* (NOR) to discharge must pay a fixed sum of money (originated from “libras tres”) for each following day, unless he had been prevented by unsuitable weather. This is the real demurrage stipulation for a compensation liquidated as a fixed sum regardless of the actual loss suffered by the carrier.

Germany history has described the earlier development of the contract of affreightment in the in northern Europe. At the beginning, there was not a clear division between freighters and shipowners because the merchants used to carry their goods in their own ships and travel along with the ships and make their own bargains with the sellers and buyers abroad. Until the twelfth century, it became common to charter the ships or part of the ships for carriage of goods. At first, the charterparty used to be oral, but later it became common to fix the agreed terms in writing through insertion of the contract terms into the *City Book*, and later by means of the contract, it has developed into *Charterparty* (originated from “carta partita”)⁹

Because of the development of the freight contract, it became significant to stipulate the time that the freighter should have at his operation for loading or discharge into the contract, and thus the provisions for the loading and discharge periods can sometimes be found in the *Hanseatic charterparties*.

Subsequently, such agreements were recognized by the *Wisby Maritime Code*. While Section 38 of the Code provides that delay caused by the master’s failure to take advantage of a fair win gives a right to ordinary damages. Moreover, Section 37 of the same Code, dealing with the charterer’s delay in loading, allows the compensation “as agreed” for all delay of more than fifteen days beyond the date fixed for departure in the contract.¹⁰

And later, the *Swedish Maritime Code* of 1667 mentions primarily to what might have agreed in the contract for the detention situation and in the second part provides for the compensation to be agreed between the parties or to be fixed as “good

⁹ Hugo Tiberg. **The Law of Demurrage**, 10 (3rd ed. London Stevens & Sons, 1979)

¹⁰ *Id* at 11.

men who are familiar with the matter” deem to be equitable. The days that the ship may be kept on demurrage are referred to in the code as “lay days”

In medieval England, the admiralty courts administered civil law which applied to the cases in the continent and other part of Europe. But the development from medieval times was affected by the conflict of jurisdiction between the admiralty courts and the common law courts.

Although the gradual growth of the common law had been largely unaffected by the contemporary legal development in other countries, but in maritime matters, the contracts as well as the customary ways of trade could not avoid the influence of the pattern followed in the other countries. Likewise, the common law courts were now faced with the problems similar to those met abroad. The time has come when the shipowners felt that the charterparty should provide the time that they had to wait for the cargo to be delivered or received and also for the payment due for delay in excess of this period. So, the courts created the process of solving these contractual problems by creating their own law of demurrage. In doing so, the effect of these agreements were a strict liability characteristic of the fixed time obligation in English law. On the other hand, when the demurrage was not provided, the contract was interpreted like other commercial contract. The courts could not borrow rules of a preconceived laytime or a fixed demurrage rate from the standard pattern usually found in the contracts. The courts would determine from the content of the contracts themselves with implying the duty on both sides of being reasonably diligent in the performance of their contractual functions. Thus, to the present day, the charterer who has delayed the operations by his fault or lack of diligence can be liable for the delay, and his liability is in damages, intended and measured as a fair compensation for the shipowner’s loss of time.¹¹ While in the codified system, the statutory rules has already be provided, but the rules in the common law courts have instead remained rules of the interpretation, fair attempts to find a probable intention of the parties, gradually solidified into norms of increasing rigidity but always liable to be revised through the method of distinguishing when their applicability becomes doubtful in individual cases.

¹¹ *Id.*, at12.

The American courts assigned the Federal courts to be responsible for interpreting the matters relating to charterparties dealing with “in Admiralty” which was dominated an influence in this particular area of the Admiralty jurisdiction from the English court’s decisions.

In France, the development of the provisions relating to maritime transportation has stipulated in the *Ordonnance de la Marine* of 1681. However, the law did not contain any provisions relating to demurrage, except a reference to local customs. And the same method was followed in the *Napoleonic commercial code* of 1807 and thus found its way into other codifications built upon the Napoleonic codes. In the Latin law systems, comprising of France Belgium and Italy, local customs are a particularly important source of law. Lately, in the year of 1942, Italy has enacted a *Code of Navigation* containing a more extensive regulation of the demurrage area.¹²

The national Scandinavian legislation was not attempt to reveal a real intention of the parties, but was aiming to the solution taken to be beneficial of all relevant parties. A solution based upon the experience and practical arrangement or in other words largely upon common contractual formulas. Therefore, the Swedish Maritime Code of 1667 contained provisions for laytime and damages for detention, as provided in Chapter V of the *Skiplego Balk* that “a person who ‘hires or freights’ a vessel must jay the agreed freight whether he loads the vessel wholly, in part, or not at all. If he has chartered part of the ship only, the master, if he is otherwise ready to sail, is not obliged to wait beyond the time which has been agreed for the delivery of the goods but may sail with the first favourable weather and still claim his freight. This arrangement was prompted partly by the ship’s owner interests, but also by the interest of other freighters, and it was not suitable.” In these cases, the laws provided that if there is absence of contractual stipulation, for fifteen “lay days” over and beyond the day that had been agreed for the completion of the loading, but during this time the shipowner was entitled to demand the compensation either by the agreement of the parties or as a

¹² *Codice della Navigazione* of 1942, section 444 – 449

special arbitrators determination. After the expiry of this legal demurrage period, the ship was free to sail.¹³

As written in the Code, it could be assumed that a certain term was set for the delivery of the goods, and this was probably the manner in which the contracts generally regulated the matter in prior times. Since, the period for loading was less importance and the time limit for discharging could not be fixed because it was not known how long the ships would be on her voyage, therefore, it was a thought desirable to provide a definite laytime for discharging operation. The time described was eight days for affreightment within the Baltic and fourteen days for affreightment outside the Baltic. For the delay exceeding this time period, the damages were due in the same way as was the case the case at the port of loading, however, the delay was not due to the Act of God.

The Danish and Norwegian Codes of the same time did not containe the similar provisions as provided in Scandinavian legislation. The fourth book of the Code of Christian V provided that the freight must be paid whether the freighter loaded the ship or not, and the shipowner must compensate the freighter for the delay exceeding the agreed time, unless the delay was due to the Act of God.¹⁴

Furthermore, the Norway and Sweden was elaborated the legal laytime as in the statutory scale of the lay times. The origin of this system was still in the doubt, but it was first found in Swedish drafts for new legislation of 1837 and 1847 which it might be developed from the old Swedish rules with the fixed time for discharge. This system was adopted the terminology for the fixed period of time that the ship had to wait for loading and discharge without payment which was called lay days. This system was adopted in Norway in 1860 and in Sweden was in the new Maritime Code of 1864. For Denmark the statutory scale was not introduced until 1892.

In addition, in Swedish legislation system, there was the Swedish Code of 1864 embodied traits from the German Commercial Code of 1863. The Code provided the matters which the parties failed to provide in their contract. The division between the

¹³ Hugo Tiberger. **The Law of Demurrage**, 14 (3rd ed. London Stevens & Sons, 1979)

¹⁴ Swedish Code, section 78

obstacles “on the ship’s side” and the obstacles in the charterer’s performance of his obligations relating to loading or discharge is carried though. The number of lay days is determined according to the fixed scale. And the number of days on demurrage (over lay days) is determined as “in no case to exceed” one half of lay days. The compensation for “over lay time” is also fixed by express provisions.¹⁵

In conclusion, laytime and demurrage have been spotted by many countries over the years, for example, Europe, England, America, France, Norway, Sweden, Germany and Scandinavia. These countries have an attempt to stipulate the law regarding laytime and demurrage in order to compensate the shipowners when there was the delay occurred beyond laytime, and also to protect the interest of the shipowners. For these reasons, these countries had the different ways in providing the provisions on laytime and demurrage which depended on their legislative system, for example, Swedish and Norwegian had German Code as their law model, or in America was influenced by the English court’s decisions.¹⁶

2.2 Definitions and Objectives of Demurrage

Demurrage is a term concerned with delay during the terminal operations, and delays during the voyage, before the ship reaches her destination.¹⁷

In origin, however, demurrage did not mean a sum of payable for breach of contract, but ‘a sum payable under and by reason of the contract for detaining a ship at the port of loading or discharge beyond the allowed time.’¹⁸ In *Lockhart v. Falk, Cleasby B*¹⁹ said:

“The word demurrage no doubt properly signifies the agreed additional payment for an allowed detention beyond a period with specified in or to be collected from the instrument: but it has also the popular or more general meaning of compensation for

¹⁵ Hugo Tiberger. **The Law of Demurrage**, 15 (3rd ed. London Stevens & Sons, 1979)

¹⁶ *Id.*, at 16.

¹⁷ *Id.*, at 529.

¹⁸ John Schofield. **Laytime And Demurrage**, 343 (5th ed. London Singapore. 2005)

¹⁹ *Lockhart v. Falk* (1875) LR 10 Ex 132, at 135

undue detention; and form the whole of each charterparty concerning the clause in question we must collect what is the proper meaning to be assigned to it.”

On the other hand, in *Harris v. Jacobs*²⁰, having said in the course of argument that demurrage is an elastic term, Brett MR said in his judgement:

“Demurrage is the agreed amount of damage which is to be paid for the delay of the ship caused by a default of the charterers at either the commencement or the end of the voyage.”

Ten years later, in *Lilly v. Stevenson*²¹, Lord Trayner took the view:

“Days stipulated for by the merchant on demurrage are just lay days, but lay days that have to be paid for. If the charterparty provides that charterer shall have ten days to load cargo, and ten days further on demurrage at a certain rate per day, the shipper has twenty days to load, although he pays something extra for the last ten, loading within twenty days is fulfilment of the obligation to load...”

The Court of Appeal in *Steel, Yoing & Co v. Grand Canary Coaling Co*²² took a similar view, Collins MR saying:

“...it was also contended that the charterparty was broken by the vessel being allowed to go on demurrage; but this is not so, for the payment of demurrage is merely a payment for the use of the ship, and not damages for a breach of charterparty”

And in the same case, Mathew LJ said:²³

“There is no ground for suggesting that the obligation to pay demurrage is by way of damages for a breach of charterparty. It is merely a payment for use of the ship.”

In *Inverkip Steamship Co v. Bunge & Co, Scrutton LJ*²⁴ suggested that both views were tenable, saying:

²⁰ *Harris v. Jacobs* (1885) 15 QBD 247, at 251

²¹ *Lilly v. Stevenson* (1895) 22 Rett 278, at 286

²² *Steel, Yoing & Co v. Grand Canary Coaling Co* (1902) 7 AC 213, at 217.

²³ *Id.*

“The sum agreed for freight in charter covers the use of the ship for an agreed time for loading or discharging, known as ‘the lay days’, and for the voyage. But there is almost invariably a term in the agreement providing for an additional payment known as demurrage for detention beyond the agreed lay days. This is sometimes treated as agreed damages for detaining the ship, sometimes as an agreed payment for extra lay days.”

Many of the terms used have been the subject of consideration by committees comprising representatives of Bimco, CMI, FONSARBA, GCBS and INTERCARGO and this has resulted in the production of two documents, Charterparty Laytime Definitions 1980, as amended, and Voyage Charterparty Laytime Interpretation Rules 1993.²⁵

The Voylayrules 1993 define demurrage in rule 24 saying:

“Demurrage” shall mean an agreed amount payable to the owner in respect of delay to the vessel beyond the laytime, for which the owner is not responsible. Demurrage shall not be subject to laytime exceptions.

In Gencon Charter (Uniform General Charter 1976 provides the possibility of a limited period on demurrage as did in many early charters, and if the vessel is further delay beyond that, then the shipowner’s claim is one for detention.²⁶ However in 1994, Gencon Charter has been revised and this resulted that the fixed time limit on demurrage was ejected.

Later on, in *Union of India v. Compania Naviera Aeolus SA (The Spalmatori)*²⁷, Lord Guest said:

“Lay days are the days which parties have stipulated for the loading or discharge of the cargo, and if they are exceeded, the charterers are in breach; demurrage

²⁴ *Inverkip Steamship Co v. Bunge & Co (1917) 22 AC 200, at 204*

²⁵ Julian Cooke, Timothy Young, Andrew Taylor, John Kimball, David Martowski, Leroy Lambert. 351 **Voyage Charters** (3rd edition Lloyd’s Of London Press Ltd.)

²⁶ John Schofield. **Laytime And Demurrage**. 344 (5th ed. London Singapore. 2005)

²⁷ *Union of India v. Compania Naviera Aeolus SA (The Spalmatori)* (1964) AC 868, at 899.

is the agreed damages to be paid for delay if the ship is delayed in loading or discharging beyond the agreed period.”

In *Dias Compania Naviera SA v. Louis Dreyfus Corporation*²⁸, Lord Diplock said:

“If laytime ends before the charterer has completed the discharging operation he breaks his contract. The breach is a continuing one; it goes on until discharge is completed and the ship is once more available to the shipowner to use for other voyages.”

In the *oriental Envoy*, Parker J said of demurrage:²⁹

“In my view, however, while demurrage can no doubt be regarded as being in the nature of damages, for detention, it is not be equated with such damages. It is very different. It is a simple contractual obligation by the charterer to pay a certain sum if he fails to complete discharge within the stipulated laytime, the commencement and the calculation of which is itself a matter of agreement.”

However, that view of demurrage as a debt, is clearly incompatible with what was said five years later by Lord Brandon in the House of Lords in *The Lips*,³⁰ who put it this way:

“I deal first with what demurrage is not. It is not the money payable by a charterer as the consideration for the exercise by him of a right to detain a chartered ship beyond the stipulated lay days. If demurrage were that, it would be a liability sounding in debt. I deal next with what demurrage is. It is a liability in damages to which a charterer becomes subject because, by detaining the chartered ship beyond the stipulated lay days, he is in breach of his contract. Most, if not all, voyage charters contain a demurrage clause, which prescribes a daily rate at which the damages for such

²⁸ *Dias Compania Naviera SA v. Louis Dreyfus Corporation* (1978) **WRL** 1 261, at 263.

²⁹ *Transamerican Steamship Corporation v. Tradax Export S.A. (The oriental Envoy)* (1982) 2 **Lloyd's Rep** 266, at 271.

³⁰ *President of India v. Lips Maritime Corporation (The Lips)* (1987) 2 **Lloyd's Rep** 311, at 315. See also *Odfiell Seachem A/S v. Continentale Des Petroles et D' Investissements and Another* (2005) 1 **Lloyd's Rep** 275, at p. 280.

detention are to be quantified. The effect of such a claim is to liquidate the damages payable: it does not alter the nature of the charter's liability, which is and remains a liability for damages, albeit liquidated damages. In the absence of any provision to the contrary in the charter the charterer's liability for demurrage accrues *de die in diem* from the moment when, after lay days have expired, the detention of the ship by him begins."

The current view is that demurrage is liquidated damages for a failure to complete loading and discharging in the allowed laytime which constituted a breach of charter.

John F Wilson, emeritus professor of law at the institute of Maritime Law, University of Southampton, has written in the book called "*Carriage of Goods by Sea*" sixth edition published in 2008 saying:³¹

"If the charterer detains the vessel beyond the agreed lay days, then he is in breach of the contract. The majority of charterparties include the clause providing that they may retain the vessel for additional days in order to complete the loading or discharging operation on payment of a fixed daily amount, known as demurrage."

