IS ABSOLUTE LIABILITY OF THE CHARTERER IN CLAIMS OF DEMURRAGE IN RESPECT OF THE FIXED-TIME CHARTER PARTY STILL JUSTIFIED IN MODERN LAW OF AFFREIGHTMENT?

by

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1 Introduction

The majority of maritime legal disputes are concerned with opposing opinions regarding the various aspects of laytime and the subsequent payment of demurrage due for the detention of a ship.[1] Demurrage is generally described as

> a payment provided by contract or by law for the use by the charterer of time beyond that which is conceived to be normally necessary for loading or discharging of a ship or for certain functions relating thereto.[2]

The word demurrage originates from the English law and has in fact two meanings:

(i) The factual situation where a ship is said to be "on demurrage" when the laytime allowed by the charter party for loading/discharging has been exceeded; and

(ii) An amount certain, or to be calculated according to a certain method, as agreed in the charter party, and which is to be paid by the charterer to the shipowner as damages for retaining the ship for a period longer then that allowed by the charter party.

Summerskill described it as

> an amount payable by charterers to shipowners in respect of delay to the ship as a result of her being kept beyond the agreed or a reasonable time for loading or discharging[3]

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1 Pickard *Laytime* 1
2 Tiberg *Demurrage*.2
3 Summerskill *Laytime* 247

It is the current view that demurrage is liquidated damages for breach of contract. In *Dias Compania Naviera SA v Louis Dreyfus Corporation,* 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.[4]

The ratio for a claim in respect of demurrage is evident. Overhead costs and a large proportion of the running of a ship are incurred even if the ship is in port. Accordingly the shipowner faces serious losses if the loading and discharge processes take longer than as agreed to in the charter party.

A demurrage clause is purely a creation of contract and is in the nature of a provision for agreed damages for detention of the vessel beyond the agreed lay days. The stipulated sum is recoverable by the shipowner irrespective of proof of damage, and represents the maximum amount recoverable for loss resulting from the detention.

2 Character and problem of demurrage

Tiberg states that the main source of confusion in the demurrage field lies in the international nature of maritime situations and the fact that courts around the world are called upon to interpret contracts which are often written in English and whose terms can only be understood against the background of developments in the English case law. The term demurrage has become commonly used in the shipping world in preference to the various vernacular expressions used by legislators, e.g. "*Surestaries*" by the French, "*Uberliegegeld*" by the Germans and "*Overliggeld*" by the Dutch.[5]

The liability of the charterer changes depending on whether fixed time has been provided for in the charter party or not. Where no fixed laytime was agreed on, English and American law will not impose other liabilities on the charterer then those which follow from a cautious interpretation of the contract.[6]

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4 (1978) WLR 261 at 263
5 Tiberg *Demurrage* 2
6 Tiberg *Demurrage* 57

The Roman law doctrine of *vis major* is partly similar to the default view. *Vis major* in the loading and unloading situation is taken to excuse the charterer for delay whether the laytime has been agreed in contract or is determined, as the law provides, by local customs.

Tiberg distinguishes between these different terms of liability as follows: [7]

- The hire view – The charterer is absolute liable to complete the loading and unloading within the laytime.
- The pure default view – The charterer is responsible for demurrage where he was negligent or has shown lack of diligence.
- The risk time view – The risk is divided between the shipowner and the charterer.

3 Liability for demurrage in South African law

The sources of the South African shipping law is as follows: [8]

(a) South African legislation
(b) South African common law or Roman-Dutch law
(c) Custom
(d) Admiralty law
(e) English law

The most important source of South African legislation is The Admiralty Jurisdiction Regulation Act 105 of 1983. The Act provides for the vesting of the powers of the admiralty courts of the Republic in the Provincial and Local divisions of the High Court of South Africa; for the extension of those powers; for the law to be applied by and for the repeal of the Colonial Courts of Admiralty Act, 1890 and for incidental matters.

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7 Tiberg *Demurrage* 95
8 Bamford *Shipping* 1

Section 6 of the 1983 Act provides:

(i) Notwithstanding anything to the contrary in any law of the common law contained a court in the exercise of its admiralty jurisdiction shall –

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890 of the United Kingdom, had jurisdiction immediately before the commencement of this Act (1 November 1983), apply the law which the High of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

This section provides for the application of English law as it was in November 1983 in respect of those heads of jurisdiction which the South African admiralty derived from the Colonial Courts of Admiralty Act. These "old" heads of jurisdiction are mostly contained in two English Acts of 1840 and 1861 and provides *inter alia* for damage claims, salvage claims and charter parties disputes limited to charter parties concluded at sea rather than any such contracts concluded within the body of a country of England. [9]

South African Roman-Dutch law should thus be regarded as applicable to charter parties disputes in terms of the 1983 Act. [10]

The position before 1 November 1983 appears to have been the same as the English law. The liability of the Charterer in the fixed laytime charter party was absolute and independent of fault.

