

RISK OF DELAY IN CHARTERPARTIES: LIKE A PING-PONG GAME?* †

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Summary: Introduction. 1. Voyage Charterparties. 1.1. Delay on the approach and the carrying voyages. 1.2. Delay in the loading/discharging operations. 2. Time charterparties. 2.1. Delay on the prosecution of the voyage. 2.2. Delay and the payment of hire. 2.3. Delay and the off-hire situation. 2.4. Delay in the redelivery of the vessel. Conclusion.

Introduction

Nowadays, one of the most used contracts in the maritime scenario is the so called charterparty contract. These contracts are used, particularly when there is a commercial need to use whether whole capacity of the ship's cargo spaces or a substantial part of them. There are different types of charter contracts, namely, time charterparties, and voyage charterparties, among others.

Delays sustained during the currency of a charterparty will usually increase the costs of the operation. Thus, the paramount question to be asked is who is to bear such extra costs caused thereby and how can the parties regulate this issue. Even though different standard contracts have been developed providing a solution for the majority of these matters, the outcome will vary according with the precise wording used in each particular case.

* "Supported by the Programme Alβan, the European Union Programme of High Level Scholarships for Latin America, scholarship no. E07M401140CO".

† *This article was presented for consideration of the review on april 13th and was accepted for publication by the editorial board on june 12th 2009, after being reviewed by an external academic.*

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This paper aims to analyze i) who bears the risk of the delays that can arise, ii) how courts have construed the related contractual provisions and iii) how can the risk be shifted if the parties so wish. Since different scenarios can appear, the study is divided in two parts: i) voyage charterparties and ii) time charterparties. Afterwards, the reader will find the author's conclusion regarding the topic.

1. VOYAGE CHARTERPARTIES.

Since the freight is calculated based on an estimated voyage which will be profitable to the shipowner, the risk of delay will be allocated regularly on him, particularly during the approach and the carrying voyages². Such risk will normally be transferred to the charterer once the time available to load or discharge the vessel has started³.

1.1. DELAY ON THE APPROACH AND THE CARRYING VOYAGES

Delay may occur in the prosecution of the approach or the carrying voyage⁴. Common law implies an obligation to proceed with reasonable dispatch in the absence of an express provision to the contrary, and a breach of this obligation will entitle the charterer to claim damages caused thereby⁵. Thus, the general rule is that the shipowner bears the risk of such delay unless covered by an exception clause⁶. However, particularly in the approach voyage, the charterer will not be able to terminate the contract unless the delay is so great as to frustrate the object of the contract⁷, the ETA (Estimated Time of Arrival) has not been given in good faith, or by the exercise of a cancellation clause⁸. Additionally, it must be highlighted that delay occurring when performing the approach or the carrying voyage can

² J. Wilson, *Carriage of Goods by Sea* (2008; Pearson Longman) p.51. Per Rix LJ in *The Doric Pride* [2006] 2Ll. Rep. para. 28 p. 179

³ J. Wilson, Op. Cit., p.51

⁴ It must be remembered that the approach voyage is regarded to be "the first stage" of the contracted voyage under a charterparty. See J. Wilson, Op. Cit., p. 63.

⁵ Ibid.

⁶ J. Wilson, *Carriage of Goods by Sea* (2008; Pearson Longman) p.51. S. Scrutton, *Scrutton on Charterparties and Bills of Lading* (1996; Sweet and Maxwell), p.103. However, excepted perils will only be available after the vessel has started the "approach voyage". *Louis Dreyfus v Parnasso* [1938] 60 Ll. Rep. 94

⁷ J. Wilson, Op. Cit., p. 63

⁸ S. Girvin, *Carriage of Goods by Sea* (2007; Oxford) p. 422. Also J. Wilson, Op. Cit., p. 63.

amount to a deviation when so great⁹ and intentionally committed, particularly if a specific route has been agreed by the parties¹⁰.

Delay can also be present at this stage when a charterparty gives the charterer the right to nominate a port/berth in which the cargo will be loaded¹¹. In this case the charterer must exercise his right in due time¹² since delay on his part may cause damages to the shipowner. If he fails to do so, the owner must wait for further instructions, since he cannot immediately withdraw the vessel from the service, unless delay in exercising the option can amount to frustration of the contract¹³.