Whilst, strictly speaking demurrage is the money payable for time in excess of the allowed laytime, it is often used to describe the period during which such money is payable. The Laytime Definitions for Charter Parties 2013 also provide that:

"On Demurrage" means that if laytime has expired, the charterer has to pay the amount of money to the shipowner. Such time ceases to count once the berth becomes available. When the vessel reaches a place where she is able to tender Notice of Readiness, laytime or time on demurrage resumes after such tender and, in respect of laytime, on expiry of any notice time provided in the charterparty.

"Demurrage" means that an agreed amount payable to the owner in respect of the delay to the vessel once the laytime has expired, for which the owner is not

³¹ John F Wilson. **Carriage of Goods by Sea**, 74 (6th edition, Pearson Education Ltd., 2008)

responsible. Demurrage shall not be subject to exceptions which apply to laytime unless specifically stated in the charterparty.

2.3 Present Sources of Law Relating to Demurrage in Foreign Countries

Causing by the Brussels convention on the ocean carrier's liability, which came to be known as the Hauge rules, the Scandinavian Maritime Codes were revised in 1936 – 1939. These particular enactments entered into force in Swedish Act 1938, Danish Act 1937, Norwegian Act 1938, and Finnish Act 1939.³² The substantial conformity in the affreightment rules was then achieved. However, when it came to demurrage, the fixed legal scale of laytime and demurrage has been abandoned in principle and retained only for smaller ships, for which it is considered to fulfill a useful function. Provisions in the Codes of importance in demurrage connections are found in Sections 77 – 97 and 105 – 115.

In Scandinavia, the legislative history behind new legislation is always available for determining the effect of the enactment; they are regarded as a complementary source of law. In Sweden, the legislative history consists of the *report of the expert committee* which has prepared the draft (the report is referred to in the text as *Committee Reports*) and the *Minister's exposition* of the finished proposal, the comments of the *Council on Legislation*, which is a committee consisting of members of the Supreme Court, and the observation of the *Law Committee*. However, parliamentary debates are not generally recognized as the source of law.

The German Commercial Code was adopted in 1863 and was readopted in the modified form in 1897. Its provisions of essential for demurrage situations are found in Sections 505 – 606. The Code is similar to the Scandinavian codes, though somewhat less rigid than the Swedish Code of 1864. Although, the old provision from Hanseatic times remains, that the time on demurrage shall be fourteen days (fifteen days in the Wisby and Lubeck Codes), the lay time is determinable, when no customs or local regulations exist, according to the circumstances of the case. The fixed time of demurrage is less serious because the shipowner is always entitled to be compensated in

³² Lars Gorton, *Nordic Law in the Early 21st Century – Maritime Law*, <http://www.scandinavianlaw.se/pdf/50-6.pdf> (last visited 25 September 2015)

the form of demurrage. The demurrage is not fixed, but is determined in fairness by the judge. A revision of the Commercial Code has long been in the program. And the latest, Commercial Code in the revised version was published in the Bundesgesetzblatt (BGBl., Federal Law Gazette), Part III, Section 4100-1, as amended by Article 1 of the Act of 20 April 2013.³³ Provision relating to demurrage is found in Section 530.

However, the law which is more rigid is the law of Interior Waterways Transportation (Binnenschiffahrtsgesetz). It covers transportation on board barges and other crafts used in the rivers and canals. Provisions of demurrage are here found in Sections 27 – 57 and contained fixed scales both for laytime and demurrage time and rate.

While Italy has a new Code of Navigation from 1942, the legal provisions in French and especially Belgian law in the field of demurrage are still very limited. Particular weight is in practice given to the writings of legal scholars, while the force precedents is considerably less than in most system; there is a general lack of consistency in the practice of the courts, and a whole series of cases is usually required to show with reasonable certainty that a particular tendency has become so pronounced that it can be regarded as “law”. Although the Latin law systems have a common origin, the important diversities in the theoretical conception of demurrage often result in varying solutions.

Holland has a comparatively modern Maritime Code from 1922. Provisions relating to demurrage are found in Section 517 and 518. The Code is essentially Germanic in type but shows more wariness in dealing with contract terms than both the German and especially the older Scandinavian Codes.

England and America have gone their own ways, without any legislation of the field of demurrage. The England law has been rapidly developed through a vast number of precedents, promptly noted and commented upon in the law reviews, especially from the latter part of the ninetieth century onwards. The law of Scottish is practically similar in the demurrage field, and Scottish cases are frequently cited in support of some of the

³³German Federal Ministry of Justice and consumer protection, http://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html (last visited 25 September 2015).

leading principles of the English law of demurrage. Cases from other parts of the Commonwealth also have a strong persuasive force on English courts.

In the United States, the administration of this area of the law lies almost exclusively with the Federal courts. The development of the law has on the whole been rather erratic and unsure and has never received the stimulating comment in law reviews and legal treatises that has been the boon of the English case law development. The publication since 1923 of the *American Maritime Cases* is valuable for the student but does not seem to have contributed much to the creation of consistent principles in the field of demurrage.

Commercial arbitration is the normal fate of an American demurrage dispute today, and the bulk of recent demurrage cases reported in the *American Maritime Cases* are arbitration decisions. Although this tendency certainly has not improved the standard of the consistency of the American law of demurrage, it must be recognized that the disputes will generally be resolved in this way, and that arbitration decisions, in arbitration cases, at least, are a source of law that must not be ignored. Whenever they are cited in the text, their character of arbitration decisions will however be noted.

CHAPTER 3

THE LEGAL STATUS AND THE APPLICATIONS OF DEMURRAGE UNDER FOREIGN LAWS

3.1 Present Sources of Law

The Scandinavian Maritime Codes were revised in 1936 – 1939 (Swedish Act 1936, Danish Act 1947, Norwegian Act 1938, Finnish Act 1939), and substantial conformity in the affreightment rules was then achieved. The Codes represent a step towards a somewhat freer treatment of the contract of affreightment. The fixed legal scale of lay time and demurrage has been abandoned in the principle and retained only for smaller ships, for which it is considered to fulfil a useful function. Provisions in the Codes of importance in demurrage connections are found in sections 77 – 97 and 105 – 115.³⁴

In Scandinavia the legislative history behind the new legislation is always available for determining the effect of the enactment; they are regarded as a complementary source of law. In Sweden the legislative history consists of the report of the expert committee which has prepared the draft (the report is referred to the text as Committee Reports) and the Minister's exposition of the finished proposal, the comments of the council on legislation, which is a committee consisting of members of parliamentary debates are not generally recognized source of law³⁵.

As the laws of the Scandinavian countries are based upon uniform legislation (and the differences even before 1936 were not great) there is also a high degree of conformity in the case of law that supplements the legal regulation. The maintenance of this conformity has been facilitated by the existence of a common system of law reports in maritime matters from all the Scandinavian countries. These reports, Nordiske

³⁴ Hugo Tibergh. **The Law of Demurrage**, 6 (3rd ed. London Stevens & Sons, 1979)

³⁵ **Scandinavian studies in Law**, vol. 1 (1957) at 168 – 171

Domme i Sjöfartsanliggander (cited in the text as ND with the year of the volume and the page of the decision) have now been issued regularly since the turn of the century.³⁶

All these matters, common legislation, common law reports, as well as a largely common legal theory and general background, have contributed to create high degree of conformity which, certain reservations, may justify the use of the term Scandinavian law of carriage by sea in Denmark, Finland, Norway and Sweden. The fact that many rules of basic contract law as well as the law relating to the sale of goods are also based upon such common legislation has further facilitated the process of assimilation.

The German Commercial Code was finally adopted in 1863 and was readopted in a modified in 1897. Its provisions of the importance for the demurrage situations are found in section 560 – 606. The Code is similar to the Scandinavian codes though somewhat less rigid than the Swedish Code of 1864. Thus although the old provision from Hanseatic times remains, that the time on demurrage shall be fourteen days (fifteen days in the Wisby and Lubeck Codes), the laytime is determinable, when no customs or local regulations exist, according to the circumstances of the cases. The fixed demurrage time is less serious because the ship is then always entitled to compensation in the form of demurrage. The demurrage rate is not fixed but is determined in the fairness by the judge. A revision of the Commercial Code has long been on the program, latest in 1940, when, however, its realization was delayed by the war effort.

More rigid instead, is the law of Interior Waterways Transportation (*Binnenschiffahrtsgesetz*), covering transportation on board barges and other craft used on rivers and canals. Provisions relating to demurrage are here found in section 27 - 57 and contain scales both for laytime and for demurrage time and rate. There is apparently a need for more detailed provisions regarding the smaller tonnage for which, it will be remembered, the Scandinavian Codes also have certain exceptions.

Committee reports, edited by J. Luz, are available from deliberations of the 1861 – 1863 Committee of the general Commercial Code. These reports do not have to standing of recognized source of law. They do not voice the definite opinion of the

³⁶ Hugo Tiberg. **The Law of Demurrage**, 17 (3rd ed. London Stevens & Sons, 1979)

committee as such but consist in a rather verbose account of the various views advanced by its members in the course of the discussions. They are however sometimes used by German writers to furnish a background to the regulations on the Commercial Code and will also be referred to occasionally in the text under the name of *Protokolle*.

While Italy has a new Code of Navigation from 1942 the legal provisions on French and especially Belgian law in the field of demurrage are still very limited. Particular weight is in practice given to writings of legal scholars, while the force of precedents is considerably less than in most system; there is a general lack of consistency in the practice of the courts, and a whole series of cases is usually required to show with reasonable certainty that a particular tendency has become so pronounced that it can be regarded as “law”. Although the Latin law systems have a common origin, important divergencies in the theoretical conception of demurrage often result in varying solutions. But frequently the value of precedents seems to be measured by bulk rather than by quality, and it seems to matter little to some authors whether their sources are domestic or alien. The existence of very comprehensive law reports in particular *Le Droit Maritime Français* (cited in the text as DMF) and before the war *Revue Internatioal de Droit Maritime* (RIDM) and *Revue de Droit Maritime Compare* (DMC), and to some extent Italian *II DIRITTO Maritimo* (DM) makes the more important decisions available for study.³⁷

Holland has comparatively modern Maritime Code from 1992 Provisions relating to demurrage are found in sections 517 and 518. The Code is essentially Germanic in type but shows more wariness in dealing with contract than both the German and especially the older Scandinavian Codes.³⁸

England and America have gone their ways, without and legislation in the field of demurrage. The English law has been rapidly developed through a vast number of precedents, promptly noted and commented upon in the law reviews, especially, from the latter part of the 19th century onwards. The law of Scotland is practically similar in the demurrage field, and Scottish cases are frequently cited in support of some of the

³⁷ Hugo Tiberghien. 18 **The Law of Demurrage**, (3rd ed. London Stevens & Sons, 1979)

³⁸ *Id.*, at 19

leading principles of the English law of demurrage. Cases from other parts of the Commonwealth also have a strong persuasive force on English courts.

In the United States the administration of this area of the law lies almost exclusively with the Federal courts. The development of the law has the whole been rather erratic and unsure and has never received the stimulating comment in law reviews and legal treatises that has been the boon of the English case law development. The publication since 1923 of the American Maritime Cases is valuable for student but does not seem to have contributed much to creation of consistent principles in the field of demurrage.

Commercial arbitration is the normal fate of an American demurrage dispute today, and the bulk of recent demurrage cases reported in the American Maritime Cases are arbitration decisions. Although this tendency certainly has not improved the standard of consistency of the American law of demurrage, it must be recognized that disputes will generally be resolved in this way, and that arbitration decisions, in arbitration cases, at least, are a source of law that must be ignored. Whenever they are cited in the text their character of arbitration decisions will however be noted.

3.2 Demurrage of a Voyage Charter

Demurrage in English and American law is always a contractual creation, while in the other systems that concern us it may be provided by law or, as it is said, custom. But however provided, demurrage is always a liquidated sum payable for and allowed detention.³⁹

A General definition can hardly go beyond this. Demurrage is seriously referred to as damages, as a contractual penalty come as a supplement to the freight, and as a unique form of compensation different from all these, and important consequences are derived from these various definitions. The battle has been particularly vigorous in the Latin Law systems between those who characterize demurrage as damages and those who adhere to the supplementary freight theory, and an echo of the same dissension is found in some American decisions.

³⁹ Hugo Tiberg. **The Law of Demurrage**, 530 (3rd ed. London Stevens & Sons, 1979)

In the Latin law systems the two theories are usually presented as alternatives, one of which must be accepted and the other rejected. This preconceived notion has distorted the discussion and obscured the rationale behind the demurrage regulation.

The adherents of the theory of demurrage as damages thus point to the results that would “follow” if the rivalling view were accepted: demurrage could not be due if the voyage were abandoned, the master would have the same lien over the cargo as for freight, the period of limitation would be the same as for the freight, demurrage would take part in general average. It is often suggested that *vis major* would not suspend the laytime of demurrage were an accessory to the freight, that, on the other hand, if the laytime were thus suspended, the same ought to be true of the demurrage period, and attention is drawn to the requirement of notification, which is said to be unwarranted unless demurrage is a form of damages.

The followers of the supplementary freight theory, on the other hand, point to the fact that the ship must remain at the charterer's disposal during the demurrage period, and they usually reinforce their argument by a theory of freight being hire for the ship, which is considered to tally particularly well with the view of demurrage as an addition to such hire. They stress the liquidated character of demurrage; that the ship is entitled to demurrage whether in *casu* damage can be shown or not.

The supplementary freight theory is classic in France and appears to be generally accepted by the courts, whereas some of the legal writers tend towards the view of demurrage as damages and others, especially in late years are abandoning any doctrinaire attachment to such preconceived notions. The theory of demurrage as damages is generally held in Belgium. In Italy the idea of demurrage as a compensation *sui generis* has been gaining ground, largely, as it seems, as a result of the Code's characterisation of affreightment as a transportation contract, but the additional freight reasoning has recurred recently. The later writers on Dutch law characterize demurrage not as damages but as a compensation for a prolongation of the waiting period.

In this confused discussion of the basic character of demurrage the underlying theories are sometimes used to justify a particular result, while in other cases the result reached by courts or solutions chosen by legislator are used to justify the theory

adopted. In Belgian law the view of demurrage as damages had long been settled when, in 1936, a new statute for the interior waterways transportation abolished the need to give notice at the beginning of the demurrage period. The requirement of notice, previously regarded as a consequence of the view of demurrage as damages, was now elevated to the dignity of basis for that view, and the courts for some time assumed that demurrage had “changed character” and become a supplement to the freight. The view of demurrage as damages is sometimes qualified by the addition that it is damages by virtue of a penal clause. This, it is considered, will explain how demurrage, though damages, can be due in cases where no damages is shown, e.g. where the ship is detained anyway by unrelated causes. In other respects the effect of the penalty is taken to be similar to that of damages in the ordinary sense.