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9. Hare *Shipping Law* 579
10 Staniland 1985 *Lloyds Maritime and Commercial Law* 466;
Staniland 1992 *SALJ* 528;
Ramsden 1989 *Journal of Maritime and Commercial Law* 193

> When the time is definitely fixed or is described so as to be calculable before hand, there is an absolute obligation on the part of the charterer to have the work completed within that period, whatever circumstances occur and this is even in a case where the endorsee of one of the bills of lading is prevented from completely unloading his portion of the cargo within the lay days ..... The charterer will be free from liability in respect of demurrage if the delay is due to the fault of the master or owner..... But he is not free if the fault is his own or that of a third party, even of a fellow consignee, or if delay is due to strikes..... or if due to a difficulty in getting lighters..... so also if delay arises from bad weather, act of enemies, or of the government.[11]

There are only three instances where the charterer will not be held answerable for damages after laytime commences namely: [12]

(i) He is covered by provisions in the charter interrupting laytime or excepting the particular impediment; or

(ii) The delay or impediment arose through culpable fault of the shipowner or his servants or agents; or

(iii) That loading or discharging was illegal by the law of the place of performance.

The general principle of *vis major,* as found in the Roman-Dutch law and which pervades the whole field of the law of contract, here serves to modify the charterer's contractual obligation to load or discharge within a fixed limit of time. The basic rule is found in the following *ratio of Solomon ACJ:*

> The authorities are clear that if a person is prevented from performing his contract by *vis major* or *casus fortuitus*, under which would be included such an Act of State as we are concerned with in this appeal, he is discharged from liability.[13]

Vis major or *force majeure* which can be described as an unforeseeable hindrance which cannot be avoided or overcome by any practical means, has the general effect of suspending obligations involving the achievement of a definite result. For *vis major* the requirement is however that the obstacle is absolute i.e. that no performance can be enforced. *Vis major* then dissolves the contract. In the loading and discharging process demurrage is usually concerned with temporary

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11 Master and Owners of the Hillcrag v Beckett 1902 NLR 450 at 460

12 Overseas Transportation Company v Meneralimportexport (The Suice) 1971 (1) Lloyds Rep 514 at 519

13 Peters, Flamman and Co v Kokstad Municipality 1919 AD 427 at 435

impediments Temporary impossibility is recognised as a special case and contracts are not automatically terminated as a result of *vis major*, and no liability is incurred.[14].

Which law will the South African courts apply when it faces the question of the liability of charterer for demurrage?

Staniland is of opinion that the majority viewpoint among judges and academics appears to be in favour of the application of English law or refer to it as a source of persuasive precedent. [15] The Roman-Dutch law has been described as applied by the parochial Courts as largely fragmentary and relatively undeveloped as a modem system of mercantile law. [16]

Hare also comments that regardless of section 6 of the 1983 Act all English law (and indeed any foreign law) can be persuasive to a South African court today where the common law is uncertain. Much of South Africa's present common law or Roman-Dutch law to which section 6(1)(b) refers are new admiralty matters which acquired a considerable English law content through similar roots and a common history. [17] The South African courts are sharing the courage to set broader admiralty horizons in shaping the law. Although much criticism has been levelled to the return of a purist Roman-Dutch law, it has been accepted that this will not be achieved[18]

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14 Boyd v Stuttaford & Co 1910 AD 101
Beretta v Rhodesia Railways Ltd 1947 (2) SA 1075 SR

15 Staniland 1985 *Lloyds Maritime and Commercial Law* 466

16 Euromarine International of Maren v The Ship Berg 1984 4 SA 647 (N) 665L

17 Hare *Shipping Law* 23

18 . Hare *Shipping Law 24*
Friedman DB "Maritime Law in Practise and in the Courts" 1985 SALJ 45"
Without wishing to detract from the greatness of our Roman-Dutch writers of the 17th and 18th century, one must point out that much of what they have to say about many of the aspects of maritime law have little application, and cannot be readily adapted to modern situations. In addition, their writings to a certain extent, were commentaries on statutory enactment's in the Netherlands, not all of which necessarily have application in South Africa; same were promulgated subsequent to 1652 (in which case they would apply in South Africa in certain circumstances only) and some were laws of a purely local nature (in which case they would not form part of the Roman-Dutch law in force in South Africa at all.)