In order to be able to shift the risk of delay to the charterers, shipowners must ensure they accomplish any contractual requirement provided to trigger the laytime clock. Therefore, the shipowner must care to put the vessel in the condition of an “arrived ship”. In the absence of a different provision, he first must establish whether the contract is a port or a berth charterparty. If it is a port charterparty, the approaching voyage will finish once the vessel enters the port¹⁴, whereas if it is a berth charterparty, the voyage will finish when the vessel is at the selected berth¹⁵. Therefore, in the former case, once the vessel is inside the port any delay in reaching the agreed berth caused by bad weather or congestion will be assumed by the charterer, whereas in the second case such a situation will be at the shipowners’ risk.

Additionally, to transfer the risk of delay the shipowner must give a valid NOR¹⁶. If he is delayed in doing so, no laytime can start even if the vessel is considered “an arrived ship”, unless otherwise agreed in the contract. Therefore, delay caused by not giving a valid NOR, or delay sustained by not being the vessel ready¹⁷ is at shipowner’s risk. Nevertheless, according to what has been held in *The Happy Day*¹⁸ case, laytime will start,

⁹ “The delay must be ‘such as to substitute an entirely different voyage for that contemplated by the bill of lading’”. J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, *Voyage Charterparties* (2007; Informa Lloyd’s Shipping Law Library) p. 255.

¹⁰ J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, *Voyage Charterparties* (2007; Informa Lloyd’s Shipping Law Library) p. 255, 267 and 268.

¹¹ J. Wilson Op. Cit. p. 60.

¹² Either within an agreed time or a “reasonable” time. See J. Wilson Op. Cit. p. 60.

¹³ Ibid. See *The Timma* [1971] 2 Ll. Rep. 91.

¹⁴ *The Johanna Oldendorff* [1974] AC 479 clarified that the vessel will be deemed to be an arrived ship in a port charterparty when she is lying at the usual place inside the port provided she is at “immediate and effective disposition of the charterer”, which will be presumed in those circumstances. See S. Baughen, *Shipping Law*, (2004, Cavendish Publishing) p. 236.

¹⁵ Ibid.

¹⁶ Notice of readiness.

¹⁷ The vessel must be in fact ready to load for the NOR to be valid. Mere formalities such as *free pratique* when the vessel is in fact ready will not impede the shipowner to give a valid NOR before such formality is obtained. See S. Baughen, Op. Cit., p. 232, 233.

¹⁸ [2002] EWCA Civ 1068; [2002] 2 Ll. Rep. 487.

and consequently the risk will be shifted, once the charge/discharge operation has started even if no NOR has yet been given by the shipowner¹⁹.

On the other hand, as usual in charterparties contracts, the parties can modify the risks they are assuming by use of specific contractual provisions. For instance, they can include a “*or so near as she may safely get*” clause, to allow the shipowner to finish the approach/carrying voyage at an alternative port, i.e. if the agreed port is blocked by strong persistent currents²⁰. Also, the parties can agree a “*reachable berth clause*” according to which the shipowner will transfer the risk of delay whenever the charterer is unable to nominate a berth to proceed to load due to congestion²¹. Furthermore, they can also agree a “*time lost waiting for a berth*”²² clause, the purpose of which is to transfer the risk to the charterer even before the ship is an “arrived ship” whether in a port or a berth charterparty, making thereby the time spent due to unavailability of the berth by congestion to count as laytime²³. It must be noted that in this specific case, delay not due to congestion, like the one caused as a consequence of fog, will not be within the scope of the clause²⁴. However, if delay is caused by the breach of the charterer’s implied duty to do something which is required for the vessel to become “an arrived ship”, like it would be to have “the cargo available at the port”²⁵, this clause²⁶ seems to continue covering the shipowner in respect of damages caused as a consequence²⁷.

Likewise, the parties can also agree in a berth charterparty a so called “WIBON” clause, transferring thereby the risk of delay due to congestion, but not due to bad weather²⁸, to the charterers²⁹.

¹⁹ However, there are some criticisms on the point. See A. Khan, “The Commencement of the Laytime in a Voyage Charterparty”. JBL (2003), p. 284.

²⁰ *The Athamas* [1963] 1 Ll. Rep. 287. J. Wilson, Op. Cit., p. 61, 62, S. Girvin, *Carriage of Goods by Sea* (2007; Oxford) p. 422. The obstruction must be permanent and not temporary. In *Metkalf v Britannia Iron works* [1877] 2 QBD 423 ice was not successfully invoked in this regard, but persistent strong river currents were accepted by the Court of Appeal in *The Athamas* cited above.

²¹ *The Angelos Lysis* [1964] 2 Ll. Rep. 28.

