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Revisions in the concept of commencement of laytime and demurrage – Laytime and demurrage clauses in international sale contracts

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Contents

Summary

Voyage charterparties, as one of the most common carriage contracts, has its own specific provisions which govern the legal relationship of the engaged parties. One of those specifications relates to the concept of laytime which is defined as the time during which the charterer can load or discharge the cargo. In this work the author tries to discuss the requirements that should be fulfilled to commence the laytime under different contractual situations and the problematic matters which are related to these provisions. In addition, the different types of laytime and its exceptions besides the concept of demurrage and despatch, which are related to the concept of laytime when the charterer cannot perform the loading or discharging operation on time or when he performs it sooner than agreed time, are discussed. Also, the incorporation of the laytime and demurrage clauses in the international sale contracts and charterparties and their interpretation are discussed under the legal systems of England and the USA as the second part of this work to analyse these two major systems based on a comparative method.

Chapter 1

1. Introduction

1.1. Background

Today, sea transportation plays a significant role in the international transport of raw and mineral materials, in addition to other types of goods. This is partially due to the huge distance between the supply and demand markets as well as the nature of global trade. Because of the diversity in demands in the field of carriage of goods in national and especially international markets, different types of sea transportation contracts are required to fulfil distinct demands. Generally, two different types of contracts of affreightment exist[1]: 1) Bills of lading and 2) charterparties which are governed by a specific legal framework and different provisions. Various forms of charterparties[2] have their own provisions, legal framework and standard forms. One of the most commonly used form of charterparties is voyage charterparty based on which the charterer charters the vessel to carry cargo from agreed port or ports to determined port or ports. In voyage charterparty, every act which is related to management, crewing, supplying the fuel and paying for it, port charges and every other necessary issue concerning the carriage of goods by the vessel and its operation, remains in the hands of the ship-owner. In return, the charterer has the duty to pay the freight and provide the cargo based on the contract.

From a historical perspective, it seems that laytime is the concise version of "lying along time". Main principles of the Law of voyage charterparties go back to the era of the Queen Victoria which have been developing through the years specially at recent century.[3] The development of voyage charterparty law was through the clauses which are used in various

[1] "An agreement whereby the shipowner agrees to carry goods by water, or furnishes a vessel for the purpose of carrying goods by water, in return for a sum of money called freight.":http://maritimedictionary.org/ASP/MarineDictionary.asp?WORD=contract+of+affreightment&Submit2=Search+Word

[2] Although there are different forms of charterparties, the most commonly used and famous charters are; Voyage, Time and Demise charters.

[3] John Schofield, *Laytime and Demurrage*, sixth edition, Informa, LONDON, 2011, p. 1.

commercial charterparties and their judicial interpretations. This development leads to the creation of some standard forms of charters. However, it does not mean that development is stopped, because the trend to use the additional clauses besides the standard forms, help the development of this branch of law. However, this issue, development, leads to the new problematic matters which shall be solved via the future litigations.

Every charterparty engages in different provisions. Through those provisions, the relationship between the engaged parties is adjusted. Besides, the most important matter to note is that in some concepts such as laytime and demurrage, the clauses and provisions of charterparty are not the sole documents which play a role in laying down the disputes of the engaged parties. Indeed, the laytime and demurrage clauses which are drafted in sale contracts play an important role in this matter.

Laytime and demurrage are two of the most important and problematic concepts under charterparties. Briefly, laytime is the specific time by which charterer is required to load or discharge the cargo. If the laytime is exceeded and the charterer cannot complete the loading or discharging operations, usually he/she would be enforced to pay a kind of liquidated damage to the ship-owner which is known as demurrage. On the other hand, usually charters include a dispatch clause based on if the charterer completes the loading and discharging operation of the cargo before the expiry time stipulated in the contract, he will be entitled to disbursement from the ship-owner.

Generally, there are three different documents in order to have an unified and standardised definition from the laytime and demurrage clauses under charterparties which are respectively: the *Charterparty Laytime Definitions 1980*, the *Voyage Charterparty Laytime Interpretation Rules 1993* and the *Baltic Code 2003* and the *Baltic code 2007*. These definitions incorporate in charterparties where the parties intend such a thing. Though, often it is persuasive for the engaged parties to combine such definitions in their contracts. Based on *Baltic Code 2003* laytime is: "The period of time agreed between the parties during which the owner will make and keep the vessel available for loading or discharging without payment additional to the freight." And demurrage is defined as: "An agreed amount payable to the owner in respect of delay to the vessel beyond the laytime, for which the owner is not responsible...."

In charterparty contracts every voyage consists of different stages which in each of them the risk is designated to charterer or ship-owner respecting the stage. Lord Diplock in *EL*

Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)[4] devided the the voyage charterparty into four different stages which will be discussed in details.

The important point is that every former stage is the prerequisite of the latter stage and while the former stage is not completed the latter cannot started.

Respecting these stages, obviously in order to commence the laytime it is necessary that the chartered vessel fulfils three different requirements: The vessel has been arrived, the ship being ready to load or discharge the cargo and the notice of readiness to load or discharge is tendered.[5]

It is important to remember that the charterparty and interpretation of its clauses are not the sole document to settle the disputes between the parties. Contracts of sales have the main role in this process.

1.2. Scope and purpose of the thesis

As it was mentioned, in order to commence laytime the fulfilment of three following requirements are necessary; the vessel has been arrived, the ship being ready to load or discharge operation and the notice of readiness to load and discharge have been tendered.

Indeed, this thesis seeks to shed light on these three different stages in details with a tendency to the problematic matters existed in these stages specially the apportionment of the risk at each of the stages. In addition, manner and modality of passing the risks between the charterer and the ship-owner are discussed. Moreover, as a significant matter and as the second part of the work, the laytime and demurrage clauses in the sale contracts and their interpretations in connection with the charterparties are elaborated. Existence of laytime and demurrage clauses in the sale contracts are not an unusual practice in international sale and commerce. These clauses are usually brief and concise because there is not any background or reference to the definition of the terms which are used in the clauses. This matter leads to a major difficulty to find the appropriate interpretation and construction for the clauses. In fact, the question concerns the nature of the legal operation of the laytime and demurrage clauses which are drafted in the sale contracts. In other words, whether these clauses are applied as indemnity clauses under charterparties or they have their independent legal characteristics in construction.

[4] *EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1973] 2 Lloyd's Rep. 285.
[5] Schofield, 2011, p. 71.

The author does not intend to discuss all aspects and provisions of the voyage charterparty or laytime and demurrage. This work is only about the necessary requirements for commencement of laytime. Also, legal and practical problematic issues which are disputable in practice for people concerned with this branch of law are argued. In second and complementary part of the work, the legal interrelationship between the sale contracts and charterparties in the theme of laytime and demurrage clauses together with their structure and interpretation will be discussed.

1.3. Research methodology and materials used

The method used in this work is widely practiced for the master thesis in law. Both dogmatic and comparative methods are applied. Regarding the dogmatic method, different academic resources including books and articles of the various scholars and professors are used to expand the subject and give an exact perspective of discussion. Under the concept of comparative method, in order to clarify the arguments and solidify the discussed subjects through objective and scientific examples, different cases from the USA and English law besides various ideas of the judges, arbitrators and scholars are compared and studied. In this respect, several online resources and dictionaries are applied to clarify standard charterparty forms, standard charterparty definitions, some engaged entities and technical meaning of some words. As it was mentioned above, the materials of the work including various books, articles, forms, dictionaries and cases are earned through hard copies or the internet.

1.4. Structure

Besides the first chapter as introduction, the body of the discussion is in five different chapters. In chapter two the discussion is about the concept of arrived ship in different types of contractual destinations and apportionment of the risk of delay and the time of shifting the risk in each type of the charters, in addition discussing the problematic matters about arrived ship especially in the port charterparty. In the second part of chapter two some famous clauses which are inserted into chaterparties to shift the risk of delay are discussed. Chapter three regards the readiness of the vessel to load and discharge and two aspects of it which is divided into legal and physical readiness. Also the concept of giving the notice and engaged problems

about it are verified for instance the validity of the notice and conferring the subsequent validity to invalid notices. In chapter four the concept of laytime and different types of it which are divided into fixed and customary laytime beside general and specified exceptions of layitme and related problematic matters are discussed. Also, in second part of the chapter four the concept of the demurrage and despatch is brought up briefly to clarify the issue. Chapter five is related to discussion of the laytime and demurrage clauses in the sale contracts as one of the most important and controversial issues in this part of law. And naturally the last chapter is contributed to a summary and conclusion of foregoing arguments.

Chapter 2

2. Arrived ship

2.1. Introduction

As it was mentioned in the foregoing discussions, in order to commence laytime, fulfilment of three requirements is necessary. The first requirement is that the ship must have been arrived. To consider a ship as an arrived ship to load or discharge operation, it is sufficient that the vessel has been arrived to her contractual destination; otherwise the vessel does not complete her voyage and cannot be considered as an arrived ship.

Regardless the role of the concept of 'arrived ship' in the commencement of laytime, the other important matter which this concept is engaged in, is the bearing of the responsibility. Indeed the criterion for allocation of the risk is the arrival of the vessel and the time of this arrival. Though, it is notable that the parties can add several clauses in the contracts to make some changes in allocating the risks and responsibilities which is discussed in this chapter.

Generally, in this chapter it is tried to discuss different aspects of the 'arrived ship' in various contractual positions and research the controversial and problematic aspects of this concept.

2.2. General Concept

Lord Diplock, through his analysis in *Oldendorff (EL) & Co GmbH v. Tradax Export SA (The Johanna Oldendorff)*[6] divided every voyage charterparty into four different stages:

1. The loading voyage, in which the vessel is on her journey to the contractual place for loading.
2. The loading operation of the cargo to the vessel in the contractual place.
3. The carrying voyage, in which the vessel leaves the loading port and is on her voyage toward the port of discharge.
4. Discharging operation in which the cargo is discharged from the vessel to the contractual place.

[6] *Oldendorff (EL) & Co GmbH v. Tradax Export SA (The Johanna Oldendorff)* [1973] 2 Lloyd's Rep. 285

It is obvious that the arrival of the vessel is the border of these four various stages and divides the stages from each other. Moreover, the arrival of the ship is the boundary to allocate the risks and responsibilities between the parties who are engaged.

Generally, there are three different types of the voyage charters which are distinguished based on the place the voyage stages end; 1) Berth and wharf, 2) Dock and 3) port charterparties[7].

2.3. Berth charterparty

It seems that the berth charterparty is the oldest form of the charparties, since the berth is the natural ending point of the voyage.[8] The *Baltic Code 2007*[9] gives a general definition of the berth:

> "2. BERTH/ANCHORAGE- in most cases the place within a port where the vessel is to load or discharge. If the word BERTH is not used, but the specific place is (or is to be) identified by its name this definition shall still apply."

In another comprehensive definition, a berth is defined as a distinguished point for loading or discharging on a jetty, wharf or dock system. Usually berths have their specified numbers like berth NO.1 or 2. It is a common practice in the charterparties to use terms like 'one safe berth in X port'. Indeed, this issue lets the charterer to nominate any berth in a port which is free and easy to reach or the case when port authorities have assigned that specified berth.[10]

In berth or wharf charterparties a vessel can be considered as an arrived ship if she rests at that berth or wharf in such a position which she does not need to move further for loading or discharging.[11] This essentiality was emphasised by Jenkins L.J. in *North River Freighters Ltd. v. President of India*[12]*:*

> "... in the case of a berth charter (that is to say a charter which requires the vessel to proceed for loading to a particular berth either specified in the charter or by the express terms of the charter to be specified by the charterer) lay days do not begin to run until the vessel has arrived at the particular berth, is ready to load, and has given notice to the charterer in manner prescribed by the charter of her readiness to load."

[7] Michael Summerskill, *Laytime*, forth edition, Stevens & Sons Limited, 1982, p. 62.
[8] Schofield, 2011, p. 78.
[9] Baltic code 2007 Charterparty and Laytime Terminology and Abbreviations
[10] Schofield, 2011, p. 78.
[11] Summerskill, 1982, p. 63.
[12] *North River Freighters Ltd. v. President of India* [1956] 1 Q.B. 333 (C.A.).

In another latter case as one of the most important cases in the history of the charterparty cases, Lord Diplock gave a clear criteria about concept of ready ship in berth and wharf charterparties:

> "Where a single berth was specified in the charter party as being the place of loading or of discharge, the loading voyage or the carrying voyage did not end until the vessel was at that very berth. Until then no obligation could lie upon the charterer to load the cargo, or to receive it, as the case might be. If the specified berth were occupied by other shipping, the vessel was still at the voyage stage while waiting in the vicinity of the berth until it became available, and time so spent was at the ship owner's expense."[13]

So, it is obvious that while the vessel does not get the specified berth or wharf, the risk of delay lies on ship-owner except some special events which will be discussed. Even if the delay is because of the congestion, bad weather and so on, the ship-owner remains as the responsible of the risk.[14] The issue can be illustrated through the *Tharsis Sulphur & Copper Mining Co. Ltd. v. Moral Brothers & Co.*[15] Based on the charterparty, the ship had to deliver cooper ore as the cargo "at any safe berth as ordered on arrival in the dock at Garston ... to be discharged when berthed with all dispatch as customary." At the arrival of the vessel, although the harbor master had ordered the berth at the right time, because of the congestion the vessel was not able to go alongside and it caused a considerable delay. The ship-owners claimed for demurrage and invoked the following statements; 1.it is the duty of the charterer to introduce an available berth 2. The voyage was completed when the vessel arrived at Garston at the disposition of the charterer and they passed the risk to the charterer when the vessel reached the Garston. But the ship-owners failed both their claims. Bowen L.J. held for both of the arguments of the ship-owners which are respectively:

> "To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option."[16]

> "The words of this proposition are full of ambiguity. If it means that as soon as the ship arrives at the place where the charterer is to exercise his option, the demurrage days begin, the proposition is too large."[17]

[13] *EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1973] 2 Lloyd's Rep. 285
[14] Summerskill, 1982,p. 63.
[15] *Tharsis Sulphur & Copper Mining Co. Ltd. v. Moral Brothers & Co* [1891] 2 Q.B. 647 (C.A.).
[16] Ibid
[17] Idid.

As it was mentioned in the foregoing case, naming the berth is not a necessary item to turn the contract into a berth charterparty. In fact, if the charterer has a right to nominate the berth based on the charterparty, the charterparty will be a berth one. Even if the charterparty contains a clause based on which the charterer has the right to nominate a berth or other discharging spot, the vessel would be considered as an arrived ship when she gets a suitable part to discharge in a spot other than a berth. So, there is no necessity for her to reach a berth to be considered as an arrived ship.[18]

A problematic issue regarding the berth charterparties which has led to uncertainty is wording of the clauses related to the loading or discharging place. It is not clear that when in a charterparty the discharging place is stipulated "Bandar Abbas, One safe berth" and in other charterparty is stipulated "one safe port, Bandar Abbas" do they have the same meaning? Indeed, it is not obvious whether both clauses have the same meaning as port charterparty or does any of them oppose each other: the first one is port and the second is berth charteparty.

In the *Finix,*[19] Mr Justice Donaldson as *obiter,* held the first foregoing clause as a port and the second one as a berth charterparty. Before the foregoing case, the viewpoint of Mr Justice Donaldson was expressed in the *Radnor*[20] by Lord Singleton and parker. The Mr Donaldson's words were:

> "But there is a realm of uncertainty where the charterparty provides that discharge shall take place at, for example, (a) 'one safe berth, London' or (b) 'London, one safe berth'. The rest is undoubtedly whether on the true construction of the charterparty, the destination is London or the berth. My own view is that in case (a) it is the berth and in case (b) it is London. This point arose in *The 'Randor'* and Lords Justices Singleton and Parker seem to have inclined to this view."[21]

In the *Randor* Lord Justice Singleton and Parker both agree that the term "one safe berth Dairen" refers to a berth as contractual destination. But, exactly like Mr Justice Donaldson their indication does not exceed from an *obiter.*

In a latter case *Puerto Rocca*[22], the same argument was referred by Mr Justice Mocatta, and the term "one safe berth Seaforth Liverpool" was indicated as a berth charterparty.

[18] Donald Davies, *Commencement of Laytime,* forth edition, informa London 2006, p. 50.
[19] *Finix* [1975] 2 Lloyd's Rep.415.
[20] *Radnor* [1955] 2 Lloyd's Rep. 668.
[21] *Finix* [1975] 2 Lloyd's Rep.415.
[22] *Puerto Rocca* [1978] 1 Lloyd's Rep. 252.

Unfortunately, there are no more cases in this matter to clarify the problem and make a definitive ruling instead of the *obiter* of the judges in the foregoing cases.

It seems that there is a problematic matter about the berth charterparties and drafting method of the clauses regarding the determination of the concept of arrived vessel. Many experts believe that the distinction which has been mentioned above between two different wording methods of the clauses is illogical. In their idea berth charterparty should only include the contracts in which a berth is nominated in that charterparty. In continue, it seems that at the end of every voyage the vessel has to go to a berth for loading or discharging operation, So when the berth is nominated in the charterparty, the destination should only be that specified berth to commence the laytime.[23]

Regardless of discussed cases, there is at least one arbitration *Scapdale*[24] in which the same matter was considered about the "one safe berth X port" and "X port one safe berth". In this case the vessel had to remain in the anchorage for 22 days because of congestion of the berths before she was able to go to the berth. The Umpire of the matter regards some discussions in his award which can be helpful:

> "With respect to Mr Justice Donaldson I find it difficult to follow the distinction between 'one safe berth London' and 'London one safe berth'. I feel that this is too artificial a distinction and it is a distinction that would be missed by most brokers when fixing a vessel. There is little doubt the commercial community would like a simple test laid down for guidance in the future so that the legal niceties which have occurred in this case do not occur again. A few suggestions have been put forward; the first is that if the word 'berth' is mentioned then the charterparty is automatically a berth charterparty, although this position is often made more complicated by the insertion of the phrase ' where in berth or port' later, which effectively deprives the charterer of any benefit of having a berth charterparty. Another commercial suggestion has been to say that no charterparty can be a berth charterparty unless it specifically names a berth in a given port."[25]

In the author's view point, as it was mentioned in the first part of the Umpire's discussion it seems that the test which was used by Mr Justice Donaldson and two other justices in the foregoing cases, is general and simple. Also it is not practical in commercial practice of the charterparties. But about the suggestions of the umpire for the problem it seems that both can lead to other difficulties. It is really difficult to conclude that, only using the word 'berth' in a

[23] Davies, 2006, p. 50.
[24] *Scapdale*, 1980, Arbitration.
[25] Davies, 2006, p. 51.

contract turns that contract into a berth charterparty regardless the intention of the parties at the time of the drafting the contract. About the second suggestion, according to the congestion in the big ports and commercial sense of the sea transportation and sometimes Unpredictability of the time which is necessary to load or discharge a vessel, it seems that it is really difficult to nominate a specified berth in the contract.

In the idea of the author, instead of playing with the words it is more useful to find a solution for the problem through the combination of the commercial matters and intention of the parties plus the custom and some practical matters like the time of tendering notice of readiness.

2.4. Dock charterparty

It seems that nowadays dock charterpaty is not mostly on fashion in sea transportation contracts which are related to the charterparties.[26] Nevertheless, it is necessary to discuss it briefly, since dock charters in some concepts have close similarities with berth charters and it can be helpful in next parts. One of these common characteristics is that both of them cover a geographical area or spot like berths or wharfs for loading or discharging operation.[27] The *Oxford English Dictionary* defined a dock as:

> "an artificial basin excavated, built round with masonry and fitted with flood gates, into which ships are received for purposes of loading and unloading or for repair"[28]

Docks usually have their clear zones and entrance, so it is not really difficult to determine that the ship is inside the dock or not, so this characteristic makes it easy to distinguish the matters which are related to responsibility of delay. Indeed, while the vessel enters the dock, the responsibility of delay is passed from the owner to the charterer.

