THE MEANING OF DEMURRAGE

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To understand demurrage, it would be necessary to understand the occasion for it.

A charter party usually contains a stipulation which prescribes the number of days available to the charterer for loading or discharging his cargo. As Lord Esher succinctly put it:

> There must be a stipulation as to the time to be occupied in the loading and in the unloading of the cargo. There must be a time, either expreessly stipulated, or implied. If it is not expressly stipulated, then it is a reasonable time which is implied by the law; but either the law or the parties fix a time. Now, when they do fix a time, how do they fix it? Why, they allow a certain number of days, during which, although the ship is at the disposal of the charterer to load or to unload the cargo, he does not pay for the use of the ship. That is the meaning of "lay days".[1]

What happens if the charterer fails to complete his undertaking within the alloted period? He may be required under the provisions of the charter to compensate the shipowner for the delay. This amount specified in the charter party as payable by the charterer for delay beyond the lay days is demurrage.

What is the justification for its imposition? An English judge explains it thus:

> All the overhead and a large proportion of the running costs of a ship are incurred even if the ship is in port. Accordingly the shipowner faces serious losses if the processes (of loading and unloading) takes longer than he had bargained for and the carrying of freight on the ship's next engagement is postponed. By way of agreed compensation for these losses, the charterer usually contracts to make further payments, called demurrage, at a daily rate in respect of detention beyond the lay time.[2]

When the charter party fixes the number of lay days, the word "day" is usually interpreted to mean a calendar day and not a period of twenty-four hours calculated from the moment of the ship's arrival.[3] Lay days are described in charter parties in various different ways. If the lay days are described as "running days", this term means that once laytime starts, every day is a lay day, including Sundays

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[1] *Nielsen v. Wait* (1885) 16 Q.B.D. 67, 70.

[2] *Navico A.G. v. Vrontados Naftiki Etairia P.E.* (1968) 1 Lloyd's Rep. 379, 383.

[3] *The Katy* (1895) P. 56.

and holidays.[4] If "working day" is used, the lay days are only those days "on which, at the port according to the custom of the port, work is done in loading an unloading ships,. . ."[5] If the charter party refers to the laydays as "weather working days", then the charterer may load and unload only on those working days on which the weather allows work to be done.[6] However, a charter party may sometimes set the duration of laytime without reference to a specific number of days but to a daily rate of loading or discharge, e.g., average rate of 150 tons per working day.[7]

Demurrage is payable upon the expiration of laytime. But for an ending to occur, there must have been a beginning. To hold the charterer liable for demurrage, it is necessary to determine the commencement of laytime.

A charter party may stipulate that laytime begins in the following manner:

> Laytime for loading and discharging shall commence at 1 p.m. if notice of readiness is given before noon, and at 6 a.m. next working day if notice is given during office hours after noon.[8]

But whatever the working, the lay days shall only commence upon compliance with the following requirements:

1. The ship is an "arrived" ship.
2. She is ready to load or discharge.
3. The shipowner has given notice of readiness to load. [9]

The "Arrived" Ship

A vessel becomes an "arrived" ship once she has reached the agreed destination. The statement, apparently self-explanatory, does not easily lend itself to an explanation.

[4] *Nielsen v. Wait* (1885) 54 L.T. 344, 346.

[5] *IBID.*

[6] *Compania Naviera Azuero S.A. v. British Oil and Cake Mills Ltd.* (1957) 2 All E.R. 241, 248.

[7] *Compania de Navigacion Zita S.A. v. Louis Dreyfus & Compagnie,* (1953) 2 All E.R. 1359.

[8] Uniform General Charter (B.I.M.C.) 1976) ("Gencon").

[9] Notice of readiness to discharge is usually not necessary as it is the duty of the holders of the bills of lading to look out for the arrival of the ship. The reason for this rule is that the bills of lading may have been assigned during the voyage, and the Master may not know who is entitled to the goods /E.R. Hardy Ivamy, *Payne and Ivamy's Carriage of Goods by Sea* (11th ed.; London; Butterworths, 1979), pp. 137-138./.

