Maritime Aspects under an International Contract of Sale and Purchase

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I.

1. Some time ago, an article was published in an English legal periodical under the title of «'Non-Maritime' Demurrage Claims» (1). «Demurrage» is a term technique of the commercial maritime law. Why this maritime expression all of a sudden was denoted «non-maritime», might at first sight be surprising. But is it really surprising? It certainly is not if one considers an international contract of sale and purchase. Since buyer and seller live in different countries, possibly even on different continents, it is obvious that the sold merchandise has to be transported to the buyer's place of business either by lorry, by railway, by an inland navigation craft or by an oceangoing vessel. One of the parties to the contract has to take care of the transportation.

It is suggested to concentrate here on questions arising because a certain merchandise is carried over sea or inland waterways, and on those questions which are of interest and practical importance for the parties to an international contract of sale and purchase.

2. A contract of sale, particularly one concluded between foreigners, understandably in the commercial life, can not provide a rule for every situation which may arise during its lifetime. The contract, therefore, necessarily relies on the national law the rules of which supplement the rules of the contract itself. It is a task of the so-called private international law to decide which particular national law supplements the contract, e.g. the law of the seller's State or that of the buyer's. In some instances, an international convention might apply, containing unform rules of law, as for instance the Convention on contracts for the international sale of goods which became effective on 01.01.1988 among numerous countries, in Germany since 01.01.1991 (2).

It is also known that, in the commercial life, due regard must be paid to the commercial usages, les usances, the habits merchants have adopted over the years. The German HGB (Commercial Code) for instance provides that «the customs and usages which are current in commerce shall be taken into consideration among merchants in respect of the meaning and effect of acts and omissions» (3). The German Law on Standard Business Terms (4) rules that due regard must be paid to these customs and usages.

These commercial usages are those commercial patterns which are voluntarily, equally and commonly followed by the relevant commercial circles. They are, if it may be called that way, the condensed practice merchants

unanimously have followed over a number of years. As an example, the Hamburg Chamber of Commerce, in the beginning of this century, has written down what has been told by the Hamburg merchants and traders to be a commercial usage. One of these usages was that Hamburg merchants were used to settle their commercial disputes by arbitration. That is what usually is called «Hamburg friendly arbitration» ([5]).

Similar to commercial usages, merchants in their business language often use short terms behind which a lot of life is hidden. Everyone knows terms like «CIF», «FOB» or the like used in the international trade. Every merchant immediately knows what they stand for, i.e. that a party who sells «CIF» has to take care of the transportation since the sale's price includes also the transportation price. This is so regardless where the seller lives. In any case, the term «CIF» stands for numerous detailed provisions. It, for instance, includes that the seller must inform the buyer as soon as the goods have been loaded and that the seller must buy an insurance against all transportation risks arising as from the time the goods are handed over to the ocean carrier([6]). It explains which party has to effect the loading and the discharging of the vessel which is used for transporting the goods([7]).

These short forms usually are called Trade Terms. Some countries have published their national trade terms as for instance numerous European countries, Australia, Canada, Egypt and the USA. The USSR apparently have not published them. It may happen that these terms slightly differ from one country to another, remarkably not in principle but as far as some secondary committments are concerned. For instance, the extent of the insurance cover to be provided might differ([8]).

In such a case, one certainly will ask as to which of the two divergent national trade terms apply; the ones of the seller's country or those of the buyer's. The answer is that the duties and obligations of each party are governed by that party's national trade terms.

Because this is so, and in order to make international trade uniform as far as possible, the International Chamber of Commerce, Paris, has tried to unify these trade terms. This aim was achieved by establishing the so-called INCOTERMS which recently were reissued in a modified and amended form, in this form being valid since 01.07.1990([9]).

This leads to the question as to which of these sets of rules applies in a particular case, the Trade Terms or the INCOTERMS. As shown, the former apply automatically because they are a commercial usage and because the law expressly provides that such an usage must be acknowledged and applied. The latter, therefore, do only apply if and when the parties have so agreed, for instance on a transaction «CIF Leningrad INCOTERMS».

3. As seen, a CIF seller or a FOB buyer has to arrange for the transportation. This means that he has to conclude the contract of transport and he has to pay for the transportation([10]). This brings about a second

contract which, as will be seen later, is not only of interest to the party which in fact concluded the contract.