In the *Dahl v. Nelson, Donkin and others*[29] the vessel was not allowed to enter the Surrey Commercial Docks because the dock manager did not permit the vessel to enter as a result of congestion in the dock and non-existence of a free berth to discharge the timber which was the cargo of the vessel. In this case House of Lords held that:

[26] Davies, 2006, P. 53.
[27] Summerskill, 1982, p. 65.
[28] Ibid.
[29] *Robert H Dahl v. Nelson, Donkin and others* (1880) 6 App Cas 38.

> "the ship did not fulfil the engagement in the charterparty to proceed to the Surrey Commercial Docks by merely going to the gates of the docks".[30]

The other important matter about dock charters is that if the vessel does not earn the permission of the dock authorities to enter, but she enters the dock for any reason, she will be identified as an arrived ship. This is the matter which is obvious through the *Compagnie Chemin de Fer du Midi v. A Bromage & Co*[31] in which the vessel was not permitted to enter on her arrival to the Barry Dock to discharge her cargo, because there was no free berth in the dock. After awhile she was allowed to enter the dock only to complete her bunker and not for discharging operation. After entering, she tendered notice of readiness however; she was not in a berth. Charterers oppose this matter and invoke to two arguments: first, they discussed that the laytime should not have commenced because when the ship tendered the notice of readiness she was not in berth and secondly, the vessel was permitted to enter the dock not to discharge but only to complete her bunker. Greer J rejected both discussions in these words:

> "It seems to me there are many reasons which may expedite or delay the arrival of a ship in the place from which her time was to count. The fact that the arrival was expedited in this case by the good nature of the dock authorities in letting her in in order to prevent her from lying in the roads without sufficient coal, is one of the circumstances that have in fact resulted in her being an arrived ship before she would otherwise have been"[32]

The other matter about the dock charterparty is the question that: is it enough that the ship arrives to the dock and tenders the notice of readiness to pass the risk or is it necessary for the ship-owners to keep the ship in readiness situation?

In *Carlton Steamship Co Ltd v. Castle Mail Packets Co Ltd*[33] the vessel arrived to the dock but she was forced to leave during loading operation because of the steadily falling tides. In this case the question was about the responsibility of the delay which was occurred because the ship left the dock after she became an arrived ship. The charterer was held responsible for the delay in the lower court. However, in Court of Appeal with a majority the order of the lower court was overruled. In this case some judges in Court of Appeal disagreed with the majority and they accepted the order of lower court. For instance Smith LJ said:

[30] Ibid.
[31] *Compagnie Chemin de Fer du Midi v. A Bromage & Co* (1921) 6 L1 L Rep 178.
[32] Ibid.
[33] *Carlton Steamship Co Ltd v. Castle Mail Packets Co Ltd* (1897) 2 CC 286.

> "... here the ship was an arrived ship when she got to Senhouse Dock, Maryport ... The owners had done their part in bringing her to Senhouse Dock, Maryport."[34]

In the idea of the author, shipping law in general and the law which is related to the voyage charterparty regarding the commencement of laytime in particular, are not merely an abstract legal discussion. These matters are the combination of law and commerce and practice. Indeed, if a ship comes to the destination but cannot stay there and keep her position to load or discharge or even to complete loading or discharging operation, her arrival will not be commercially and practically beneficial for the charterers. Indeed, leaving the position of arrival before completing the loading or discharging is against the goal of the charterparty and the ship has to keep his position as an arrived ship until the loading or discharging is completed.

The last issue about dock charters is when a vessel which is under a dock charter arrives to contractual dock but not a berth, she can be considered as an arrived ship. But there is an exception to this main rule and it is the time when there is a free and available berth on arrival of the vessel and the vessel is able to go straight into that berth. In such situation the arrival of the vessel and end of the voyage is at the time the ship gets to the berth. The words of Lord Diplock are helpful to clarify this matter in the *Johanna Oldendorff*[35]*:*

> "Since the business purpose of the voyage stages is to bring the vessel to a berth at which the cargo can be loaded or discharged, the shipowner does not complete the loading or the carrying voyage until the vessel has come to a stop at a place within the larger area whence her proceeding further would serve no business purpose. If on her arrival within the dock or port there is a berth available at which the charterer is willing and able to load or discharge the cargo, the vessel must proceed straight there and her loading or carrying voyage will not be completed until she reaches it. But if no berth is available, the voyage stage ends when she is moored at any convenient place from which she can get to a berth as soon as one is vacant. The subsequent delay while waiting for a berth does not fall within the voyage stage under a dock charter or port charter, but in the loading or discharging stage"[36]

[34] Ibid.

[35] *Oldendorff (EL) & Co GmbH v. Tradax Export SA (The Johanna Oldendorff)* [1973] 2 Lloyd's Rep. 285, at p. 305 (HL).

[36] Ibid.

2.5. Port charterparty

Under the port charterparty, two different situations can be occurred upon the arrival of the ship. First, same as berth charterparty, is the situation when a berth is available upon arrival of the vessel and she must directly go forward to the berth, so she is not treated as an arrived ship until she lies alongside the berth. The second situation which is more controversial is the time that there is no available berth and the vessel has to wait for a free and available berth. There are different definitions of the port based on geographical, administrative, commercial, fiscal or legal viewpoint. This matter has led to an uncertainty and consequently conflicting decisions.[37]

In the *Leonis v. Rank*[38] the vessel arrived in the usual waiting place of the vessels where the charterers were able to load her. The Court of Appeal identified the vessel as an arrived ship because she was within the commercial area of the port and at the disposition of the charterers. As it is obvious in this case the court only concentrated on the commercial area of the port despite different definitions of the port, inasmuch as there was a commercial contract between the parties which the court interpreted it. Though, definition of the commercial area of the ports is such a difficult matter especially according to the expansion of the ports.[39]

In a latter case which was 52 years after the *Leonis v. Rank*[40] the commercial area test applied another time in such a big port like Buenos Aires in the *Aello*[41]. In addition, the nature of cargo which was maize played an important role in the decision of the judges.[42]

In this case based on the charterparty the ship anchored 22 miles from the dock area ,within the legal and administrative limits of the port, on 12 October to load the cargo of maize. But she had not reached the berth until 20 October because no berth was available. The House of Lords did not identify the vessel as an arrived ship because she was not in the commercial area of the port.

The *Aello* did not change the principles which were applied in the *Leonis* to define an arrived ship, but through this case it was clarified that it is possible to apply a broader area as a

[37] John F. Wilson, *Carriage of goods by sea,* seventh edition, Pearson 2010, p. 54.
[38] *Leonis v. Rank* [1907] 1 K.B. 344.
[39]Davies,2006, p. 4.
[40]*Leonis v. Rank* [1907] 1 K.B. 344.
[41] *Aello* [1960] Loyd's Rep. 623.
[42] Davis, 2006, p. 5.

commercial area comparing earlier cases specifically in the case of big ports. This area could even be outside the administrative zone of the ports depending on the type of cargo which should be loaded or discharged. For instance, Tankers often load or discharge so far from the center of the ports and naturally they can be considered as arrived ship when they are really close to the loading or discharging port and not at the nucleus of the port. To apply the "Commercial area" test there are several uncertainties as a result of the flexibility in the definition of the test which leads to economic injustice for the ship owners.[43]

The *Delian Spirit*[44] showed the problems and uncertainties to apply the 'commercial area test' more than past. In this case the vessel, tanker, anchored in waiting area of the port because of the congestion in the berths. This spot was inside the legal, fiscal and administrative area of the port but it was not the place which usually used to load or discharge oil in that port. Based on the 'commercial area test', the ship was not arrived according the nature of the cargo, though in the practical viewpoint she completed her voyage because she anchored in the waiting area which every other ship rests.

Although, Both High Court and Court Of Appeal based on the 'commercial area test' did not apply the vessel as an arrived ship, this case clarifies the problems to operate the test more than the past and also the necessity to review the test and generally the concept of arrived ship which occurred two years later in the *Johanna Oldendorff*[45].

In the *Johanna Oldendorff* the vessel was chartered to carry balk grain from the USA to Liverpool/ Birkenhead which was the port that nominated by the charterer. At the time of reaching the port, the vessel anchored at the Mersey Bar which was within the administrative limit of the port because there was no available berth to discharge, but with a distance of 17 miles from the dock area. The controversy was whether the ship was considered 'arrived' at the Mersey Bar or whether when she reached the berth after 16 days anchoring at the Mersey Bar.[46]

House of Lords did not apply the 'commercial test' which was the base of the court order in the *Aello.* They overruled the 'commercial test' based on the difficulties existed in definition

[43] Ibid, P. 7.
[44] *Delian Spirit* [1971] 1 Lloyd's Rep. 506.
[45] *EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1973] 2 Lloyd's Rep. 285.
[46] Wilson, 2010, p. 54.

of ‘commercial area’ which led to ambiguity in law. So, they held that the vessel was an arrived ship when she anchored the Bar light-vessel.[47]

House of Lords applied a new established test to identify the arrived ships in port chrterparties in *Johanna Oldendorff* which is known as Reid test. The summary of legal achievements of this case is:

The most important item for an arrived ship is reaching a position within a port where she is at the immediate and effective disposition of the charterer. In this concept the geographical position of the ship has the secondary importance. The ship would be at the immediate and effective disposition of the charterer if she is within the port at the place where ships usually anchor or lie as waiting place unless the charterer proves the adverse. It would be responsibility of the ship-owner to show that the vessel is at the disposition of the charterer if the vessel is waiting in the place other than the usual waiting place.[48]

The words of Lord Reid, the test has been gotten his name, are:

> “Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position *within the port* where she is at the *immediate and effective disposition* of the charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the charter...
>
> If the ship is waiting at some other place in the port then it will be for the owner to prove that she is as fully at the disposition of the charterer as she would have been if in the vicinity of the berth for loading or discharging.”[49]

In the Reid test the assumption is that, if the ship lies down at a place where usually the ships from that type wait to reach a berth and this spot is inside the port, so the vessel is at the immediate and effective disposition of the charterer.[50]

2.5.1. “At the immediate and effective disposition of the charterer”

[47] Davis, 2006, p. 9.
[48] Ibid, p. 9.
[49] Ibid, p. 9.
[50] Schofield, 2011, p. 5.

A ship is assumed as an arrived ship when regardless the lying at the waiting place she is at the immediate and effective disposition of the charterer at the contractual destination. Indeed with fulfilment of these issues in the absence of the contrary provisions, the voyage of the vessel is ended and the risk is passed from the ship-owner to the charterer. To fulfil 'at the immediate and effective disposition of the charterer' it is not necessary for the ship to be at the specific loading or discharging places, nor being at such places where the ships with special cargo normally wait to load or discharge their special cargo.[51]

To operate to *Johanna Oldendorff* decision or Reid test, it is important to define the term 'port'. Regardless the commercial meaning of the port and the view of the engaged people in the business, the court has to consider the activities of various port authorities who maybe exercise some special legal systems and regulations in different ports. In addition, other engaged issues for instance: legal, administrative, geographical and fiscal boundaries may play role in definition of the port.[52]

Notwithstanding Lord Diplock's allegation that little difficulty has been experienced in applying the *Johanna Olendorff* test, in practice and through different cases after *Johanna Olendorff* the problems has been showed in interpretation of the requirements of Reid test.

In *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)*[53] the ship started her journey toward Brake as the loading port which was a river port on the Weser. At the end of the journey there was no available berth and the vessel was ordered to wait at the Weser light which was stationed in the Weser estuary, a point 25 miles downstream from the port. It is notable that since there was no suitable place within the port which ships could lie there during the waiting time for the free berth, the place which *Maratha Envoy,* was waiting there has been considered as a normal waiting place for vessels in the size of the *Maratha Envoy.*[54] House of Lords based on Reid Test held that the vessel was not arrived ship because she anchored at the Weser lightship which was outside the mouth of the river. In addition, the Weser lightship was not within the legal, fiscal and administrative limits of the

[51] Summerskill, 1982, p. 72-73.
[52] Ibid, p. 71.
[53] *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1977] 2 Lloyd's Rep. 301.
[54] Wilson, 2010, p. 55.

Brake port. Also, charterers, shippers, ship-owners and other people who are engaged in the shipping business did not regard the Weser Lightship as a part of the port.[55]

Indeed, this case rejected the attempts which were made to expand the guidelines of the Reid test. As a result, accepting the ship which anchored at the usual waiting area of the port as an arrived ship was overruled regardless the matter that the waiting place is inside the port limits or not.[56]

This case has not gotten the approval of the universal shipping world. In fact contrary to Lord Diplock's idea that little difficulty has been experienced in applying the *Johanna Oldendorff* test; in practice this test has faced several problems, because this test has not suggested a clear definition of exact point at which the risk is transferred from the ship-owner to the charterer. In addition, as it was mentioned one of the most important requirements of the *Oldendorff* test to fulfil the concept of arrived ship is engaged with port area, while this test has not provided a clear and effective formula to define and identify the port area.[57]

2.6. Modification of requirements for beginning of laytime to shift risk of delay

As it was mentioned in previous sections for commencement of laytime it is necessary that the ship must be arrived at the contractual destination and be ready for loading or discharging operation, in addition notice of readiness must have been tendered. Then the risk of delay will be passed from the ship owner to the charterer. The foregoing requirements may be changed by the explicit terms which can advance or delay the moment of the beginning of laytime[58] and subsequently changing in the time of the passing the risk of delay.
There are different famous clauses in this field. Two clauses which are directly related to the concept of 'port and berth charters' are discussed in this part.

2.6.1. Whether in berth or not (WIBON)

[55] Stephen Girvin, *Carriage of goods by sea*, second edition, Oxford University Press 2011, p. 563.
[56] Ibid, 2011, p. 562.
[57] Wilson, 2010, p. 55.
[58] Summerskill, 1982, p. 137.

Where the charter is a berth one or there is an expressed clause in the contract based on which the charterer has the right to select a berth as destination, the expression of "Whether in berth or not" term means that; if a berth is not available at the arrival of the vessel, laytime commences to run at the time any notice period has elapsed after the ship arrives. To validate the (WIBON) clause it is important that the ship be within the port area and at the immediate and effective disposition of the charterer. In this concept there is a significant difference between the word 'available' and word 'accessible' as will be discussed via various cases.[59]

It is clear that this clause has created an important change concerning the responsibility for risk of delay under voyage charterparties in which the berth is chosen as the destination. Indeed, this clause is in the benefit of the ship owners to avoid the uncertainties which was discussed in the foregoing discussions under the field of responsibility for the risk of delay. Though, there are some important matters to operate this clause which sometimes lead to confusion, for instance when the bad weather does not permit the vessel to enter the area which can benefit the privileges of the clause. The most famous case which has presented a conclusive guidance in details of the matter is *Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd (The Kyzikos*[60]. Though, it seems that it is necessary to discuss earlier cases to encircle the issue, before arguing about the *Kyzikos*.

In *Northfield Steamship Co Ltd v. Compagnie L'Union des Gaz*[61], A ship was chartered to carry coal to Savona. At the time of the arrival all berths were occupied and the vessel had to moor within the port and tendered notice of readiness to discharge. It is notable that the charterparty contained a clause which said: "Time to commence when steamer is ready to unload and written notice given, whether in berth or not". The Court of Appeal in contrary to the charterers held that laytime started to run when the vessel moored inside the port.[62] In fact, in this case the court accepted to pass the risk of delay from the owner to the charterer in a berth charter before ship reaches the berth, because of existence of an (WIBON) clause in the charterparty.

In a more recent case the matter of usual waiting place which was not within the port was discussed. The *Carga del Compania Naviera SA v. Ross T Smyth & Co Ltd (The Seafort)*[63] was the case based on which the vessel was chartered to carry grain from Vancouver to two

[59] Schofield, 2011, p. 161.

[60] *Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd (The Kyzikos)*[1989] 1 Lloyd's Rep 1.

[61] *Northfield Steamship Co Ltd v. Compagnie L'Union des Gaz* (1911) 17 CC 74 (CA).

[62] Summerskills, 1982, p. 148.

[63] *Carga del Compania Naviera SA v. Ross T Smyth & Co Ltd (The Seafort)* [1962] 2 Lloyd's Rep 147.

ports which were London and Hull. The charterparty contained a clause which regarded: "Time at second port to count from arrival of vessel at second port, whether in berth or not". The vessel got to the Hull which was the second port but because there was no berth available she had to wait at Spurn Head which was the normal waiting place for ships of the *Seafort's* size. The waiting place was at the distance of 22 miles from the port and outside the legal, fiscal and administrative limits of the port.[64] The court rejected the owners' claim that the laytime started to run at the usual waiting place. In fact, in this case the court did not accept to pass the risk of delay from the time of the vessel waiting in the usual waiting place because that place was out of the port zone.

The notable point here is that, despite the fact that the clause is frequently inserted in the port charterparties, it has no effect in such charters. In *Oldendorff (EL) & Co GmbH v Tradax Export SA (The Johanna Oldendorff)*[65] Roskill LJ discussed that if the clause has not been inserted in the charter, the result would be the same as the existence of the clause, because the contract was a port charter. The same position has been taken by the Lord Diplock in the *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)*[66]:

> "The effect of this well-known phrase in berth charters has been settled for more than half a century. Unser it time starts to run when the vessel is waiting within the normal port of destination for a berth there to become vacant. In effect it makes the Reid test applicable to a berth charter. It it has no effect in a port charter; the Reid test is applicable anyway."[67]

As it was mentioned the *Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd (The Kyzikos)*[68] plays an important role to clarify the different angles of the (WIBON). In this case the vessel was chartered to carry steel from Italy to Houston, Texas. At the arrival of the ship to Houston the berth was available but because of the fog the vessel was not able to reach the port. There was a (WIBON) clause in the charterparty. The other important matter which was discussed in the courts was whether the vessel was at the immediate and effective disposition of the charterers or not. To brief the matter, after different lower courts the House

[64] Schofield, 2011, p. 161.
[65] *Oldendorff(EL) & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1973] 2 Lloyd's Rep 285.
[66] *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1977] 2 Lloyd's Rep. 301.
[67] Ibid.
[68] *Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd (The Kyzikos)*[1989] 1 Lloyd's Rep 1.

of Lords held that the vessel was not arrived ship when was prevented to enter the port because of bad weather. In this concept Lord Brandon regarded that:

> "... I am of opinion, having regard to the authorities to which I referred earlier and the context in which the acronym "Wibon" is to be found in the charterpart here concerned, that phrase "whether in berth or not" should be interpreted as applying only to cases where a berth is not available and not also to cases a berth is available but is unreachable by reason of bad weather."[69]

It seems that the position of law would be the same as *Kyzikos,* if the vessel cannot reach the berth as a result of lack of the water or some prohibitions on navigation from the side of port authorities.

At the end of this part it is important to mention that the *Voylayrules 1993* provides some provisions in contrary to the discussed matter based on which the ship can be considered an arrived ship under (WIBON) clause when she is only within the port and this matter is clearly against the position of common law. So, the provisions of *Voylayrules 1993* only are applied when specifically incorporated to the charterparty.[70]

The *Voylayrules 1993* provides:

> ""whether in berth or not" (WIBON) or "BERTH OR NO BERTH" shall mean that if no loading or discharging berth is available on her arrival the vessel, on reaching any usual waiting place at or off the port, shall be entitled to tender Notice of Readiness from it and laytime shall commence in accordance with the charterparty."

2.6.2. Whether in port or not (WIPON)

This phrase is usually used in continuity with the (WIBON) and the framework to operate both these phrases is broadly the same, except substitution of the port instead of the berth.