²² Gencon charterparty clause.

²³ J. Wilson, Op. Cit., p. 56. See *The Darrah* [1977] AC 157.

²⁴ *The Kyzikos* [1989] 1 Ll. Rep., HL.

²⁵ Or “to obtain some permission”. J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 363.

²⁶ At least in the way it is in the GENCON charterparty form. J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 363.

²⁷ J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 363. As explained by the authors, in this case damages can be claimed as demurrage given the construction of the GENCON clause, whereas if a different wording is agreed by the parties, such damages would be recoverable as damages for detention.

²⁸ D. Aspragkathou, “Review of the Gencon Charter Clauses for the Commencement of Laytime: Analysis of the ‘Time Lost in waiting for a Berth to Count as Laytime or Time on Demurrage’ Clause”. JMLC, (2007), October, p. 608.

²⁹ J. Wilson, Op. Cit. p. 56.

1.2. DELAY IN THE LOADING/DISCHARGE OPERATIONS.

Laytime is the agreed amount of time contemplated in the contract and already paid for as part of the freight to carry out the load or discharge operations from the vessel³⁰. Therefore, once the contractual requirements provided in for the laytime to start running have been fulfilled, the risk of delay is shifted to the charterer³¹. Usually, the charterparty will state how laytime is going to be calculated. When no specific laytime is agreed, the law normally will imply a duty on the charterers to carry out such operations “within a reasonable time”³². However, when a particular time has been agreed, charterer can use this time as he pleases and there is no further obligation to carry out the operation promptly³³.

However, once again, the risk of any delay can be transferred back to the shipowner by a suspension of the laytime due to the occurrence³⁴ of an excepted situations contemplated in the contract, or also when is the fault of the shipowner which has caused the delay³⁵. Three clarifications must be made in this regard: firstly, the burden is on the charterer to prove that the excepted situation has taken place³⁶; secondly, general exception clauses in the contract will not be applicable either to laytime or to demurrage, only specific exception clauses will be applicable provided that they are clearly stated in the contract as to give them such effect³⁷; and thirdly, the fault of the owner in order to interrupt the laytime need not to be actionable³⁸.

On the other hand, charterparties usually contain demurrage clauses. These clauses will establish a sum to be charged to the charterers as “liquidated damages”³⁹ i.e. per day,

³⁰ J. Wilson, Op. Cit., p. 70.

³¹ Ibid.

³² J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 354. “A reasonable time” means reasonable under the circumstances then existing, other than self-imposed inhabilities of either shipowner or charterer, and should be estimated with reference to the means and facilities then available at the port, the course of business at the port, the customary methods employed at the port, and the character of the port with regard to tides and otherwise”. Scrutton, Op. Cit., p. 316.

³³ J. Wilson, Op. Cit., p. 73.

³⁴ Prof. Scrutton also mentioned “*the loading or unloading being illegal by the law of the place where they have to be performed*” and “*a frustrating event*” as situations in which laytime will not be computed against the charterer. See Scrutton, Op. Cit., p. 312.

³⁵ Or another person for whom the owner is responsible. See J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 353.

³⁶ Scrutton, Op. Cit., p. 305.

³⁷ J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 355. See in particular the discussion made about the sugar charterparty clause regarding this issue. See also *The Solon* [2000] 1 Ll. Rep. 292.

³⁸ J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 353.

³⁹ Scrutton, Op. Cit., 298.

when the laytime has been consumed and the load/discharge operation has not finished. However, as it happens with the laytime, the risk of delay when the demurrage clock has started can be shifted back to the owners by the presence of an event covered in a sufficiently worded exception clause⁴⁰, as well as when the cause of delay is the shipowners' fault⁴¹.

The period in which demurrage can be claimed will vary according to what the parties have established in the contract. For instance, the parties can agree a specific number of days to count as demurrage, i.e. "ten working days" or, the parties may opt to not state a specific number of days as the maximum to be counted as demurrage. In the former case, once the agreed period has expired, no demurrage would be available but damages for detention would be⁴². In the latter case, demurrages would be possibly claimed through the whole period until i) the loading/discharge is finished, ii) the delay is so prolonged as to frustrate the contract, or iii) the charterer has repudiated the contract⁴³. Another delay sustained after loading/discharge is completed⁴⁴, caused by the charterer's breach of any other duty under the contract, will not count as demurrage but can be recoverable as damages for detention, unless otherwise agreed⁴⁵.