Demurrage is not an entirely indigenous creation in the Latin Law systems; foreign elements have perforce gone into the making of the comparatively uniform institution that we know today in different countries under that name. The international concept of demurrage will not fit as easily and naturally into the local mould as is believed by some Latin Law writers who draw from foreign sources in support of their conclusions. The phenomenon of demurrage should be accepted as it is; it may resemble freight or it may resemble damages, but it should not be taken granted that it is either. If exceptions must be introduced to fit into a particular category, it does not belong to that category, and it is vain to draw further conclusions from the classification. A neutral formulation serves that purpose better.

The foreign criticism is directed towards theoretical speculations intended to reveal the “nature” of demurrage from various factual characteristics and to persuade the courts of the necessity of accepting certain consequences considered to be associated with such a nature. Where however the legislator has consciously striven to achieve a consolidation of the demurrage regulation, making it conform to some particular set of accepted rules, or where the courts have consistently manifested such an intention, the drawing of the further conclusions may be quite justified. Thus where the use of demurrage is characterised as not a breach but as the character’s right, similar to that of using the laytime, it is not premature to conclude that the character should be free from liability for further damage that would not have arisen if the ship had

dispatched within the laytime, and where the legislator has made demurrage conform to freight for purposes of enforcement, it is consistent to apply that principle throughout.

In American law there has been little discussion on the subject of the nature of demurrage, although inconsistent flat statements are often found that it is either supplementary freight or damages; sometimes it is described as a penalty clause. In English law it now appears to be settled that, *prima facie*, at least, demurrage is liquidated damages for breach. Scandinavian and German authors have generally preferred a more neutral approach characterized demurrage as a compensation *sui generis* payable for delay beyond the laytime.

3.3 Effects

3.3.1 Continuous Effect of the Charter

The use of demurrage time, whether conceived as a breach or not, does not entitle the shipowner to rescind the contract, unless the detention extends beyond the agreed demurrage period or the contract is somehow frustrated or repudiated. He is limited to his claim for demurrage as a compensation for having his ship waiting at the port. The beach, as the matter is expressed in English law does not “go to the root of the contract”⁴⁰.

In Scandinavia and Germany, where the contract is not in anyway considered to be broken by the use of demurrage time, and where the length of the demurrage period is limited by express legal stipulations, problems of frustration can hardly be taken to arise at this stage. Impliedly both the Scandinavian and German codes may be said prescribe that the ship must remain for loading or discharge until the expiry of the entire loading or discharging time unless the charterer renounces the contract, and this position was also taken in a Danish Supreme decision. A similar duty to remain is provided in the Dutch and Italian codes, and that is the recognized position also in

⁴⁰ Hugo Tiberg. **The Law of Demurrage**, 353 (3rd ed. London Stevens & Sons, 1979)

Belgian law, while French writers have been less consistent or less explicit on the subject.⁴¹

In the common law systems the problem of when the demurrage period, and thus the ship's duty to wait ends, may arise in three different forms, depending on whether the stipulated demurrage is for a fixed period or not, and whether there is any stipulation for demurrage at all.⁴²

When the time on demurrage is fixed and the charterer detains the ship beyond the laytime, he is usually allowed to keep her until the demurrage period has expired, although it was questioned, in an American case, whether he would not forfeit this right by failure to deliver any cargo at all the laytime.

If there is a rate stipulated for demurrage, but no specified period, the ship may not sail until the adventure is frustrated, or the delay amounts to a repudiation of the contract. Notice by the shipowner that he considers the delay excessive, and that he therefore intends to claim damages in full for further detention, has been held to have no effect on the charterer's liability in this respect.

If there is no stipulation for demurrage at all, the position is doubtful. This question was expressly left open by Bray J. in *Wilson & Coventry v. Thorensen*, and no later case either in England or America has bearing upon the matter. In this case no laytime is agreed, the ordinary rule of law operates, and the charterer's obligations have to be performed within a reasonable time. If the delay is such as to go to the root of the contract, the shipowner will then be entitled to rescind.

Where the laytime is fixed, on the other hand, this may be taken to mean either an absolute undertaking on the charterer's part, setting out a final limit for the lading time, and giving the shipowner the right to rescind the contract after that time, or the intention may have been to provide a loading time beyond which damages should be payable, not liquidated as a rate of demurrage, but at large. With this difference, the effect would be the same as in the case of a rate, but not time, stipulated for demurrage.

⁴¹ *Id.*, at 356

⁴² *Id.*, at 357

3.3.2 Liquidated Character

Demurrage has been described above as a liquidated sum, payable for an allowed detention. It should be unaffected by the extent of the loss actually suffered by the ship. This general statement does not express the whole truth and needs further qualification.

A liquidated of an amount due as compensation may be conceived either as a convenient way of forestalling litigation regarding the exact loss suffered, or it may be conceived, as in the case of a penalty, as an absolute fixation determining and at the same time limiting the owner's claim. Regardless of the various theories concerning the character of demurrage the trend of opinion in all systems that concern us goes rather decidedly in the latter direction.

On the one hand, it is generally held that the owner need not show that he has suffered any loss as a result of the delay. This view has been taken in American⁴³, English⁴⁴, Scandinavian, German and French law in case where the ship was detained in port by causes unconnected with the delayed loading or discharge, such as ice or government prohibitions. One Belgian case, mentioned and criticized by the leading writers on the subject, and one Italian case, now hardly reconcilable with the wording of the present Code of Navigation may be noted as exceptions, based on the theory that demurrage, being damages, cannot be due unless a loss is shown. Since it would seem, then, that actual detention of the ship need not have resulted from the delayed loading or discharging operations it may be assumed a fortiori that other and more speculative

⁴³ *Randall v. Sprague* (1 CCA 1896) 74 F. 247, *The Prusa* (SDNY) 1925 AMC 1626, cf. in a time-charter connection *Hines v. Dampskibsselskabet* (1 CCA) 226 F. 502 (the ship performed her own repairs while she was offshore). In *Thomas Bell S.S. Co. v. Stewart* (5 CCA 1929) 31 F.2nd 44 it appears that the ship would have been delayed at the port of Miami even if she had been admitted there, because the sunken ship continued for a long time to block the channel, but this did not prevent demurrage from running.

Two cases, *The Hartismere* (Md) 1937 AMC 594 and *D'Amico v. Procter & Gamble* (ND Cal. 1974) 1975 AMC 98 have held that actual prevention must be shown, but both are based on inconclusive authority which does not on analysis support that result.

⁴⁴ *Jamieson v. Lawrie* (1796) 6 Bro. P.C. 474

losses need not be demonstrated. The ship need not show that he would have found other profitable occupation for his ship elsewhere.

On the other hand, the owner will generally have to be content with the agreed compensation, even though his real loss should be greater. This is especially the case where the damage consists in loss of freight due to a detention which would not have occurred if the ship had been dispatched during the laytime, e.g. where ice at the port after the laytime detains the ship for the rest of the season.⁴⁵

Demurrage seems to be naturally associated with loss of freight in the minds of many jurists. Where the connection with the loss of time has been less immediate, the courts in some countries have been less inclined to regard the demurrage provision as exhaustive. This is not without reason, for loss of freight can be easily anticipated and compensated by an adequate allowance, while it would neither be possible, nor proper with regard to the regulatory function of demurrage, to let it cover losses which might be encountered. In a leading English case, owing to the charterer's delay, the loading was not completed within the summer period, with the result that the ship was not allowed to take on a full summer cargo, the charterers were held liable to pay dead freight in respect of the cargo which could thus not be shipped. And where the carrier has incurred extra costs in order to save time, such costs have been held recoverable as long as they do not exceed the demurrage saved.⁴⁶ But if the delay results only in fewer voyages and thus a decrease of the freight earned within a given period of time, demurrage is considered as the adequate remedy.⁴⁷ For Belgian law van Bladel mentions the example of extra quay dues or damage caused to a vessel due to a prolonged stay in salt waters as cases that might give rise to extra damages,⁴⁸ and a

⁴⁵ *Gabler v. McChesney* (no. 2) (1901) 70 N.Y.S. 195, *Jamie v. Lawrie* (1796) 6 Bro. P.C. 474

⁴⁶ *Cazalet v. Morris* 1916 S.C. 952

⁴⁷ *Suisse Atlantique Societe d' Armement Maritime v. N.V. Rotterdamsche Kolen Centrale* (1966) 1 L.L.R. 529. It is important to note that in that case the delay reduced the number of voyages that could be performed under the contract- which was for an unlimited number of consecutive voyages within the two year period; it was suggested that there would exist an obligation to enable the shipowner to perform the normal number of voyages, just as there had been held to exist.

⁴⁸ Van Bladel no. 1324

French case allowed compensation for services ordered for the time of expected departure and rendered useless through the delay.⁴⁹

In American law the question is not settled. Wharfage and watchmen fees have been held to be included in the liquidation,⁵⁰ and one case denied recovery for extra loss consisting of the fouling of the bottom of the ship, but the court was able to reach that decision on the ground that the damage had not been sufficiently proved.⁵¹ On the other hand extra mooring costs where the charterer had failed to provide a discharging berth were allowed without question in a recent State court case,⁵² and extra costs incurred in speeding up the discharge have been allowed to the extent of the demurrage saved.⁵³ Where the delay led to cancellation of a time charter under which the ship was operating, the operator was awarded special damages in respect of the loss.⁵⁴ And loss of freight under a consecutive voyage charterparty has under special circumstances been held not to be adequately covered by the provided demurrage rate.⁵⁵

A Scandinavian court would probably be slow to award damages for extra loss beyond the direct time loss.⁵⁶ There would be no ground for such a payment since the use of the demurrage period is not regarded as a breach but as a right similar to the use

⁴⁹ Rouen 1949, DMF 1950, 303

⁵⁰ *The C.P. Raymond* (SDNY 1886) 28 F. 765

⁵¹ *Maclay v. U.C.* (1908) 43 Ct.Cl. 90

⁵² *Wilson v. Elwin* (Supreme Ct. Wash. 1959) 338 P.2d 762

⁵³ *Yone Suzuki v. Central Argentine Ry.* (2 CCA 1928) 27 F.2nd 795, *The Walter D. Noyes* (2 CCA) 1930 AMC 432 (piling costs). But demurrage for the time saved is not allowed: *Isbrandtsen Co. v. Lynchcroft* (city Ct. 1957) N.Y.S. 2nd 721

⁵⁴ *The Nitric* (Or. 1965) 1965 AMC 2758

⁵⁵ *Empresa Maritime de Transportes v. A.T. Massey Coal Co.* (ED Va 1963) 1965 AMC 517; the ground for this decision is considered in the following section.

⁵⁶ Cf. ND 1918, 635 M&C The obiter dictum in ND 1924, 497 Kristiania, that the agreed demurrage was a compensation merely for the loss of time, can hardly be taken to state the rule correctly, cf. also Jantzen, p.118. In ND 1924, 247 SCD a custom was invoked to give the shipowner a right to extra compensation. Jantzen thinks that the matter is settled by a Finnish Supreme Court decision reported in NSC (Nordisk Skiberederforenings Cirkulaerer) 3316, which he thinks will be flows by other Scandinavian courts.

In ND 1928, 496 the Swedish Supreme Court, rather surprisingly, awarded demurrage which would have been incurred if the shipowner had not taken over the charterer's work during a strike. Cf. contra in America *Isbrandtsen Co. v. Lynchcroft* (Supra note 6 c).

of the laytime. This applies to the legal “over laytime” provided by the Maritime Codes, but this expression must also be taken, *prima facie*, at least, to cover a demurrage period provided by the contract and obliging the carrier in the same way to remain for loading. The same observations can be made regarding German law, and the reasoning would probably also be acceptable to a French court professing the supplementary freight theory. Direct express due to the charterer’s fault should however be recoverable, e.g. where the absence of the charterer’s workmen leads to an idle expense of waiting money to the ship’s men.⁵⁷ Extra expense incurred by the shipowner in order to minimize the delay should also be recoverable where it results in saving of demurrage.

3.3.3 Kinds of delay covered

It would seem that in English Law, at least, the agreed demurrage rate, though frequently inadequate as a compensation, is in fact normative for the shipowner’s claim, even the delay arises through a breach by the charterer of some fundamental obligation that would entitle the shipowner to rescind, so long as he does not avail himself of that right.⁵⁸ This might be the case where the charterer fails to have a cargo for the shipment⁵⁹ or at least where by his conduct he evinces complete inability to deliver any cargo,⁶⁰ and where, unknown to the shipowner, he ships a dangerous or contractual cargo.⁶¹ The demurrage rate applies even if the delay is extensive, and also if it is culpable or even deliberate -though not perhaps if it can be said to be fraudulent- as long as the contract remains in effect.⁶² But it is only for loading and unloading and

⁵⁷ ND 1932, 296 M&C.

⁵⁸ See per Devlin, J. in *Chandris v. Isbrandtsen- Moller* 919510 1 K.B. 240, 249, cf. *Radcliffe S.S. Co. v. Barnett* (1926) 31 Com.Cas.222, an “order port” case. In *Keyser v. Jurvelius* 95 CCA 1903) 122 F. 218, it seems that if the shippers had been charterers their liability would have been limited by the demurrage rate although they had nominated an unsafe discharging port.

⁵⁹ *Inverkip S.S. Co. v. Bunge* (1917)

⁶⁰ This particular variant was added to the list of fundamental breaches by Devlin, J. in *Universal Cargo Carriers v. Pedro Citati* (1957)

⁶¹ *Chandris v. Isbrandtsen-Moller* (1951)

⁶² In *Suisse Atlantique Societe d’ Armement Maritime v. N.V. Rotterdamsche Kolen Centrale* (the *General Guisan*) (1966) a contract for consecutive voyages with coal cargoes over a period of two years had been signed during the period of high coal

attendant delays such as waiting for berth that the charterer's liability is limited by the demurrage rate. For other kinds of breach, e.g. failure to prepare shipping documents, resulting in delay after the completion of the loading, the damages will be at large.

The general rule that the demurrage liquidation covers delays in loading and discharge from whatever cause arising may certainly be stated as valid for American law also. Thus where the shipper, who was not the charterer, had nominated an unsafe discharging port and delay was caused for that reason, it was not questioned that a charterer would have been bound by the demurrage clause, even though the shipper might not be bound.⁶³ Recent cases are more to the point. Delay in providing a cargo,⁶⁴ - even if it is very extensive- as well as delay in berthing chargeable to the charterer⁶⁵ have been held for compensable under the demurrage clause. Whether the charterer can rely on the demurrage provision when he detains the ship deliberately in his own interest is more doubtful.⁶⁶

prices resulting from the Suez crisis. When the coal process and market freights sank, the charterer lost interest in the contract and kept the vessel waiting for extended periods, so that less than half of the number of voyages that would have been normal in the two-year period could be performed. The demurrage rate was utterly inadequate to cover such a loss. In the house of Lords, Lord Reid said "The appellants allege that the respondents caused these delays deliberately (i.e. with the willful intention of limiting the number of contractual voyages.). They do not allege fraud or bad faith. This allegation would appear to cover a case where the charterers decided that it would pay them better to delay loading and discharge and pay the resulting demurrage at the relatively low agreed rate, rather than load and discharge more speedily and then have to buy more coal and pay the relatively high agreed freight on the additional voyages which would then be possible. If facts of that kind could be proved I think that it would be open to the arbitrators to find that the respondents had committed a fundamental or repudiatory breach." The effect of such a breach, however, would only be that the shipowners might elect to rescind the contract, and then claim damages; since they had not done so, they were limited by the demurrage rate. So also Lord Hodson p. 553 "... I see no reason to hold that attributing to the respondents a willful intention of limiting the number of contractual voyages affects the sums otherwise payable by way of demurrage..."