One case from the London arbitration[71] which has some complicated issue to discuss can be helpful to digest the matter. The vessel was chartered for Bandar Bushire a port in south of Iran. The vessel had to join a convey in Bandar Abbas and she arrived to Bandar Abbas in September 1981 and the vessel tendered a notice of readiness to discharge in this port. Then,

[69] Ibid.
[70] Schofield, 2011, p. 164-165.
[71] London Arbitration- LMLN 143, 25 April 1985.

again the vessel joined a convey toward Bandar Bushire and got there in December and berthed in this port. The vessel completed her unloading operation in the end of the December.

In the arbitration the ship-owners ratiocinated that their vessel was an arrived ship for discharging operation for Bandar Bushire at the time she arrived at Bandar Abbas based on the (WIBON) clause in the charterparty which stipulated that notice of readiness could be tendered "whether in port or not". In continue, the owners argued that based on the *Johannal Oldendorff* test their vessel was ready and fully at the disposal of the charterers.

The arbitrators rejected the claims of the ship owners and held that tendering the notice of readiness in Bandar Abbas cannot change the position of the vessel to a ready ship for Bandar Bushire which is about 400 miles distant from the contractual destination. The vessel could be considered as an arrived ship when she arrived at the roads of Bandar Bushire. Also, according to almost 400 miles distant between two ports, Bandar Abbas could not be regarded as the usual waiting place of the Bandar Bushire.

In London Arbitration 8/03[72] the arbitrators regarded the relation of the (WIPON) clauses and berth charters. They held that:

> "In the case of a berth charter, that at very least required that the vessel should have completed the sea leg of the voyage and reached a point as near as possible to the loading or discharging berth. At ports where that port was outside port limits, the WIPON provisions would assist the owner by allowing the vessel to tender notice of readiness there. Where however, as at Setubal, the vessel merely paused on its passage in to the port or berth, for example, to pick up a pilot, the requirements of the provision would not be satisfied."[73]

The point which is achievable from the foregoing cases is one of the most important differences between (WIBON) and (WIPON) about the place that the vessel could be considered as an arrived ship. Schofield clarified the issue:

> "..., whilst a WIPON clause may operate to activate the commencement of laytime when the vessel concerned is a significant distance away from the port in question, nevertheless, the other criteria applicable to a WIBON

[72] London Arbitration 8/03-LMLN 615, 12 June 2003.
[73] Ibid.

provision must also be met and the anchorage that the ship has reached must be a recognised waiting place for that particular port."[74]

[74] Schofield, 2011, p. 167.

Chapter 3

3. Readiness

3.1. Introduction

As it was mentioned at the beginning of this work, for commencement of laytime three different requirements should be fulfilled. At chapter two the first essential item was studied and in this chapter the two other including the readiness of the ship to load or discharge and giving notice of readiness for loading or discharging operation will be discussed.

Indeed, the readiness or unreadiness of the ship to load or discharge, tendering a valid or invalid notice of readiness in addition to turning an invalid one to a valid notice together are the matters which are engaged with time and money and consequently the matters which are directly related to issue of the responsibility for damages and risks.

3.2. Readiness

To tender a valid notice of readiness the vessel must be ready in all aspects to load or discharge the specified cargo. In fact a ready vessel is the one in which the charterer does not have any excuse to cancel the charter by virtue of cancellation clauses. [75]

Generally, to study the matters which are related to readiness it seems inevitable to divide the concept into two main branches including physical and legal readiness which will be discussed in details in this chapter.

3.2.1. **Physical** readiness

As it is understandable from the name of this concept it is related to the physical and technical situation of the vessel and sometimes its present or former cargo. The first requirement for physical readiness is that the cargo spaces of the vessel must be ready and available for the contractual cargo. Secondly, the equipments of the vessel which are engaged

[75] Semmerskill, 1982, p. 114.

in loading or discharging operation must be prepared and ready for such matters. And the final issue is about the overstowed cargo and accessibility of this type of cargo.

3.2.1.1. Cargo spaces

In the concept of cargo spaces a ready ship is the vessel which is completely ready in all her holds in a way that the charterer can have a complete control of every part of the vessel which is designated for the cargo.[76]

Lord Davey in *Weir v. Union SS Co Ltd*, about the availability of the cargo spaces commented that: "... you must read such expression as "with clear holds" or "the whole reach or burthen of the vessel" as meaning the full space of the vessel proper to be filled with cargo ..."

In fact, this matter is not a simple issue to identify. The question is that which parts of the vessel can be accounted as the parts which should be available for the cargo?

In the *Noemijulia Steamship Co Ltd v. Minister of Food*[77] the ship was chartered to load a cargo of grain. On the arrival at the Buenos Aires, as the loading port, the charterers discovered that the No 3 hold (both tween deck and lower holds) contained coal as the bunker. The charter contained a clause: 'to have the full reach and burthen of the steamer including tween and shelter decks, bridges, poop, etc'. The owners tendered the notice of readiness but the notice was rejected by the charterers and they claimed to cancel the charter. Charterers referred to four different reasons to cancel the contract and one of them was unavailability of the hold number 3 to load the cargo, though the charterers' claim was not accepted by the Court of Appeal. In this case the judges stated that the hold number 3 was designed to store and keep bunker spaces and not for the cargo. In addition, the length of the contractual voyage required to reserve that amount of coal in hold number 3. So, coal existence in the hold number 3 was not the reason to justify the unreadiness of the vessel based on the unavailability of the whole cargo space.[78]

The important point to mention is that the general rule regarding cargo spaces states the fact that to identify a ship as a ready vessel to load cargo, it is necessary that the whole inward

[76] *Groves, Maclean & CO v. Volkart Brothers* (1885) 1 TLR 454.
[77] *Noemijulia Steamship Co Ltd v. Minister of Food* (1950) 84 L1 L Rep 354.
[78] Schofield, 2011.p 99 &100

cargo must have been discharged before the loading operation starts. But, this general rule has an exception, because the ships without both cargo and ballast are unstable and it is dangerous for the vessel. Thus, it is normal for such a vessel to perform loading and discharging the cargo at the same time to keep the vessel in ballast situation. In the *Sailing Ship Lyderhorn Co v. Duncan, Fox and Co*[79], this matter was stipulated by Cozens Hardy MR:

> "I think that the authorities really decide that a vessel is not ready to load unless she is discharged and ready in all her holds so as to give the charterers complete control of every portion of the ship available for cargo, except so much as is reasonably required to keep her upright."[80]

Indeed, this technical issue leads to a kind of complexity and contradiction between the legal definition and practice. Though, the modern designated tankers have solved the problem. New and modern tankers have special segregated tanks to ballast themselves when they are on their empty voyages while for previous generation of tankers or some old tankers in our era it is common to use their cargo tanks to ballast the vessel.[81]

The next sufficient issue which is important to discuss is about the preparing the cargo spaces based on the specified cargo and the degree of this preparing regarding the charter or common law provisions. In the *TresFlores*[82] based on the charter the vessel had to load a cargo of maize. Prior to the loading operation the cargo spaces were inspected by the port authorities and they ordered the vessel to be fumigated because of pollution in the holds. The court held that the vessel could only be considered as a ready one when the fumigation operation was completed. In this case there was a clause which stipulated the preparedness of the holds with all details. If the charter was empty of such clause about the condition of the cargo spaces, the standard to distinguish the degree of enough cleanness would be depended on the customary practice about the contractual cargo between the parties.[83] For example, if the contractual cargo is grain, the cargo spaces must be clean, dry and without smell. In addition, spaces should save the determined degree of temperature and air circulation to avoid the mildew in long voyages.

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[79] *Sailing Ship Lyderhorn Co v. Duncan, Fox and Co* (1909) 14 CC 293.
[80] Ibid.
[81] Schofield, 2011, p. 100.
[82] *Tres Flores, The*. *See Compania de Naviera Nedelka SA v. Tradax International SA* [1973] 2 Lloyd's Rep 247
[83] Ibid. p 102

As it was mentioned in the beginning of this part, the degree of cleanness of cargo plays a main role in the preparedness of the cargo spaces, especially in relation to some specified cargoes.

In *Misano Di Navigazione SpA*[84], which the government of the USA was the charterer of the vessel, there was a clause in the charter stating the cargo spaces must be cleaned to the satisfaction of the charterer .But, the court ordered that cleaning of the holds by the owners based on good faith is enough to consider the vessel as an arrived ship. And there is nothing more than good faith to obligate the ship-owners to clean the cargo spaces.[85]

Since degree of cleanness is one of the important issues in carrying the cargo in good condition and avoiding the damages of uncleanness, many items play role in this matter; like the available time, nature of cargo and so on. In some fields which the risk of pollution is higher (like the parcel tanker trade), parties try to agree about the cleanness factors deeper and in more details. *Bimchemvoy*[86] charter is one of the charter forms in which the cleanness is referred in details. Part II 9 of this charter states that:

> "9.cleaning
>
> Owners shall clean Vessel's tanks pipes and pumps at their expense and in their time and unless the Master certifies that Vessel's coils have been tested and found tight, shall test tightness of coils at their expense and in their time to the satisfaction of Charterers' inspector.
>
> If, in Owners' opinion, acceptance of the tanks and/or coils is unreasonably withheld, then the independent inspector shall be appointed whose decision shall be final. If the independent inspector considers that the tanks are insufficiently clean to receive the cargo, then they shall be further cleaned at owners' expense and time to the satisfaction of the independent inspector whose fees and expenses shall be paid by the Owners. If the independent inspector considers that the tanks are sufficiently clean to receive the cargo his fees and expenses plus any loss of time and expense incurred by Owners shall be borne by Charterers."

3.2.1.2. Equipment

[84] *Misano Di Navigazione SpA v. United states of America (The Mare del Nord)* US Ct of App (2nd Cir), LMLN 335, 5 September 1992.
[85] Schofield, 2011, p. 102
[86] The Baltic and International Maritime Conference Standard Voyage Charterparty for the Transportation of Chemicals in Tank Vessels. Code Name "Bimchemvoy"

The readiness of equipments means that all equipments of the vessel which are engaged in the loading or discharging operation must be ready to perform such operation. Regarding the type of the cargo and vessel, equipment could include pumps, crude oil washing machines, vacuvators, winches, hatches, etc. All the equipment which are necessary to load or discharge a specified cargo must be ready to use at the required time, in addition they must be capable to load or discharge the whole of the cargo, otherwise the ship would not be considered as a ready ship.[87]

The *Noemijulia Steamship Co Ltd v. Minister of Food*[88] is a very helpful case to explain that to what extent the vessel's equipment must be ready to get the title of readiness. In this case the main mast of the ship was collapsed and two derricks were broken because of the fire during the unloading of the previous cargo. Although the vessel was repaired in a temporary form by the ship-owners and they obtained the provisional certificate of class for the ship, charterers claimed that because the vessel did not have two after derricks and main mast, so she was not ready and they rejected the ship.[89] In the arbitration a very important point was discovered as the legal key of the matter. It was shown that both after derricks were out of order, but the point was that these two derricks were not necessary to load the cargo, and loading process could be done by other means of the vessel which were ready to load. The High Court judges held that because the loading process could be done by means other than broken derricks so, in business sense the ship was ready and there was no reason proving the fact that it was unready. Lately, the Court of Appeal confirmed the verdict of High Court.[90]

In *Armement Adolf Deppe*[91] as the ship reached the destination the owner was responsible to load and discharge the cargo but the consignee did not accept discharging the cargo nor he has done any activity to discharge the cargo. Indeed, the ship was ready to discharge but the consignee did not cooperate with the owners to unload and receive the cargo and as a result the Court identified the vessel as a ready ship. In this concept Swinfen Eady LJ said:

> "it is the duty of the merchants to co-operate with the owners in the receipt of cargo, and upon the facts I am satisfied that the only reason why the ship did not take on board the gang and rig the gear to fulfil the owners' duty in discharging was that the receivers were not desirous of receiving the cargo at the buoys and were so not willing to co-operate in her

[87] Davies, 2006, p. 172-173.
[88] *Noemijulia Steamship Co Ltd v. Minister of Food* (1950) 84 L1 L Rep 354
[89] Schofield, 2011, p. 107.
[90] Davies, 2006, p. 174-175.
[91] *Armement Adolf Deppe v. Robinson* (*John)* [1917] 2 K.B. 204

> discharge there and made no preparations for doing so. The ship was lying at a waiting berth, her voyage being ended; it would have been an idle form to take on board men and open hatches and make other preparations at the buoys when there was no desire or intention of the merchants to receive cargo until the ship was berthed at the quay. The ship was ready to discharge in a business and mercantile sense, and the idle formality of incurring useless expense was not necessary as a condition precedent to the commencement of the lay days."[92]

3.2.1.3. Overstowed cargo

The issue of the overstowed cargo is related to the physical accessibility of the cargo to discharge. In the business sense of carriage of goods sometimes different parcels of cargo are transported by the same vessel on the same voyage. However, these parcels are owned by different owners and transferred under different carriage contracts. In such a situation notice of readiness is valid when all overstowed cargo is accessible. To tender a valid notice of readiness it is not necessary that the whole overstowed cargo be on top, in fact the legal key of tendering a valid notice of readiness regarding an owerstowed cargo is accessibility of it.[93]

3.2.2. Legal readiness

The other aspect of the concept of readiness is legal readiness. In order to fulfil the physical readiness it is necessary to tender the notice of readiness and it will not be tendered if the ship is not ready legally. Based on the concept of legal readiness the ready ship is the one which has all necessary documents, if required by the charterers. The owner can make them available for the charterers at the loading or discharging place. This general rule has an exception which occurs if a document is requested by the authorities of the port or other qualified organizations. This matter would not be considered as a legal obstacle for starting to load or unload the cargo.[94] There are different papers which are necessary to earn to fulfil the concept of legal readiness which will be discussed in this part in details.

[92] Davies, 2006, p. 173.
[93] Schofield, 2011,p. 106.
[94] Davies, 2006, p. 183.

3.2.2.1. Free pratique and quarantine

These two terms in the concept of shipping law are in the contrary with each other. Indeed, if a vessel is not able to get *Free prarique* licence, may be imposed by the *quarantine* restrictions. So, *Free prarique* is one of the most important matters under the concept of readiness which failing to obtain it leads to consider the vessel as an unready ship.[95]

THE MARITIME & SHIPPING DICTIONARY 2012 defines *Free pratique and quarantine* in the concept of Maritime law respectively:

> "Permission granted by the authorities at a port, being satisfied as to the state of health of those on board a ship on arrival for them to make physical contact with the shore."[96]
> "The period during which an arriving vessel, including its equipment, cargo, crew or passengers, suspected to carry or carrying a contagious disease is detained in strict isolation to prevent the spread of such a disease. A restraint placed on an operation to protect the public against a health hazard. A ship may be *quarantine*d so that it cannot leave a protected point. During that period, the Q flag is hoisted."[97]

So, it is obvious that if the vessel cannot earn the *free prarique* papers, charterers will not be able to have physical connection with the vessel for loading or discharging of cargo and the vessel will not be under disposition of the charterer to load or unload.

In an American case the *Pan Cargo Shipping Corp v. United States,* this matter was regarded clearly:[98]

> "No vessel may communicate with the shore in a foreign port, in the sense of persons leaving the vessel or coming abroad the vessel or loading or unloading cargo or taking on stores, without prior permission of the shore authorities. The grant of this permission is usually under the authority of medical officers, the danger normally apprehended being contagious diseases among passengers or crew. The permission itself is generally called 'pratique' or 'free pratique'."[99]

In the sense of *free prarique* "*Austin Friars"*[100] is one of the old cases that is still practical after many years because of the importance of the matters which was discussed within. The

[95] Schofield, 2011, P. 112.
[96] http://maritimedictionary.org/ASP/MarineDictionary.asp?WORD=free+pratique&Submit2=Search+Word
[97] http://maritimedictionary.org/ASP/MarineDictionary.asp?WORD=quarantine&Submit2=Search+Word
[98] *Pan Cargo Shipping Corp v. United States* 234 F Supp 623. 629 (SDNY 1964).
[99] *Pan Cargo Shipping Corp v. United States* 234 F Supp 623 at p. 629 (SDNY 1964).

[100] *Austin Friars*, The (1894) 71 L.T. 27

Austin Friars was on her voyage from Constantinople to Galatz to load the cargo in this port based on a charterparty. But as a result of a collision with another vessel, the *Austin Friars* had to go back to the Constantinople for a temporary repair in order to be able to continue her voyage toward Galatz. She reached the Galatz at 23:00 10th of October and because it was too late to inspect the ship to grant the *free pratique*, the loading operation was postponed to next day. The *free pratique* was granted to the vessel by the doctor of the port on 11th of October. This matter allowed the charterers to operate a clause of the charterparty to cancel the charterparty since based on that clause they had such a right to cancel the charter in the condition that the ship was not ready till midnight of the 10th of October.

Judges of High Court regarded that since there had been a clause for cancellation if the ship could not be ready by midnight of October 10th, the charterers were entitled to cancel the charter because the vessel was not able to obtain the *free pratique* certification by agreed time. There is an interesting point in the judges' opinion stating that there seems no difference whether a medical officer order the vessel in to the quarantine anchorage or when the authority prohibit access to the vessel. In both cases the authorities of the ports counted the ship as an unready ship to load or discharge the cargo.

As it was mentioned via the foregoing cases to tender a notice of readineness, earning a *free pratique* licence is necessary. Though, through a confusing decision in the *Delian Spirit*[101] Lord Denning held that in some cases obtaining a *free pratique* license is a formality process to tender notice of readiness. However, under common law a vessel without free pratiuque cannot be considered as a ready ship.[102]

Thus, it seems that earning a *free pratique* license in arriving of a vessel to a foreign port plays a legal role more than 'mere formality' which was mentioned by Lord Denning in *Delian Spirit.* In the *Apollo*[103] this matter has been clarified as following; the charterers chartered the vessel on New York Produce form. At the Naples as the discharging port two persons of the ship crew were taken to the hospital because they were suspected of typhus. At the next loading port which was Lower Buchanan, the health officials of the port informed about the story of the Naples inspected the vessel and all crew. Through the inspection no evidence of disease was found in the ship or her crew, but the officials only issued the *free pratique* license after disinfection of the vessel. All the foregoing matters caused about 30

[101] *Delian Spirit, The; Food Corporation of India v. Carras Shipping Co. Ltd.* [1983] 2 Lloyd's Rep.496
[102] Davies, 2006, p. 185.
[103] *Apollo, The; Sidermar S.p. A.v. Apollo Corporation* [1978] 1 lloyd's Rep. 200

hours delay for the charterers. The court accepted the claim of the charterers to entitle to put the ship off-hire under the clauses of the charter. Based on Mr Justice Mocatta's discussion the port officials' act was more than formality and since this action prevented the operation of the vessel to load or discharge, she was off-hire and the charterers were fulfilled to benefit the off-hire clause.[104]

The notable point is that as it was mentioned about different types of the charterparty which the owners can benefit from the (WIBON) or (WIPON) clauses for commencement of laytime, the same legal position can be set under the (WIFPON) "whether in *free pratique* or not" to commence laytime. Indeed, under this clause if a vessel locate at a place where is entitled for tendering notice of readiness based on the (WIFPON) clause she would not be prevented to commence the laytime since she is not in *free pratique* situation.[105]

3.3. Giving notice of readiness

3.3.1. General concept

As one of the provisions of common law under voyage charter, charterers must have awareness of the readiness and arrival of the chartered vessel at the loading port. The reason is that while the charterer has not been informed from the fulfilment of other party's legal obligations, he cannot start his legal duties. Indeed starting the legal obligations of the charterer depends on his awareness of the other side's actions which is possible through notice of readiness.[106]

3.3.2. Two types of giving notice of readiness

Under the concept of giving notice of readiness, two different positions have to be distinguished. First the position under common law provisions and second position under expressed provisions.

