
# Risk of delay - not always on demurrage

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By *John Kure* August, 2012

The focus point of the article will be on demurrage as a concept, how far it stretches and what comes next, and thereby illuminate the legal guide lines for the commercial decision. It will be assumed that the vessel is already on demurrage. Hence, the article will not deal with delay occurring before the vessel is on demurrage.

Risk of delays is not regulated by any regime. Thus, the parties are free to agree how the contract should be stipulated. Accordingly, the wording of the contract and its negotiation is strongly commercially based. When settling claims the relationship of the involved parties will have a high priority. It is important to have the cash flow, the position and future commercial relation of the Owner or the Charterer in mind. However, while having the commercial approach, it is important to keep in mind the legal consequences that a term like demurrage has, how far it stretches, and whether the course of events on the actual voyage, calls for additional sources of claims, are worthwhile focus points of profit for the involved parties; shipowners, charterers and brokers.

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**Legal guides for a commercial decision**

To make the full commercial weighing of the issue it is crucial to deeply understand, not only shipping commercially, but also the legal foundation on which demurrage is based, i.e. which terms to use in the contract, where will it lead, and how strong is that contract in case it comes to in- or out of court negotiations. Only by knowing the exact legal basis on which you are negotiating, is it possible to make the right commercial decision as to cash flow, future employment of the vessel etc. The demurrage departments need to know their bargaining power, strengths and weaknesses to make such decision.


A tendency when interpreting charterparties and understanding demurrage, is the believe that demurrage covers the payment of time for delay of the vessel from expiration of laytime, until the vessel again is free to sail on its next voyage. The interpretation might arise from a misunderstanding of the adage "once on demurrage always on demurrage".

The approach might also be adopted because it is easy to quantify. Often this leads to the following, when making the calculations; Either the contract is taken literally, and then the demurrage calculation only includes time, while in operations and then the extra time is not charged at all, or all time is taken into account as demurrage[1]. Even though the approach sometimes will financially end up to the right amount, it can in many cases be a very expensive approach for the parties.

**Cargo operations – the limit for demurrage**

Under a voyage charter the Charterer is to pay freight, which is calculated not in accordance with time, but on the basis of geography. Where it is the Charterers obligation to pay freight, it is the Owners obligation to transport a cargo from a load port to a discharge port or position. Hence, delay under a voyage charter affects the profitability as it diminishes the value of freight, and the delay in performance fall on the shipowner. The allocation of risk for delay is basically what laytime and demurrage is about. The important question is which period demurrage covers? Unless otherwise stipulated in the contract, the shipowner bears the risk of delay during the voyage, and the Charterer bears the risk of delay in loading and discharging.

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In the standard charterparties of the tanker trade the loading and discharge operations end with the disconnection of hoses. Some charterparties forms allow "time solely for awaiting documents" to be part of demurrage[2]. However, to extend demurrage further than stipulated to time after the operations have ended is a legal mixup, and commercially it might not be the most profitable solution. Even though the end of the cargo operations sets a natural limit for claiming demurrage, it does not limit the claim by further delay of the vessel. The damages simply turn from being liquidated to being unliquidated.

**Damages for detention**

The remedy for delay after completion of loading or discharging is damages for detention, if there is a breach of contract[3]. There are numerous examples where delay of the vessel occurs after the discharge operations, where the Charterer is liable for damages for detention. The Charterer will e.g. be liable for damages for detention of the vessel, if by breach of contract he delays her in the course of the voyage, by failure to give orders in due time[4], or in delay for presenting bill of ladings for signature, or in delay by failing to get custom clearance, subject to the terms of the contract.

**Important and profitable difference**

Demurrage and detention both deal with risk of delay, but are completely different from one another. Demurrage is liquidated damages for breach of contract, and detention is unliquidated, assessable damages for breach of contract. As the liquidated damages is already stipulated in the Charterparty and can be easily calculated, demurrage departments have a strong tendency to simply include the time the vessel is detained in the demurrage calculation. However, that can be an unwise and expensive solution for shipowners. Charterers also need to be aware of the difference, which also becomes crucial to their business - as claims for detention involves other criteria than demurrage claims.

*Exception clauses*

Where demurrage, as seen above, is liquidated damages for breach of contract, damages for detention are damages which are not regulated by the contract, but is dealt with in tort. Hence, where demurrage will stop running in the event of a clear demurrage exception clause or by default of the shipowner - same exception is not applicable for damages for detention.

*Rate of damages*

When the vessel is on demurrage, unless the contract stipulates, or it can be proven that the charterer is separately in breach of contract, then there is no right to recover additional losses caused by the delay[5].
If the vessel is detained after the loading operations, the damages for such delay are not limited to the agreed demurrage rate. Where, the shipowners do have to prove that they suffered a loss to be entitled to damages for detention, same is not required for demurrage claims. However, that should not scare off the shipowners. Often it is not as difficult as it may seem. Furthermore, the demurrage rate may be used in practise as evidence of the market value of the vessel during the period of detention[6]. However, the claim is not limited to the rate, when there exist additional evidence of the earning capacity of the vessel[7].

*Timebar and exclusion clauses*

The presence of timebar clauses regulating the time in which a demurrage claim under a charter party can be raised is more the rule than the exception. Often they stipulate a period after final discharge in which a fully documented claim shall be forwarded from the Owner to the Charterer. Frequently, such clauses are stipulated as exclusion clauses, providing claims must be brought within a certain time-limit – commonly in the tanker trade within 45-90 days, failing which the defaulting party will be released from all liability. However, unless otherwise stipulated, the time bar for damages for detention is six years when the contract is subject to English law[8].

**Detention – possibilities rather than limitations**

No commercial decision should be taken without knowing the legal guidelines. Demurrage and the associated disciplines require much more than a commercial understanding and extensive experience. It is crucial to understand that demurrage is liqudated damages for a breach of contract, and that detention has huge potential as a separate focus point. Knowing the exact nature, and the extent to which it legally stretches can be a not insignificant source to profit for the contracting parties.

Thus, not only legally but also commercially it would be sound to make two separate calculations, one for demurrage and one for damages for detention – or at least make it clear in the calculation, which part of the claim is damages for detention. Detention claims are not limited by the demurrage rate – but only subject to the test of remoteness of damages. Furthermore, a claim for detention is not excluded by demurrage exemption clause. Commercially the parties could be reluctant to review older voyages to forward the claims, where it is possible. However, going forward there is no reason not to give detention claims separate focus. It is profitable.

1 In those instances where it is not delay in the last port and the following ports are additional ports, Owners can be privileged – depending on the stipulated interim clause – to have such delay time and expenses covered specific in the Charterparty.
2 See e.g. BPvoy4
3 See. "Bouadoura" (1989) 1 Ll. Rep. 393.
4 See. Aktieselskabet Olive Bank v. Dansk Fabrik [1919] KB 162.
5 See. Reidar v. Acros (1927) 1 K.B. 352.
6 See Rashtriya v. Huddardt Parker, [1988] 1 Ll. Rep. 342 at 345.
7 See "The Noel Bay" [1989] Lloyds Law Reports 361 at p. 366.
8 See Limitation Act 1980 section 5.

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