Notwithstanding all the arguments it is unsure whether our courts will depart from the English law applicable to charter parties. [19]

The acceptance of the Roman-Dutch principle in the demurrage situation will alter the whole concept of absolute liability of the charterer as it is applied in the English law.

4 Liability for demurrage in English law

The position in the English law is set out by Lord Show of Dunfermline in *William Alexander & Sons v Aktieselekabet Dampskibert Hansa*[20]

> My Lords..... The law is perfectly well settled. In Randall v Lynch Lord Ellenborough stated the position in law which has never been departed from : "I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated days he does not restore her to the owner, he is responsible for all the various vicissitudes which may prevent him from doing so..... If by the terms of the charter party, he has agreed to discharge it within a fixed period of time, this is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevented him from performing it.

4.1 Exception Clauses

The exception clause will normally be construed as only applying to the period covered by the laytime. It will not protect the charterer once the vessel has come on demurrage. Therefore the maxim "once on demurrage, always on demurrage" unless it explicitly so provides in the charter party, will not protect the charterer. Thus once a ship used all it's laytime and is on demurrage and another impediment, which was covered in the exception clause, further delay the discharge process, the ship remains on demurrage. [21]

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19 Staniland 1992 *SALJ* 528 argues that it fell within the jurisdiction of Admiralty prior to 1891 and Girdwood 1995 *SA Mercantile LJ* has a contrary view.

20 1920 AC 88

21 *Islamic Republic of Ivan Shipping Lines v Royal Bank of Scotland* 1987 1 Lloyds Rep 266

However, again the *maxim* is like most sayings only true in part. Various judgements have to be considered and one can again only talk of a general rule. Whether a particular exception clause applied after laytime expired, was the point at issue in *Dias Compania Naviera SA v Louis Dreyfus Corporation (The Dias)*. [22] A clause in the charter provided that

> At discharging, Charterers….. have the option at any time to treat at their expense ship's ….. cargo and time so used to not count…..

The vessel was on demurrage waiting in the roads to discharge when the cargo was fumigated. First the arbitrators ruled that the time did not run during the fumigation process, but the umpire held that demurrage continued to accrue. The latter view was upheld by Mocatta J, [23] but reversed by the Court of Appeal [24] and finally upheld by the House of Lords. Lord Diplock concluded on p. 329 :

> For my part, I think that when construed in the light of established principle, clause 15 is unequivocal. It means that time used in fumigation is not been taken into account only in the calculation of laytime. The provision that "time is not to count" has not further application once laytime has expired. But even if I were persuaded that the clause was in some way ambiguous, this would not be enough to save the charterers from their liability to pay demurrage during the period while fumigation was being carried out after laytime had expired.

In the case of *President of India v NG Livarios Maritime Co* (*The John Michalos*) [25] the ship was delayed by a strike at the discharge port after laytime expired. The charter contained a strike clause which in essence read:

> Charterers shall not be liable for any delay in loading or discharging including delay due to the availability of cargo which delay or unavailability is caused in whole or in part by….. strikes….. and any other causes beyond the control of charterers.

Leggat J. held that the last phrase of the clause was more naturally to be read as a corollary to the other two exclusion causes which excluded laytime, thereby extending the specified exclusions to demurrage.

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22 1978 1 Lloyds Rep 325
23 1976 2 Lloyds Rep 395
24 1977 1 Lloyds Rep 485
25 1987 2 Lloyds Rep 188

In a subsequent case it was held that the previous case (*The John Michalos*) was the only case where it was held that a clause which did not expressly mention demurrage had been held to provide an exemption from it. [26]

In a charter the following exemption appeared :

> Strikes or lockouts of men, or any other accidents or stoppages on railway and/or canal and/or river by ice or frost or any other force major cases including government interference's occurring beyond the control of the shippers or consignees, which may prevent or delay loading and discharge or the vessel, always excepted.

The Court held that the clause was not sufficiently clear to invoke an intention to exclude demurrage. [27]

It is thus evident that delays in the loading process has been exclusively treated by the courts as part of the charterer's liability unless it is clearly excepted in the charter.

4.2 Detention by Default of Charterers :

It has been pointed out that where the exclusion clauses are properly worded and included in the charter party, a charterer is exempted from demurrage where the ship is detained beyond the agreed or reasonable lay days. A proviso, by which demurrage is only payable if detention occurred by default of the charterers, is often used to achieve this object.