[104] Davies, 2006, p. 185.
[105] Julian Cooke et al, Voyage Charters, third edition, informa, LONDON, 2007, p. 384.
[106] Summerskill, 1982, p. 122.

3.3.2.1. Under common law

First, when the charter is silent about the way the notice has to be given by the ship owner or his agents to the charterer or shipper. And the second situation is one based on which the charter determines expressed provisions for the way which notice has to be tendered. Regardless whichever of those foregoing situations is applied, two requirements in both of them have to be fulfilled. 1. The ship can be considered as an arrived ship and stands in a place ,as it was discussed regarding the concept of arrived ship in different types of charters, where is entitled to give the notice and 2. The location of the vessel should be in a position which at the time of giving the notice she would be ready to load or discharge in full sense.[107]
Under the first situation when the charter is silent about the way based on which the notice has to be tendered, the general rules of common law govern the matter. Under common law it is not necessary that the notice is given in written format, thus it can be tendered orally and only at the first loading port. So it is the duty of the charterer to watch the arrival of the vessel in the next loading or discharging port. Indeed, the most important matter is charterer's awareness of arrival and readiness of the vessel, so if the vessel does not tender the notice and charterers are aware about the readiness and arrival of the ship, laytime would start to run. In the *Franco-British Steamship Co v. Watson & Youell*[108] the foregoing matter was emphasised by Horridge J.[109]
It is important to bear in mind that in the case the notice of readiness is not required based on the charter or is not tendered by the owner, it is on the shoulders of the owner to show that the charterer had known about arrival and readiness of the vessel.

3.3.2.2. Under expressed provisions

Under the expressed provisions in the charterparty forms usually notice of readiness should be given in written form and it is not unusual to stipulate other requirements to give the

[107] Simon Rainey QC, Arrival readiness and the commencement of laytime, Edited in Prof.D. Rhidian Thomas, THE EVOLVING LAW AND PRACTICE OF VOYAGE CHARTERPARTIES, informa, LONDON , 2009, p. 152-153.
[108] *Franco-British Steamship Co v. Watson & Youell* (1921) 9 Ll L Rep 282.
[109] Schofield, 2011, P. 123-124.

notice under the charterparty. Clause 11 of the Exxonvoy 84 charter form[110] contains a notice of readiness clause which is prepared symbol for this concept.

> "11. NOTICE OF READINESS. Upon arrival at customary anchorage or waiting place at each loading and discharging port or place. Master or Vessel's agent shall give Charterer or its representative notice by letter, telegraph, telex, radio or telephone (if radio or telephone, subsequently confirmed promptly in writing) that Vessel is in all respects ready to load or discharge cargo, berth or no berth."[111]

Like every legal concept, the case law plays a significant role in the concept of the tendering notice of readiness under expressed clauses. In this part the matter will be discussed through different cases.

In the *Adolf Leonhardt*[112] the notice of readiness was radioed from the vessel to the port of destination to transfer it to the charterers. The notice was changed into written form by the port recipient and passed to the agent of the charterers, while based on the charter which was Centrocon form it was stipulated that the notice of readiness must be given to the agents of the charterer in writing. The court held it is not necessary that the notice is emanated from the ship in writing from, only informing the charterers in written form is necessary to fulfil the clause.

Generally, the common forms of charters indicate that the notice of readiness must be given within office hours. But sometimes it is difficult to interpret the clauses which are related to this matter. The most common problem is about the Saturdays which will be discussed in this part. In a case[113] in London Arbitration, the notice of readiness was tendered by the owners at 08 50 Saturday morning. Based on the local practice it was showed that the Lisbon as engaged port was open and all issues which are related to perform loading or discharging operation were ready on Saturday mornings. On the other hand, it was proved that all shipping agents and majority of the importers/exporters were closed on Saturday mornings. In addition, it was emphasised in the charter that Saturday afternoon and Sunday are excluded from laytime. The arbitrators held that in this case the role of business offices working hours is more important than the role of the readiness of the port authorities or stevedores to load or discharge. Thus, it is obvious that it was impossible for the charterers to receive notice of

[110] http://shippingforum.files.wordpress.com/2012/08/exxonvoy-84.pdf
[111] Ibid.
[112] *Adolf Leonhardt* [1986] 2 Lloyd's Rep 395.
[113] London Arbitration- LMLN 15, 29 May 1980.

readiness before Monday morning since their office was closed on Saturday and Sunday and laytime has to commence from Monday.

In the next case[114] the vessel Achieved the Mersey Bar at 03 09 on Saturday. The agent of the charterers received the notice of readiness through telex at 09 55 and transferred it to the charterers at 10 00 that Saturday while both the offices of the charterers and their agents were closed on that day. The charter contained three different provisions regarding giving notice. Based on the first one the owner had the right to tender notice of readiness before 12 00 of Saturday morning if his vessel had entered at the Custom House. The second provision held that, regardless whether entering the vessel to Custom House or not, the notice has to be given during ordinary office hours. Regarding the third clause, it was mentioned that the owner tenders the notice when the vessel approaches the Land's and after the order of the charterers to unload. In fact, in this case the complicated matter was about the interpretation of those provisions and their link with each other. At the end, the arbitrators held that the notice which was given on Saturday morning was a valid notice. Indeed, in the idea of the author those different clauses were designed to give the charterer the right to choose the one he prefers.

The other matter that sometimes leads to complication in the concept of the clauses which are related to notice of readiness is about using the term "within X and X local time". In the *Petr Schmidt*[115] Based on the charter's provisions it was required that the owner gives the notices "within 06.00 and 17.00 local time". But the notices were given out of the determined time in all three discharge ports, respectively at 00 01, 18 00 and 18 00. At the arbitration the arbitrators considered the notices true and effective which takes its effect from 06 00 o'clock of the next day. In the court the judges rejected the discussion of the charterers which argued that the notices were invalid at the time of tendering and they could not be turned to legal and effective notice subsequently. The Court of Appeal held that since the notices were given out of contractual framework and because they did not follow the contractual requirement regarding the time of tendering, those kinds of notices could not be invoked to commence the laytime even if they are tendered correctly and truly (correct and true here mean the vessel is arrived and ready). Sir Christopher Slade held that:

> "the commercial purpose of the clause ... must have been to ensure that the charterers or their agents should not be saddled with the

[114] London Arbitration- LMLN 44, 9 July 1981.

[115] *Petr Schmidt* [1998] 2 Lloyd's Rep 1.

> receipt of a notice ... outside what might be regarded as office hours".[116]

As it was mentioned, arriving the vessel to her destination and readiness of it to load or discharge are both essential and inherent necessities to tender notice of readiness. Indeed, to tender a true and correct notice of readiness two characteristic including arrival and readiness of the vessel are necessary, unless the notice will be a null and invalid one. The invalid notice will not be validated, even if the charter stipulates that the vessel will be ready in the future.[117]

In the concept of the validating an invalid notice of readiness, the *Mexico I*[118] is a very famous case referred in the other cases too. In this case on the arrival of the vessel an overstowed cargo prevented the discharging of cargo. As it was mentioned in the part of physical readiness when the cargo is not accessible because of the overstowed cargo, the vessel cannot be considered as a ready ship and consequently is not allowed to tender notice of readiness. But, at the arrival of the destination the vessel tendered notice of readiness while she was not ready to discharge because of inaccessibility of the cargo. Two weeks after giving the notice, the overstowed cargo was picked up and the ship became ready because the cargo was accessible to unload and no further notice was given to discharge. The arbitrators held that the notice was invalid at the time it was given but, at the time the ship became ready the notice turned to a valid one. The Court of Appeal rejected the arbitrators' idea and held that a notice of readiness which is originally invalid could not be as an "inchoate notice" which is validated when the ship turns to a ready one. The same legal position was adopted in the *Agamemnon*[119] when the vessel tendered the notice of readiness before arriving within the port zone. After the vessel became an arrived one she did not tendered any more notice. The court rejected the claim of the owners which the notice became valid while the vessel became arrived. [120]

It is really important to mention that the discussion about subsequent validating of the notice of readiness regards the charters which contain some special and expressed provisions respecting notice of readiness. In the cases in which there is no provisions to tender the notice of readiness, so subsequently giving the notice is governed by common law the matter is different. As it was mentioned in foregoing discussions in the cases which tendering the

[116] Ibid.
[117] Rainey QC, 2009, p. 154.
[118] *Mexico I* [1990] 1 L1 L Rep 507 (CA).
[119] *Agamemnon* [1998] 1 Lloyd's Rep 675.
[120] Rainey QC, 2009, p. 154-155.

notice of readiness is governed by common law, at the time of awareness of the charterer from the readiness and arrival of the vessel, there is no requirement to give the notice. It does not mean that an invalid notice could be turned to a valid and effective one, but in fact it means that generally there is no necessity for tendering the notice since the charterers are aware of the arrival and readiness of the vessel.[121]

3.3.3. Subsequent validation of an originally invalid notice of readiness

Usually there are complicated issues regarding the cases in relation to the effect of an invalid notice where no further notice of readiness was not given subsequently to validate the first one. While the facts which were considered for decision in the *Mexico I*[122] contain comparatively straightforward matters.

In *the Happy Day*[123] the vessel could not berth ,under a berth charterparty, on the day she tendered a notice of readiness. She reached the berth and started to discharge the next day, but she did not tender another valid notice. The discharge operation was very slow and it took about 3 months from the day which the vessel was out of the port to complete the discharge. At the arbitration it was discovered that because the charter was a berth one and the vessel had given the notice before arriving to the berth so it was not a valid notice. In continue, arbitrators held that: "laytime commenced on the first occasion on which it could have commenced, had a valid notice been presented". At the appeal the charterers claimed for despatch as whole amount which was stipulated in the charter. They invoked the *Mexico I*[124] and discussed that because the notice was invalid, laytime never started. In the High Court it was held by Longley J, that the invalid notice which charterers did not accept in any sense is not reliable by the owners under any circumstance. In addition, he held that commencement of discharge cannot be interpreted as any new agreement between the parties based on which the charterers withdrew their right to have an effective and valid notice just because they did

[121] Ibid, p. 155-156.
[122] *Mexico I* [1990] 1 L1 L Rep 507 (CA).
[123] *Glencore Grain Ltd* v. *Flacker Shipping Ltd (The Happy Day)* [2001] 1 Lloyd's Rep 754.
[124] *Mexico I* [1990] 1 L1 L Rep 507 (CA).

not reject the invalid notice of readiness. So, charterers' claim for dispatch was accepted in appeal.[125]

The same legal position was applied one year after *the Happy Day* in *the Mass Glory*[126]. The same as *the Happy Day* it was a berth charter and the berth was available to anchor. But, as a result of the ship not having the cargo document, the charterers ordered that no one has the right to enter or access the vessel as long as an original set of bills of lading could be prepared and shown. Thus, the vessel was not able to berth or discharge. On the arrival to the port the master gave a notice of readiness which was not a valid one because the vessel had not reached the berth. After about 50 days the problem was resolved and the discharge started to run after receiving the cargo documents. But similar to *the Happy Day* no new and valid notice has been given. At the arbitration it was held that the laytime commenced to run at the time in which the discharge was started, also the arbitrators held that the charterers have to compensate the damages which were occurred to the owners as a result of their order for detain of the ship. The High Court at the appeal did not accept the owners' claim regarding the issues in *the Happy Day* and *the Mass Glory* and reached to the same conclusion confirming the charterers' entitlement for the despatch.

It seems that the conclusion reached by Potter LJ In the *the Happy Day*[127] which was agreed by Lady Justice Arden and Sir Denis Henry, is really helpful to digest the new doctrine applied in foregoing cases.

> " Laytime can commence under a voyage charterparty requiring service of a notice of readiness when no valid notice of readiness has been served in circumstances where (a) a notice of readiness valid in form is served upon the charterers or receivers as required under the charterparty prior to the arrival of the vessel; (b) the vessel thereafter arrives and is, or is accepted to be, ready to discharge to the knowledge of the charterers; (c) discharge thereafter commences to the order of the charterers or receivers without either having given any intimation of rejection or reservation in respect of the notice of readiness previously served or any indication that further notice is required before laytime commences. In such circumstances, the charterers may be deemed to have waived reliance upon the invalidity of the original notice as from the time of commencement of discharge and laytime will commence in accordance with the regime provided for in the charterparty."[128]

[125] Schofield, 2011, p. 136.

[126] *Glencore Grain Ltd v. Goldbeam Shipping Inc (The Mass Glory)* [2002] 2 Lloyd's Rep 244.

[127] *Glencore Grain Ltd* v. *Flacker Shipping Ltd (The Happy Day)* [2001] 1 Lloyd's Rep 487.

[128] Ibid. and Schofield, 2011, p. 137.

In addition Potter LJ in his judgement held that:

> "For the reasons which I have set out, I consider the doctrine of waiver may be invoked and applied in such a case and that the commencement of loading by the charterer or receiver without rejection of or reservation regarding the NOR can properly be treated as the "something else" which Lord Justice Mustill indicated (in *The Mexico I*) was required to be added to mere knowledge of readiness on the part of the charterers for a finding of waiver or estoppel to be justified. Not only does the commencement of loading manifest an acceptance of the vessel"s readiness to load, it also meets the concern of Lord Justice Mustill that to argue (as it was in *The Mexico I*) that laytime should begin at the point when the charterers or their agents became aware that the cargo was ready, would give rise to uncertainty and substitute a basis for the computation of laytime which would be a fertile source of dispute."[129]

As it was mentioned in the conclusion of the Potter LJ, his idea relies on the matter that there is no rejection from the side of charterers against the invalid and unaffected notice. This issue can be considered as waiver of the charterers from their right to have a valid and effected notice. Also charterers tacitly agree to coincide the commencement of laytime and starting point of loading or discharging operation. This idea which is known as doctrine of waiver leads to some circumstances and legal conclusion which are:

a. The judgement of *The Happy Day* case is only acceptable in the circumstances which the invalidity of the notice of readiness is because of tendering the notice before arrival of the vessel to the contractual geographical point. Indeed, this judgement is not applicable in other conditions in which the notice of readiness is not valid.
b. The notice of readiness which is valid regarding its form must be given to the party or person who is qualified based on charter to receive such notice.
c. The notice can be transferred as a received notice but not as a rejected one. It is important that in such circumstances a party who has received the notice be aware of the results of his decision and what he can do regarding such notice.
d. In waiver doctrine one of the most important matters is the legal capacity and authority of the person who waives the invalid notice. Sometimes, in courts or arbitrations, the agent of the charterer or receiver has the implied capacity not only for receiving the notice but also for the wave of it.

[129] *Glencore Grain Ltd* v. *Flacker Shipping Ltd (The Happy Day)* [2001] 1 Lloyd's Rep 487.

e. Based on the waiver doctrine the invalid notice turns to valid one at starting of the loading or discharging operation which in fact coincide with the commencement of laytime regarding the provisions which are stipulated in the charter.[130]

[130] Schofield, 2011, p. 137-138.

Chapter 4

4. Laytime and Demurrage

4.1. Introduction

In the foregoing chapters, the conditions which are necessary to commence laytime were discussed. In this chapter, different aspects of laytime will be discussed, including various types of laytime and exceptions for the general definition of laytime. In addition, at the end of this chapter, the concepts of demurrage and despatch which have direct relationship with laytime will be argued.

Generally laytime is defined as:

> "The period of time agreed between the parties during which the owner will make and keep the ship available for loading/ discharging without payment additional to the freight. The time allowed to the charterer is not indefinite. The time is either "fixed" or "calculable"."[131]

[131] http://maritimedictionary.org/ASP/MarineDictionary.asp?WORD=laytime&Submit2=Search+Word

So, as clear from the foregoing definition, the concept of laytime is divisible into two categories: 1) fixed 2) non-fixed or customary laytime.

4.2. Fixed laytime

Based on a fixed laytime clause, it is the duty of the charterer to load or discharge within a fixed period of time based on which he is responsible for any delay in loading or discharging, unless excepted in the charter.

Lord Hunter in *William Alexander & Sons* v. *Aktieselskabet Dampskabet Hansa and Others*[132] is a Scottish case, gave a clear statement which is useful determining bounds of the concept:

> "It is well settled that where a merchant has undertaken to discharge a ship within a fixed number of days he is liable in demurrage for any delay of the ship beyond that period unless such delay is attributable to the fault of the shipowner or those for whom he is responsible. The risk of delay from causes for which neither of the contracting parties is responsible is with the merchant."[133]

It is notable that parties can insert some terms in the charter, for instance "whether working days", or incorporate exception clauses to exclude some occasions which may cause delay in the loading or discharging operation. This matter will be discussed in the next sections. Moreover, to calculate the amount of laytime, usually different units of time or rate of working cargo, is stipulated in the charter.

4.2.1. Calendar days

[132] Quoted in the speech of Viscount Finlay in the judgment of the House of Lords, reported at (1919) 25 CC 13, at p. 15.
[133] Ibid.

In this method, days are counted from midnight to midnight and consecutively. Concerning this method regardless of the matter that what time of the day the loading or discharging is started, the whole day is counted as a lay day.[134]

Lord Devlin in *Reardon Smith Line Ltd* v. *Ministry of Agriculture*[135] explained the matter as:

> "In the beginning, a day was a day—a Monday, a Tuesday or a Wednesday, as the case might be. Work began, one may suppose, sometime in the morning and ended in the evening, the number of hours that were worked varying from port to port and in different trades. But whatever the number was, at the end of the Monday one lay day had gone and at the end of the Tuesday another; and if the work went into Wednesday, that counted as a whole day because of the rule that a part of a day was to be treated as a day. For this reason the charterer was not obliged to use a "broken" day. If notice of readiness was given during the day he could, if he chose, wait until the following day so that he could start with a whole day."[136]

4.2.2. Conventional days

In this method, parties stipulate in the charter that time starts to run to count the laytime from the notice of readiness expired and under this system time runs in periods of 24 hours. It is obvious that, if under the charter some special days like Sundays or other holidays are excluded, the days which fall under such exclusions will not be counted as lay days.[137]

4.2.3. Running days

Indeed, the reason to apply the term 'running days' is to distinguish this term from 'working days'. In this method every day and night consecutively including Sundays and holydays must be counted as lay days.

In some charters the term 'running hours' include all days and nights, counted as laytime to load or discharge, unless the time which is expressly excluded in charter or by custom. In *Voylayrules 1993* running or consecutive days are defined as: "shall mean days which follow one immediately after the other."[138]

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[134] Schofield, 2011, p. 12.

[135] *Reardon Smith Line Ltd* v. *Ministry of Agriculture, Fisheries and Food* [1963] AC 69.

[136] Ibid, p. 738.

[137] Schofield, 2011, p. 13.

[138] https://www.bimco.org/en/Chartering/Documents/Sundry_Other_Forms/~/media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_VOYLAYRULES_93.ashx

4.2.4. Working days

It seems that the term 'working days' have been used to exclude Sundays and holidays from the term 'running days'. The concept of 'working days' can be different in various countries. Regardless of the custom, habits and law the difference in holidays in Christian and non-Christian countries can be the reason for this difference.

The most important discussion in this concept is whether a working day includes whole 24 hours of day or less than it for instance 10 hours a day.

In *Alvion Steamship Corporation Panama* v. *Galban Lobo Trading Co SA of Havana (The Rubystone)*[139] Lord Goddard held that a working cannot be interpreted to include whole of 24 hours a day:

> "… I venture to think that if you say to a workman or to an employer of workmen: "What is your working day? How many hours is your working day?", they would not say: "Twenty-four hours". That is not the working day; you are asleep for a good part of the 24 hours. To say a working day is a period of 24 hours seems to me to ignore entirely the fact that the word "working" qualifies the word "day" and cuts it down …"[140]

But, in *Reardon Smith Line* v. *Ministry of Agriculture*[141] the House of Lords overruled Lord Goddard's discussion based on which a working day is a part of the day which is spent in working.[142]

At the end it seems that to interpret the working day regarding work hours, it is important to focus on the different ports rules and customs. It means that a working day in one port can mean whole 24 hour and in the other one only 10 hour a day.