⁶³ Keyser v. Jurvelius 95 CCA 1903) 122 F. 218

⁶⁴ Thus in the unity (supra) where the delay, due to Government prohibition, lasted practically from the 25th June until the 4th September.

⁶⁵ Gloria S.S. Co. v. India Supply Mission (SDNY) 1968 where the contract had a "whether in the berth or not" clause.

⁶⁶ Thus damages have been awarded for delay during the laytime, deliberately caused by the charterer under circumstances receding those of the General Guisan case ,

It has been mentioned that Scandinavian and German law regard use of the demurrage period not as a breach but as the charterer's normal right. The mere fact that the delay is culpably caused by the charterer should not change this,⁶⁷ while the detention whose principal purpose is molest the shipowner may give rise to damages at large.⁶⁸ But while the ordinary demurrage regulation, then, does not appear to contemplate a breach of contract, the fact that there has been a breach would not necessarily have to render the assessment contained in the demurrage provision inapplicable.⁶⁹ On the other hand it may well be that a breach of a distinct obligation, as the provision of a safe cargo⁷⁰ should entitle the shipowner to damages at large.⁷¹ The same should be true of duties specially undertaken by the charterer in excess of his

Empresa Maritime de Transportes v. A.T. Massey Coal Co. (ED Va 1963) 1965 and *Concord Petroleum v. Mobil Shipping* (1965).

⁶⁷ There is no direct case authority in Scandinavia; the point might well have been raised in ND 121 M&C or 1956. For German see *Arbitration 1930 HansRGZ 1930 B. 680*. The situation being in fact the same as with regard to delay during the laytime, reference may be made to pp. 193-197.

⁶⁸ Jantzen p. 79, a; cf. Capelle, p.209 German Civil Code, section 226. See further supra, pp. 193, 197 with regard to the laytime, to which similar considerations apply.

⁶⁹ Thus damages have been awarded for delay during the laytime, deliberately caused by the charterer under circumstances receding those of the *General Guisan* case, *Empresa Maritime de Transportes v. A.T. Massey Coal Co.* (ED Va 1963) 1965 and *Concord Petroleum v. Mobil Shipping* (1965).

⁷⁰ Jantzen p. 79, a; cf. Capelle, p.209 German Civil Code, section 226. See further supra, 193, 197 with regard to the laytime, to which similar considerations apply.

⁷¹ Falkanger, *Konsekutive Reiser*, Oslo 1965, 108 is critical against allowing the charterer to use the loading time for other purposes than loading and would recommend damages as a corrective against such use. As far as demurrage time is concerned, the first question to be discussed ought to be whether the liquidation should be taken to be exhaustive whether there is a breach or not; if it is, the breach has still the effect – especially important under a consecutive voyage charterparty – of enabling the charterer to rescind the contract. If it is considered that there exists a need for inadequate demurrage stipulations – which will not fulfill the function of demurrage proper but which may appear to the parties as an attractive sales argument in the carrier's offer of his services – it would be meaningful to ascribe the further effect to the breach that the demurrage rate becomes inapplicable; otherwise not.

⁷² Cf. ND 1941, 353 M&C (the cargo, having heated, was discharged en route; not clear whether or to what extent contract was taken to be at an end).

⁷³ Cf. also ND 1917, In a "mixed time and voyage charter" the carrier had agreed to perform as many voyages as he could within a given time. In addition the contract contained a demurrage provision. The charter period was exceeded, although the ship never came on demurrage under the demurrage clause. It was held that damages must be calculated on the basis of market freight.

normal functions, e.g. where he has undertaken to provide ice-breaker assistance to provide from the port of loading⁷² or has undertaken a part of the clearance which would normally be the shippowner's task.⁷³ In other respects the clearance of the ship is a problem which will have to be considered in a later connection.

In Latin law systems the situation is complicated by recognition of a device known as *Contre-staries*, *contre-surestaries* or *extrastallie*. They consist of a standardized augmentation of the demurrage, sometimes by as much as 100 percent and in the Italian code by 50 percent. They are similar to a penalty in that they are independent of the shipowner's actual loss and for the most part higher. Their origin is said to be local customs, but the provision of such a standardized extra compensation seems to have become accepted as a rule of general validity.

Basically the *Contre-staries* are due after the expiry of the demurrage period, but it is possible that that they might also be due in other situations. Smeesters-Winkelmolen may have had such a case in mind when they speak of an "abusive and abnormal" detention.⁷⁴ It would seem important that the field of application of the *Contre-staries* should be carefully circumscribed, for their amount may easily exceed the damages that should be due for detention outside the demurrage field. The author has, however, found no case dealing with the matter and indeed no case granting *Contre-staries* before the end of the ordinary demurrage period. An authoritative Italian case has held the demurrage rate inapplication to situation of a ship having abandoned the voyage owing to the outbreak of war, and suffering delay in discharging in a neutral port, but this was on the ground that the contract had become inoperative altogether.

⁷² Smeesters-Winkelmolen no. 540

3.3.4 Calculation of Laytime

a) Protest or notice of expiry of laytime

Neither English, American, Scandinavian⁷⁵ or dutch law has any general requirement of protest or notification before the laytime can begin, although in cases of FAC loading and other uncertain clauses, the master has sometimes been held at fault for not informing the charterer that he is ready to receive faster.⁷⁶ German law requires the master to give notice when he considers the laytime to be an end in case where no time has been fixed by the contract; the giving of such notice is regarded as indispensable for any contracts governed in all respects by German law.⁷⁷ The new Italian code dispenses with the need to give notice, although it is said that local customs may sometimes prescribe notification.

b) demurrage runs continuously; Exceptions case to apply

Where demurrage is conceived as damages or as supplementary freight or as something else the well-known formula in the shipping world that “once on demurrage, always on demurrage”⁷⁸ has become almost universally accepted; once the laytime has expired demurrage is due for every day, Sundays and holidays as well as days that would be exceptedduring the laytime, on which the ship is further delayed.⁷⁹

c) The period on demurrage may be suspended; legal length of time

While there is in general agreement that demurrage must be paid for each day that the ship is detained, the Scandinavian, German and Dutch codes all allow that the

⁷⁵ This is noted in Swedish Committee Reports (1936) at page 86, where the view is expressed that the owner should not require to commit himself at this stage. If this is the theory it seems that notice need not be given even if the laytime is not definitely fixed. Different, then, Jantzen page 115, citing NSC (Nordisk Skibsrederforenings Circulaerer) 3155 from 1926, and Handbok i Skeppsklarering 17, 36.

⁷⁶ Kristiania the shipowner consented to work overtime on Saturday in order to get his ship off, the laytime then having expired. The Kristiania Maritime Court assumed that he had waived his right to claim demurrage.

⁷⁷ The use of an English form of the charterparty may be regarded as a derogation of the notice requirement.

⁷⁸ See also 3.5 page 46.

⁷⁹ Sometimes this is expressly provided. See *Hull v. Cargo of Pig Iron*.

time may be suspended for other purposes. These codes all regard the laytime and the demurrage period as one integral allowance granted the charterer for loading or dischargem calculated in the same way and suspended by the same hindrances.⁸⁰

3.4 Recent cases

Alphapoint Shipping Ltd v (1) Rotem Amfert Negev Ltd⁸¹

Facts

The defendant charterers chartered from the claimant shipowner the "Agios Dimitrios" under a voyage charter on the Gencon form (1984 Revision) dated 6 May 2003 to load at Eilat a cargo of phosphate, potash and salt for carriage to Amsterdam. The relevant terms of the charter read as follows:

Clause 23(b) At loading port(s) when tendering notice of readiness, vessel's cargo holds and hatch covers shall be clean, dry of loose rust and otherwise ready and suitable to receive the intended cargo.

Clause 25 (Twelve)Crew and mechanical failure – time lost at loading and/or discharging port(s) which can be reasonably attributed to crew and/or ship's mechanical failure, shall not be counted as laytime or time on demurrage. Any extra expense thereof to be borne by the owners.

The vessel arrived at Eilat in the early morning of 8 May 2003 and the surveyor appointed by the shippers/charterers conducted what the arbitrators described as "a superficial visual examination" of the vessel's cargo holds, from the main deck. He indicated that the holds were acceptable. Notice of readiness was accepted and time began to run from that day. Loading began on May 12. On May 21, the shippers' inspector noted that the holds had been contaminated by a previous cargo of barley. Loading was suspended to enable the surface of the cargo already loaded and the upper parts of the holds to be cleaned. During this period the ship was moved off the loading berth. Loading was recommenced only on May 29. It was completed on June 3.

⁸⁰ Dutch Commercial Code, section 518.

⁸¹ http://archive.onlinedmc.co.uk/alphapoint_shp_v_rotem_amfert_negev.htm

The shipowner claimed that time had begun to run when notice of readiness was accepted on 8 May and that laytime therefore expired on May 20, the day before the discovery of the contamination. It accordingly claimed demurrage on the basis of the maxim "once on demurrage, always on demurrage" and gave no allowance in its demurrage calculations for the time from May 21 to May 29, when the loading was suspended to clean the holds and the cargo surfaces. The shipowner maintained that the vessel did not need further cleaning and that, when notice of readiness was given on 8 May, she was as clean as was necessary to carry the contractual cargo.

Charterers, on the other hand, maintained that contamination by barley damaged or would damage the contractual cargo and that the vessel was, at no material time before suspension of loading, ready to load. They accordingly deducted some US\$56,500 from the demurrage account, representing the demurrage that would have accrued – or an equivalent amount in damages – during the period of suspension of loading. The first claim was based on clause 25 of the charter, the time lost being reasonably attributable to "crew failure" to clean the holds properly before giving notice of readiness. The second claim was based on a breach of clause 23(b), which entitled the charterers to damages equivalent to the demurrage due.

However, in the event that the shipowner was held to be in breach of contract in either respect, it submitted that the charterers' acceptance of the notice of readiness acted either as an estoppel or as a waiver of the breach, on which the shipowners had relied in commencing loading, thereby permitting the consequent contamination of the cargo with the barley residues and rendering any subsequent cleaning of the holds more costly to carry out.

The arbitrators held that the holds had been inadequately cleaned in breach of clause 23(b) of the charterparty and that all time from the suspension of loading until completion of the cleaning of the holds should be treated as time lost. As a result, it should not count as demurrage either under the application of a counterclaim for damages or under the express provisions of clause 25 of the charterparty.

On appeal to the High Court, the shipowner submitted that there had been a serious irregularity under section 68 of the Arbitration Act 1996, in that the arbitrators had not considered its submission (1) that the charterers were estopped, by reason of their acceptance of the notice of readiness, from arguing either that demurrage should be reduced by operation of clause 25, or by way of set-off for breach of clause 23(b); and (2) the charterers had obtained a benefit from the need to take the vessel off her berth to carry out the cleaning, in that they had arranged for another vessel - also on charter to them - to occupy that berth for loading. This would have saved the charterers money and their damages should have been reduced accordingly.

Judgment

In considering the appeal, the judge said that it was important to keep in mind the distinction in the remedies provided by clauses 23(b) and 25 respectively. If there had been a breach of cl.23(b) by omission of the shipowner to provide clean holds ready and suitable to receive the intended cargo and notice of readiness had been given and accepted by charterers, the question whether the shipowners had complied with their obligation was not necessarily concluded, for the holds may in fact have been unclean and unfit and that condition may not have been reasonably apparent when the notice of readiness was accepted. Time would then begin to run and, in the absence of a provision such as cl.25 which stops it running, it would continue to run until completion of loading. If, in the meantime, there was delay while the holds were cleaned – and the shipowner's breach thereby cured – the charterers would be entitled to damages for that breach which might at least in part be quantified by reference to the amount of demurrage as may have occurred. The demurrage in respect of the delay period would not then be recoverable because the damages due to the charterers would be offset against the demurrage otherwise due to the shipowners.

Where, however, there was a provision such as cl.25, which had the effect of interrupting or reducing the period of laytime or time on demurrage, the analysis was different. If the facts provided for in the clause as a ground for the interruption of time were established, time is to be treated as automatically curtailed. The effect of cl.25 in the present case was thus that if time were lost by reason of the failure of the crew to

perform functions relevant to loading and that caused delay in loading, the period of delay would be deducted from the used laytime or, if the vessel were already on demurrage, from the time on demurrage. This clause clearly did not depend on the charterers establishing that the shipowner was in breach by reason of such crew failure, but merely on the fact of such crew failure and the consequent delay. Further, the process of quantification of the relevant deduction of time had nothing to do with whether the charterers had suffered a net financial loss due to the crew's failure; the only relevant currency was that of lost time.

The judge held that, against this background, it was open to the arbitrators to conclude that acceptance of the notice of readiness following the superficial inspection had no greater effect than to represent that, as far as such inspection disclosed, the vessel's holds were clean and ready for loading to commence. That, however, was a representation neither that there had been no breach of cl. 23(b) nor that there had been no earlier crew failure within cl. 25. All that was represented was that, so far as the charterers were aware, the vessel was ready to start loading. That was enough to start laytime running. Consequently, when, upon discovery of the true state of the holds, loading was stopped and charterers asserted that the shipowner was in breach of cl. 23(b) and that the facts also fell within cl. 25, they were not resiling from any previous representation implicit in their acceptance of the notice of readiness. Thus the waiver and estoppel submission could never get past the first stage, namely that of establishing that there had been a material representation or promise.

On this analysis, the arbitrators had reached the correct conclusion on the issue of estoppel and there had been no serious irregularity in this respect.

As to the second point, the judge noted that the shipowner had adduced no evidence to substantiate its allegation that the charterers' losses had been reduced by the earlier loading of the other vessel. Accordingly, the judge did not believe that the arbitrators had committed any serious irregularity in not taking the matter into account. Nor did he believe that any alleged irregularity relating to the proof of damages for breach of cl.23(b) would have given rise to substantial injustice (as required by s.68 of the Arbitration Act), since the charterers would have been entitled, by reason of the

provisions of cl. 25, to displace the demurrage claim to the same extent as awarded by the arbitrators. That clause operated regardless of any set-off by way of a claim for damages for breach of the charterparty.

In consequence, the application under s.68 was dismissed and the award was not remitted to the arbitrators.

Stolt Tankers Inc v Landmart Chemicals SA (Stolt Spur) (2002)⁸²

Facts

This was an appeal by Owners, Stolt Tankers from an arbitration award disallowing part of their demurrage claim. The question of law for decision was: "whether (in the absence of any relevant provision in the governing voyage charterparty) laytime or time on demurrage was interrupted because, while the vessel was waiting for charterers' berth to become available, she engaged in operations in respect of cargo carried under another charterparty". The arbitrators had found that there had been interruption and had accordingly reduced their award in owners' favour by US\$124,000. ¹

The Arguments

The owners said that the arbitrators had not paid proper regard to the cause of the vessel's delay, which was congestion at the berth. The operations they had conducted had not caused any additional delay to the vessel. The charterers contended that in order to be entitled to claim demurrage, the shipowners were obliged to have the vessel ready and available to load or discharge. The owners replied that time would be interrupted only where the vessel had been rendered unavailable through their "fault".