To give an example: The CIF seller, who has sold a cargo of 25 000 mt steel «CIF Shanghai» is not in the first place concerned on when the goods arrive at Shanghai or when the buyer takes there delivery of the cargo, or whether the goods arrive there in a damaged condition. This is so because the risk that the condition of the goods deteriorates passes on to the buyer in the very moment the goods are being loaded onto the ship, i.e. when they pass ship's rail([11]).

Nevertheless, it may happen that under the contract of affreightment – i.e. not under the contract of sale – the seller is still contractually committed vis-à-vis the carrier to do certain things or to pay for certain shortcomings. For instance: Under the contract of carriage, the CIF seller is (often) liable if the container into which the cargo was stowed is not returned by the buyer to the carrier. Under the contract of sale however the buyer is obliged to return the empty container to the carrier. If it is not so returned, the carrier will try to hold the seller liable for the consequenses. It then is up to the seller to seek compensation from the buyer since he has to perform that duty according to the contract of sale. Thus, it is always necessary to keep in mind that there are two contracts which, legally speaking, are absolutely independent the one from the other whilst, commercially speaking, one is the logical and practical consequence of the other.

4. Remains to add some definitions of terms which will be used more often in this paper.

The contract of carriage mentioned (or contract of transportation, or contract of affreightment) is concluded between a carrier («Verfrachter») and a shipper respectively charterer (in German one term only: «Befrachter»). This contract is either evidenced by a charterparty (in case a full shipload is carried) or by a bill of lading (in case one parcel only is carried, or if the CIF buyer presents the bill of lading he has bought to the carrier).

A charterparty is concluded when, e.g. the CIF seller of 30 000 mt grain has agreed with the owner of a bulk carrier being able to load that quantity that this owner undertakes to transport that cargo to the agreed port of discharge (port of destination). Coming now back to the term «demurrage» earlier used, it is plain that loading and discharging of such a quantity needs some time. On the other hand, a ship is a «money earning machine», each day of service costing a remarkable amount of money. With the freight, the charterer pays also for the time the vessel usually needs to load and discharge that cargo. But the freight understandably cannot be the reward for the transportation as well as for an extended loading or discharging time (sometimes ships have to wait many days or even weeks in a port, because of congestion or obstruction or because there are no lorries or waggons available into which to discharge the cargo). In such a case, if a reasonable or expressly agreed loading time has passed, the charterer has to pay to the carrier, in addition to the freight, an extra remuneration called «demurrage» («surestaries», «Liegegeld»)([12]).

Remains to add a remark on the nature of a bill of lading issued in a shipping operation. At first, the bill of lading means a receipt issued by a ship's master to the shipper in which he certifies having received 25 000 t of grain or 20 containers marked ABC1-20, which contain 1 000 cartons each of spare parts, in an external good order and condition. In addition, such a bill of lading represents the goods described therein insofar as selling and handing over the document is equivalent to, and means, selling and handing over these goods. One might say, the bill of lading is the «symbol of the goods». But that is not all. The bill of lading may have a third function. It usually contains, on its backside, a lot of clauses which are apt to evidence the contents of a contract, linking the carrier and the consignee/buyer. They in fact do so in case of the relation carrier-CIF buyer; they do not do so, however, in the relation carrier-FOB buyer. In the latter case, the FOB buyer has already, before or on shipment, concluded a contract of carriage with the carrier so that a second contract (evidenced by a bill of lading) is not needed and thus superfluous. There is one exception: If no particular written contract was drawn up it is assumed that the clauses of the bill of lading later issued evidence the contents of that contract([13]).

II.

In the following, some examples will be given which show which particular «maritime» problems may arise when performing an international contract of sale.

1. One of the most important questions is that of the quality of the service the carrier offers to the parties to the contract of sale. This aspect comprises the quality of the carrier himself.

The INCOTERMS CIF provide that the seller must «contract on usual terms... for the carriage of goods... by the usual route in a seagoing vessel of the type normally used for the transport of goods of the contract description». Nothing is said with a view to the person of the carrier. Thus, the seller in principle is free to select a carrier he deems reliable and able to perform the contract. Of course, there are expensive carriers and less expensive ones. Consequently, a seller may be tempted to choose a less expensive one. So-called outsiders, operating a shipping line in strong competition to a conference line or to other groupings, sometimes are less expensive than the line they compete with. There is no doubt that a seller may contract with such an outsider. Sometimes there are found on the market operators of financially weak a standing. There the difficulties begin.