4.2.5. Weather permitting and weather working day

The 'weather permitting' is the method based on which if bad weather leads to interrupt loading or discharging of the cargo to the vessel the time which was not used because of the

[139] *Alvion Steamship Corporation Panama* v. *Galban Lobo Trading Co SA of Havana (The Rubystone)* [1955] 1 Lloyd"s Rep 9 (CA).
[140] Ibid.
[141] *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food* [1963] 1 Lloyd"s Rep 12.
[142] Schofield, 2011, p. 16-17.

bad weather may be deducted from the time which is counted as laytime. The important point to mention regarding this method is that if the vessel is waiting for available berth or she is not on her loading or discharging process, laytime will be continued to run and under 'Weather permitting' method such a matters cannot be the reason to deduct those times from the laytime.[143]

The method of 'weather working days' is defined as a working day to load or discharge a particular type of cargo in which the weather allows the ship to load or discharge that intended type of cargo. Based on this method, if the vessel is waiting for a berth, the time would be counted as a weather working day provided that weather would allow loading or discharging that special type of cargo at the berth which parties agreed the vessel to enter. It is important to mention that if only a part of a day can be used to load or discharge, that day is a weather working day, but the part of the day which was not used because of the bad weather may be deducted from the laytime.[144]

The *Charterparty Laytime Definations 1980* in part 16 provide that:

> ""WEATHER WORKING DAY" – means a working day or part of' a working day during which it is or, if the vessel is still waiting for her turn, it would be possible to load/discharge the cargo without interference due to the weather. If such interference occurs (or would have occurred if work had been in progress), there shall be excluded from the laytime a period calculated by reference to the ratio which the duration of the interference bears to the time which would have or could have been worked but for the interference."[145]

Absolutely, there are other various types of the methods to count the fixed laytime in different charter forms and contracts, but the foregoing methods were discussed to show the historical development of the concept besides the most practical methods.

4.3. Fixed laytime by reference to rates of working cargo

[143] Cooke, 2007, p. 398.
[144] Schofield, 2011, p. 18.
[145] http://www.lawandsea.net/CP_Voy/Charterparty_Voyage_Laytime_Definitions.html

Sometimes under a fixed laytime, parties use provisions to calculate laytime based on some methods like 'workable hatch' per day. The term 'workable hatch' means the hatch is completely ready and available and equipped to load or discharge cargo.[146]
The *Voylayrules 1993* provides:

> " "PER WORKING HATCH PER DAY (WHD)" or "PER WORKABLE HATCH PER DAY (WHD)" shall mean that the laytime is to be calculated by dividing (A), the quantity of cargo in the hold with the largest quantity, by (B), the result of multiplying the agreed daily rate per working or workable hatch by the number of hatches serving that hold."

So, regarding this definition each pair of parallel twin hatches is counted as one hatch, unless one hatch has ability to operate both gangs at the same time.[147]

4.4. Non-fixed or Customary laytime

If the parties to a charter do not have any agreement regarding the time which is necessary for loading or discharging of the vessel or in the charterparty the terms like 'liner terms' or 'customary despatch' are used to calculate the laytime, This charter will be considered as a customary laytime contract and a reasonable time must be considered to load or discharge the vessel.[148]

4.4.1. Reasonable time

Using the term 'reasonable time' leads to some different interpretations of this term. Indeed, the question is that what is the legal meaning of the term 'reasonable time'? The matter was discussed in the *Rodgers v. Forresters*[149] as one of the earlier cases about the concept. In this case the matter was the discharging of cargo into bond, which was the place the delay was caused as a result of dock congestion. There was a clause in the charterparty which was stipulated that "the said freighter should be allowed the usual and customary time to unload the ship or vessel at her port of discharge". So, Lord Ellenborough explained the case as

[146] Cooke, 2007, p. 401.
[147] Schofield, 2011, p. 38-39.
[148] Summerskill, 1982, p. 48 & Schofield, 2011, p. 52.
[149] *Rodgers v. Forresters* (1880) 2 Camp 483.

following: “the usual and customary time was that which would be taken to discharge into a bonded warehouse in the then state of the docks.”[150]

In *ford and others v. Cotesworth and another*[151] it was held that the usual and customary time is different from port to port and in each port it should be determined regarding the conditions of normal affair of that port. In fact in this definition, the state of port of loading or discharging is the most important issue to determine the necessary time for layitme ignoring other related circumstances. This argument did not pay attention to the parties of the contract and the necessity of their reasonable attempts to perform the load or discharge operation, so it was rejected by Blackburn J.[152]

In *Postlethwaite* v.*Freeland*[153] the destination of the vessel was East London, South Africa. The charter held about discharge: “cargo to be discharged with all dispatch according to the custom of the port”. At East London everything was based on the custom of the port, but because of the congestion at the port and lack of the lighters to carry cargo from vessel to the harbour, the ship had to wait 31 days to discharge. The House of Lords rejected the owners claim for demurrage regarding the matter that was held by Lord Selborne:

> “...Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought (I think) to be taken into consideration.”[154]

In another case *Pantland Hick v. Raymond & Reid*[155] House of Lords had to decide about the meaning of the ‘reasonable’ regarding the term ‘reasonable time’; whether reasonable means in actual or ordinary conditions. In this case parties did not stipulate any time for discharging the cargo and the vessel transferred cargo under a bills of lading contract. At the arrival, the discharging operation of cargo was started but the unloadeing operation was interrupted because of the strike of the dock labours. The consignee could not provide any

[150] Schofield, 2011, p. 53.
[151] *Ford and others v. Cotesworth and another* (1868) LR 4 QB 127.
[152] Schofield, 2011, p. 53-54.
[153] *Postlethwaite* v.*Freeland* (1880) 5 APP Cas 599.
[154] Ibid.
[155] *Pantland Hick v. Raymond & Reid* [1893] AC 22

other labour because no one was available. House of Lords in this case tendered an order based on which the consignees were not liable for delay.[156] Lord Hurschell discussed that:

> "… I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon "the ordinary circumstances" say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year … It appears to me that the appellant"s contention would involve constant difficulty and dispute and that the only sound principle is that the "reasonable time" should depend on the circumstances that actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled."[157]

From the foregoing cases it is understandable that the courts tendered orders according to special conditions of each case. In some of them the ordinary state of ports was considered while in the others the ability and attempts of the charterers or consignees were regarded. Moreover, in other latter cases the authoritiesonly held that "reasonable must be reasonable under all the circumstances of the case".[158]

In the idea of the author it seems that because the charterparty is a private agreement between ship-owner and charterer, at first stage it should be considered that charterer has fulfilled his obligations to load or discharge the vessel or not. In fact it is important to be proved that the charterer has attempted with all of his capacity to fulfil the loading or discharging operation in a reasonable time. When the question is answered and it is cleared that the charterer has tried with whole ability, in the second stage the ordinary circumstances of the port or other engaged matters can be considered.

4.4.2. Customary despatch

The *Charterparty Laytime Definations 1980*[159] defines "customary dispatch" as: ""CUSTOMARY DESPATCH" —means that the charter must load and/or discharge as fast as is possible in the circumstances prevailing at the time of loading or discharging."

The word custom or customary which is used in the foregoing definition or other clauses which are related to the non-fixed laytime, does not mean that the loading or discharging has

[156] Schofield, 2011, p. 55.
[157] Ibid.
[158] *C A Van Liewen* v. *Hollis Bros (The Lizzie)* (1919) 25 CC 83, at p. 87 *per* Lord Dunedin.
[159][159] http://www.lawandsea.net/CP_Voy/Charterparty_Voyage_Laytime_Definitions.html

to be done under the local custom of the port. Indeed, the word custom is referred to the usual and normal settled practice of the port.[160]

4.5. Laytime exceptions and interruptions

First of all it is important to mention that the term 'interruptions to laytime' includes the events which laytime is stopped to run because such occasions are not within the definition of laytime stipulated in laytime clauses, while the term 'laytime exceptions' includes such occasions which are within the definition of laytime but are excluded of that definition.[161]
Before discussing different types of exceptions it is necessary to argue different ways of operation of exceptions in customary and fixed laytime charters.

4.5.1. Operation of the concept of exceptions of laytime under customary and fixed laytime

According to the customary laytime, in the case that time is not fixed to load or discharge or when based on the charter the charterer should load or discharge 'with customary dispatch', normally the risk of delay lies on the shoulders of ship-owner. As it was discussed before under the non-fixed laytime the charterer's duty is only limited to load or discharge within a reasonable time based on the circumstances of a particular port. Thus, in such a condition any matter which interrupts the charterer to do his duty will be a good excuse for him to benefit from the laytime exceptions concept. However, under a fixed laytime that the charterer has to load or discharge within a time limit, the risk lies on the charterer and he will be responsible for any delay or interruption which leads to delay in the running of the laytime, unless exception clauses are inserted in the charter.[162]
Generally and academically laytime exceptions are divided into two branches which are discussed in below.

4.5.2. General exceptions clauses

[160] Summerskill, 1982, p. 49.
[161] Schofield, 2011, p. 195.
[162] Wilson, 2010, p. 74.

Usually the charters include a general all-inclusive exception clause beside the specified clauses. Sometimes in the concept of the general exceptions there is mutuality between owner and charterer and it is necessary that the clause be clear regarding the beneficiary party of the clause. In some cases the mutuality was about whether for laytimy period or demurrage or both unless an expressed wording clause not used to clarify the matter, it leads to uncertainty. So, the same transparency has to be existed about the periods which the clause includes, for instance the period of laytime, demurrage, or even the periods which charterer needs to make the cargo ready for loading. A general result which is earned via studying different cases regarding laytime exceptions is that courts have had a very strict interpretation respecting the exception clauses. So, a general worded exception clause which does not have clear and sufficient wording will not be applicable in the running of laytime or paying demurrage. Even in the concept of lack of cargo availability to load, it is important that the charter has clear worded clause to be considered as an applicable. In the *Johs Stove*[163] it was held that where laytime and demurrage have their own code of more limited exceptions, the general exception clauses which are worded by general terms will not be applicable to perform. Sometimes because of the non existence of clarified terms in the general exceptions the charterer loses his right to benefit from the general exception clauses, though the parties' intention had provided such a benefit for the charterer.[164]

To brief the issue, general achievements regarding the 'general exception clauses' which have came out from the discussions and interpretations respecting different cases can be summarised in these words:

> - "A. If the preceding exceptions are of the same type, or as is sometimes said, of the same genus, then there is a presumption that only exceptions of that type or genus are excluded. This is the *ejusdem generis* rule of construction.
> - B. If, however, there is no common thread running through the preceding exceptions then the words will be interpreted more widely and may be given a literal meaning.
> - C. If the final words of exclusion include the word "whatsoever", or something similar, then this will tend to exclude the *ejusdem generis* rule and even if the preceding exceptions are of the same type or genus, the final words will still normally be given a wide meaning."[165]

[163] Johs Stove [1984] 1 Lloyd's Rep. 38.
[164] Cooke, 2007, p. 355.
[165] Schofield, 2011, p. 191.

4.5.3. Specified exception clauses

Generally the exception clauses are interpreted to cover the laytime period. Thus, the charterer will not be benefited by an exception clause at the time that demurrage is performing, unless the charter includes an expressed clause and covers the demurrage under the exceptions. The general rule is that an exception clause should cover the loading and discharging operation, unless the charter stipulates other matters as well.[166]

4.5.3.1. Fault of the ship-owner

Based on the 'Fault of the ship-owner' exception the laytime stops to run when there is a delay as a result of fault of the ship-owner or the people for whom the owner is responsible. So, there are two main questions which should be answered to crystallise the matter. First, what is the meaning of the fault and second who are the people which ship-owner is responsible for them? Though, the cases always have not answered clearly and directly the questions, it will be tried to discuss them.

4.5.3.1.1. What is the meaning of fault?

To answer the first question the words of Donaldson J, in *The Fontevivo*[167] can be helpful:

> "… the mere fact that the shipowner by some act of his prevents the continuous loading or discharging of the vessel is not enough to interrupt the running of the laydays; it is necessary to show also that there was some fault on the part of the shipowner …"[168]

So, based on the foregoing definition any act of the ship-owner or people the owner is responsible for cannot be considered as their fault. In fact, in order to realize the concept of the fault of the owner, he must have breached the obligation. Also, a connection between the failure of the owner and the act which has led to the fault should be existed.

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[166] Schofield, 2011, p. 197.
[167] *Gem Shipping Co of Monrovia* v. *Babanaft (Lebanon) SARL (The Fontevivo)* [1975] 1 Lloyd"s Rep 339.
[168] Ibid, p. 342.

As it was mentioned in the foregoing parts when the ship tenders notice of readiness, she should be at the disposal of the charterers. So, if the ship-owner does anything willingly against the right of the charterers to have disposal for load or discharge on the vessel, this matter will be considered as the fault of the ship-owner. In *Scrutton on Charter Parties*[169] Andrew Smith J held that: "However in order to be entitled to claim demurrage, the shipowner is under an obligation to have the vessel ready and available to load or discharge".

4.5.3.1.2. For whose fault the ship-owner is responsible?

It seems that the people for whom the ship-owner is responsible are people who represent the ship-owner to do parts of his duty when he is absent.[170] Though, there is no formula to what extent the responsibility of the ship-owner regarding other people can be extended. So, the matter has different aspects to discuss in various cases. In the *Harris* v. *Best, Ryley & Co*[171] some parts of the cargo of the chartered vessel were damaged and some shifted because of the bad weather. In London, as the second loading port, they had to restow the shifted cargo, so the owners employed stevedores who had been appointed by the charterers. At the end, the ship was delayed about 3 days because of the unhandy stevedores. The court held that the stevedores were employed by owners, so the charterers had no liability for delay. It is notable that according to the nature of loading and discharging which are a joint operation, sometimes an external matter stops or delays the loading or discharging and non of the parties have fault for such a matter like shortage or strike of stevedores. However, according to the rules which govern the fixed laytime, the demurrage for the additional time should have been paid by the charterer.[172]

In *Overseas Transportation Co v. Mineralimportexport (The Sinoe)*[173] the responsibility of the ship-owner regarding stevedores was considered much deeper. In this case based on the charter it was the responsibility of the charterer to employ stevedores and pay for them to discharge the cargo under FIO terms. Though, it was held under one clause of the charter that the stevedores will be considered "as Owners' servants and subject to the orders and direction

[169] *Stolt Tankers Inc* v. *Landmark Chemicals SA (The Stolt Spur)* [2002] 1 Lloyd"s Rep 786.
[170] *Budgett & Co* v. *Binnington & Co* [1891] 1 QB 35.
[171] *Harris* v. *Best, Ryley & Co* (1892) 68 LT 76.
[172] Schofield, 2011, p. 206.
[173] *Overseas Transportation Co* v. *Mineralimportexport (The Sinoe)* [1971] 1 Lloyd"s Rep 514; [1972] 1 Lloyd"s Rep 201 (CA).

of the master". In this case the incompetence stevedores incurred a significant delay at the time of the discharging. Donaldson J, held that the charter did not contain a clear worded provision based on which the owners can be identified responsible for the default of the stevedores. And in the Court of Appeal Lord Denning MR and Megaw LJ, agreed with the lord Donaldson J's discussion and argued that: Though, the stevedores can be considered as the servants of the owners, the main and final cause of the delay is the ordination of the incompetence stevedores by the charterers and charterers are the responsible for delay.[174] In this field Lord Denning Held that:

> "Let me suppose, however, that clause 23 is sufficient to make the stevedores in some respects the servants of the owners. Even then the charterers are not, in my opinion, able to rely on it, and for this reason: it was the charterers who appointed the stevedores. It was their duty to appoint stevedores who were competent to do the discharging. The stevedores here turned out to be utterly incompetent. I do not think the bad conduct of the stevedores can be the fault of the owners, when the real cause of it was the fault of the charterers in appointing stevedores who were incompetent."[175]

Through the discussed cases it can be summarised that the responsibility of the ship-owner for other person's fault has different features in different cases and this matter in every case has to be discussed regarding the detailed conditions of that case.

In *Ropner Shipping Co Ltd* v. *Cleeves Western Valleys Anthracite Collieries Ltd*[176] which is a case from Court of Appeal related to the fault of the owners directly, the vessel based on the order of the owner left the loading berth for bunkering operation and this matter caused a delay in loading process, though based on the charter the bunkering time was excluded from the laytime period. After different discussions, as a brief summary it was concluded that:

> "... there would have been no fault on the part of the shipowners if the vessel bunkered before or after demurrage commenced, if no cargo was available and time would continue to run. It is also suggested that the same answer should apply where a vessel was removed from a waiting berth to bunker, where congestion had prevented her berthing on arrival."[177]

[174] Schofield, 2011, p. 207.
[175] *Overseas Transportation Co* v. *Mineralimportexport (The Sinoe)* [1971] 1 Lloyd"s Rep 514; [1972] 1 Lloyd"s Rep 201 (CA), p. 205.
[176] *Ropner Shipping Co Ltd* v. *Cleeves Western Valleys Anthracite Collieries Ltd* (1927) 27 Ll L Rep 317.
[177] Schofield, 2011, p. 209.

4.5.3.2. Adverse weather

Adverse weather periods are usually excluded from the laytime periods. The word 'weather' includes a wide range of atmosphere conditions. Regardless of the definition of the bad weather, the discussion is that for example rainy weather can be considered as bad weather in loading or discharging the cargo of bulk sugar, while it is not a problem to load or discharge a cargo of oil from a tanker. The other argument is about the definition of bad weather in relation to the different types of vessels or even different types of the charters. As the general rule the weather must be considered adverse for exclusion of laytime period based on the foregoing discussions. The most usual atmospheric phenomena which fall in the concept of bad weather exclusions are conditions like high winds, snow, rain, hail and sleet. To exclude such conditions from the laytime period it is necessary that such weather condition occurs at the place of loading or discharging operation, though sometimes it is not easy to distinguish if the weather is adverse for that type of cargo or not. In one case from London Arbitration[178] it was held that: "... normal winter conditions at disport not to stop time from counting". In that case the laytime was under 'weather working days'. In this case the cargo of green bananas had to be discharged in the St Petersburg at the end of January and beginning of February when the weather was snowy and rainy. In this case the owners claimed that rainy and snowy weather are normal atmospheric situations in the winter of St Petersburg, in contrast with their discussion charterers invoked the normal definition of the 'weather working days'. The tribunal rejected both claims and accepted an alternative solution based on which in order to avoid the freezing of bananas after every short period of discharging they had to heat up the holds and start to discharge again. In addition, it was held that the period which was used each time for heating up the inside temperature of the holds will not be counted as laytime. Also, time will be stopped to run during every heating up based on the bad weather exclusion clause.[179]

4.5.3.3. Other weather conditions

[178] London Arbitration 23/04- LMLN 650, 13 October 2004.
[179] Schofield, 2011, p. 211-212.

Regardless of the various foregoing weather conditions, there are other different atmospheric phenomena which sometimes fall in the concept of bad weather such as frost, ice, surf, swell, bore tides, etc.