Judgment

(1) The "wider principle" recognised by Evans J in *Ellis Shipping Corp. v. Voest Alpine Intertrading* (the "Lefthero") should be applied in this case, whereby if

⁸² http://archive.onlinedmc.co.uk/stolt_tankers_v_landmark.htm

actions of the owners for their own purposes rendered a vessel unavailable for cargo operations, it was natural to regard that in itself as preventing the loading or discharge of the vessel and 'as a cause of any delay in cargo operations'.

(2) It was not necessary to show that the owners' actions had in fact caused a delay in cargo operations.

(3) Demurrage was payable because the shipowners, having agreed freight to cover the voyage and an agreed time for loading and discharging processes, faced serious losses if this time was exceeded. The charterers agreed to compensate them for these losses by way of demurrage. If a vessel was not available for the charterers' cargo operations but was being used by the owners for their own purposes, there was no reason why the charterers should pay compensation. The charterers were not detaining her.

The appeal was dismissed.

3.5 "Once on Demurrage, Always on Demurrage"

Certainty is a concept that any businessman looks for. When a ship owner charters his vessel out he needs to know (amongst other things) when the Charterparty comes into effect, when laydays commence and end, and when freight or hire becomes due. He also needs to know what the consequences are of his breach of Charterparty or what remedies may be available if, for example, Charterers fail to pay hire or are likely to exceed the permitted duration of the charter period (see the Steamship website article on the "Kriti Arti"). Often the underlying facts of any such breach do not fit neatly within the obligations and responsibilities of the parties as set out in the governing Charterparty and it is this uncertainty that leads to disputes.

Notwithstanding the potential for uncertainty, the shipping industry has developed a number of time-honoured principles and maxims which are intended govern when everything else is not quite so clear. One such maxim is "once on

demurrage, always on demurrage". In other words, once Charterers have used up their laytime and the vessel is on demurrage, all time used will fall for their account, cause.⁸³

However to what degree is this maxim reliable? The English courts have commented on the maxim in the past but a judicial eyebrow was again raised recently in the case of the "Agios Dimitrios".⁸⁴ The court had been asked to consider whether or not demurrage could be interrupted when, save for loss of time "attributed to crew and/or ship's mechanical failure", there was no express provision preventing time lost as counting as time on demurrage.

The facts of the case are not unusual. The vessel was chartered on an amended Gencon form to carry a cargo of phosphate, potash and salt to Amsterdam. Upon arrival at the load port NOR was tendered and Charterers instructed a surveyor to inspect the vessel and her holds. Following the inspection, which was merely superficial, NOR was accepted by Charterers on 8 May 2003 and time began to run.

Loading commenced on 12 May 2003. Laytime expired at 1801 on 20 May 2003.

On 21 May, however, it was discovered that the holds still contained significant traces of the previous cargo of barley. Accordingly, loading was stopped and the vessel left the berth for further cleaning. Following cleaning, loading re-commenced on 29 May and was completed on 3 June 2003.

The owners brought a claim for demurrage and made no allowance for the time between 21 and 29 May when the vessel's holds were being cleaned. The vessel had gone on demurrage the day before the barley was discovered. Therefore, Owners contended, if the maxim "once on demurrage, always on demurrage" was correct, the vessel would remain on demurrage during the period when the holds were cleaned.

⁸³ Similar to most maxims it is true in part and probably more accurately means that unless an exception clause refers specifically to demurrage, that exemption will only apply during the running of laytime, but see below

⁸⁴ Alphapoint Shipping Ltd v (1) Rotem Amfert Negev Ltd (2) Dead Sea Works Ltd QBD, Commercial Court - unreported

Alternatively, Owners argued, when Charterers accepted the NOR they waived their right to allege Owners were in breach of clause 23(b) of the Charterparty. This clause provided that the vessel's holds should be fit to receive the intended cargo at the time the NOR was tendered. Charterers argued they were not estopped from relying on clause 23(b), and that the failure of the crew properly to prepare the holds entitled them to deduct time lost from time on laytime or demurrage in accordance with clause 25.

The matter went to arbitration where it was held that the holds were, in fact, unclean at the time of the NOR on 8 May, that (i) demurrage was interrupted upon discovery of this fact and (ii) acceptance of the NOR did not amount to a waiver. The arbitrators commented that even though Charterers had accepted the NOR, despite the holds being unfit, they should not suffer a loss as a consequence. In the "Helle Skou"⁸⁵ Donaldson J stated that "...accepting notice is one thing. Waiving the right to damages for breach ... is quite another...". Owners appealed.

The appeal itself was based on a number of factors, however, the crux of the matter turned on deciding whether or not the arbitrators were correct in allowing demurrage to be suspended.

The court held that the Charterers' acceptance of the NOR merely represented to Owners that, based on the inspection that took place, the holds were apparently fit to receive the cargo. This representation did not, however, exonerate Owners from breach of their obligations under clause 23 (b). When the true state of the vessel was discovered, Charterers did not resile from any position previously made at the time of accepting the NOR. As a consequence, Charterers were entitled to deduct the time lost for secondary cleaning from time on demurrage under clause 25. Demurrage was suspended.

So, once on demurrage, not always on demurrage.

This decision is by no means the first of its kind. When Lord Reid summed up the commercial realities which established the principle of "once on, always on", he

⁸⁵ *Sofial S.A. v Ove Skou Rederi* (1976) 2 **Lloyd's Rep**, at 214

stated that "The loss must fall on someone, and one would think business people who made the contract would regard it as reasonable that the man whose fault it is should pay for it".⁸⁶

Despite this, Lord Reid and his successors have held that, absent express provision in the Charter, exceptions which would otherwise stop the running of laytime are not to be applied to demurrage.⁸⁷ In order to rely on a contractual exception, the Charterparty must make it abundantly clear that demurrage is to benefit by the provision in question. In the "Agios Dimitrios", clause 25 clearly referred to time deductible from demurrage.

In other cases, Owners' fault can be taken to suspend the running of demurrage even if the Charter does not expressly provide for this. Where Owners have acted for their own convenience, Charterers cannot be expected to pay demurrage arising from the Owners' act. When Owners removed a vessel already on demurrage from a berth to take on bunkers, Sargant LJ commented that "in order that demurrage may be claimed by the shipowners, ... they must do nothing to prevent the vessel from being available and at the disposal of the Charterers ...".⁸⁸

In the more recent decision of the "Stolt Spur"⁸⁹ the court reaffirmed the principle that demurrage cannot be claimed when Owners deliberately remove the vessel from the disposal of Charterers. The "Stolt Spur" was a parcel tanker carrying cargoes for several Charterers and arrived at the discharge port for one such Charterer and tendered a valid NOR. Because there was no berth available for 17 days, Owners took the opportunity to leave the outer anchorage in order to discharge and load other cargoes, all the time retaining its position in the queue at the first discharge port. Owners contested that they were not at fault and so time used during the delay would fall as laytime and demurrage. The court held that demurrage could not be claimed as

⁸⁶ *Union of India v Compania Naviera Aeolus S.A. (The Spalmatori)* (1932) 2 **Lloyd's Rep**, at 179

⁸⁷ With the possible exception of *The "John Michalos"* (1987) 2 *l*r 188 in which there was no express reference to demurrage.

⁸⁸ *Ropner Shipping Co Ltd v Cleaves Western Valleys Anthracite Collieries (Re Ropner)* (1927) 27 **LI L Rep**, at 317

⁸⁹ *Stolt Tankers Inc v Landmart Chemicals SA (Stolt Spur)* (2002) 1 **Lloyd's Rep** 786

Charterers were effectively denied the use of the vessel, even though this was not the main or effective cause of the delay.

In addition, when faced with the possibility of interruptions to demurrage, one must consider causation and remoteness of damage.

"The Forum Craftsman"⁹⁰ was discharging her cargo of sugar in Bandar Abbas when it was discovered that sea water ingress had contaminated some of the cargo. Nevertheless, because the amount of contamination was not problematic, discharge continued until a lack of transportation brought the operation to a halt. Whilst discharge was suspended, the vessel was ordered off berth and told to wait at anchorage. It was anticipated that the delay would be very short, however, it was a full 79 days before the vessel was able to reberth. Charterers accepted that the vessel was on demurrage when she was forced off berth and to counter the maxim "once on demurrage, always on demurrage" they would have to show "some special reason why they should not be liable for the period of 79 days". Charterers argued that it was Owners' breach of their seaworthiness obligations that caused the 79 day delay and that it must have been contemplated that an unseaworthy vessel with sea water damaged goods arriving in Bandar Abbas would result in a delay to discharge operations similar to those that which took place. As a consequence, any losses flowing from this must fall for Owners' account. In the circumstances, the court disagreed. Hobhouse, J stated that:

"If the Charterer had performed his obligation in time, the excepted peril later occurring would have had no causal relevance at all; it only has relevance because of the charterers' earlier breach".⁹¹

To conclude, therefore, a ship owner can only be certain of the continued running of demurrage when he is not the direct cause of the time lost, through default or by denying Charterers full use of the vessel. Save for these considerations, once on demurrage the vessel will remain on demurrage if the cause of the delay has not been

⁹⁰ Islamic Republic of Iran Shipping Lines v Ierax Shipping Co of Panama (The Forum Craftsman) (1991) 1 **Lloyd's Rep** 81

⁹¹ *Id.*, at 87.

contemplated by either Owners or Charterers. To this extent only will the maxim "once on demurrage always on demurrage" hold true.



CHAPTER 4

THE LEGAL STATUS AND THE APPLICATIONS OF DEMURRAGE UNDER THAI LAWS

4.1 Overview

Demurrage in English and American law is always a contractual creation⁹² and is not provided in the legal statute, while in other systems that concerned us it may be provided by law or, as it is said, custom. For example, French and Belgium law has stipulated provisions relating to demurrage in their legal legislation which referenced to local customs. Similarly to Italy which has enacted demurrage in a *Code of Navigation*. Also German has amended the provisions in Hanseatic Visby Code and stipulated demurrage in Libeck and Flemish Code. Same as in Scandinavia, its law contained provisions for laytime and damages for detention, as provided in Chapter V of the *Skiplego Balk* that “a person who ‘hires or freights’ a vessel must pay the agreed freight whether he loads the vessel wholly, in part, or not at all.

As you can see, the term of demurrage can be created by the contract, by law, or by customs which can be different depended on each legal system. However, in the same legal system, the status of demurrage appeared to be different. For example, in English law, it now appears to be settled that, *prima facie*, at least, demurrage is liquidated damages for breach.⁹³ However, in American law there has been little discussion on the subject of the nature of demurrage, although inconsistent flat statements are often found that it is either supplementary freight or damages, sometimes it is simply described as a penalty clause.⁹⁴ In the Latin law system, the two theories are usually presented as alternatives, one of which must be accepted and the other are rejected. This preconceived notion has distorted the discussion and obscured the rationale behind the demurrage regulation. One of the theories of demurrage in Latin

⁹² Hugo Tiberg. **The Law of Demurrage**, 530 (3rd ed. London Stevens & Sons, 1979)

⁹³ *Id.*, at 535.

⁹⁴ *Id.*, at 534.

law system is perceived as damages. This points to the results that would “follow” if the rivaling view were accepted: demurrage could not be due if the voyage were abandoned, the master would have the same lien over the cargo as for freight, the limitation would be the same as for the freight, demurrage would take part in general average. The follower theory of demurrage is deemed to be the supplementary freight⁹⁵. It points to the fact that the ship must remain at the charterer’s disposal during the demurrage period, and they usually reinforce their argument by a theory of freight being hire for the ship which is considered to be correspond particularly well with the view of demurrage as an addition to such hire. They stress the liquidated character of demurrage that the ship is entitled to demurrage whether *in casu* damage can be shown or not.⁹⁶ The supplementary freight theory is classic in France and appears to be generally accepted by the courts, whereas some of the legal writers tend towards the view of demurrage as damages. The theory of demurrage as damages is generally held in Belgium.⁹⁷ In contrast with Italy, the idea of demurrage is deemed to be a compensation which seems to be as a result of the Code’s characterization of the affreightment as a transportation contract, but the additional freight reasoning has recurred recently. The later writers on Dutch law characterize demurrage not as demurrage but as a compensation for a prolongation of the waiting period. In Scandinavian and German authors have generally preferred a more neutral approach and characterized demurrage as a compensation *sui generis* payable for delay beyond the lay time.⁹⁸

As mentioned above, after considering the issue of demurrage under Thai law, it appears that demurrage does not include in Thai legislation. This can be drawn in conclusion that demurrage is not created by law, meaning that the rule of demurrage or lay time does not appear in Thai legal code or act. So, there is a problem that whether the contractors can provide demurrage in the contract. After considering Section 151 of

⁹⁵ There is an opinion that the idea of demurrage as a supplementary freight does not seem to fit into the Code’s system and is rarely mentioned by later writers. The Code itself omitted that definition which appeared in previous drafts. (footnote **Law of Demurrage**, 532. 7a)

⁹⁶ *Id.*, at 531.

⁹⁷ *Id.*, at 532.

⁹⁸ *Id.*, at 535.

the Civil and Commercial Code which stated that “An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral.”, it can be answered that even though the issue of demurrage is differed from any provision of any law, but it does not relate to public order or good moral, so if the parties agree to provide the term of demurrage in their contract, such term is effective and not void. It can be seen that the law accepts the term agreed by the parties which is based on the principle of the “Autonomy of the Will”. The general principle regarding freedom and autonomy of the will is that whatever the parties needed to be enforced, the law shall accept and enforce as much as possible in the part that is not in conflict of minority. Furthermore, even the unnamed contract and is not specified by Book III of the Civil and Commercial Code which made by the parties can be enter into force if such contract is not void pursuant to Book I of the Civil and Commercial Code.

After the parties agree to specify the demurrage into the voyage charter, the Civil and Commercial Code of Thailand is accepted such agreement according to the general principle regarding freedom and autonomy of the will. However, Thai legislation does not provide any terms or regulations regarding demurrage. So, it must be considered that what status of demurrage actually is in Thai legal system and how it can be enforced. In this chapter, we have to analyze and compare the rules and foreign laws which state the demurrage because in Thai legal system, demurrage can be created only by contract which means that the parties have to agree to specify the amount of money paid as demurrage in their contracts, then the law will apply to such term.

After considering demurrage in foreign laws, the conditions of the Civil and Commercial Code of Thailand which relate to demurrage is as followed;

4.2 The Legal Status and the Applications of Demurrage under Thai Laws

4.2.1 The Penalty

4.2.1.1 Definition and Condition of the Penalty

The Civil and Commercial Code Section 379 states that

“If the debtor promises the creditor the payment of a sum of money as penalty in case he does not perform his obligation or does not perform it in the proper manner, the penalty is forfeited if he is in default. If the performance due consists in a forbearance, the penalty is forfeited as soon as any act in contravention of the obligation is committed.”