This type of clause does not appear to have found much favour with the courts since in effect it goes contrary to the concept of fixed laytime. The Court of Appeal appear to treat default, detention and breach of contract as identical concepts, the default giving rise to the detention and thus a breach of contract. In the case of *Leeds Shipping Co. Ltd v Duncan, Fox & Co Ltd* [28] the charter incorporated the Australian equivalent of the Hague Rules which by Art. IV (3) provide:

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26 *Marc Rich & Co Ltd v Tarlotti Companies Naveira SA (The Kalliopi A)* 1988 2 Lloyds Rep 106
27 *Islamic Republic of Ivan Shipping Lines v Ierax Shipping Co* LMLN 276 2 June 1990
28 1932 42 Lloyds Rep 123

> The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the skipper, his agent or his servants.

In that case the delay arose through the incompetence of the shipowner's stevedores. It was argued that demurrage was included in "loss or damage" and thus excluded without fault. Mackinnon J. found that the clause required clearer words to avoid liability for demurrage by showing that the failure to discharge was due to the fault of the shipowner. [29]

In *Argonaut Navigation Co v Ministry of Food Sellers*[30] J held that:

> To detain the vessel beyond lay days was a breach of the contract by the charterers….. They remained in default and without any protection under the charter party until the loading was completed.

The Court of Appeal confirmed this judgement in and Singleton L.J. said:

> The default of the charterers lay in not providing the cargo at the proper place and time. It was through the default that the detention occurred. The detention was due to the default of the charterers.[31]

The courts only concern itself with the strict interpretation of the charter party when dealing with default or negligence on the part of the charterer.

In the case of *N.V. Reederij Amsterdam v President of India* [32] (*The Amstelmolen*) the court remarks the following regarding the proviso attached to the demurrage clause:

> What is the meaning of the word default? Does it necessarily involve moral fault or negligence or does it simply mean a breach of contract? If it does mean a breach of contract, does it have to be some breach which is antecedent to or otherwise different from the mere detention of the ship beyond the specified period? Or does the mere detention of the ship beyond the specified constitute default of the charterers unless the detention was caused by an excepted risk or owners breach of contract? [33]

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29 1932 42 Lloyds Rep 128
30 1948 81 Lloyds Rep 377
31 1948 82 Lloyds Rep 231
32 1960 2 Lloyds Rep 82
33 1960 2 Lloyds Rep 90

Having reviewed the earlier authorities he concluded that the word 'default' does not necessarily involve moral fault or negligence : it means a breach of contract. Thirdly it is not necessary to look for any antecedent breach of contract, because the mere detention of a ship beyond the specified laytime constitutes a breach of contract, and therefore a default of the charterers, unless the detention has been caused by an expected risk or a breach of contract by owners.[34]

4.3 The Delay Caused by the Shipowner

Demurrage will not be payable where it arises from the fault of the shipowner or those for whom he is responsible. It has been stated in the case of *Budgett v Binnington*[35] that if the shipowner is prevented from carrying out his part of the discharge by the acts of persons over whom he has no control, he is not responsible for the delay.

If an extraneous event only affect the shipowner, then demurrage will not be payable if the delay is caused for whom he is alone responsible. [36]

Furthermore it is also clear that not every act of the shipowner or those for whom he is responsible which results in delay will suffice to oust a claim of demurrage. In *Houlder v Weir* [37] the discharge of the cargo was delayed because of a need by the ship to take on ballast. The court held that this was not a breach of obligation, but merely the performance of a necessary operation, no less for the protection of the cargo then for the protection of the ship.

There is also a line of authorities which suggest that where the fault or breach of duty is covered by an exception clause then there is no longer any breach. [38]

Can the shipowner by means of an exemption clause in the charter party excuse himself if there has been fault on his part? This was considered by Parker J in the case of *Blue Anchor Line Ltd v Alfred C Toepfer International GmbH* (*The Union Amsterdam*) (1982) 2 Lloyd's Rep. 43.

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34 1960 2 Lloyds Rep 91
35 1891 AGB 39
36 Summerskill *Laytime* 309
37 1905 10 CC 228
38 Summerskill *Laytime* 312

The judge considered as obiter :

In the second place a breach of duty remains a breach of duty, and therefore fault notwithstanding, that liability for the breach is excluded.