The frost is the moisture which freezes on the cold surfaces in the shape of the ice crystals. In the sense of 'frost excluded clause' the matter which was engaged in most cases is about extension of the inclusion of the clause. In some cases it was held that the clause only includes the occasions which the frost does not allow the direct loading or discharging operation and the clause does not include the stages before or after them, while in the *Pinch & Simpson* v. *Harrison, Whitfield & Co*[180] matter was changed. In this case the vessel was chartered to carry loam from River Thomas to Middlesbrough. The loam which was carried from the nearest mines for loading was frosted in the trucks over the night and this matter hampered the loam for loading to the vessel. On the other hand, the charter contains a clause based on which the frost was excluded from the loading period: "frosts ... preventing the loading or unloading or provision of the cargo". In this case Denning J, discussed that the clause includes the stages before than loading too and held that:

> "Those words show that a distinction is drawn between the act of loading and the provision of cargo. The loading is the actual operation of loading from the wharf or quay on to the ship. The provision of cargo applies to an earlier time—that is to say, in this case the actual provision of the loam from the quarry and its carriage down to the jetty. It applies, in my judgment, to the getting of the cargo, in that it has to be got out of the quarry. It applies not only to the carrying of it down to the jetty but to the actual picking of it out of the quarry."[181]

As it was mentioned the wording of the clauses have the most important role in their influence and interpretation, as Denning J, interpreted the words "provision of cargo" in a way to include the stages before the loading in the frost exclusion clause.[182]

4.5.3.4. Holidays

Like the other exceptions of laytime, holidays maybe defined to be counted out of the laytime period as an interruption for the laytime, for instance by mean of terms like "working days"

[180] *Pinch & Simpson* v. *Harrison, Whitfield & Co* (1948) 81 Ll L Rep 268.
[181] Ibid, p. 273.
[182] Schofield, 2011, p. 235.

and "weather working days" or as an exception by using terms like "Sundays and holidays excepted". First of all to discuss the exception clauses of holidays it is necessary to define the term 'holiday'. For the first stage it is necessary to mention that the term "non-working days" is different from the "holidays". The different standard definitions of laytime only defines the holidays in general terms with no reference to the justifications of the hoiliday, while it seems that to find the samples of holiday it is necessary to refer to the regulation, law, practice and custom of the engaged port.[183] *Baltic code 2007* defines holiday as:

"9. HOLIDAY

A day other than the normal weekly day(s) of rest, or part thereof, when by local law or practice the relevant work during what would otherwise be ordinary working hours is not normally carried out."[184]

4.5.3.4.1. Regulations and law

It is obvious that a holiday has to be declared by a qualified authority. But sometime the holidays are regional or are declared by the municipal authorities only in a part of a country and not all of it as we can see in the *Hain Steamship Co Ltd* v. *Sociedad Anonima Comercial de Exportactión e Importación (Louis Dreyfus & Co Ltd)*[185] based on which two days were declared as holidays; the first by the province of Buenos Aires and the second by the municipal authority of the of the port and town. While based on the order of the federal government the custom and federal offices were opened on those two days. In this case Mackinnon J held that:

> "With limited exceptions, such as national holidays like July 4 in the United States and, I suppose, to some extent, bank holidays in England, holidays are necessarily things which vary as to particular days in particular parts of the country … holidays really are a local institution and only very exceptionally a national institution."[186]

In some ports the local port trusts or other similar associations declare their own specified holiday's list which sometimes can be different from the local or competent authorities list.

[183] *A/S Westfal-Larsen & Co* v. *Russo-Norwegian Transport Co Ltd* (1931) 40 Ll L Rep 259.
[184] http://www.balticexchange.cn/Download/TheBaltic_CODE.pdf.
[185] *Hain Steamship Co Ltd* v. *Sociedad Anonima Comercial de Exportactión e Importación (Louis Dreyfus & Co Ltd) (The Trevarrack)*(1932) 43 L1 L Rep 136.
[186] Ibid, p. 139.

Regardless of the matter that to declare such holidays the authorities must have such qualification under their law to give such list, it is necessary that their declared list be under the custom and practice of the engaged port. Though, in some countries with the state political system, the central authorities give such competence to the states to have their specified holidays.[187]

4.5.3.4.2. Custom and practice

A holiday can be considered based on the settled and institutionalized custom and practice of a specified port. So, such a practice must be accepted by the majority proportion of the engaged people or authorities. In *Z Steamship Co Ltd* v. *Amtorg, New York*[188] in this field Goddard J held that:

> "If it could be shown that certain trades—I do not think one would be enough—a certain number of trades had closed their doors in Boston on Saturdays so that a large number of working people regarded Saturday as a holiday, although you might persuade somebody to work on that day, more might be said, but I do not think you could make a holiday … merely because of some arrangement between employers and employees in a particular trade … ."[189]

To conclude this part it is notable that there are different phrases like "General and local holidays", "Legal holiday" and so on which are used in charterparties. One of the most famous phrases which are applied in charterparties is "as specified in BIMCO calendar" because every year Baltic and International Maritime Council provides a calendar of various types of the holidays in different ports of the world in that year in progress and the information regarding the holidays come from the competent associations of different countries.[190]

4.5.3.5. Strikes

[187] Schofield, 2011, p. 248.
[188] *Z Steamship Co Ltd* v. *Amtorg, New York* (1938) 61 Ll L Rep 97.
[189] Ibid, p. 104.
[190] Schofield, 2011, p. 250-253.

Sometimes the strike of the people who are engaged in the shipping industry may lead to delay in loading or discharging operation. Though, exclusion of the strike time from the period of laytime is only possible by mean of stipulation of such exclusion in the charter.

4.5.3.5.1. Definition

Usually, strike is defined as "a general concerted refusal by workmen to work in consequence of an alleged grievance."[191] It seems that although this definition includes the characteristics of the strike, it cannot be considered as a comprehensive one. Because in some different cases it is obvious that the strike is not only applied for work condition or wages. Sometimes the strike is because of the reasons other than protest for wages or work conditions, for instance in the *Seeberg Bros. V. Russian Wood Agency*[192] the strike was a sympathetic matter. In this case MacKinnon J. Held that:

> "... it was said that it was a strike in sympathy with some labour grievance of some alleged unions of seamen or other workers on or connected with Latvian ships in Latvian and other ports. That was the nature of the strike ... it appears to be established that there was a strike declared with all the due formality of a resolution of the trade union and so forth whereby the Leningrad stevedores agreed to abstain from loading timber upon Latvian ships."[193]

It is notable that the refusal of the workers to work a part of the day can be excluded from the laytime period under a strike exclusion clause.

4.5.3.5.2. Default of the charterer

Charterers are not considered as qualified to benefit from 'the strike exclusion clause' when their wrong action or inaction has caused the delay. Even if delay is caused by the strike as a result of the fact that charterers have not complied their obligation, they would be responsible for delay and could not invoke the exception clause. In the *Dampskibsselskabet Danmark v.*

[191] Summerskill, 1982, p. 213-214.
[192] *Seeberg Bros. V. Russian Wood Agency* (1934) 50 L1. L. Rep. 146.
[193] Ibid.

Poulsen & Co[194] the charterers had failed to supply the cargo. In addition, a strike caused a delay in loading operation. In the court the charterers were held responsible for the delay because if they had fulfilled their obligation to supply the cargo, the delay could have been avoided.[195]

Gencon Strike clause is one of the practical clauses in the charterparty contracts.

> "16. General Strike Clause 217
> (a) If there is a strike or lock-out affecting or preventing the actual loading of the cargo, or any part of it, when the Vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, the Master or the Owners may ask the Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless the Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, the Owners shall have the option of cancelling this Charter Party. If part cargo has already been loaded, the Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account. (b) If there is a strike or lock-out affecting or preventing the actual discharging of the cargo on or after the Vessel's arrival at or off port of discharge and same has not been settled within 48 hours, the Charterers shall have the option keeping the Vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging until the strike or lock-out terminates and thereafter full demurrage shall be payable until the completion of discharging, or of ordering the Vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after the Master or the Owners have given notice to the Charterers of the strike or lock-out affecting The discharge. On delivery of the cargo at such port, all conditions of this Charter Party and of the Bill of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance to the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion. (c) Except for the obligations described above, neither the Charterers nor the Owners shall be responsible for the consequences of any strikes or lock-outs preventing or affecting the actual loading or discharging of the cargo."[196]

4.5.3.6. Shifting and lightening

[194] *Dampskibsselskabet Danmark v. Poulsen & Co* (1913) S.C. 1043.
[195] Summerskill, 1982, p. 215.
[196] http://pub.tjufe.edu.cn/department/guomaoxi/jingpinke/downloads/flfg/gencon94.pdf

Generally there are two different types of shifting; 1) From an anchorage to a berth, 2) From a berth to another berth. Traditionally the shifting cost of the vessel from anchorage to the berth is considered under the costs of carrying voyage and for the owner's account. Though, the terms of the charter determines about the time of the shifting and the person who time of the shifting is in his account. Under the berth charterers time starts to run upon arrival of the vessel to the berth while regarding the port charterparty, time starts to run upon the entry of the vessel into the anchorage which is inside the limits of the port, unless the exception clauses or other clauses of the charter are stipulated other provisions.[197]

It seems that regardless the tendency of some charters to transfer the responsibility of the shifting time, from an inside port limits anchorage to a berth- to the ship-owner, the words of the charter determine the excluded time for shifting. The courts procedure show that they do not accept to exclude the shifting time in the lack of the stipulated exclusion clause.[198]

So, when the vessel anchors out of the limits of the port, because the vessel's journey is not finished the time which is lost in the anchorage is a part of the carrying voyage and at the account of the owner. To avoid this matter and transfer the risk from the owner to the charterer the term 'reachable on arrival' is used in some charterparties which based on them the owner can claim for damages that are resulted because of the vessel's detention in the anchorage outside of the port. In the berth charterparty the same rule is applicable until the vessel reaches the point where can tender notice of readiness.[199] In the *Laura Prima*[200] the House of Lords held that:

> "Reachable on arrival means precisely what it says. If a berth cannot be reached on arrival, the warranty is broken unless there is some relevant protecting exceptions ... The berth is required to have two characteristics; it has to be safe and it also has to be reachable on arrival".[201]

Regarding the shifting from a berth to another one, in the absence of the stipulated clause which allows the charterer to load at two or more berths, the ship has no duty to accept the order of the charterer for such kind of loading. Though, now a day usually the charters contain the provisions based on which the right of loading at more than one berth is granted

[197] Schofield, 2011, p. 295-296.
[198] A handout from UCL, *THE RISK OF DELAY IN LOADING AND DISCHARGING LAYTIME AND DEMURRAGE INTERRUPTIONS AND EXCEPTIONS*, p. 15.
[199] Ibid, p. 15.
[200] *Laura Prima* [1980] 1 Lloyd's Rep 466.
[201] Ibid.

to the charterer. It is notable that during the shifting, the laytime calculation will be continued unless the charter stipulates other provisions in contrary, or the goal of the shifting is for owners own purpose which leads to draw back the vessel from the immediate and effective disposition of the charterers.[202]

Respecting the matter of lightening it is sufficient to mention that if based on the charter the charterer has the right to nominate the unloading port and he chooses a port which the vessel is not able to enter without lightening, this matter will be considered as a breach of the charter from the side of the charterer. In this type of situations the laytime will commence in the normal way at the time the vessel gets the nearest point in which she can unload safely if the charter includes a 'as near as she may safely get' clause. On the other hand if such a provision does not exist in the charter the legal position of the charterer will be the same as the time he cannot nominate a port to unload, so he will be responsible for detention of the discharge course.[203]

4.6. Demurrage

Demurrage is defined in *voylayrules 1993* as: ""DEMURRAGE " shall mean an agreed amount payable to the Owner in respect of delay to the vessel beyond the laytime for which the Owner is not responsible. Demurrage shall not be subject to laytime exceptions."[204]

In fact demurrage is a liquidated damage which is paid by the charterer to the owner because the loading or discharging operation exceeds beyond the time which was agreed.[205] Most charterparties contain a clause based on which the charterer can retain the vessel for additional days than lay days to complete the loading and discharging. The fixed amount which is paid by the charterer for retention of the owner's vessel during those extra days is demurrage. The most important matter to note is that whether the charterparty includes the fixed number of days for demurrage or there is no limitation in time for the demurrage period, ship-owner will be able to terminate the charter and leave the loading or discharging point during the demurrage time when the charterer's delay to load or discharge is such a substantial breach which may go to the root of the contract and frustrate the goal or object of

[202] A hand out from UCL, p. 16.
[203] Ibid, p. 17.
[204] https://www.bimco.org/en/Chartering/Documents/Sundry_Other_Forms/~/media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_VOYLAYRULES_93.ashx
[205] Hill. CH, *MARITIME LAW*, sixth edition, LLP, LONDON HONG KONG, 2003, p. 244.

the charter,.[206] At common law the nature of demurrage is a contract which is concluded to identify a type of financial penalty which is on the shoulders of the charterer because he has been unable to fulfil his obligations based on the contract. The rate of demurrage has a direct link with the rate of freight, so the owner can balance his financial matters at the time of demurrage same as the time his ship operates financially and earns money as freight. It is notable that demurrage is just to compensate the ship-owner's damages and losses which are caused by delay at loading or discharging, and it is not to recover other damages of the owners. As it was mentioned demurrage is a type of liquidated damage and based on general rules regarding this kind of damage if the rate of demurrage is so high in comparison with the highest feasible loss as a result of breach, the court will be rightful to reduce the rate of demurrage.[207]

The charterer's responsibility to pay the demurrage starts at the moment in which the laytime period is expired and will run durably even through the excluded periods of laytime like holidays and Sundays and bad weather working days. Consequently, the exceptions which stipulated in the charter for laytime period are not applicable in the period of demurrage, unless expressly stipulated in the charter. In addition, based on the general legal principles it is obvious that when the delay is caused by the fault of the ship-owner the demurrage will not take place. Though, the demurrage will take place when the delay is caused neither by the fault of the owner nor charterer.[208]

Demurrage is not the same as damage for detention, since the latter one is a type of unliquidated damage which charterer has to pay for detaining the vessel for any reason other than exceeding the loading or discharging operation beyond the agreed period. For instance, detention of the vessel for repairing because of the damage which is caused by the people who are working for the charterer can be discussed.[209]

4.7. Despatch money

Based on common law provisions there is no reward for the charterer if he performs the loading and discharging operation in a period less than the time which is stipulated in the

[206] Wilson, 2010, p. 76.
[207] Ibid, p. 77.
[208] Ibid, p, 77.
[209] Hill, 2003, p. 244.

charter. Since completing the loading or discharging operation is beneficial for the ship-owner to operate her vessel under other contracts, the charters usually contain a clause based on which the charterer is entitled to be rewarded under the title of despatch when he can complete the loading or unloading operation sooner than stipulated time. The rate of despatch is usually one half of the demurrage rate according to the custom. It seems that regarding different constructions methods there are some conflicts in interpretation of the clauses like 'despatch is payable for all time saved' or 'despatch is payable for laytime saved'. This matter led to a discussion that the despatch is payable only for the saved laytime or it comprises the excluded times too. Though, there are different cases in this concept each of them having its own characteristics which make the matter difficult to earn a comprehensive answer. It seems that similar to the payment method in demurrage the same way is used regarding the despatch, so all laytime excluded days are payable under the concept of despatch.[210]

[210]Wilson, 2010, p. 78-79.

Chapter 5

5. Laytime and demurrage clauses in the sale contracts

5.1. Introduction

Normally, a voyage chaterparty for carriage of cargo by sea is an outcome of a sale contract which is concluded between the seller and buyer before the creation of voyage charteparty. Although, the charter has its own characteristics, the sale contract impresses the charter through various clauses and conditions which influence the circumstances and provisions of the charter.[211] One of those matters is the laytime and demurrage clauses. Inserting the laytime and demurrage clauses is a usual matter in the sale contracts especially international sale contracts despite the fact that the original domain of the laytime and demurrage clauses are the law of the voyage charterparties. The problem of these kinds of clauses relates to their construction. Since these clauses are inserted to the sale contracts in a concise and compendious way and usually with no background definition, so these matters might lead to some problems in finding the appropriate interpretation for the foregoing clauses.[212] To

[211] Lars Gorton & Rolf Ihre, A PRACTICAL GUIDE TO CONTRACTS OF AFFREIGHTMENT AND HYBRID COTRACTS, Second editin, LLOYD'S OF LONDON PRESS LTD, 1990, p. 1-2.

[212] Professor Jason Chuah, Laytime and demurrage clauses in contracts of sale- a survey of the New York Society of Maritime Arbitrator's awards (1978- 2008) and English case law, Edited in Prof.D. Rhidian Thomas,

clarify the discussion it would be helpful to explain the matter by means of an example. Under the CIF sale contracts, it is the liability of the seller to arrange the shipment, thus he will be responsible for the demurrage against the ship-owner based on the voyage charterparty provisions. While, if the contract of sale held that under its laytime and demurrage clauses the buyer has the legal equivalent position of the seller which is the same as charterer in our case, the seller will have the right to contend the demurrage from the buyer which he paid to the ship-owner. The problem discussed in the first lines about the construction of these clauses and their legal nature arises here in one hand and on the other hand the legal characteristic of the link of the laytime and demurrage clauses in the sale contract and charterparty with each other. Indeed, the question is whether the laytime and demurrage clauses in the sale contract play the role of an indemnity for the party who is responsible to pay the demurrage based on the charterparty or on the other hand it operates as an independent clause of the voyage charterparty. To answer this question in the following chapter the matter is discussed through various cases in two different legal systems including English and American law. In addition, different types of the sale contracts are studied to answer the question in practical terms. It is notable that inserting the laytime and demurrage clauses in the sale contracts may realise under the port-to-port international sale of goods contracts in the form of FOB, CFR, CIF, so on.[213]

5.2. The risk of demurrage

Before discussing the interpretation of the laytime and demurrage clauses in the international sale contracts and studying the trends of the courts and arbitrations in interpretation of such clauses, it is appropriate to argue more about the demurrage risk in two main sale contracts including; FOB and CIF. In the FOB sale contracts it is the responsibility of the buyer to convene the voyage charter with the ship-owner and logically it is the buyer who will be obliged for the demurrage caused by delay in the port of loading. So, it is a major risk for the buyer to bear the responsibility for the risk of delay in loading operation while he does not have any control in loading the cargo. In the CIF sale contracts since the seller is the one who

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THE EVOLVING LAW AND PRACTICE OF VOYAGE CHARTERPARTIES, informa, LONDON , 2009, p. 171.

[213] Professor Emeritus D. Rhidian Thomas, *THE EXPANDING CONCEPTS OF LAYTIME AND DEMURRAGE*, p. 5.

concludes the carriage contract with the ship-owner, he will be responsible for the demurrage of delay in the discharge port too. The seller as the charterer does not have control on the unloading operation in the port of discharge, so this matter imposes a huge risk on seller. Thus, it is normal that the FOB buyer or charterer and the CIF seller or charterer try to protect themselves against the demurrage which is not caused by them. This protection is done through inserting the laytime and demurrage clauses in the sale contracts.[214]

5.3. Indemnity or independent clause?

Since there are financial concerns for the seller or buyer in each of the above mentioned selection switches ,indemnity or independency, answering the foregoing question can help to solve the dispute which usually exists between the sellers and buyers. To discuss the matter, the key word to find the answer is studying different cases which are involved in the international CIF or FOB sale contracts in one hand and charterparties on the other hand.

5.4. English Law

The *Adolf Leonhardt*[215] is one of the cases that might show the relationship between the sale contracts and charterparties in practice and commercial sense. In this case the seller as plaintiff sold 25,000 tonnes of flint maize on January 17th 1978 for shipping in the April 1978 based on a FOB sale contract. According to the contract of sale it was provided that the 1/3 of the maize had to be shipped from Buenos Aires and the rest 2/3 of the cargo had to be loaded in one up river port not above San Lorenzo. By the way the sale contract was merged with the GAFTA[216] 64 and 125 which in some parts of it were stipulated that:

> "Special conditions ... Time to count as per Centrocon Charterparty, WIBON, WIPON, WIFPON. Demurrage/Despatch as per C/P ... other Conditions as per Centro Exportadores terms....
>
> The Centro terms provided *inter alia:*
>
> Loading Rate: Once vessel is berthed alongside berth suitable to Sellers and ready to load this parcel, Sellers Guarantee ... according

[214] Ibid, p. 6.
[215] *Adolf Leonhardt* [1986] 2 Lloyd's Rep. 395.
[216] The international sales of grain, animal feeding stuffs, pulses and rices are traditionally bought and sold under the terms and conditions of Gafta standard forms of contract. http://www.gafta.com/contracts.