An international arbitration tribunal under the auspices of the international Chamber of Commerce had to decide on a case of this kind([14]). A Belgian firm had sold 500 t zinc in bars «C&F Karachi». It had agreed with the buyer as follows: «Goods should be shipped on a regular liner vessel sailing directly for Karachi, preferably Pakistan National Shipping Corporation's ship». The cargo was loaded on board of a vessel called the «Lina S», on 18th April.

Thereafter the vessel went to Rotterdam where she remained idle for six days. She then proceeded to Dunkirk to load another cargo of 12 000 t suggar. When, on 18th July, the vessel had not yet arrived in Karachi the buyer asked the seller for the reasons of the delay. It then was found out that in the meantime the vessel had been auctioned in Dunkirk and that the cargo had been discharged and stored there. The buyer therefore cancelled the contract of sale and claimed damages. The arbitration tribunal allowed this claim.

As it held, usually the buyer has to bear the risk caused by the goods having to be transported over sea. Of course, the parties are free to contract otherwise. Under a C&F contract, the risk of the transportation usually passes on to the buyer in the very moment the cargo is loaded. If therefore the carrier does not perform his duties at all, the buyer bears the risk. The situation of course is different if the damage suffered by the buyer is due to the fact that the seller has not performed his commitments, for instance if, when concluding the contract of carriage, the seller does not act reasonably and carefully. It is not sufficient for him to show that he has engaged reliable forwarding agents or chartering brokers. In this particular case, as the tribunal found, the broker acting for the seller had agreed upon a contract of affreightment with a newly established outsider line unknown in Antwerp and of whom it later had become known that the first sailing announced in the press had repeatedly been postponed for altogether 8 weeks.

2. The French Cour de Cassation had to decide a similar case([15]). Barley had been sold C&F Mombasa. During the contract negotiations, the buyer had insisted that the merchandise was delivered to him as quickly as possible. The seller shipped the cargo on 01.08.1975 at Antwerp with a liner vessel. This vessel however was seriously delayed because of, and during its, call at various ports of the Red Sea so that consequently it arrived at Mombasa only on 15.11.1975. The seller sued the buyer for damages resulting from that delay and for cargo damage also due to the delay. Cour de Cassation finally allowed the claim and held the seller liable.

Again, the reason, for this decision is that the seller did not perform a duty he had undertaken to perform namely to use a quick means of transport. The delay and the damage to the cargo was not a pure transportation risk which usually is born by the buyer.

3. In another case, a tanker had carried petroleum CIF INCOTERMS French discharging port. The vessel loaded the cargo in Far East and sailed for Europe. On her way she suffered an engine breakdown, and fire broke out, so that the cargo had to be transshipped into another tanker. The buyer sued the seller for damages before a Paris ad hoc arbitration tribunal. The first question that tribunal had to answer was as to when the risk for damages to the cargo had passed from the seller to the buyer. The buyer in that case had argued that he did not bear this risk due to the fact that the tanker the seller had contracted for was cargo-unworthy when loading the cargo. The tribunal held, relying on the wording of the INCOTERMS CIF, that the seller had no duty to inspect the

chartered vessel before commencing to load in order to find out as to whether it was capable and apt to transport the cargo. In the arbitrators' view, this would particularly be valid in a case where cargo is sold during the carriage([16]).

4. The latter case reminds CIF sellers that they have to charter a vessel «of the type normally used for the transport of goods of contract description». In former times the INCOTERMS as well as various national Trade Terms had provided that no sailing vessels may be chartered. In the old English case Ransom v. Manufacture d'Engrais it had been decided by an English court that the seller was liable for cargo damage caused because the cargo had been carried by a (slow) sailing vessel([17]).

In an international sale contract, time is often of the essence. If therefore the seller does not ship the merchandise at the agreed date he might have a secondary contractual obligation to inform the buyer of that fact([18]).