2. TIME CHARTERPARTIES

The general rule is that the risk of delay is borne mainly by the charterer since the hire will remain fully payable until redelivery of the vessel, unless an express provision to the contrary⁴⁶.

2.1. DELAY ON THE PROSECUTION OF THE VOYAGE

Under a time charterparty, the shipowner is deemed to be under an implied obligation to proceed with "utmost dispatch"⁴⁷; breach of this obligation will entitle the charterer to claim

⁴⁰ *The John Michalos* [1987] 2 Ll. Rep. 188. J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 415. L. Gorton, P. Hillenius, R. Ihre, A. Sandervarn, *Shipbroking and Chartering Practice* (2004; LLP) p. 243.

⁴¹ In the latest case, regard must be had as to whether the owners' fault has deprived the charterer the access to the cargo or vessel since the onus can change accordingly. J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 415.

⁴² However in this case, the claim will be subject to the regular test for damages to be recoverable and the owner must provide proof of the extension of the damage. See J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 417.

⁴³ J. Cooke, J. Kimball, T. Young, D. Martowsky, A. Taylor, L. Lambert, Op. Cit., p. 417, 418.

⁴⁴ "[O]nce the loading operation has been completed, the charterer has no right to detain the vessel further, even though the laytime has not expired". J. Wilson, Op. Cit., p. 73.

⁴⁵ M. Wilford, T. Coghlin, J. Kimball, *Time Charters* (2003; London Shipping Law Library) p. 419.

⁴⁶ M. Wilford, T. Coghlin, J. Kimball, *Time Charters* (2003; London Shipping Law Library) p. 274.

damages⁴⁸, although the shipowner can be exempted if he is able to show that the delay was caused by an event covered by an exception clause⁴⁹.

2.2. DELAY AND THE PAYMENT OF HIRE

The payment of the hire to the shipowner in advance or on the due date is considered an “absolute obligation”⁵⁰. Therefore, delay in making the payment according to the express contractual terms will normally imply a breach of contract on the part of the charterers⁵¹. Additionally, when it is established that the payment was not made on the due date because of circumstances other than the charterer’s mistake or oversight⁵², the shipowner can claim damages and also terminate the charter and withdraw the vessel from services provided that there is no anti-technicality clause in the contract to comply with before. However, if the lateness of the payment is due to a situation tacitly approved by the shipowner (i.e. the acceptance of previous payments of hire in installments or with delay), the withdrawal of the vessel seems not to be possible *“unless and until a reasonable notice has been given to the charterers that strict compliance will in future be required”*⁵³. On the other hand, once the late payment has been made by the charterers, unreasonable delay on the part of the shipowner in exercising the right to withdraw the vessel *“may amount to a waiver of that right”*⁵⁴.

2.3. DELAY AND THE OFF-HIRE SITUATION

If a delay is caused during the charter period by a situation that has been contemplated by the parties as to put the vessel off-hire i.e., “a breakdown of machinery”, the risk of such delay will be allocated on the shipowner since hire will not be payable if the event arises and time is lost as a consequence thereof, even if the event has occurred without any breach of the shipowner’s contractual duties⁵⁵. There are two types of Off-Hire Clauses,

⁴⁷ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 307.

⁴⁸ J. Wilson, Op. Cit. p. 16.

⁴⁹ See for example clause 12 of the Baltime charterparty. In that case, the owners will be protected against delay even if there is a breach of the duty to proceed with utmost dispatch unless it is caused by “personal want of diligence or personal default on the part of the owners or their manager” M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 621, 622.

⁵⁰ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 274.

⁵¹ J. Wilson, Op. Cit. p. 94.

⁵² *The Tropwind No. 2* [1982] 1 Ll. Rep. p. 237 and *Stocznia v Latvian Shipping* [2002] EWCA 889.

⁵³ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 275.

⁵⁴ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 282.

⁵⁵ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 405, 406. However, *“regard must be had to the particular work that is required of the ship at the relevant time and only if that is affected does the possibly of the off-hire arise”* p. 406.

thus, the time within which hire will be effectively suspended will depend on whether a 'period' or a 'net loss of time' clause was agreed in the contract⁵⁶.

On the other hand, even if the charterer is not able to put the vessel off-hire, he might have the right to claim back hire or any other damage suffered for delay, caused by any deficient performance in relation to the vessel description⁵⁷, i.e. delay sustained as a consequence of not being the vessel capable of reaching or maintaining the agreed speed. However, it will be always a matter of the precise wording whether or not such a claim can succeed.