> Centrocon, but Sellers shall not be responsible for anytime lost due to ... strikes ... or any other cause of *force majeure*."

On the first of February of the same year, 1978, the buyers concluded another sale contract with the sub-buyers to sell 500,000 tonnes of maize to V/O Exportkhleb of Moscow and based on the contract it was agreed by the parties that carrying of contractual cargo had to be performed from March to July 1978. In addition, according to the agreement the parties had agreed that the seller would be responsible for demurrage as per charterparty rate. To clarify the matter, the charter which was made by the V/O company stipulated that:

> "30... if the cargo cannot be loaded by reason of ... a strike ... or by reason ... of obstructions .... Beyond the control of the Charterers ... time for loading ... shall not count during the continuance of such causes ... In the case of any delay by reasons of the above mentioned causes no claim for ... demurrage shall be made by the charterers ... or owners of the steamer ..."

In continue, the sellers for loading of the 2/3 of the maize cargo recommended one of the up-river ports with the name of Rosario and buyers introduced the *"Adolf Leonhardt"* after nomination of the same vessel by the sub-buyers company. At the loading port because of the congestion in the port traffic, the vessel was forced to wait for a long period of time and as a result a claim was executed by the buyers for demurrage of fifty days which was amounted to approximately $ 205,000.00.

The nature and origin of the claim was accepted in both first arbitration and GAFTA's Board of Appeal. But the question was about the interpretation of the sale contract clauses. The question was whether because of the blockage at the port which was out of the control of the sellers they can still benefit from the Centrocon charterpary and its strike clauses to be exempted from demurrage liability or whether the sellers have to indemnify the buyers versus their contractual responsibility to the sub-buyers.[217] Indeed in this case the problem was the same as mentioned before about the construction of the legal relationship between the sale contract and charterparty as an independent or indemnifying contract.

In this case Mr Justice Staughton regarded that; the Centrocon charterpary form which governs the legal connection between the buyer and seller fixed the events and times in which the time could be enumerated or stopped and excluded to run. The strike clause was one of

[217] Davies, 2006, p. 321.

them based on which the seller has no responsibility for the delay which was resulted by the obstruction and congestion in the port. About the nature and interpretation of the sale contract Mr Justice Staughton worded that; at the time of the conclusion of the sale contract there was no charterparty contract between the seller and buyer or not even sub-sale contracts between the buyer and sub-buyer. So, it is not logic to assume that the sale contract can be an indemnity for the contracts which had not been existed or even assumed their conditions at the time of concluding the first sale contract. To clarify the matter the words of Mr Justice Staughton can be effective:

> "Issue (3) is whether the sellers have an independent obligation to pay demurrage to the buyers, or whether they are only obliged to indemnify the buyers against liability to V/O Exportkhleb. This was discussed at length. My answer would be that the sellers have an independent obligation, as the Board of Appeal held. I do not find it surprising that a buyer should contract to receive demurrage at a different rate, or on different conditions, than those governing his liability to pay a shipowner or a sub-buyer. Normally one might perhaps expect the terms to be same but they may be different. What persuades me that an independent obligation was intended here is the reference in the sale contract to the Centrocon charterparty, scilicet in its printed form. Whatever terms might be agreed between the buyers and a shipowner, or their sub-buyers, it was all Lombard Street to a china orange that would not be precisely the printed terms of the Centrocon form. The buyers had not, when they contracted with the sellers, concluded their sub-sale, at any rate in point of form; it makes good sense that they should bargain for an independent obligation in the terms of the printed form, if only as an approximation to what they might agree with their sub-buyers."[218]

One of the most important and recent cases in relation to the role of the laytime and demurrage clauses in the contracts of sale and their incorporation with the charterparties is the decision of Court of Appeal in the *Fal Oil Co. Ltd. v. Petronas Trading corporation*[219]. In this case the sellers as the claimants sold four cargo of the fuel oil to the defendant buyers under CNF sale contract.[220]

The sale contract included some provisions regarding the laytime and demurrage as following:

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[218] *Adolf Leonhardt* [1986] 2 Lloyd's Rep. 395.

[219] *Fal Oil Co. Ltd. v. Petronas Trading corporation* [2004] 2 Lloyd,s Rep. 160.

[220] **Cost and Freight (named destination port)** - Seller must pay the costs and freight to bring the goods to the port of destination. However, risk is transferred to the buyer once the goods have crossed the ship's rail. Maritime transport only and Insurance for the goods is NOT included. Insurance is at the Cost of the Buyer. http://www.ourwpa.com/member/assets/incoterms.htm

> "10. Laytime:
>
> Laytime allowed shall be a total of 36 hours SHINC to commence six hours after Notice of Readiness is tendered or upon berthing whichever is earlier and time shall cease counting at disconnection of hoses.
>
> 11. Demurrage:
>
> As per charter-party per day *pro rata.*
>
> ...
>
> 15. Other terms and conditions:
>
> Where not in conflict with the foregoing, Incoterms 2000 with latest amendments for CNF sales to apply."

In this sense it is clear that at the time of conclusion of the CNF sale contract, the engaged parties did not have an accurate information about the provisions of charterparty which was made subsequently by the sellers through chartering a vessel from Fal shipping company under the terms of Asbatankvoy based on which the period for laytime was determined 72 running hours SHINC and the stipulated demurrage was USD 18,000 for each day. In addition, the charterparty stipulated that the commencement of laytime would be on the arrival of the ship into the berth or six hours after *receipt* of the notice of readiness, whichever is the earlier. Comparing the provisions of the sale contract and charterparty, the variation and dissimilarity of the demurrage and laytime clauses in both contracts is obvious.[221]

The usual discussion regarding the interpretation of the laytime and demurrage clauses in the sale contracts was repeated in the Court of Appeal in this case too. The buyers in this case claimed that the sale contract should be interpreted as an indemnifying contract and since the sellers are not liable against the Fal Shipping Company as the ship-owners, the sellers have no right to contend from the buyers. But in contrast with the buyers argument the Court of Appeal with a majority of 2-1 overruled the buyers claim and held that the laytime and demurrage clauses in the sale contract are independent clauses which are play autonomous roles from the charterparty. The majority of the court of appeal justified their opinion based on their interpretation from wording method of the clause and absence of the cross reference for insertion of the sale contract to the charterparty. In continue, Mance LJ as one of the majority authorities held that the sale contract was created before the conclusion of the

[221] Professor Jason Chuah, 2009, p. 172.

charterparty and logically it has an independent and separate nature from the charterparty. He also added the parties did not have information about the terms and provisions of the future charterparty according to priority in conclusion of the sale contract. So, as the sale contract was created separately and independently, normally its terms containing the laytime and demurrage clauses have to be interpreted independently too. Also the majority provided that since the laytime clauses in the charterparty and sale contract are contradictory with each other, so it seems really remote that the parties intention was based on the creation of a link between two contracts. In the idea of the Mance LJ, since according to the sale contract the cargo had to be carried through four different shipments, so four different charterparties were necessary to be concluded, which each of them might have its own different terms and clauses regarding the laytime. And it was not unusual that the laytime provisions in each of the charterparties did not match the laytime terms of the sale contract. If based on the claim of the buyers the demurrage clause in the sale contract is considered as an indemnifying clause, the adaptation of the laytime clauses in the different charterparties will be so intangible and impractical which would not be acceptable in commercial terms.[222]

On the other hand Buxton LJ who was in minority and as a result he interpreted the laytime and demurrage clauses in the sale contract as an indemnifying contract and not as an independent one, believed that the interpretation of the majority regarding the role of the laytime and clauses in the sale contract did not match the commercial goals of inserting such clauses in the sale contract. Later he invoked that based on the commercial purpose of the sale contract, by chartering a vessel to carry the cargo, the charterer will be the responsible person to pay the demurrage to the owner of the chartered vessel. In response to such kind of responsibility imposed to the charterer regarding the commercial senses of the sale contract, the charterer of the vessel normally tries to pass the liability to pay demurrage to the counterparty of the sale contract for the time that the delay is caused by that counterparty. At the end based on the foregoing matters Buxton LJ regarded that the laytime and demurrage clauses in the sale contracts should be interpreted as an indemnity.

As it was mentioned at the beginning of discussion about this case, the lordship of the Buxton LJ was not agreed by the other two judges Mance LJ and Judge LJJ and they worded that the laytime and demurrage clauses in the sale contract have to be considered as an independent clause and these clauses should be interpreted with no assumptions and prejudgements like

[222] Professor Jason Chuah, 2009, p. 172-173.

Buxton LJ considered in his lordship. Mance LJ invoked the words of Lord Atkinson in *Houlder Bros v The Commissioners of Public Works*[223] to consolidate his idea in the foregoing sense as following:

> "There is, however, no rule of law that the vendor in a cif contract may not secure for himself a profit under a demurrage clause contained in it. Neither is there any indisputable presumption of law that the parties to such a contract did not intend that he should receive such a profit."[224]

Moreover, the invoking of the Mance LJ to the words of the Lord Atkinson was not agreed by the Buxton LJ and he insisted that the words of the Lord Atkinson are not necessarily in inconsistency to consider the laytime and demurrage clauses in the sale contracts as an indemnity. In the idea of Buxton LJ this matter leads to prevent the seller from earning a windfall profit from the sale contract. However, this discussion was answered by invoking the point that the seller would be held up to get a windfall profit by the law on penalties.[225]

In this case after comprehensive discussions, the conclusion of the Court of Appeal was summarised by Mance LJ which is helpful to have a brief framework of the current legal arguments at the Court.

> "(i) provisions in the sale contract regarding layitme and demurrage should be approached without any pre-conceptions or presumption as to their likely nature....
>
> (iv) Although the authorities distinguish generally between (a) provisions operating as an indemnity and (b) independent provisions, the precise nature and effect of any demurrage provision depends upon the context and wording of the particular provisions, including the scope of any reference to or incorporation of the demurrage provisions of any charterparty or other third party contract.
>
> (v) In the absence of any cross-reference in the sale contract provisions to a charterparty or other contract under which demurrage liability may arise, the natural inference is that the sale contract falls within category (b)....
>
> (vii) Thus, for example (although it is unnecessary to express a view on the correctness or otherwise of the actual construction put on any previous contract differently worded to the present), In *Suzuki* the words 'demurrage as per charter-party or freight agreement' were interpreted as meaning that the case fell within category (a). In contrast, in *Gill & Dufus* Mr justice Clarke considered that the

[223] *Houlder Bros v The Commissioners of Public Works* [1908] AC 276 (PC), at 291.
[224] *Fal Oil Co. Ltd. v. Petronas Trading corporation* [2004] 2 Lloyd,s Rep. 160.
[225] Professor Jason Chuah, 2009, p. 174.

> particular provisions for demurrage there in view brought the sale contract within category (b)....”[226]

Albeit, there is not a specified criterion and standard method for drafting the laytime and demurrage clauses in the international contracts of sale. So, the various sale contracts contain different drafted laytime and demurrage clauses.[227] This matter leads to confusion in practice for the people who are engaged in the carriage of the goods by sea under the voyage charters specially for the businessmen who are responsible to pay demurrage of delay.

In practice and in the commercial sense it is important for the businessmen to know about the legal framework of their obligations and liabilities in every commercial contract. The guidelines of the Mance LJ are really helpful to find that framework regarding the legal instruction and role of sale contracts' laytime and demurrage clauses in incorporation with the charterparties. However, applying Mance LJ's framework in every case might cause some problems since in one hand every case has its own situations and considerations, and on the other hand the precautions that the courts exert in their interpretations to hinder interference in the parties' contract and intention may cause some obstacles to apply Mance LJ's framework. For instance, any cross-reference in the sale contract to the charterparty is not necessarily the reason to interpret the sale contract as an indemnity. In fact, the wording method in the laytime and demurrage clauses in the sale contracts is the determinant factor to interpret such clauses. Though, in some cases it is a problematic matter to find the construction through the used words.

To conclude the discussion regarding the *Fal Oil Co. Ltd. v. Petronas Trading corporation*[228] in which the laytime and demurrage clauses were considered independently, it is necessary to mention that the appeal of the sellers was succeeded and the appealers were granted the right to benefit from the demurrage of the buyers, while regarding the charterparty the buyers had no responsibility to pay the demurrage. The justification of Mance LJ to observe the laytime and demurrage clauses as independent clauses and not as indemnity could be helpful to clearify the foregoing arguments.

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[226] Ibid.

[227] Professor Emeritus D. Rhidian Thomas, p. 6.

[228] *Fal Oil Co. Ltd. v. Petronas Trading corporation* [2004] 2 Lloyd,s Rep. 160.

"1. The sale contract was made independently of, and without knowledge of the terms of, any charterparty. Since the sale contract covered four shipments, there might well have been four very different charterparties. The sail contract contained a specific laytime code (clause 10), which would not necessarily coincide with whatever charterparty had been or might in future be made. The two did not coincide in the case of the first shipment with which we are concerned, since laytime was under the charterparty reversible and so allowed a total of 72 hours for loading (with which Petersons were not concerned at all) and discharging.

1. As soon as one has a situation where the laytime provisions may not coincide, problems arise about treating sale contract demurrage provisions as operating by way of indemnity in respect of charterparty liability.
2. Most importantly, the present sale contract demurrage clause (clause 11) clearly incorporates a rate, and no more.
3. Once it is concluded that the express words of the laytime and demurrage provisions do no more than refer to the charterparty rate, their natural reading and effect is as an independent obligation. So read, they have an understandable and acceptable rationale as a code containing an agreed approximation or pre-estimate of the loss which the sellers, Fal Oil, would be likely to suffer in the event of delay in discharging. There is no need to force them into category (a). We have not heard or been concerned with any suggestion that the present sale contract provisions were not, as and when agreed, a genuine pre-estimate of the seller's likely exposure."[229]

5.5. American Law

To discuss the legal role of laytime and demurrage clauses in the sale contracts under the American law, one of the appropriate originals is the published arbitral verdicts and discussions of the parties or arbitrators of the New York Society of Maritime Arbitrators (SMA). Under the USA law it is normal that the engaged parties choose the arbitration to decide about disputes which are related to laytime and demurrage clauses in the contracts of sale. The SMA includes approximately 110 experts in maritime arbitration field to unravel the disputes under the marine contract cases or some other fields of maritime law for instance bills of ladings or charterparties and so forth.[230]

[229] *Fal Oil Co. Ltd. v. Petronas Trading corporation* [2004] 2 Lloyd,s Rep. 160.

[230] Professor Jason Chuah, 2009, p. 171 & 183.- http://smany.org/

5.5.1. The efficacy of independency of the laytime and demurrage clauses in the sale contracts in determination of the eligible tribunal.

Before discussing the nature of the construction regarding the laytime and demurrage clauses in the law of USA, it seems that it is appropriate to discuss the American law method regarding the competency of the tribunals in laytime and demurrage cases under the sale contracts. Based on the USA legal system and pursuant to section 1331(1) of the 28 UCS, the competent legal authorities to deal with the "any civil case of admiralty or maritime jurisdiction ..." are the US Federal District courts. Regarding the laytime and demurrage clauses in the sale contracts, the question is that whether the Federal District Courts have the jurisdiction on the dispute or not. In other words the question is whether the sale contracts' disputes which include laytime and demurrage clauses can be handled under maritime disputes or not.

In *Aston Agro-Industrial v Star Grain Ltd*[231] the Star as buyer purchased a cargo of wheat from Aston the seller. In continue, two ships had been chartered by the sellers to transfer the wheat cargo to Egypt as the contractual destination. During the sea voyage the cargo was damaged by the sea water and as a result the Egyptian authorities did not permit the vessels to perform the unloading operation. On the other hand, the buyers abstained to let the vessels go back while they had not compensated for the damaged cargo. Consequently, the vessels had been forced to stay in port for about 60 days until the ship-owners paid the compensation for the damaged cargo in cash. The sellers claimed for demurrage under related clause in the sale contract in the (GAFTA) and the panel of (GAFTA) held that in this case the laytime and demurrage clause in the sale contract does not operate as an indemnity clause and in contrast this clause was interpreted as an independent clause. In continue the tribunal held that the demurrage was as a result of direct behavior of the Star which did not permit the ships to re-export the cargo. Sellers won the case and based on the judgement of the tribunal they got a maritime attachment order by a federal district court against the buyers. However, later this order was refused by the District Court of New York by virtue that the case was not a maritime related and could not be considered in the Federal District Courts. In addition, the District Court of New York added that the case was a commercial case according to the sale

[231] *Aston Agro-Industrial v Star Grain Ltd* (SDNY) 06 CV 2805 (GBD) 2006 U.s. Dist LEXIS 91636.

contract and it contradicts the arbitrators' opinion concerning the marine transportation agreement. In this sense the court held that:

> "... the specific clauses of the contracts that Aston enforced, the so-called 'demurrage clauses', do not explicitly contain any obligation on either party to compensate the other for demurrage owed to the vessel. Instead, these clauses merely set forth the rate at which any demurrage charge would be calculated should it occur."[232]

However, it was not mentioned in the judgement of the court what happens if the laytime and demurrage clauses in the sale contracts were considered as an indemnity clause and whether the federal district courts are qualified to deal with the case or not. The matter of competency is one of the important and complicated problems since the matter has a direct connection with the 'statute of limitation' of the disputes. In the cases which are related to the laytime and demurrage clauses in the sale contracts if the dispute is considered as a case under sale of goods, the statute of limitation for the claim will be four years while if the case is considered as a maritime claim the claimant will have six years period as statute of limitation.[233]

In the *In re Arbitration between Naftomar Shipping and Trading Co and Northern Liquid Fuels International and its successor, Enron Gas Liquids Inc,*[234] the dispute was related to the demurrage clause of the contract of sale. The demurrage clause was considered as an indemnity and based on it the defendant argued that the main goal of the contract is sale of goods and regardless the matter that the contract contains some clauses related to the carriage of cargo through the sea, it should be considered as a sale contract which lies under competency of the local state jurisdiction with four years period of the statute limitations. The panel of the SMA did not accept the discussions of the defendants and held that "the maritime aspects could be served from the non-maritime part of the sale contract; as such, as the dispute did not concern any of the FOB sale obligations, it would be treated as a maritime matter."[235]

Through the foregoing cases the following misunderstanding might be appeared; in the cases in which the laytime and demurrage clauses of the sale contracts are considered as an indemnity the case is under jurisdiction of the local courts, and on the contrary in the cases that the clauses are considered as independent clauses the federal district courts is competent

[232] GAFTA Arbitration No. 13-282. Fn. 59, at 12.
[233] Professor Jason Chuah, 2009, p. 185.
[234] *In re Arbitration between Naftomar Shipping and Trading Co and Northern Liquid Fuels International and its successor, Enron Gas Liquids Inc* SMA Award No. 2997; 2 August 1993.
[235] Professor Jason Chuah, 2009, p. 185.

to deal with the matter. The *People's Democratic Republic of Yemen v Goodpasture Inc*[236] can be helpful to eliminate this misunderstanding and clarify the discussion. In this case, the claim of Yemen regarding the deadfreight, detention, etc was observed as a claim based on the contract of the sale and under the jurisdiction of the local state courts, also a matter for statute of limitations of the New York local courts. But the primitive award was overruled in the second stage and it was held that the claim is an independent claim and not indemnity one under the jurisdiction of the federal maritime courts. The very important and instrumental part of the award was held that even if the matter was categorised under an indemnity issue, the federal maritime courts would be competent to deal with the case.[237]

The other matter respecting the competency of the arbitration was in *The Sideri*[238]. In this case the argument was about the consolidation and alliance of all of the existed disputes of the engaged parties including between the owner and charterer in one side, and between the seller and buyer on the other side in only one arbitration. Indeed the question was that whether the consolidation of all disputes in only one arbitration is legally justified in both cases of the indemnity and independency of the sale contracts' laytime and demurrage clauses or it is only justified regarding the case of indemnity. To conclude the discussion and get a practical result, words of professor Chuah are instrumental:

"It might thus be concluded that the fact that the laytime and demurrage clause is a free-standing provision, consolidation would still be granted where the interest of justice requires it."[239]

5.5.2. The substantive dealing with the case and assumption of separateness

After foregoing discussions which are more related to the law of procedure in the USA legal system, the next step to introduce the method based on which the American legal system engages in the laytime and demurrage clauses in sale contracts is about the substantive proceeding of the arbitrations.