5. Contracts are not always absolutely clear. Consequently, difficulties inevitably arise.

A buyer and a seller had agreed the delivery of steel
«FAS our discharging berth Hamburg...
with full German discharging time...
Saturday no discharging day».

The cargo was carried by an inland navigation craft. The owner of that vessel berthed at the agreed discharging place and the stevedores of the buyer discharged the cargo (in other words, the buyer paid for the discharging). The owner of the inland navigation craft claimed demurrage. The buyer at first had to consider what the contract provided for: «FAS». He noticed that there is a Trade Term «FAS loading port». There is no Trade Term, or INCOTERM, «FAS discharging port». It exists a Trade Term «ab Kai... benannter Einfuhrhafen» (i.e. ex quay named discharging port). According to this latter Trade Term, the seller has to pay the discharging costs whilst the buyer has to bear all expenses arising once the cargo has been placed on the quay. However, this trade term certainly was not meant by the parties when agreeing upon «FAS our discharging place Hamburg».

Taking into consideration that the buyer had discharged the cargo at his own expense one therefore could only assume that he had done so because of the contract concluded. This means that, according to the contract, the seller had undertaken to bring the cargo alongside that discharging place of the buyer. Thus, the buyer had to discharge. It therefore, in addition, was also his duty to bear the demurrage which had accrued.

This view was re-inforced by the fact that the parties, in their contract of sale, had provided some details for the counting of the laytime and demurrage time. In other words, what the parties in fact had agreed upon was practically speaking that what the INCOTERMS provide under the clause «ab Schiff Löschhafen», i.e. «ex ship discharging port».

Consequently, in principle the buyer was liable to the seller for discharging port demurrage if such demurrage had accrued at all.

6. In that case, the seller had agreed upon a contract of affreightment with a shipowner. In this contract, a charterparty, the parties had agreed upon laytime([19]) in both the loading and the discharging port, and on demurrage in case the vessel was kept in these ports longer than contractually allowed (longer than the «allowed lay-time»). Therefore, under that contract of affreightment, the seller was liable vis-à-vis the carrier for the demurrage accrued in the port of discharge. He then would have had the possibility, namely under the contract of sale (as seen above), to ask, at least in principle, reimbursment of that demurrage from the buyer. This is understandable if one considers that that demurrage had become due only because the buyer had unloaded the vessel slowly.

In that particular case the carrier had issued an inland navigation bill of lading («Ladeschein») to the shipper/seller who, in performance of the contract of sale, had handed it over to the buyer who thus became the consignee of the cargo. Thus a third contract comes into the picture. In such a case, it may be that according to the terms printed in that document the buyer himself is liable for the discharging port demurrage directly vis-à-vis the carrier. Sometimes the clauses in the bill of lading or «Ladeschein» are short ones only so that in addition the applicable law has to be taken into consideration dealing with laytime problems (in Germany either the HGB for maritime demurrage, or the Inland Navigation Law and further agreements for the inland navigation demurrage)([20]).

One should keep in mind that, if there are two or three contracts, these contracts are usually independant from each other. This is so even if the same questions are governed by them. This is illustrated by the following example. The claim of the carrier against the charterer for payment of demurrage become time-barred, for instance under French law, after one year. Claims of the FOB buyer against the seller become time-barred after ten years. Thus, the seller cannot argue that the buyer's claim for loading port demurrage, because it is for payment of demurrage, is time-barred after one year only([21]).

One, of course, can foresee difficulties if these contracts are governed by different national laws and/or written in different languages. Insofar it is necessary to know the terms techniques in all languages used. E.g. «demurrage» stands for the French «surestaries» or the German «Liegegeld» even if their legal character is different.

7. It often happens that the contract of sale contains, with a view to the transportation needed, special «Shipping Terms & Conditions»([22]).

However, it even more often happens that a contract of sale does not provide anything with regard to the transportation. For instance, many contracts do not say anything on the calculation of the laytime and on the demurrage rate. It is submitted that in such a case, at least in principle, the calculation of the laytime must be effected as provided for by the relevant charterparty and also that the demurrage rate agreed upon in the charterparty applies to the legal relation existing between seller and buyer. This once was held by a Paris arbitration tribunal([23]) and by Court of Appeal Celle([24]).

8. It has been said that «in principle» the calculation of the laytime must be done alike under both contracts. There are exceptions.