For one thing, an examination of the terms of the charter party is necessary to enable one to determine whether or not the ship has arrived. If the charter party designates a port as the point of destination without further qualification, then:

> Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reach a position within the port where she is at the immediate and effective disposition of the charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the charterer. . .
>
> If the ship is waiting at some other place in the port, then it will be for the owner to prove that she is as fully at the disposition of the charterer as she would have been if in the vicinity of the berth for loading or discharge.[10]

The above criterion assumes that one is familiar with the limits of the designated port to enable the ship to occupy a position *within* the port. What would happen if the waiting area lies outside the fiscal or legal limits of the port? This was the dilemma faced the owners of the *Maratha Envoy*[11] which anchored at the Weser Lightship while awaiting a berth at the port of Brake. Since the Lightship anchorage was not considered part of any of the Weser ports, the House of Lords[12] affirmed the decision of the lower court which ruled that the voyage had not ended nor was the vessel waiting for she never reached the nominated port.[13]

Perhaps, the difficulties inherent in determining port boundaries may be avoided if the charterer reserves the right to name a particular dock or berth in the port for, in that case, the vessel becomes an "arrived" ship only when she reaches the actual berth designated by the charterer.[14]

Another factor which affects the first requirement is the expression "or so near thereto as she can safely get" which is found in a number of voyage charter parties. This set of words provides the shipowner with an alternative contractual destination. The phrase becomes operative when an obstruction that cannot be

[10] *E.L. Oldendorff & Co., G.m.b.h. v. Tradax Export S.A.: The "Johanna Oldendorf"*, (1973) 2 Lloyd's Rep. 285, 291.

[11] (1977) 2 Lloyd's Rep. 301.

[12] The House of Lords acts as the Supreme Court of the United Kingdom.

[13] *Federal Commerce and Navigation Co., Ltd. v. Tradax Export S.A.: "The Maratha Envoy"* (1975) 2 Lloyd's Rep. 222, 233.

[14] *Stag Line Ltd. v. Board of Trade* (1950) 1 All E.R. 1105, 1106.

overcome by the shipowner by any reasonable means effectively prevents the ship from reaching the agreed destination within a reasonable time.[15] Thus, it may be possible for a vessel to become an "arrived" ship even if she has not reached the designated place of destination if the "near" clause becomes applicable to the situation.

Readiness to Load or Discharge

Assuming that the vessel has gained the status of an "arrived" ship, she must then be available to the charterer for loading or discharge. A ship to be ready to load or discharge "must be completely ready in all her holds. . .so as to afford the merchant/charterer complete control of every portion of the ship available for cargo."[16] This means that the charterer has physical access to the ship and her holds and that no laws or regulations stand in the way of such access.

Notice of Readiness

The notice informs the charterer of the arrival of the ship at the contractual destination or "so near thereto as she can get safely get" and her readiness to load. Such notice may be given by the shipowner. If the charterer is not provided with such notice and is not otherwise aware of the vessel's availability to him, laytime does not begin.

A notice of readiness to be valid must not be premature. It must be given at the time when the vessel is actually ready to load or discharge as the case may be. Judge Donaldson of the London High Court explains the reason for this condition:

> The whole purpose of a notice of readiness is to inform the shippers or consignees that the vessel is presently ready to load or discharge and the period of time within which they have agreed to load or discharge the vessel is measured from that moment, whether or not the counting of laytime is postponed,. . . Notice of anticipated readiness is different in kind for the anticipation, however reasonable, may be frustrated in the event. Furthermore, under such a notice, the starting point for the drawing up of the time sheets cannot be determined without an inquiry as to the precise moment of time when the vessel in fact became ready and this may be much more difficult than determining whether or not she was ready when the notice was given.[17]

[15] Michael Brynmor Summerskill, *Laytime* (2nd ed.; London: Stevens & Sons Limited, 1973), p. 81.

[16] *Groves, Maclean & Co. v. Volkart Brothers* (1884) C. & E. 203.

[17] *Christensen v. Hindustan Steel Ltd.* (1971) 1 Lloyd's Rep. 395, 399.