John Schofield suggested that this part of the obiter judgement cannot be supported and if "fault" is covered by an exclusion clause, time will continue to run, whether it be laytime or demurrage time. [39]

4.4 Illegality

The illegality of loading or discharge affords a separate excuse for the charterer where he is prevented from performing his work within the agreed limit of time. This is true where the illegality prevents performance altogether, but not where the illegality is only of a temporary nature. [40]

5 Comparative conclusions

The opposite to the absolute liability of the fixed time charterer is the pure default view.

In terms of this proposal demurrage can only be claimed where the charterer has shown lack of diligence, alternatively he was negligent in his actions. This is also the situation in both the English and American law where the charter party does not fix a laytime.

The Roman law doctrine of *vis major,* an unforeseeable hindrance which cannot be avoided or overcome by any practical means, has the general effect of suspending obligations involving the achievement of the contract. This will have the effect that in the loading in discharge situation *vis major* will excuse the charterer for delay caused by it.

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39 Schofield *Laytime* 200
40 Tiberg *Demurrage* 509

Italian law does not only recognise *vis major* hindrances, but also other occurrences "not imputable to" the charterer affords an excuse.[41]

Tilberg argued that the *vis major* doctrine does not fit well into the demurrage regulation irrespective whether the contract is broken or not. He submits that the need for reparation is important because the reparation is frequently inadequate to cover the heavy expenditure incurred by a ship that is kept waiting in idleness[42].

He further says that it is also clear that the *vis major* principle may lead to very capricious results in practice. His main argument is that *vis major* only concerns itself with a hindrance that is absolute and permanent, while demurrage is only concerned with temporary hindrances. *Vis major* will lead to the dissolution of the contract because performance cannot be enforced.

Section 96 of the Scandinavian Maritime Code provides that the charter is liable for damages where he delays the ship in that he delayed to provide cargo documents or giving orders regarding her destination, provided such detention is due to the charterers neglect of fault. [43]

The United States of America also recognises the fact that if the delay is caused by neither the fault of the charterer or the vessel, the charterer usually remains responsible. However, the Sixth Circuit Court has upheld the view that the absence of fault is sufficient to excuse the charterer or consignee from liability for demurrage. On the other hand the Second, Fifth and Ninth Circuit courts have determined that it is the charterer's obligation to load and discharge the cargo within the agreed laytime regardless of fault. [44]

The US accepts *vis major* as a common law exception to the usual rule that the charterer is absolute responsible for demurrage where it amounts to a sudden or unforeseen interruption or prevention of cargo operations not occurring through the fault of the charterer. [45]

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41 Tiberg Demurrage 59 & 60
42 Tiberg Demurrage 58 & 59
43 Tiberg *Demurrage* 60
44 Texter 1985 *Lloyds Maritime and Commercial Law* 344
45 Texter 1985 *Lloyds Maritime and Commercial Law* 344 & 356

Only extraordinary events which satisfy the *vis major* or *force majeure* criteria and which are proximately related to the circumstances that prevent a party's performance, due to causes otherwise not avoided by care, will exempt liability for demurrage. Thus labour strikes nor machinery breakdowns were held not to constitute major breakdowns, as it is not regarded as *force majeure* circumstances. [46]

It is apparent that there is no uniform approach amongst the major legal systems regarding liability in demurrage.[47]

6 The Application of the Hague and Hague-Visby Rules

In terms of the common law the carrier is absolute liable for the preservation of the goods entrusted to him for carriage. This absolute liability was however tempered and qualified in terms of the Hague Rules in order to bring a more just distribution of risk and because of the lack of uniformity in the laws of various nations with regard to bills of lading.

In terms of Article V of the Rules the provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under charter party, they shall comply with the terms of these Rules .

In terms of section 1(a) of the Carriage of Goods By Sea Act 1 of 1986 the Hague-Visby Rules as contained in the Schedule to the Act shall apply in relation and in connection with the carriage of goods by sea in ship where the port of shipment is a port in the Republic, whether or not the carriage is between ports in two different states within the meaning of Article X of the Rules .