According to this Section, penalty means the damages or the compensation agreed by the parties in advance. The debtor promises that if the debtor does not perform his obligation or does not perform it in a proper manner, the debtor will allow the creditor to forfeit or claim the penalty from the debtor. In the case the debtor performs his obligation whose object is the forbearance from an act, if the debtor breaches the obligation, the creditor can also forfeit or claim the penalty from the debtor. However, the debtor does not have the duty to deliver the penalty to the creditor at the time of making the contract or in advance. The creditor may ask for the penalty after the breach of the contract or after the debtor does not perform his obligation.

The penalty must be made by the contract, otherwise the court shall not grant the penalty. The term of penalty might be in the contract of the performance of the obligation or can be made in another contract apart from the main contract later on which is the accessory contract. Apart from the validity of the accessory contract, the principal contract or main contract must also be valid. (Section 384 of the Civil and Commercial Code)

The penalty in term of the damages or the compensation agreed by the parties in advance, even it is called the damages, the penalty, or the interest, they are the penalty and if the debtor does not perform his obligation or does not perform it in a proper manner, the creditor shall forfeit or claim the penalty from the debtor.

4.2.1.2 The Penalty in the Form of a Sum of Money

In order to forfeit or claim the penalty from the debtor, the debtor must not perform his obligation or does not perform it in a proper manner.

In case the debtor does not perform his obligation, we must consider Section 380 of the Civil and Commercial Code which states that;

“If the debtor has promised the penalty for the case of his not performing his obligation, his creditor may demand the forfeited penalty in lieu of performance. If the creditor declares to the debtor that he demands the penalty, the claim for performance is barred.

If the creditor has a claim for compensation for non-performance, he may demand the forfeited penalty as the minimum amount of the damage. Proof of further damage is admissible.”

The first paragraph applies to the case where the creditor has the right to claim the damages from the debtor if the debtor does not perform the obligation. In contrast with Section 381 of the Civil and Commercial Code which states that;

“If the debtor has promised the penalty for the case of his not performing the obligation in the proper manner, such as, not at the fixed time, the creditor may demand the forfeited penalty in addition to the performance.

If the creditor has a claim for compensation on account of improper performance, provisions of the second paragraph Section 380 are applied.

If the creditor accepts the performance he may demand the penalty only if on acceptance he reserves the right to do so.”

Section 381 applies in case the debtor does not perform his obligation in a proper manner. As a result, when paragraph one of Section 380 is applied, the creditor is entitled to choose either way whether to claim the penalty or make a demand for a

compulsory performance of his obligation pursuant to Section 213⁹⁹. In another way, the creditor may deny the penalty, but instead demand for a compulsory performance of his obligation.

4.2.1.3 The Penalty in Any Other From Than a Sum of Money

The penalty which is not a sum of money is specified in Section 382 of the Civil and Commercial Code which states as followed;

Section 382 “If another performance than the payment of a sum of money is promised as penalty, the provisions of Section 379 to 381 are applied; the claim for compensation is barred if the creditor demands the penalty.”

To specify in the contract that the penalty shall be the performance such as a compulsory performance, an obligation whose subject is the forbearance from an act, or delivery of the property, the rights and the obligation of the parties about the penalty is still the same as stated in Section 397, 380, and 381. However, if the creditor claims the penalty, the creditor cannot claim for the compensation anymore, in other word, Section 380 paragraph two and Section 381 paragraph two are not applied in this case.

4.2.1.4 The Result of Providing the Penalty

If the debtor does not perform his obligation or does not perform it in a proper manner, the creditor is entitled to claim for the penalty as agreed without having to prove about the amount of money as agreed by the party unless the damage occurs more than the penalty agreed by the parties according to Section 222¹⁰⁰ or the penalty may be reduced by the court if it is disproportionately high according to Section 383¹⁰¹.

⁹⁹ Section 213 paragraph one states that “If a debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance, except where the nature of the obligation does not permit it.”

¹⁰⁰ Section 222 states that “The claim of damages is for compensation for all such damage as usually arises from non-performance.

The creditor may demand compensation even for such damage as has arisen from special circumstance, if the party concerned foresaw or ought to have foreseen such circumstances.”

The penalty may be forfeited when (1) the debtor does not perform his obligation (2) the debtor does not perform it in the proper manner (not in the case when does not perform his entire obligation, but when the debtor does not perform the obligation in accordance with the true intent and purpose of the same according to Section 215¹⁰², or when the debtor does not perform his obligation at the fixed time according to Section 381, or the debtor performs the wrong obligation, and so on (3) the debtor breaches the obligation.

The penalty will be forfeited under the conditions mentioned above in case when the subject of an obligation is the doing of an act when the debtor is in default according to Section 204¹⁰³ which means that after sending the warning to the debtor, if the debtor does not perform after warning given by the creditor, the debtor is in default. (Section 204 paragraph one). Or in case a time by calendar is fixed for the performance, the debtor is in default without warning if he does not perform at the fixed time (Section 204 paragraph two) However when the subject of an obligation is the forbearance from an act, if the debtor breaches the obligation, the debtor is in default because the forbearance from an act is differed from the obligation whose subject is the doing of an act.

Nevertheless, if the performance of the obligation becomes impossible in consequence of a circumstance without the responsibility of the debtor (Section

¹⁰¹ Section 383 paragraph one states that “If a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by the Court. In determination of reasonableness every legitimate interest of the creditor, not merely his property interest, shall be taken into consideration. After payment of the penalty the claim for reduction is Barr edition”

¹⁰² Section 215 states that “When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may claim compensation for any damage caused thereby.”

¹⁰³ Section 204 states that “If the debtor does not perform after warning given by the creditor after maturity, he is in default through the warning.

If a time by calendar is fixed for the performance, the debtor is in default without warning if he does not perform at the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may be reckoned by the calendar from the time of notice.”

219)¹⁰⁴, the debtor is relieved from his obligation. In this case the creditor cannot forfeit the penalty and has to return the penalty to the debtor.

4.2.1.5 The Reduction of the Penalty

Section 383 of the Civil and Commercial Code states that

“If a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by the Court. In the determination of reasonableness every legitimate interest of the creditor, not merely his property interest, shall be taken into consideration. After payment of the penalty the claim for reduction is barred.

The same rule applies also, apart from the cases provided for by Sections 379 and 382, if a person promises a penalty for the case of his doing or forbearing to do some act.”

The parties of the contract agree to provide a sum of money as the penalty or other method that can be calculated freely or up to their satisfaction. However, sometimes the parties are in a situation to exert influence over each other. The party who has less bargaining power may have to accept the high disproportionate penalty. So, Section 383 of the Civil and Commercial Code provides that the court may reduce the penalty without any requests from the parties, considering Section 142 of the Civil Procedure Code which states that

“Judgment or order of the court shall be adjudicated on every claim in the plaint, but no judgment or order shall be rendered exceeding or beyond the claims contained in such plaint, except that:

.....

¹⁰⁴ Section 219 paragraph one states that “The debtor is relieved from his obligation to perform if the performance becomes impossible in consequence of a circumstance, for which he is not responsible, occurring after the creation of the obligation.”

(5) in the case where the issue of the law concerning public order could have been raised, the Court, when he deems appropriate, raise that issue for the purpose of making a decision and render a judgment’

4.2.1.6 The Burden of Proof of the Debtor Against the Forfeiture of the Penalty

The law has given the burden of proof of the debtor against the forfeiture of the penalty in Section 385 of the Civil and Commercial Code which states that

Section 385 “If the debtor contests the forfeiture of the penalty on the ground of having performed his obligation, he must prove the performance, unless the performance due from him consisted in a forbearance.”

The debtor has the burden to prove that he has already performed his obligation because after the debtor refers to the fact that he has made the contract with the creditor, the burden of proof has already transferred to the debtor.

Table 4.1: Explaining the Penalty

Provisions relating to the penalty according to the Civil and Commercial Code	Nature of the penalty
<p>Section 379</p> <p>“If the debtor promises the creditor the payment of a sum of money as penalty in case he does not perform his obligation or does not perform it in the proper manner, the penalty is forfeited if he is in default. If the performance due consists in a forbearance, the penalty is forfeited as soon as any act in contravention of the obligation is committed.”</p>	<p>The penalty means the damages or the compensation agreed by the parties in advance. The debtor promises that if the debtor does not perform his obligation or does not perform it in a proper manner, the debtor will allow the creditor to forfeit or claim the penalty from the debtor. In the case the debtor performs his obligation whose object is the forbearance from an act, if the debtor breaches the obligation, the creditor can also forfeit or claim the penalty from the debtor. However, the debtor does not have the duty to deliver the penalty to the creditor at the time of making the contract or in advance.¹⁰⁵ The creditor may ask for the penalty after the breach of the contract or after the debtor does not perform his obligation.</p>
<p>Section 380</p>	<p>If the debtor has promised the penalty, the</p>

ดร. สนั่นทกรณ (จำปี) โสคติพันธุ์, พิมพ์ครั้งที่ 18. กรุงเทพฯ: สำนักพิมพ์วิญญูชน, พ.ศ. 2557 [Sanakorn (Chompee) Sodtiphan, Explanation of Legal Transaction- Contract, Volume 18, Winyuchon, B.E. 2557]

Provisions relating to the penalty according to the Civil and Commercial Code	Nature of the penalty
<p>“If the debtor has promised the penalty for the case of his not performing his obligation, his creditor may demand the forfeited penalty in lieu of performance. If the creditor declares to the debtor that he demands the penalty, the claim for performance is barred.</p> <p>If the creditor has a claim for compensation for non-performance, he may demand the forfeited penalty as the minimum amount of the damage. Proof of further damage is admissible.”</p>	<p>creditor is entitled for the penalty without having to prove for it unless the creditor claims for the damages in the amount greater than the promised penalty. However, the damages have to be proved by the creditor in the court.</p>
<p>Section 381</p> <p>“If the debtor has promised the penalty for the case of his not performing the obligation in the proper manner, such as, not at the fixed time, the creditor may demand the forfeited penalty in addition to the performance.</p> <p>If the creditor has a claim for compensation on account of improper performance, provisions of the second paragraph Section 380 are applied.</p>	<p>In the case the debtor does not perform it in a proper manner. As a result when paragraph one of Section 380 is applied, the creditor is entitled to choose either way whether to claim the penalty or make a demand for a compulsory performance of his obligation pursuant to Section 213¹⁰⁶. In another way, the creditor may deny the penalty, but instead demand for a compulsory performance of his obligation.</p>

¹⁰⁶ Section 213 paragraph one states that “If a debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance, except where the nature of the obligation does not permit it.”

Provisions relating to the penalty according to the Civil and Commercial Code	Nature of the penalty
<p>If the creditor accepts the performance he may demand the penalty only if on acceptance he reserves the right to do so.”</p>	
<p>Section 382</p> <p>“If another performance than the payment of a sum of money is promised as penalty, the provisions of Section 379 to 381 are applied; the claim for compensation is barred if the creditor demands the penalty.”</p>	<p>To specify in the contract that the penalty shall be the performance such as a compulsory performance, an obligation whose subject is the forbearance from an act, or delivery of the property, the rights and the obligation of the parties about the penalty is still the same as stated in Section 397, 380, and 381. However, if the creditor claims the penalty, the creditor cannot claim for the compensation anymore in other word Section 380 paragraph two and Section 381 paragraph two are not applied in this case.</p>
<p>Section 383</p> <p>“If a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by the Court. In determination of reasonableness every legitimate interest of the creditor, not merely his property interest, shall be taken into consideration. After payment of the penalty the claim for reduction is barred.</p>	<p>If the penalty is disproportionately high, the court may reduce the penalty as he deems appropriate.</p>

Provisions relating to the penalty according to the Civil and Commercial Code	Nature of the penalty
<p>The same rule applies also, apart from the cases provided for by Sections 379 and 382, if a person promises a penalty for the case of his doing or forbearing to do some act.”</p>	
<p>Section 384</p> <p>“If the promises performance is invalid, an agreement made for a penalty for non-performance of the promise is also invalid, even if the parties knew of the invalidity of the promise.”</p>	<p>The penalty must be made by the contract, otherwise the court shall not grant the penalty. The term of penalty might be in the contract of the performance of the obligation or can be made in another contract apart from the main contract later on which is the accessory contract. Apart from the validity of the accessory contract, the principal contract or main contract must also be valid.</p>
<p>Section 385.</p> <p>“If the debtor contests the forfeiture of the penalty on the ground of having performed his obligation, he must prove the performance, unless the performance due from him consisted in a forbearance.”</p>	<p>The debtor has the burden to prove that he has already performed his obligation because after the debtor refers to the fact that he has made the contract with the creditor, the burden of proof has already transferred to the debtor.</p>

4.2.2 The Damages

4.2.2.1 The Definition of Damages

The damages means the compensation given to the injured person in order to reimburse any damage caused by not performing the obligation or not performing it in the proper manner. The claim of damages is for compensation for all such damage as usually arises from non-performance and the damage as has arisen from special circumstance. (Section 222) The court shall grant the damages as a sum of money, except in case of the wrongful acts, the court might restitute of the property of which the injured person has been wrongfully deprived or its value as well as damages to be granted for any caused which included as compensation according to Section 438 paragraph two¹⁰⁷ of the Civil and Commercial Code.

The rights to claim the damages in the contract are as followed;

- 1) the debtor fails to perform his obligation (Section 213)
- 2) the debtor does not perform the obligation in the proper manner (Section 215)
- 3) the perform of the obligation is delayed, after the debtor is in default and the damage has arisen in the consequence that the debtor is responsible.

The provision relating to the damages is stated in Section 222 of the Civil and Commercial Code which states that

“The claim of damages is for compensation for all such damage as usually arises from non-performance.

The creditor may demand compensation even for such damage as has arisen from special circumstance, if the party concerned foresaw or ought to have foreseen such circumstances.”

¹⁰⁷ Section 438 paragraph two states that “Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages for any injury caused”

After the debtor breaches the contract, the creditor has the burden to prove about the damages.

4.2.2.2 The Claim of Damages.

The claim for damages can be done only by court and the injured person has to prove to the court that he is actually been injured. The court shall grant the damages as he is actually injured. The court cannot reduce the damages. If the injured person cannot prove the amount of the damages to the court but the damage has actually arisen, the court shall grant he damages as he deems appropriate.

4.2.2.3 The Burden of Proof for the Claim of Damages

The injured person has to prove the damage arisen to him to the court because he refers to the fact that he is actually injured from the breach of the contract and the damage is arisen to him.

4.2.2.4 The Difference of the Penalty and the Damages

The differences of the penalty and the damages are as followed;

1) The penalty does not always have to be a sum of money. It can be a compulsory performance or the forbearance from an act. However, the damages have to be a sum of money except some kind of compensation caused by the wrongful act.

2) The penalty has to be provided by contract. However, the damages do not have to be provided in advance. If the damage has arisen after the contract has been made, the injured person is entitled to claim for the damages actually sustained by him.

3) The specified penalty, once having been delivered to the creditors, can be forfeited without the court's order. However, the damages can be granted only by the court according to Section 222.

4) If the debtor has promised the penalty, the creditor is entitled for the penalty without having to prove for it unless the creditor claims for the damages in the amount greater than the promised penalty according to Section 380 paragraph two. However, the damages have to be proved by the creditor in the court.