Under a contract of sale CIF buyer and seller were in disagreement on the demurrage the buyer had to restitute to the seller because of a prolonged discharging time. A contract of sale provided inter alia: «... discharged 400 t per hold/weather working day... with max. 2 000 mt. per day. Demurrage USD 3,500.– per day pro rata with half despatch.» The agreed discharging rate was 1 600 t per day. The vessel, MV «Handy Mariner», arrived at the discharging port on September 30, 1987 and she had to wait for a berth until October 13, because of congestion. The sellers contended that time started to count either on arrival or at the latest with the next working period after the vessel had arrived in the port and tendered notice of readiness, i.e. on October 1st. The buyers on the other hand contended that time could not start to count until the vessel's berth on October 13.

Whilst GAFTA arbitration in two instances had allowed the sellers' claim, both judicial instances disallowed it ([25]). The court concluded that the parties had not intended to use words of the sale contract in the technical sense which they bore in charterparties, i.e. that they had not intended to alter the effect of naming a port as the destination so that consequently laytime did not start to run with the vessel's arrival in the roads waiting for berth. The contract of sale contained no express provision as to when time should start to count. As the court emphasized there was not a sufficient indication of the parties' intention to shift responsibility to the buyers for the time lost in waiting for a berth. As Lord Justice Staughton reasoned, another solution would be «capricious»; «the buyer does not know when he makes the contract how much other cargo will be carried on the vessel and so share his liability prorata... I would require rather clearer words before holding that the buyer had assumed such a liability» ([26]). In consequence a CIF seller should insist on a specific provision such as «whether in berth or not» to be inserted into his contract if he wishes the buyer to be responsible for the time lost due to congestion at the discharging port ([27]).

To resume, laytime is calculated alike under both contracts as long as the wording of the contract so allows.

9. In a case decided by a Paris ad hoc arbitration tribunal mentioned above ([28]) the contract of sale referred expressly, as regards the demurrage rate, to the charterparty concluded by the seller. In that case the parties, i.e. seller and owner, had agreed upon an ASBA-tankvoy CP, a voyage charter which, against all probability, did not contain a demurrage rate. The freight was agreed per day. The tribunal decided in principle that the daily freight rate should be taken as the demurrage rate. For some particular reasons of that case however the tribunal estimated what according to the market an acceptable demurrage rate was and so decided.

Similarly, Chambre Arbitrale de Paris (an arbitration tribunal dealing with grain contracts) had recently held that a buyer CIF is obliged to pay to the

seller the demurrage accrued in the port of discharge on the basis of the time charter rate which the seller had to pay, as charterer, to the carrier([29]).

In the English case Mallozi v. Carapelli([30]) the CIF contract provided for a certain «average rate of discharge». The contract clause went on to provide: «Demurrage/half despatch on unloading at the rates indicated in the charter-party for Buyer's account». The seller had chartered a vessel on basis of a time charter contract and claimed what he called demurrage when the buyer did not apply the agreed average rate of discharge. The court decided that the buyer did not owe demurrage since the contract of affreightment did not contain any provision for demurrage. In view of the clause mentioned the seller was not entitled to argue that damages for detention were due.

In that case, buyer and seller had agreed that «first or second (discharging) port to be agreed between the seller and the buyer on the ship passing the Straits of Gibraltar». No negotiations had taken place at all on that question and finally the seller had ordered the vessel first to a port convenient to him, thus causing certain damages to the buyer (who had loaded another part cargo on the vessel). Court of Appeal held([31]) that there was no breach by the seller of any obligation in respect of negotiating on the first or second port of discharge, because there was no legally binding obligation to negotiate. The reason for this decision is this: The law cannot recognize a contract to negotiate because it is too uncertain to have any binding force.

10. An ICC arbitration tribunal had to decide on demurrage in a FOB contract for the sale of oil products([32]). The contract provided, a.o., that «time for loading... will be 60 hours». As regards the liability of the seller for demurrage, a typewrite clause provided: «Possible demurrage will be calculated on the basis of Worldscale and conform the freight level as determined in the charterparty but may not exceed the basis rate indicated in Worldscale under the heading Demurrage Rates». Demurrage in fact accrued in the loading port. The buyer, as charterer, paid to the carrier demurrage being calculated in accordance with the charterparty on the basis of Worldscale 220 (i.e. USD 4 334, – demurrage per 24 hours). The seller admitted only to owe demurrage calculated on the basis of Worldscale 100 (USD 1 770, – demurrage per 24 hours). Consequently, the buyer sued the seller for payment of the demurrage likewise calculated on the basis of Worldscale 220.