2.4. DELAY IN THE REDELIVERY OF THE VESSEL

If due to the charterer's orders to proceed on a final voyage the vessel is redelivered late (including any implied or express margin of tolerance) the charterer will be in breach of contract (and albeit the charterer's order being 'legitimate'⁵⁸), damages can be recoverable unless an exception clause can be applied⁵⁹. Such an order will be legitimate if it was reasonable to believe that the vessel can undertake such a final voyage and be redelivered on time according to the contract⁶⁰. Thus, if the vessel is redelivered late (overlap), the charterer will have to pay the owners the hire for this extra-period at "*the market rate if higher than in the charterer*"⁶¹. Additional damage sustained by the owners, i.e. the cancelation of a subsequent charter, was supposed to be recoverable⁶² but now it seems that this particular claim will not succeed in future since it was considered exceptional in character and thus, one for which the charterers are not supposed to be found liable⁶³. Therefore, the general rule is that the risk of this kind of delay is borne by the charterer⁶⁴. However, the owners are not entitled to treat the charterers orders in this regard as a repudiation of the contract unless, once the order is (or become) illegitimate and the charterer is asked to provide a new legitimate order, no such order is given⁶⁵. It

⁵⁶ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 406.

⁵⁷ J. Wilson, Op. Cit. p. 87.

⁵⁸ *The Peonia* [1991] 1 Il. Rep. 100. *The Gregos* [1995] 1 LLR 1. M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 131.

⁵⁹ J. Wilson, Op. Cit. p. 90.

⁶⁰ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 275. See *The Peonia* [1991] 1 Il. Rep. 100. However this not seems to be the position hold by Prof. Scrutton, who pointed out that "*Where a time charter is for a stated period, the date for redelivery should be regarded as an approximate date only, unless there is a clear agreement to the contrary. In the absence of such an agreement, the charterer commits no breach of contract if he sends the ship on her last voyage with reasonable grounds for expecting that she will be redelivered within a reasonable time of the stipulated date*". Scrutton, Op. Cit., p. 348.

⁶¹ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 131.

⁶² *The Achileas* [2007] 1 Ll. Rep. 19.

⁶³ *The Achileas*[2008] WL 2596066

⁶⁴ *The Gregos* [1995] 1 LLR 1

⁶⁵ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 133.

must be pointed out also that clauses including a phrase such as “*Charterers have further option to complete last voyage within below trading limits*” have been construed as not entitling the charterer to give an illegitimate last voyage order, but only to exempt him from paying damages if accidentally the vessel is in fact lately redelivered⁶⁶. Again, in order to shift the risk of such a delay back to the owners, parties can agree in clear words that the charterer will be given the right to order the vessel to proceed in an illegitimate last voyage, like in the Shelltime 3 form⁶⁷; or by including a “without guarantee”⁶⁸ clause in the contract, whose purpose is to remove the obligation on the charterer to redeliver the vessel before the expiration of the agreed period by requiring him no more than to provide the estimated date of redelivery in good faith⁶⁹.

CONCLUSION

To sum up, the risk of delay is in principle allocated on one of the parties, but it can be shifted –and even shifted back once again - to the counterparty according to the facts and to what has been agreed in each particular contract. Thus, this situation can be found similar to a ping – pong game by means of which the ball passes from one side to the other, being it at risk of each player during his turn. However, due to commercial reasons, in some events the parties can agree to put ‘the ball’ on the other side of the ‘table’, transferring the liability of delay that is in principle expected to be borne by one of the parties, to the other one (i.e. during the loading or discharge to a person different to the shipowner or the charterer). This situation will take place, for instance, when the charterer, seller or buyer under an international sale contract, transfers the risk of such delay to his counterparty under this agreement, who is normally not the shipowner⁷⁰. Thus, the paramount point in this topic seems to be the parties’ usage of the ‘freedom of contract’ in each particular case.

⁶⁶ *The Peonia* [1991] 1 Ll. Rep. 100. M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 137.

⁶⁷ *The World Symphony* [1991] 2 Ll. Rep. 251 and [1992] 2 Ll. Rep. 115 (C.A.)

⁶⁸ For example, “*duration about 70/80 days without guarantee*”. *The Lendoudis Evangelos II* [1997] 1 Ll. Rep. 404.

⁶⁹ M. Wilford, T. Coghlin, J. Kimball, Op. Cit., p. 141.

⁷⁰ C. Debattista, “Laytime and Demurrage Clauses in Contracts of sale – Links and Connections”. LMCLQ (2003), p. 509.

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