5) The calculation of the penalty is not only for the reimbursement of the damage, but also for other interest of the creditor. However, the damages which are granted by the court is usually for the interest of the property.

6) If the penalty is disproportionately high, the court may reduce the penalty as he deems appropriate according to Section 383. However, the court cannot reduce the actual damages arisen to the injured person according to Section 222.

4.3 Analysis of the status of demurrage under Thai law

In Common law system, the concept of demurrage in common law system is different from civil law system because before the shipowner can fix the demurrage amount, various factors must be taken to consideration. For example, the burning cost which is the minimum expenses that must be occurred even if the ship does not sail. This is the consumption because the ship cannot sub engine or affloated, also the crew that must be hired and taken on board as well as the matter of safety. The costs will incurred even if the ship does not sail which is the reason behind the concept that "Once the demurrage, always demurrage". So in Common law system, demurrage cannot be reduced which is contrary to civil law system that demurrage can be reduced according to Section 383 of Civil and Commercial Code. However, in this thesis will focus only in Civil law system.

Take a look at Thai law, it is admitted that the demurrage can be deemed as the penalty under Thai law, not the damages because the shipowner and the charterer agree to pay a sum of money if the charterer uses the ship beyond the period of the moment fixed for the departure. In contrast, the damages cannot be agreed before the parties are actually injured. Moreover, the shipowner does not have the burden to prove the amount of the money he is entitled which is in contrast to the damages.

The reasons that the demurrage can be admitted as the penalty under Thai law are as followed;

1) Because the voyage charter and the demurrage concept have their own characteristics substantially different from general contracts, the judge who is involved in the trial and adjudication of the case needs to study and understand the background

of demurrage, customs, intention of the parties, conditions and terms of voyage charter, especially the demurrage clause in order to proceed with the trial and render the judgement.

2) Due to the fact that most of voyage charterparty contracts are on standard form and, *inter alia*, Gencon, the most popular one. In those standard forms, a governing law clause is normally contained, and mostly, English law to apply. Therefore, there may be a question of law on the element of choice of law or conflict of law, particularly, in the case where the parties to the voyage charterparty in question of conflict of law, particularly, in the case where the parties to the voyage charterparty in question are not of the same nationality. In some case, the law agreed by the parties and the question of conflict of law must be observed and cannot be overlooked by the parties to the parties to the proceedings and the Court. Unless the parties fail to raise such question of law or to produce evidence to satisfy the Court of the stipulated foreign law, the Court shall apply Thai law.

3) Notwithstanding the above, it is to be remembered that Section 5 of the Act on Conflict of Laws, B.E. 2481 of Thailand provides a restriction on the applicability of foreign law. In brief, it can apply so far as it is not against public order or good morals.

4) Having overwhelmed the threshold in the two preceding recommendations. The court needs to consider all circumstances at the time of making the contract for example, if the demurrage is reasonably proportionate, the court may grant the agreed amount of demurrage. However, if the demurrage is disproportionately high, the court may reduce the demurrage as he deems appropriate.

5) We also have to consider the provisions of the unfair contract, according to Section 4 of the Unfair contract Terms Act, B.E. 2540 (1997), if the terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. So the charterer may raise the issue of the unfair contract in the

court. If the court hears that such term is an unfair contract terms, the court may grant the demurrage as he deems fair and reasonable.

4.4 The Application of the Penalty to the Demurrage

The court may apply the penalty after applying to the demurrage as followed;

1) Because the voyage charter and the demurrage concept have their own characteristics substantially different from general contracts, the judge who is involved in the trial and adjudication of the case needs to study and understand the background of demurrage, customs, intention of the parties, conditions and terms of voyage charter, especially the demurrage clause in order to proceed with the trial and render the judgement.

2) Due to the fact that most of voyage charterparty contracts are on standard form and, *inter alia*, Gencon, the most popular one. In those standard forms, a governing law clause is normally contained, and mostly, English law to apply. Therefore, there may be a question of law on the element of choice of law or conflict of law, particularly, in the case where the parties to the voyage charterparty in question of conflict of law, particularly, in the case where the parties to the voyage charterparty in question are not of the same nationality. In some case, the law agreed by the parties and the question of conflict of law must be observed and cannot be overlooked by the parties to the parties to the proceedings and the Court. Unless the parties fail to raise such question of law or to produce evidence to satisfy the Court of the stipulated foreign law, the Court shall apply Thai law.

3) Notwithstanding the above, it is to be remembered that Section 5 of the Act on Conflict of Laws, B.E. 2481 of Thailand provides a restriction on the applicability of foreign law. In brief, it can apply so far as it is not against public order or good morals.

4) Having overwhelmed the threshold in the two preceding recommendations. The court needs to consider all circumstances at the time of making the contract for example, if the demurrage is reasonably proportionate, the court may grant the agreed amount of demurrage. However, if the demurrage is disproportionately high, the court may reduce the demurrage as he deems appropriate.

5) We also have to consider the provisions of the unfair contract, according to Section 4 of the Unfair contract Terms Act, B.E. 2540 (1997), if the terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. So the charterer may raise the issue of the unfair contract in the court. If the court hears that such term is an unfair contract terms, the court may grant the demurrage as he deems fair and reasonable.

In conclusion, according to reasons mentioned above, demurrage can be applied to the penalty according to Thai law because after applying the provisions of the penalty, such provisions can be deemed appropriate and effective to the objective of the demurrage.

Table 4.2: Comparing the Penalty and the Demurrage

Nature of the penalty	Nature of demurrage
<p>The debtor promises that if the debtor does not perform his obligation or does not perform it in a proper manner, the debtor will allow the creditor to forfeit or claim the penalty from the debtor. In the case the debtor performs his obligation whose object is the forbearance from an act, if the debtor breaches the obligation, the creditor can also forfeit or claim the penalty from the debtor. However, the debtor does not have the duty to deliver the penalty to the creditor at the time of making the contract or in advance. The creditor may ask for the penalty after the breach of the contract or after the debtor does not perform his obligation. (section 379)</p>	<p>The shipowner and the charterer agree to pay a sum of money if the charterer uses the ship beyond the period of the moment fixed for the departure. Demurrage does not have to be delivered to the shipowner before the laytime is exceeded.</p>
<p>The parties of the contract agree to pay the penalty in advance.</p>	<p>An objective of the charterparty is to provide the demurrage in the contract in advance.</p>
<p>If the debtor has promised the penalty, the creditor is entitled to claim for the penalty without having to prove for it. (section 380 paragraph one)</p>	<p>The charterer has to pay for the demurrage in case the ship has been used longer than the laytime without having to prove for it.</p>
<p>Unless the creditor claims for the damages</p>	<p>In case the fixed amount of demurrage is</p>

Nature of the penalty	Nature of demurrage
in the amount greater than the promised penalty, the creditor has to prove for further damage. However, the damages have to be proved by the creditor in the court (section 380 paragraph two)	disproportionately low, the shipowner may demand the forfeited penalty as the minimum amount of the damage and is not prohibited to prove for further damage.
The penalty can be agreed as the performance of the obligation. (section 382)	-
If the penalty is disproportionately high, the court may reduce the penalty as he deems appropriate. (section 383)	In case the fixed amount of demurrage is disproportionately high, the court shall reduce the demurrage as he deems appropriate.
The term of the penalty might be in the contract of the performance of the obligation or can be made in another contract apart from the main contract later on which is the accessory contract. Apart from the validity of the accessory contract, the principal contract or main contract must also be valid. (section 384)	The demurrage can be made in the voyage charter or can be made in another contract apart from the voyage charter. The principal contract or main contract must also be valid.

4.5 In the Unfair Contract Perception

4.5.1 Concept of the Unfair Contract Terms Act, B.E. 2540 (1997)

In the past, when parties made a contract agreement, they would give strict respect to their intentions. Thus, all parties would be forced to act according to the terms in a contract, as made by their consent. This principle was the standard legal fair according to the established legal system because the contracting parties were bound to the provisions of any contract agreement, which was the deemed important thing to enforce. By lawyers and the Court, if the objective of a contract was not unlawful, did not conflict with the stability of the state, and was not against public morals, then the terms of a contract would bind the parties who made the agreement. However, at the present time, if we stay bound to that principle, then this can cause unequal status, and disadvantage, between the parties. Persons who take advantage of their superior knowledge and contracting experience can create an unfair contract, which misuses those parties of a weaker bargaining position. Unfair contract terms can appear in many kinds of contracts, such as hire of service contracts, hire of work contracts, or any similar kind of contract. This may effect consumers who enter into such contracts in the capacity as buyers, lessees, borrowers or other persons. If we are bound to the old principle, which accords to the sacred element of declaration of intention, then a party that takes advantage can force another party to act under the terms in a contract, providing the objective of the contract does not conflict with the stability of the state or public morals, which can cause unfair conditions to those of lesser power, or lesser social and economic status in Thai society.¹⁰⁸

Moreover, the general legal system could not solve and remedy this particular problem. However, the Act called the “Unfair Contract Terms Act, B.E. 2540” was enacted to deal with the problem of the unfairness and unrest in society caused by adherence to unfair contracts. By means of this Act, guidelines have been set for Thai Courts to consider what contract or agreement is too unfair, and empower the relevant Court to order such unfair contract or agreement to be only effective and enforceable, as is appropriate and fair, depending upon the facts of the case, in the opinion of the

¹⁰⁸ http://www.marut.th.com/pr/mshow_index.php3?id=15.

Court. Regarding the main principle of the Unfair Contract Terms Act, B.E. 2540, the Court will examine the terms in a contract by consideration of the good faith of all parties to it, what the parties have done, and the potential negative effects on the parties.

Additionally, any term in a contract between the parties, which is made for excluding or restricting liability before the result has occurred, is void and unenforceable. However, this Act is not retroactive for contracts made before 15th of May, 1998, which is the date of initial enforcement. The terms with characters or effects in a way that the other party is obliged to comply or bear more burden than which could have been anticipated by a reasonable person in normal circumstance may be regarded as an unfair contract term such as :-

- A contract rendering the contract liable to be terminated at any time, and granting the right to terminate the contract immediately without remedy to any other party involved.

- A contract term rendering another party to be more liable, or to bear more burden, than that prescribed by law.

- A contract granting the right to a party to claim or compel another party to bear more burden than that which could have been anticipated by a reasonable person in normal circumstances. For example, : there are many kinds of credit loan agreement contract which may have terms that include high interest rates and penalties, which are much higher than the standard rates for general loan agreements.

The credit arranger will allow the consumer a credit loan with the intention for the debt to be paid later. However, the interest rate in the contract terms may be much higher than the normal interest rate and the contract terms may also have penalties. If the sum of interest and any respective penalties are around 40 percent of the principal, then the Court could consider the contract terms to be an unfair agreement between the Parties, if the normal loan interest rate was around 15 percent of the principal, as the contract terms would cause more burden than that which could have been anticipated by a reasonable person in normal circumstances. The respective burdens are considered

by comparing between the respective burdens of the contracting parties. When one party, which has a weaker bargaining power, receives more burden than that prescribed by the act, then the Court can consider the contract terms to be unfair. The Court can also issue an order for reducing any penalty and the interest rate for which the Court has considered as too high.

In summary, the Unfair Contract Terms Act, B.E. 2540 (1997), has the legal principle for the consumer that: the consumer can request the Court to remedy unfairness in a contract to a more equitable level. This is not restricted to the terms in a contract, which cause a consumer to bear excessive burdens, but also the Court can consider what contract or agreement is unfair, and so order any such deemed unfair contract to be amended as is appropriate and equitable depending upon the case. The success of this Act depends upon the role of lawyers, the decisions and interpretations of the judges presiding on the cases, and Society's resolve to deal with contract unfairness as prescribed in this act.

4.5.2 Reasons for the Promulgation of the Act

The reason for the promulgation of this Act is as follows: owing to the legal principle relating to the juristic acts or the enforceable contract based on the liberty of people, according to the principle of sacredness of declaration of intention. The state shall not, even though a party has an advantage over the other party, intervene in the matter unless the action is expressly prohibited by law or is contrary to public order and good morals. However, with the current social nature has changed, and a party who has a stronger bargaining power in economy could, by depending on such principle, take advantage of the other party who has a weaker bargaining power in the case. This leads to the unfairness and unrest in society. It, for the state, is supposed to outline the frame of exercising the principle of sacredness of declaration of intention and liberty of people so as to cure unfairness and unrest in society. By means of this, a guideline has been set for Court to consider of what contract or agreement is unfair, and empower the Court to order such unfair contract or agreement be effective in enforcement as it is appropriate and fair depending upon the case. With the reason mentioned, therefore, it is necessary to enact this Act.

4.5.3 Section 4 of an Unfair Contract Act, B.E. 2540

According to Section 4 of the Unfair contract Act B.E. 2540 (1997) which states that

“The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.

In case of doubt, the standard form contract shall be interpreted in favour of the party that does not prescribe the said standard form contract.

The terms with characters or effects in a way that the other party is obliged to comply or bear more burden than that could have been anticipated by a reasonable person in normal circumstance may be regarded as terms that render an advantage over the other party, such as:

1. terms excluding or restriction liability arising from breach of contract;
2. terms rendering the other party to be liable or to bear more burden than that prescribed by law;
3. terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party is not in breach of the contract in the essential part;
4. terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;
5. terms granting the right to a party to the contract to claim or compel the other party to bear more burden than that existed at the time of making the contract;
6. terms in a contract of sale with right of redemption whereby the buyer fixes the redeemed price higher than the selling price plus rate of interest exceeding fifteen percent per year;

7. terms in a hire-purchase contract which prescribe excessive hire-purchasing price or which imposes unreasonable burdens on the part of the hire-purchaser;
8. terms in a credit card contract which compels the consumer to pay interest, penalty, expenses or any other benefits excessively, in the case of default of payment or in the case related thereto;
9. terms prescribing a method of calculation of compound interest that cause the consumer to bear excessive burdens.

In considering whether the advantage rendered by the terms under paragraph three be unreasonable, Section 10 shall apply *mutatis mutandis*.”

Section 10 “In determining to what extent the terms be enforceable as fair and reasonable it shall be taken into consideration all circumstances of the case, including:

1. good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual condition
2. ordinary usages applicable to such kind of contract;
3. time and place of making the contract or performing of the contract;
4. the much heavier burden borne by one contracting party when compared to that of the other party.”

From these sections, usually in voyage charter, the contract between the shipowner and the charterer is a contract between consumer and the business, trading or professional operator or in a standard form contract.

Sometimes, the party who has less bargaining power has to accept the unreasonable term because another party have more advantage over the other party which causes the party to accept the unfair contract terms, such terms can be enforceable to the extent that they are fair and reasonable according to the circumstances.