The arbitrators interpreted the clause concerning demurrage in the sense that the rate of demurrage payable by the seller to the buyer was linked to the freight of the charterparty but with a limit of the basic rate indicated in Worldscale under the heading «Demurrage Rate» which is Worldscale 100. In their opinion, that Worldscale 100 should be taken as basic rate for the calculation of demurrage and not Worldscale 200 also followed from the clause stating that «in order to determine the basic rate (demurrage rate), there shall be taken in consideration the quantity effectively loaded, and not the capacity of the ship».

11. In one of the Paris cases mentioned(33) the tribunal had held that a party to a contract of sale asking for payment of demurrage from his contractual partner does not need proving that beforehand he in fact paid that demurrage to the carrier.

The same problem was discussed in an English case. The issue between the parties – to a FOB contract – was whether there is an absolute liability to demurrage (loadport) by the seller when the vessel has in fact become entitled to demurrage or whether this is a provision in the nature of an indemnity, so that the seller can only be made liable to pay such demurrage if the buyer has either become liable to pay it or has in fact paid it(34). The question was not definitely answered by the court. Nevertheless the court considered the problem reviewing the following clause:

> «Despatch/demurrage at the port(s) of loading shall be for the account of Seller. Despatch on all time saved basis shall be minimum half of the demurrage rate».

In doing so it mentioned (obiter?) the correct view to be that the clause is in the nature of an indemnity provision particularly having regard to the words «for the account of» used in the mentioned clause (Sethia Ltd. v. State Trading Corporation)(35).

12. It is not surprising to note that sometimes differences exist in the jurisdiction of courts belonging to different countries. An English court as seen(36) held that payment of demurrage becomes due as an indemnity whilst a French arbitration tribunal once held that the party to the contract of sale who had chartered the vessel need not prove that he in fact paid the demurrage to the carrier(37).

The question arises why this difference of opinion exists. The reason might be this: Under most Continental laws demurrage due under a charter contract is an extra remuneration which the charterer owes to the carrier, as the French say «un supplément de fret»(38). According to these laws, the charterer is contractually entitled to keep the chartered vessel for loading and/or discharging purposes longer than the laytime which had been agreed upon. In England, however, it is settled law that it is a breach of contract for a character to fail to load and discharge within the stipulated laytime. Therefore, demurrage is categorized as liquidated damages for breach of contract(39).

Once, as in England, demurrage is understood to be damages it is understandable that the view is taken that this is alike under a sale contract and that, for instance, the FOB buyer, when demanding from the seller payment of loading port demurrage, must prove that he has suffered damages (namely payment(40) of demurrage to the carrier).

13. As seen, under a FOB contract, it is the duty of the buyer to conclude a contract of affreightment. He in any case will do so if large quantities of cargo have been sold so that a vessel must be chartered. Practical difficulties, however, may arise if single parcels or small quantities have been sold. Very

often, it is the seller who arranges for the transportation. He knows when the merchandise is ready for being transported and he knows the transportation facilities, in any case better than the buyer. What in suchlike cases usually happens is that the seller books the cargo (as it is called) telling the carrier that the consignee, i.e. the receiver of the cargo, in the port of discharge, will pay for the transport («freight collect»).

In these cases, the legal question arises as to who is the contractual partner of the carrier. It is submitted that, at least under German law, the seller as shipper («Ablader») concludes the contract in the name and on account of the buyer([41]). The reason is that, in commercial circles, that person is considered to be contractual partner who pays the price. That is the reason why carriers are used to provide in their Liner Bills of Lading (their standard business terms) that they have rights and claims not only against their contractual partner, the charterer, but also against the owner of the goods and likewise against the (non contracting) shipper («Ablader»).