However, should a charterer unconditonally accept a premature notice with knowledge of its defect, he may be estoped by such conduct from subsequently contesting the validity of such notice.[18]

Once laytime commences, determination of its duration is only a matter of calculation. If the parties did not agree on a definite number of lay days or a specific method of ascertaining laytime, then the charterer is only obliged to load and unload the ship within a reasonable time.[19] If the contract fixes the laytime, the charterer is bound to fulfill his duty of loading or unloading within the stipulated period to avoid liability for demurrage. Even if he establishes that he exercised due diligence in trying to comply with this obligation, such proof will not exempt him from payment of demurrage.[20] The only excuses for failure to load or unload or discharge within the laytime are the following:

1. Delay was caused by the fault of the shipowner[21] or the employees, servants or other agents of the shipowner.[22]

2. Cause of the delay falls within an exception clause.[23]

3. Working the ship is made illegal by the law of the place of performance.[24]

Additionally, there is authority for holding that the charterer is not liable for demurrage if he cannot load the vessel at the designated port because it is strike-bound.[25] With respect to the first excuse, it should be pointed out that it is not sufficient for the charterer to establish a causal connection between the acts of the

[18] *Surrey Shipping Co., Ltd. v. Campagnie Continentale (France) S.A.: The "Shackleford"*, (1978) 2 Lloyd's Rep. 154.

[19] *Hick v. Raymond and Reid* (1893) A.C. 22, 28.

[20] Summerskill, *op. cit.*, p. 212.

[21] *In re Ropner Shipping Co., Ltd. and Cleeves Western Valleys Anthracite Colliereies Ltd.* (1927) 1. K.B. 879, 888).

[22] *Budgett v. Binnington* (1891) 1 Q.B. 35.

[23] *William Alexander & Sons, v. Aktieselskabet Dampskibet Hansa* (1920) A.C. 88, 94.

[24] *Overseas Transportation Company v. Mineralimportexport* (1971) 1 Lloyd's Rep. 514.

[25] *Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries, and Food* (1961) 2 All E.R. 577, 599.

shipowner and the delay. He needs to prove that the shipowner was also acting in breach of his obligation to provide the charterer with all the necessary facilities for the loading or unloading of the ship.[26]

With respect to the second cause, the general rule is that the exceptions clause cease to operate upon the expiration of laytime unless the contract clearly provides that they will still apply afterwards.[27] This rule has given rise to the saying "once on demurrage, always on demurrage". In this instance, the world "demurrage" does not refer to the amount payable by the charterer but to the time during which such amount accrues.

To determine the demurrage payable, it may be necessary to pinpoint the time when loading (or unloading) was completed. *Svenssons Travaruaktiebolog v. Cliffe S.S. Co.*, laid down the general rule as follows: "In most cases, the mere reception or dumping down of the cargo on the ship does not involve completion of loading, because. . .the operation of loading involves all that is required to put the cargo in a condition in which it can be carried."[29]

So long as the charterer has not completed the process of loading or unloading, he is entitled to utilize the whole of the laytime for said purpose.[30] But once he has finished loading or unloading, he is not entitled to delay the ship's departure even though the laytime has not yet expired.[31]

It should be obvious by now to the reader that this exposition is based on English law. The author adopted this approach due to the dearth of Philippine jurisprudence on the subject of demurrage. In any case, it would have been difficult to explain this concept without resorting to the legal system primarily responsible for its development. Furthermore, most charter parties cite English law as the governing law of the contract.

[26] *Houlder v. Weir* (1905) 2 K.B. 267, 271.

[27] *Compania Naviera Aeolus S.A. v. Union of India* (1962) 2 All E.R. 670, 674.

[28] *Argonaut Navigation Co., Ltd. v. Ministry of Food* (1949) 1 All E.R. 160, 164.

[29] (1932) 1 K.B. 490, 494.

[30] *Margaronis Navigation Agency Ltd. v. Henry W. Peabody & Co. of London Ltd.* (1964) 1 Lloyd's Rep. 173, 186.

[31] *"Nolisement" (Owners) v. Bunge and Born* (1916-17) All E.R. Rep. 734, 740.