In the case of the demurrage, the agreement is usually written in voyage charter which already made in a standard form contract. The parties of demurrage are between the shipowner and the charterer. The charterer is usually a consumer and the shipowner is usually the business, trading or professional operator. If the charterparties serve the term of demurrage with the unfair conditions which are for example,

1.terms excluding or restriction liability arising from breach of contract;

2.terms rendering the other party to be liable or to bear more burden than that prescribed by law;

3.terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party is not in breach of the contract in the essential part;

4.terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;

5.terms granting the right to a party to the contract to claim or compel the other party to bear more burden than that existed at the time of making the contract

The term on voyage charter concerning to demurrage can be enforceable to the extent that they are fair and reasonable according to the circumstances.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

In the voyage charter, it may provide many conditions. The important conditions usually argued are, for example, the condition about the period of time that the shipowner allows the charterer to use the ship, a certain period of time at his disposal for the loading and discharge of the cargo, the so called *Laytime*. Moreover, another important issue affecting the shipowner and the charterer is the condition of demurrage which can only be provided in the voyage charter. The problems of demurrage are, for example, legal treatment of demurrage (whether to treat it as the penalty or otherwise) and legal consideration as to its fairness to parties concerned.

Demurrage has two important elements. First is a sum agreed by the charterer pay to be paid as liquidated damages for delay beyond a stipulated or reasonable period of time for loading or unloading. Second is a period of time beyond a stipulated or reasonable period of time for loading or unloading.

This result is brought about by the various functions of demurrage, some of which are for the shipowner's immediate benefit and others for the charterer's benefit. On the whole there may be perceived, in the demurrage regulation¹⁰⁹;

- 1) a reparative function;
- 2) a retentive function
- 3) a punishment function
- 4) an incentive function

¹⁰⁹ Hugo Tiberg. **The Law of Demurrage**, 40-42 (3rd ed. London Stevens & Sons, 1979)

From the parative angle, the demurrage clause appears to be interested for the shipowner's benefit, and this may be said of the demurrage regulation as a whole.

But the demurrage clause itself, given a lay time provision, serves the charterer's interest, because without it the charterer would not have any right to retain the ship beyond the lay time at all. This is the retentive function of the demurrage regulation. It constrains the ship to remain in spite of minor delays. Demurrage in this sense is a payment for a consideration, which is the ship's remaining in port.

As such a payment demurrage should not be due in respect of subsequent detention beyond the time that the charterer actually uses for the performance of his work. On the other hand, it should be payable even if the ship would in any case have been delayed by causes operating simultaneously with the charterer's performance of his functions, as it is benefit which the charterer enjoys that should be of importance.

A penalty is stipulated to strengthen the position of the creditor. Its function is to punish a debtor for not performing his obligation or breaching of the contract. However, the charterer will be more inclined to regard demurrage as a punishment for his failure to load in time, and his tendency will be admit liability only in those cases where the delay is due to his fault. But a punishment is not a true "function" of demurrage. Seen positively it amounts to an incentive for the charterer to pursue his task with diligence.

In its incentive function, demurrage serves the shipowner's interest in getting the ship dispatched quickly. But fundamentally it serves a common or public interest in decreasing the waiting limits at both ends of the voyage. The incentive function requires the lay time to be so short that the charterer is always held to do his best, and it requires the payment to be such as to constitute an effective inducement for the charterer to be avoided all unnecessary delays.

5.2 Findings

Problems surrounding demurrage lie in the legal status of demurrage and legal treatment and legal consideration as to its fairness to parties concerned, especially, when consideration is made from different system of law, i.e. common law and civil law.

With regard of its legal status of demurrage, it is submitted by the study that from Thai law perspective it should be perceived as a “penalty” simply because;

1) The parties to a charterparty can agree in the contract a sum of money.

2) An objective of the charterparty is to provide the demurrage in the contract in advance in case of the delay of the ship by the charter’s fault. However, the debtor (charterer) does not have the duty to deliver the penalty to the creditor (shipowner or head-charterer, as the case may be) at the time of making the contract or in advance. The creditor may ask for the penalty after the debtor does not perform his obligation.

3) The charterparty has the intention to avoid any dispute arising from the uncertain amount of damages.

4) In case the charterparty breaches the contract, the shipowner can claim for the demurrage without the burden to prove for the actual damage.

5) Demurrage as the specified amount of money does not have to be delivered to the shipowner before the breach of the contract.

As far as fairness to the parties concerned, the charterer in some cases, e.g. in a voyage charterparty is a consumer and the shipowner is the business, trading or professional operator. If the charterparties serve the term of demurrage with unfair conditions, the term on voyage charter concerning to demurrage can be enforceable to the extent that they are fair and reasonable according to the circumstances.

5.3 Recommendations

According to these reasons mentioned in this thesis, I hereby propose the recommendations as follow;

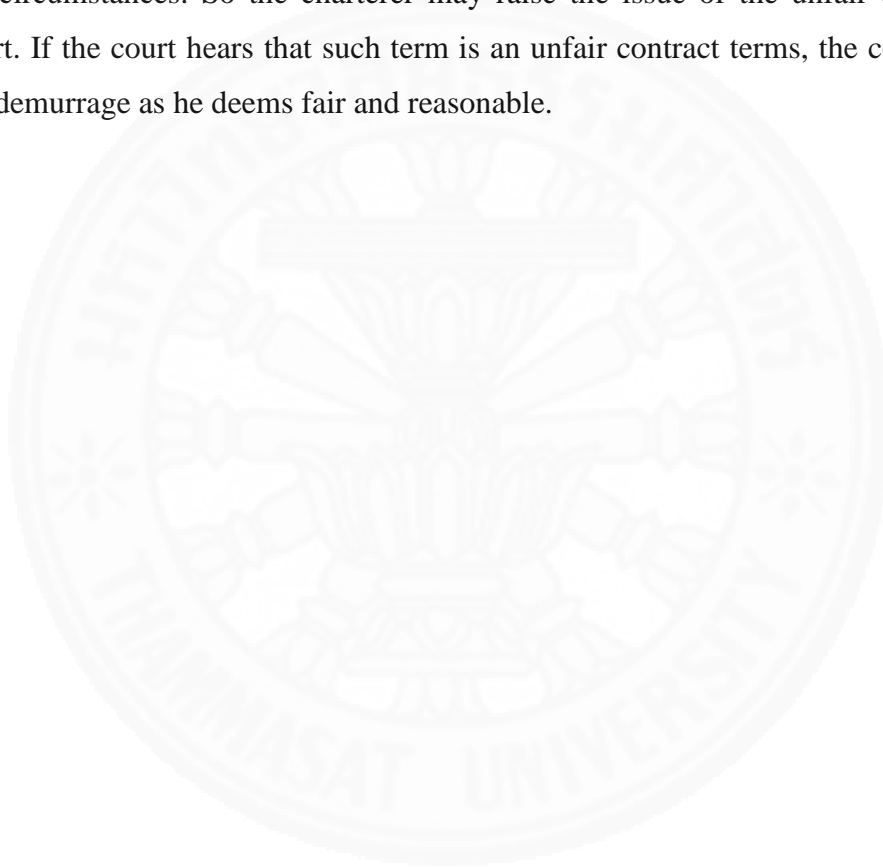
1) Because the voyage charter and the demurrage concept have their own characteristics substantially different from general contracts, the judge who is involved in the trial and adjudication of the case needs to study and understand the background of demurrage, customs, intention of the parties, conditions and terms of voyage charter, especially the demurrage clause in order to proceed with the trial and render the judgement.

2) Due to the fact that most of voyage charterparty contracts are on standard form and, *inter alia*, Gencon, the most popular one. In those standard forms, a governing law clause is normally contained, and mostly, English law to apply. Therefore, there may be a question of law on the element of choice of law or conflict of law, particularly, in the case where the parties to the voyage charterparty in question of conflict of law, particularly, in the case where the parties to the voyage charterparty in question are not of the same nationality. In some case, the law agreed by the parties and the question of conflict of law must be observed and cannot be overlooked by the parties to the parties to the proceedings and the Court. Unless the parties fail to raise such question of law or to produce evidence to satisfy the Court of the stipulated foreign law, the Court shall apply Thai law.

3) Notwithstanding the above, it is to be remembered that Section 5 of the Act on Conflict of Laws, B.E. 2481 of Thailand provides a restriction on the applicability of foreign law. In brief, it can apply so far as it is not against public order or good morals.

4) Having overwhelmed the threshold in the two preceding recommendations. The court needs to consider all circumstances at the time of making the contract for example, if the demurrage is reasonably proportionate, the court may grant the agreed amount of demurrage. However, if the demurrage is disproportionately high, the court may reduce the demurrage as he deems appropriate.

5) We also have to consider the provisions of the unfair contract, according to Section 4 of the Unfair contract Terms Act, B.E. 2540 (1997), if the terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. So the charterer may raise the issue of the unfair contract in the court. If the court hears that such term is an unfair contract terms, the court may grant the demurrage as he deems fair and reasonable.



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APPENDICE

APPENDIX A

Unfair Contract Terms Act, B.E. 2540 (1997)

Given on the 14th Day of November, B.E. 2540; Being the 52nd Year of the Present Reign.

His Majesty King Bhumibol Adulyadej has been graciously pleased to proclaim that :
Whereas it is expedient to enact the law governing unfair contract terms ;

Be it, therefore, enacted by the King, by and with the advice and consent of the National Assembly, as follows:

Section 1 This Act shall be called the "**Unfair Contract Terms Act B.E. 2540**".

Section 2 This Act shall come into force after the expiration of one hundred and eighty days from the date of its publication in the Royal Gazette.*

Section 3 In this Act.

- "**Contract terms**" means terms, agreement and consent, including announcement and notice excluding or restricting the liability.
- "**Consumer**" means a person entering into a contract in the capacity of a buyer, lessee, hire-purchaser, borrower, insured or other person value entering into a contract so as to acquire property, service or any other benefits for however, the said entering into such contract shall not be for trade of such property, service or benefits, and it shall mean to include a person entering into a contract in the capacity of a guarantor of the said person who does not execute the same for trade as well.
- "**Business, trading or professional operator**" means a person entering into a contract in the capacity of a seller, lessor, seller by hire-purchase, lender, insurer or any person entering into a contract so as to supply property, service or any other benefits; in any case, such entering into the contract must be for the trade

of such property, service or benefits according to their ordinary course of business.

- **"Standard form contract"** means written contract in which essential terms have been prescribed in advance, regardless whether being executed in any form, and is used by either contracting party in his business operation.

Section 4 The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with [right of redemption](#) which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.

In case of doubt, the standard form contract shall be interpreted in favour of the party that does not prescribe the said standard form contract.

The terms with characters or effects in a way that the other party is obliged to comply or bear more burden than that could have been anticipated by a reasonable person in normal circumstance may be regarded as terms that render an advantage over the other party, such as:

1. terms excluding or restriction liability arising from breach of contract;
2. terms rendering the other party to be liable or to bear more burden than that prescribed by law;
3. terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party is not in breach of the contract in the essential part;
4. terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;
5. terms granting the right to a party to the contract to claim or compel the other party to bear more burden than that existed at the time of making the contract;

6. terms in a contract of sale with right of redemption whereby the buyer fixes the redeemed price higher than the selling price plus rate of interest exceeding fifteen percent per year;
7. terms in a [hire-purchase](#) contract which prescribe excessive hire-purchasing price or which imposes unreasonable burdens on the part of the hire-purchaser;
8. terms in a credit card contract which compels the consumer to pay interest, penalty, expenses or any other benefits excessively, in the case of default of payment or in the case related thereto;
9. terms prescribing a method of calculation of compound interest that cause the consumer to bear excessive burdens.

In considering whether the advantage rendered by the terms under paragraph three be unreasonable, section 10 shall apply *mutatis mutandis*.

Section 5 The terms restricting the right or freedom in professing an occupation or an execution of a juristic act related to the business, trading or professional operation which are not void, but being the terms that cause the person whose right or freedom has been restricted to bear more burden than that could have been anticipated under normal circumstances, shall only be enforceable to the extent that they are fair and reasonable according to such circumstances.

In determining whether the terms under paragraph one cause the person, whose right or freedom has been restricted, to bear more burden than that could have been anticipated, consideration shall be taken to the scope of the area and the period of restriction of right or freedom, including whose ability and opportunity to profess occupation or to execute juristic act in other form or with other person, as well as all legitimate advantages and disadvantages of the contracting parties.

Section 6 A contract between the consumer and the business, trading or professional operator involving payment of debts by delivery of property to the consumer shall not contain the terms excluding or restricting the liability of the business, trading or professional operator for a defect or disturbance of right, except where the consumer knew of the defect or the cause of such disturbance of right, at the time of making the

contract. In such a case, the terms excluding or restricting the liability shall only be enforceable to the extent that they are fair and reasonable according such circumstances.

Section 7 In a contract which prescribes that something is given as earnest if there occurs a case that such earnest to be forfeited is disproportionately high, the court may order that forfeiture be reduced to the actual damage so occurred.

Section 8 The terms, announcement or notice made in advance to exclude or restrict liability for tort or breach of contract respecting loss of life, body or health of another person as a result of an action deliberately or negligently committed by the person making the terms, announcement or notice or by other person for which the person making the terms, announcement or notice shall also be liable, shall not be raised as an exclusion or restriction of the liability.

The terms, announcement or notice made in advance to exclude or restrict the liability in any case other than that mentioned in paragraph one which are not void shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.

Section 9 The agreement or consent of the injured party to an action clearly prohibited by law or which is contrary to public order or good morals shall not be raised as a defense to exclude or restrict the tortious liability.

Section 10 In determining to what extent the terms be enforceable as fair and reasonable it shall be taken into consideration all circumstances of the case, including:

1. good faith, bargaining power, economic status knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual condition
2. ordinary usages applicable to such kind of contract;
3. time and place of making the contract or performing of the contract;

4. the much heavier burden borne by one contracting party when compared to that of the other party.

Section 11 Any contract terms which prohibit the applicability of this Act, either partly or wholly, shall be void.

Section 12 This Act shall not be applied to the juristic acts or contracts made prior to the date of entry into force of this Act.

Section 13 In the court proceeding filed under this Act, if upon the application of a party or the court thinks fit the court may ask a qualified person or expert to give opinion for its consideration in deciding such case.

Section 14 The qualified person or expert asked by the court to give opinion shall be entitled to remunerations, travel and accommodation expenses in accordance with the regulations laid down by the Ministry of Justice with approval of the Ministry of Finance.

Section 15 The Minister of Justice shall be in charge of this Act, and shall be empowered to issue regulations for the implementation of this Act.

Countersigned by **General Chavalit Yongjaiyoot** *Prime Minister*

Remark : The reason for the promulgation of this Act is as follows: owing to the legal principle relating to the juristic acts or the enforceable contract based on the liberty of people, according to the principle of sacredness of declaration of intention. The state shall not, eventhough a party has an advantage over the other party, intervene in the matter unless the action is expressly prohibited by law or is contrary to public order and good morals. However, with the current social nature has changed, and a party who has a stronger bargaining power in economy could, by depending on such principle, take advantage of the other party who has a weaker bargaining power in the case. This leads to the unfairness and unrest in society. It, for the state, is supposed to out line the frame of exercising the principle of sacredness of declaration of intention and liberty of people so as to cure unfairness and unrest in society. By means of this, a guideline has

been set for Court to consider of what contract or agreement is unfair, and empower the Court to order such unfair contract or agreement be effective in enforcement as it is appropriate and fair depending upon the case. With the reason mentioned, therefore, it is necessary to enact this Act.

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