Often, the contract of sale does not provide anything expressly on the authority of the seller to conclude, for the buyer, the contract of affreightment. In such cases one might speak of an implied authority to do so([42]). Likewise often, contracts so provide expressly, as for instance: «Seller to engage the necessary tonnage accomodation on behalf of the buyer», or: «Bei Verschiffung mit Linienschiffen besorgt der Verkäufer für Rechnung und Gefahr des Käufers den Schiffsraum»([43]). Practical differences to the usual FOB contract may be that the seller, and not the buyer, might have to bear storage expenses or harbour dues arisen in the port of loading or the loading port demurrage. The risk of damage to the cargo may be differently divided.

In the German literature this kind of contract is called «erweiterter FOB-Vertrag» (extended FOB contract).

Some contracts go further when they provide: «Contracts made on the condition 'FOB port of shipment' shall be construed exactly the same as C&F contracts except that the freight shall be for account of the buyer and generally be payable at destination. The sellers must book the shipping space and conclude all matters dealing with the shipment of the coffee»([44]). That is what usually is called an «abgewandelter FOB-Vertrag» (i.e. modified FOB contract). Again, the seller's obligations are increased, and his risks enlarged (e.g. if the ship does not present herself in time). So is his responsibility([45]).

These short remarks should suffice. They show two things. Commercial contracts are closely following the (sometimes changing) practical necessities of the trade. Legal interpretation, legal theory and jurisdiction have to carefully take notice of these necessities and changes.

14. The question has been considered as to which party to the contract of sale has to conclude the contract of carriage and how this contract is entered into. Also this aspect is of particular importance, sometimes in connection with the question when the contract of carriage starts to be effective.

In a Hamburg court case goods during their being loaded became damaged([46]). They were damaged before they had passed ship's rail. It appeared that loading had been arranged by an independent quay company for whose services the shipper had paid. In other words, loading was not done by the shipping line. Consequently, it was held that the carrier was not liable for damages. This means that the damage was the risk of the seller. It was not the buyer's risk (assuming a CIF or FOB contract) as the goods had not yet passed ship's rail. The damage was not covered by the insurance a CIF seller has to cover under the (German) CIF trade terms([47]) since that insurance should cover transportation risks arising as from delivery of the goods to the carrier.

The case therefore shows how careful a CIF or FOB seller must be when considering the insurance cover he has to and he should buy.

III.

In the foregoing, just a few cases, questions and problems could be mentioned where maritime aspects must be considered under an international contract of sale. The use of Bills of Lading in international trade has not been dealt with in detail([48]). The transfer of property could not be discussed, both generally and regarding a «res in transitu». This appeared not to be necessary since plenty of legal literature exists insofar. It is, however, astonishing to note that, as far as can be seen, not much, or nearly no, legal literature exists dealing with the topics described. What exists is either literature on the law of a particular means of trnasport or on the law of sale and purchase; but there is nothing focussing transportation problems arising under a contract of sale, i.e. affecting seller and/or buyer. Similar problems, as the ones discussed, or even totally different ones, might arise under a contract of sale with a view to land transportation and air carriage.

FOOTNOTES

([1]) F.M. Ventris, «Non-Maritime» Demurrage Claims, in: Lloyd's Maritime and Commercial Law Quarterly 1984, 657.

([2]) Cf. the commentary R. Herber, Internationales Kaufrecht, München 1991.

([3]) § 346 HGB.

([4]) § 24 II AGB-Gesetz.

([5]) Cf. details in J. Trappe, The Law and Institutions of Arbitration in the Federal Republic of Germany and their Relevance for English-German Business Relations, in: Böckstiegel e.a., Commercial Arbitration in the Federal Republic of Germany and in England, Cologne 1987, 77, 82 seq.

([6]) Trade Terms CIF I 8, I 14.

([7]) Trade Terms CIF I 4.

([8]) Cf. H. Haage, Das Abladegeschäft, Hamburg 1958, 146 seq.

([9]) International Chamber of Commerce, INCOTERMS 1990. Trade Terms CIF I 1; INCOTERMS CIF A 3 a.

([10]) Trade Terms CIF I 11; INCOTERMS CIF A5.

([11]) Trade Terms CIF I 11 and II 1.

([12]) § 567 (4) HGB. In English law, this is not an extra remuneration but agreed liquidated damages. Cf. the most recent decision, The «Uljanovsk» (1990) 1 Lloyd's Rep. 425, 431.

(13) Landgericht Hamburg, Versicherungsrecht (VersR) 1982, 140.