Does this now mean that the liability of the carrier and the shipper, in respect of charter parties, are limited and set out in Articles III and IV of the Rules ? [48]

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46 *Penn RR Co v Mooroe – McCormach Lines Inc* 246F Supp 143 (SDNY, 1965) affd, 370DF and 430, 432 (2nd Cir. 1966) and *Parcel Tankers Inc. and Stolt-Nielson Chartering v Alumina Partners of Jamaica and Kaiser-Jamaica Corp. SMA No. 770* (*Stolt Tudor*) Arb. In NY 1973

47 For various examples see Johannes Trappe 1986 *Lloyds Maritime and Commercial Law* 251

48 In terms of the Rules the carrier's absolute warranty of sea-worthiness is replaced by a duty to exercise due diligence to make the ship sea-worthy. The carrier is liable for negligence of himself and his servants. In

In the *Union Amsterdam* case [49] the shipowner argued that he is exempted for any loss or damage to the cargo for causes excepted by the US Carriage of Goods By Sea Act, in particular clause 4(2) which excluded liability for acts etc. done in the navigation or management of the ship. The judge dismissed this argument and held that the exclusion clause relied on did not cover the circumstances of the case, since what was excluded was only liability to cargo caused by delay.

John Schofield then argued that any exception clause which a party puts forward to excuse his liability for demurrage would have to be very clearly worded to achieve this object. [50]

From the judgement in the *Union Amsterdam* case this object is unlikely to be achieved by incorporating the Hague Rules into the charter.

The courts are unwilling to hold that a general exception clause will excuse the responsible party. Lloyd J. held in the *Johs Stove* case that :

> I agree with the arbitrator that a general exceptions clause such as clause 19 will not normally be read as applying to provisions of laytime and demurrage, unless the language is very precise and clear. [51]

In *Leeds Shipping Co Ltd v Duncan, Fox & Co Ltd* [52] the court rejected the argument that the exception clause, the same as Art. IV(3) of the Hague-Visby Rules , excepted the charterer from demurrage unless the loss or damage is caused by his fault or neglect. In that case the delay arose through the incompetence of the owner's stevedores. The court held the view that although the clause had been expressly written into the charter, it would still have required

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terms of Art. IV(2) the carrier is also exempted from damages or loss resulting from a host of impediments such as, Act of God, Act of War, strikes, riots etc. In terms of Article IV(3) the shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising, or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

49 1982 2 Lloyd's Rep 49
50 Schofield *Laytime* 312
51 1983 1 Lloyd's Rep 41
52 1932 2 Lloyd's Rep 128

clearer words to avoid liability for demurrage by showing that the failure to discharge was due to the fault of the shipowner.

Another reason why the exception clauses in the Hague Rules are not applicable to the carrier and charterer is mentioned by D'Arcy. Referring to Art. V of the rules which makes it applicable to charter parties if a bill of lading was issued, he argues that the bill of lading and consequently the Hague Rules governs the contract between the shipowner and consignee of the goods shipped by the charterer, as well as the contracts of affreightments between the shipowner and all other shippers shipping goods on the chartered ship. However, the contract between the shipowner and charterer is not subject to the rules, unless the parties have expressly or impliedly agreed to amend to contract in the charter party by a contract contained in the bill of lading. [53]

Article 1 of the Hague Rules describes a "carrier" as including the owner or charterer who enters into a contract with the shipper. The Hague Rules regulates in main the responsibilities and liabilities of the carrier on the one hand and the shipper on the other hand. It is submitted that this distinction is sufficient to indicate that the Hague Rules were not intended to regulate the relationship between shipowner and charterer in a charter party.

It is then submitted that the Hague Rules do not cover the relationship between the shipowner on the one hand and the charterer on the other.

6 Conclusion

The layman can ask with justification why liability for demurrage cast upon the charterer has been elevated beyond the normal standards of the law of contract. Why then are the general exception clauses not applicable to demurrage, unless it is specifically cast in clear words?

The fact that various exception clauses have developed over the years is indicative of the fact that the absolute liability of the charterer is not in line with the risks employed in the commercial trade.

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53 D'Arcy *Ridleys' Law* 15 1

There is a worldwide tendency to move away from strict liability cast upon a party in the commercial world of trade. The Hague-Visby Rules and in particular Articles III & IV are prime examples thereof. The shipowner in a charter party is aware of the risks involved if his ship is detained beyond the stipulated laytime by the charterer. He can protect himself adequately by inserting the suitable clauses in the charter party to protect himself against delays. He still has all his common law remedies available to claim damages in case the charterer exceeds the laytime.

It is submitted that a more even-handed approach be adopted to determine the charterer's and shipowner's liability in the demurrage situation. It is proposed that;

(a) the current position be replaced with an international set of rules as contained in Articles III & IV of the Hague rule,.

(b) each party carries it's own risk, unless it is excluded by an exception clause or fault of the other party, and that liability for demurrage be judged in terms of the common law principles of the law of contract.

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Abbreviations

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