(14) Sentence 24.05.1988, Jurisprudence du port d'Anvers 1988, 197.

(15) 21.06.1983, Bulletin des Transports 1984, 102 (No.2090 of 24.04.1984).

(16) The award is not published. A report on it is found in J. Trappe, Entwicklungen im Charterrecht, Schriften des Deutschen Vereins für Internationales Seerecht, A 52, Hamburg 1985, 5 seq.

(17) 13 LI.L.Rep. 205.

(18) German Bundesgerichtshof 12.12.1990, WM 1991, 464, 467.

(19) This term should not be mixed up with the term «laydays», i.e. the days during which the carrier is obliged to present a load-ready vessel in the port of loading.

(20) A Bremen Court decided on the demurrage claim, cf. TranspR 1991, 155.

(21) Paris Award 06.11.1984 (not published), cf. Note (16).

(22) As, e.g., the ones mentioned in the English judgment Sethis Ltd. v. State Trading Corp. (1986) 1 Lloyd's Rep. 31, 34 (CoA).

(23) Chambre Arbitrale Maritime Paris, Sentence No. 439 of 09.03.1982, Droit Maritime Français 1982, 629.

(24) VersR 1981, 528.

(25) Ets. Soules and Cie. v. Intertradex S.A., 08.11.1990 (Court of Appeal) (1991) 1 Lloyd's Rep. 378.

(26) Ibidem 386.

(27) N. Walser, Lloyd's List 03.05.1991, p. 4.

(28) Cf. Foot note (16).

(29) Sentence No. 7151 of 23.04.1981, with a short quotation in the text mentioned in Foot note (16).

(30) (1975) 1 Lloyd's Rep. 229 and (1976) 1 Lloyd's Rep. 407 (CoA). N. Walser reports that this decision has been frequently criticised, Lloyd's List 03.05.1991, p. 4

(31) (1976) 1 Lloyd's Rep. 407, 413.

(32) Case No. 2795, 1977; cf. S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards 1974-1985, Paris 1990, 28 seq.

(33) Cf. Note (21).

(34) One might ask as to whether these are really alternatives. Both possibilities comprise the situation that the buyer, as charterer, is bound to the carrier to pay demurrage. The true alternatives appear to be: liability and no liability (either in toto or at least partly). – In Socap International v. Marc Rich, the FOB sale contract permitted the buyer to recover loading port demurrage from the seller, but only «to the extent that seller is able to recover such demurrage from the supplier» (1990) 2 Lloyd's Rep. 175.

(35) (1986) 1 Lloyd's Rep. 31, 34 (CoA).

(36) Sethia Ltd v. State Trading Corp. (1986) 1 Lloyd's Rep. 31 (CoA).

(37) Chambre Arbitrale Maritime de Paris, Sentence No. 439 of 09.03.1982, Droit Maritime Français 1982, 629.

(38) In France: Art. 4 Law No. 420 of 10.06.1966. In Germany: Bundesgerichtshof, BGHZ 1, 47 and Landgericht Aschaffenburg, TranspR 1984, 82. OLG Celle VersR 1981, 528, spoke of «damages», clearly erroneously as explained in a note VersR 1981, 718. § 567 (4) HGB speaks of «Vergütung».

(39) The most recent case is The «Uljanovsk» (1990) 1 Lloyd's Rep. 425, 431.

(40) The mere fact to be exposed to a valid claim for payment may also be «damages».

(41) Cf. V. Digenopoulos, Die Abwandlung der CIF- und FOB-Geschäfte im modernen Überseekaufrecht, Frankfurt/Main 1978, 195; R. Rodière, Droit Maritime, Assurances et Ventes Maritimes, Paris 1983, 541.

(42) Otherwise the buyer could not expect the contract to be performed.

(43) Cf. more examples in Digenopoulos, ibidem, 196.

(44) Digenopoulos, ibidem, 196.

(45) Digenopoulos, ibidem, 208 seq.

(46) Oberlandesgericht Hamburg, VersR 1973, 1138, with a note in VersR 1973, 1139.

(47) Cf. Trade Terms CIF I 14.

(48) Reference may be made to the recently edited book of Ch. Debattista, Sale of Goods Carried by Sea, London 1990.