[236] *People's Democratic Republic of Yemen v Goodpasture Inc* (2d Cir 1986) 782 F 2d. 346.
[237] Professor Jason Chuah, 2009, p. 186.
[238] *The Sideri*, (1982) No. 81 Civ 7468 (WCC), (SDNY 1982) U.S. Dist LEXIS 9333, 4 February 1982.
[239] Professor Jason Chuah, 2009, p. 186.

Regardless the distinguished characteristics of every sale contract and charterparty, the USA arbitration system inclines to the presumption of the separateness between the sale contract and charterparty. To complete the above issue it is notable that the tendency of the US arbitration system is consideration of presumption of the separateness between the sale contracts and charterparties and also between sale contracts or charterparties and various contracts which are concluded around them.[240] In the *In re arbitration between Interpetrol Bermuda Ltd and Transworld Oil Ltd (The M/T Atland and The M/t Phillips Oklahama)*[241] there were three different and contradictory contracts which each of them contained provisions and terms about the laytime and demurrage clauses. The first contract was a FOB sale contract between the seller and their supplier, the next contract was another FOB sale contract with the same terms and provisions between the seller and buyer, and finally a charterparty which was concluded between the buyer and ship-owner. The panel of arbitration rejected to suppose the two FOB sale contracts as back to back agreements and award of the panel only was restricted to the sale contract between seller and buyer.

In the *In re Arbitration between Lineas Maritimas de Santo Domingo and Gulf & Western Industries Central Romana Corp (The MV Virginia)*[242] which is a sale contract case, the charterparty was concluded by the seller, the panel emphasised on the separateness of the contract of sale and charterpary holding that the charterer is liable for the demurrage based on the charterparty and this liability is not forgivable due to the failure of the receiver under the provisions of the contract of sale. In continue, the panel of arbitration concluded the discussion as following: "whatever obligations exist between those parties must necessarily arise out of their sales agreement and the understandings reached therein".[243]

Words of professor Chuah in question are useful to give a comprehensive Pluralisation regarding the two foregoing cases:

> "It may have to do with the fact that although a high degree of cooperation was expected, the contracts should be treated as separate and independent of each other and the terms of the charterparty could

[240] Ibid, p. 186.
[241] In re arbitration between Interpetrol Bermuda Ltd and Transworld Oil Ltd (The M/T Atland and The M/t Phillips Oklahama) SMA Award No. 2217 ; 19 July 1985.
[242] *In re Arbitration between Lineas Maritimas de Santo Domingo and Gulf & Western Industries Central Romana Corp (The MV Virginia)* SMA award No. 1387; 21 November 1979.
[243] Ibid, p. 8 of the lexisnexis report.

> not be assumed to apply to the sale contract, and *vice versa,* without explicit words to that effect."[244]

The independence of the sale contract's laytime and demurrage clauses from the charterparty and their separateness besides the necessity of the clear and expressed terms for turning of the independency to the indemnity clause were emphasised in various cases of GAFTA tribunals. This subject is clear in the words of GAFTA tribunal in the *Aston*:[245]

> "It is generally *accepted in the trade* that parties to a sale for shipment in the sales terms may deviate from the terms of the underlying charterparty. In the Tribunal's experience the sale discharge provisions *usually* are independent of the charterpart."[246]

> "Alternatively the seller, also not themselves charterers, might have contracted to buy the goods from others who were charterers, on the terms similar to those in the contract notes. A further possibility, of course, is that the sellers were not liable to anybody for demurrage, and merely wished to make an adventitious profit from their contract with the buyers."[247]

It is important to mention that there is not an international and comprehensive clear criterion and framework for inserting the laytime and demurrage clauses into the international sale contracts. Though, the way these clauses are drafted has a very important role in their interpretation.[248]

As it was mentioned, in the American legal system to consider the laytime and demurrage clauses in sale contract as an indemnity, the expressed and obvious words are necessary. This concept was emphasised by the GAFTA tribunal:

> "The distinction normally would depend on how much of the original charterparties laytime provisions were imported into the sale contract. If laytime can properly be calculated without reference to the charterparty laytime provisions the sales terms must take precedent."[249]

[244] Professor Jason Chuah, 2009, p. 187.
[245] *Aston,* SMA award No. 1387; 21 November 1979. lexisnexis report, fn. 59.
[246] Emphasis added, the GAFTA Opinion at 16.
[247] Ibid, at 17.
[248] Professor Emeritus D. Rhidian Thomas, p. 6.
[249] Emphasis added, the GAFTA Opinion at 16.

Chapter 6

6. Conclusion

First of all it is notable that one of the major and practical goals of the law is identifying the responsibilities for the parties engaged in a legal issue and the point or the moment in which one party gets through with the responsibility and passes it to the other engaged party. In this work it is tried to study the foregoing matter in relation with the laytime, arrived ship, and notice of readiness. In addition different types of the laytime and its exceptions which have direct influence on the responsibility of the parties, are discussed. As it was mentioned before, the charterparty is not the sole document which adjusts the legal relationship and responsibilities of the engaged parties in a voyage charterparty. In the last part of the work the role of laytime and demurrage clauses in the sale contracts and their interpretation in the parties' legal relationship in the American and English legal systems have been researched.

In charterparty contracts every voyage consists of different stages which in each of them the risk is designated to charterer or ship-owner respecting that stage. Lord Diplock in *EL*

Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)[250] devided the voyage charterparty into four different stages:

1. The loading voyage in which the vessel is on her journey to the contractual place for loading.
2. The loading of the cargo to the vessel in the contractual place.
3. The carrying voyage in which the vessel leaves the loading port and is on her voyage toward the port of discharge.
4. Discharging operation in which the cargo is discharged from the vessel to the contractual place.

In stages 1 and 3 the responsibility just lies on the ship-owner while in the stage 2 and 4 the ship-owner and charterer have joint responsibility. The important point is that every former stage is the prerequisite of the latter stage and while the former stage is not completed the latter cannot started.

So, based on the above mentioned stages for commencement of the laytime, fulfilment of three requirements is vital for the chartered vessel: The vessel has been arrived, the ship being ready to load or discharge the cargo and the notice of readiness to load or discharge is tendered.

At first level, to consider the concept of arrived ship it is important to mention that there are three different major forms of charterparties including: berth, dock and port charterparties in which the vessel is considered as an arrived ship according to different contractual destinations. Also, the time and place in which the risk of delay is passed from the ship-owner to the charterer, based on the definition of contractual destinations, is different in each of the foregoing charterparty forms. Normally, The risk of delay lies on the ship-owner before reaching of the vessel to the contractual destination except some special conditions like the (WIBON) or (WIPON) clauses that based on them parties agree in other way. The controversial discussion regards the identifying and definition of ‘destination’.

Irrespective some problems which might be existed in drafting of the berth charterpartyies that may lead to some controversy about the type of the charter which may be resolved by the clear wordings, it seems that at the sense of the berth charters practically there are sprinkling problems since there is a fairly clear definition of the term ‘berth’. It is notable that before vessel reaches the contractual destination the risk of delay lies on the ship-owner and even if

[250] *EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1973] 2 Lloyd's Rep. 285.

the delay is because of the congestion, bad weather and so on, the ship-owner remains as the responsible of the risk.

Regarding the dock charterparty, since docks usually have their clear zones and entrance, it is not really difficult to determine that the ship is inside the dock or not, then she can be considered as an arrived ship or not. Thus, this characteristic simplifies the distinguishing of the matters related to responsibility of delay. Indeed, as soon as the vessel enters the dock, the responsibility of delay is passed from the owner to the charterer.

The problematic types of charterparties are the port charterparties that tribunals still have problem and are uncertain in finding a definition for the port area to give a clear criterion to the people who are engaged. In *Leonis v. Rank*[251] The Court of Appeal identified the vessel as an arrived ship because she was within the commercial area of the port and at the disposition of the charterers. In this case the court only considered the commercial aspect of port to award its verdict. Though, definition of the commercial area of the ports is such a difficult matter especially according to the expansion of the ports. The commercial area test applied in the *Aello*[252] 52 years later. However, the *Aello*[253] led to more uncertainties because of the broad definition of the commercial area in this case. The problems and uncertainties of the commercial area test were shown in the *Delian Spirit*[254] too. Thus, the Reid test was examined to modify the position of law and to get an exact position regarding the definition of port in the *Johanna Oldendorff*[255] based on which the most important item for an arrived ship is reaching a position within a port where she is at the immediate and effective disposition of the charterer. In this concept the geographical position of the ship has the secondary importance. The ship would be at the immediate and effective disposition of the charterer if she is within the port at the place where ships usually anchor or lie as waiting place unless the charterer proves the adverse.

Though, In *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)*[256] it was held that to consider the vessel as an arrived ship it is necessary that she exists within the port zone and the physical presence of the vessel in the normal waiting place

[251] *Leonis v. Rank* [1907] 1 K.B. 344.
[252] *Aello, Aello* [1960] Loyd's Rep. 623.
[253] Ibid.
[254] *Delian Spirit* [1971] 1 Lloyd's Rep. 506.
[255] *EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff)* [1973] 2 Lloyd's Rep. 285.
[256] *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1977] 2 Lloyd's Rep. 301.

is not sufficient to fulfil the concept of arrived ship. In fact the *Maratha Envoy* was a dissatisfactory for the people who tried to expand the Reid test into the usual waiting places which were out of the port limits. It seems that in contrast with the Lord Diplock, the Reid test faced practical problems since it could not suggest a clear definition of the point in which the risk of delay is passed from the ship-owner to the charterer.

To sum up this part, it is sufficient to have a clear definition of the port area to recognise the exact point of passing the risk of delay. In this respect the viewpoint of the business people who are engaged practically in the matter is very important. In addition, some other items like legal, geographical, fiscal, administrative and so on can play roles to identify the port area. However, according to the different situations of various ports each of the above mentioned items might be considered according to the specific conditions of any port.

As it was mentioned, the second item which is necessary for commencement of laytime is readiness of the vessel for loading or discharging operation. Indeed, the readiness or un-readiness, tendering a valid or invalid notice of readiness and turning an invalid notice to a valid one are engaged with time and money and consequently have direct connection with the responsibility for damages and risks. As a result, preparing the vessel in order to tender the notice of readiness has a significant role in the relationship of the owner and charterer. Since the laytime does not start to run without a valid notice of readiness, this issue might lead to the inability of the owner in claiming for demurrage in one hand and the charterer's claim for the despatch on the other hand.

The concept of readiness of the vessel is divided in to two fields: legal and physical. Based on this division, 1) the ship must get the whole documentation which are legally necessary for the vessel, 2) be physically clean in all places which are specified for the cargo, 3) loading and discharging equipment of the vessel must be ready to perform the loading or discharging operation in order to be considered as a ready ship. As a part of legal readiness the vessel has to get the *free prarique* licence to be presumed as a ready vessel. In fact, this document is the health certification which is granted by the port authorities to allow the people onboard to have physical contact with the shore. If a vessel is suspected to carry a contagious disease, she will be detained in strict isolation to prevent the spread of the illness; this situation is named as *quarantine.*

The notable subject is that different ports or countries may apply various regulations concerning the documentation or certification of the vessel which ship-owners must be aware

of them and make the ships ready according to these provisions. Also, in some cases it is necessary to respect the high degree of cleanness for a special cargo based on the contract or sea transportation customs. As a final word regardless of legal definition of readiness, it is inevitable to analyze this concept through the case law, contractual terms and sea transportation customs. Moreover, a combination of these issues helps us to crystallize the subject.

The third requirement for commencement of laytime is tendering the notice of readiness. As one of the common law provisions under voyage charter, charterers must have awareness of the readiness and arrival of the chartered vessel at the loading port. The reason is that while the charterer has not been informed from the fulfilment of other party's legal obligations, he cannot start his legal duties. Indeed the prerequisite of starting the legal obligations of the charterer is his awareness of the fulfilment of ship-owner's legal duties like arrival or readiness of the vessel; this matter is possible through notice of readiness. Generally, there are two types of giving notice of readiness: the first method is tendering the notice under the provisions of common law based on which at the time when the charter is silent about giving the notice, the general rules of common law govern the matter, and the second method is the situation which the charter contains expressed provisions about tendering the notice of readiness. Regardless the differences of the foregoing methods with each other in procedure, the main requirements have to be fulfilled similarly in both methods: 1. The ship can be considered as an arrived ship and stands in such a position, as it was discussed regarding the concept of arrived ship in different types of charters, where is entitled to give the notice. 2. At the time of giving the notice, the location of the vessel should be in an available position to load or discharge in full sense. It is important to bear in mind that in the case the notice of readiness is not required based on the charter or is not tendered by the owner, it is on the shoulders of the owner to show that the charterer had been informed about arrival and readiness of the vessel.

For tendering a valid notice of readiness, as it was mentioned, fulfilment of two requirements including arrival and readiness of the vessel are essential, unless the notice will be a null and invalid one. Even if in the charter it is stipulated that the vessel will be ready in the future, the invalid notice cannot be validated as we can study through the cases like *Mexico I*[257] and *Agamemnon.*[258]. However, *the Happy Day*[259] with introducing a new doctrine as the 'waiver

[257] *Mexico I* [1990] 1 L1 L Rep 507 (CA).
[258] *Agamemnon* [1998] 1 Lloyd's Rep 675.

doctrine' inserted an exemption to the foregoing legal principle and allowed the subsequent validating of invalid notices under some special circumstances. The brief legal conclusion of *the Happy Day*[260] is:

a. The judgement of *The Happy Day* case is only acceptable in the circumstances which the invalidity of the notice of readiness is because of tendering the notice before arrival of the vessel to the contractual geographical point. Indeed, this judgement is not applicable in other conditions in which the notice of readiness is not valid.
b. The notice of readiness which is valid regarding its form must be given to the party or person who is qualified based on charter to receive such notice.
c. The notice can be transferred as a received notice but not as a rejected one. It is important that in such circumstances a party who has received the notice be aware of the results of his decision and what he can do regarding such notice.
d. In waiver doctrine one of the most important matters is the legal capacity and authority of the person who waives the invalid notice. Sometimes, in courts or arbitrations, the agent of the charterer or receiver has the implied capacity not only for receiving the notice but also for the wave of it.
e. Based on the waiver doctrine the invalid notice turns to valid one at starting of the loading or discharging operation which in fact coincide with the commencement of laytime regarding the provisions which are stipulated in the charter.

It is really important to mention that the discussion about subsequent validating of the notice of readiness regards the charters which contain some special and expressed provisions respecting notice of readiness. In the cases in which there is no provisions to tender the notice of readiness, tendering the subsequent notice is governed by common law and it is a different subject. By this I mean that at the time of awareness of the charterer from the readiness and arrival of the vessel, there is no requirement to give the notice. It does not mean that an invalid notice could be turned to a valid and effective one, but in fact it means that generally there is no necessity for tendering the notice since the charterers are aware of the arrival and readiness of the vessel.

After discussing the fulfillment of necessary conditions for commencement of laytime, it is suitable to conclude the different aspects and exceptions of the laytime and discuss despatch

[259] *Glencore Grain Ltd* v. *Flacker Shipping Ltd (The Happy Day)* [2001] 1 Lloyd's Rep 754.
[260] *Ibid.*

and demurrage. Generally there are two different types of laytime: 1. Fixed laytime based on which it is the duty of the charterer to load or discharge within a fixed period of time. It is notable that to calculate the amount of laytime, usually different units of time or rate of working cargo are stipulated in the charter which some of them are: calendar days, conventional days, running days, working days, weather permitting and weather working days. Sometimes under a fixed laytime, parties use provisions to calculate laytime based on some methods like 'workable hatch' per day. The term 'workable hatch' means that the hatch is completely ready and available and equipped to load or discharge cargo. 2. If the parties of a charter do not have any agreement regarding the time which is necessary for loading or discharging of the vessel or in the charterparty the terms like 'liner terms' or 'customary despatch' are used to calculate the laytime, this contract will be a customary laytime contract and a reasonable time must be considered to load or discharge the vessel. The term 'reasonable' time was discussed in various cases which remind us the point that the courts have tendered orders in disputes regarding the meaning of the reasonable time according to special conditions of each case. In some of them the ordinary state of ports was considered while in the others the ability and attempts of the charterers or consignees were regarded. Moreover, in other latter cases the authorities held that "reasonable must be reasonable under all the circumstances of the case".[261]

In the idea of the author it seems that because the charterparty is a private agreement between the ship-owner and charterer, at first stage it should be considered that charterer has fulfilled his obligations to load or discharge the vessel or not. In fact it is important to be proved that the charterer has attempted to fulfil loading or discharging operations in a reasonable time with all of his capacity. When the question is answered and it is cleared that the charterer has tried with whole of his ability, in second stage the ordinary circumstances of the port or other engaged matters can be considered.

In the next step, laytime exceptions which are divided into two different categories are discussed. 1. General exception clauses 2. Specified exception clauses which can include the events like: fault of the ship-owner, adverse weather and some other weather conditions like ice, surf, swell, holidays, strikes, shifting and lightening.

After the foregoing discussions regarding laytime and the matters related to this concept, it is notable that if the charterer cannot complete the loading or discharging operation within the agreed laytime, he shall pay demurrage to the owner as a liquidated damage. At common law,

[261] *C A Van Liewen* v. *Hollis Bros (The Lizzie)* (1919) 25 CC 83, at p. 87 *per* Lord Dunedin.

the nature of demurrage is a contract concluded to identify a type of financial penalty which is on the shoulders of the charterer because he has been unable to fulfil his obligations based on the contract. The rate of demurrage has a direct link with the rate of freight, so the owner can balance his financial matters at the time of demurrage same as the time his ship operates financially and earns money as freight. The charterer's responsibility to pay the demurrage starts at the moment in which the laytime period is expired and will run durably even through the excluded periods of laytime like holidays and Sundays and bad weather working days. Consequently, the exceptions which stipulated in the charter for laytime period are not applicable in the period of demurrage, unless expressly stipulated in the charter. In addition, based on the general legal principles it is obvious that when the delay is caused by the fault of the ship-owner the demurrage will not take place. Though, the demurrage will take place when the delay is caused neither by the fault of the owner nor charterer. On the other hand, Since completing the loading or discharging operation before the contractual time is beneficial for the ship-owner, to operate her vessel under other contracts, the charters usually contain a clause based on which the charterer is entitled to a reward under the title of despatch when he can complete the loading or unloading operation sooner than than stipulated time. The notable point is that regarding different constructions of the clauses there are some conflicts in interpretation of the clauses like 'despatch is payable for all time saved' or 'despatch is payable for laytime saved'. This matter led to a discussion that the despatch is payable only for the saved laytime or it comprises the excluded times too. Though, there are different cases in this concept with their own characteristics which makes it difficult to get a comprehensive answer. It seems that the way applied regarding the despatch is similar to the payment method in demurrage, so all excluded laytime days are payable under the concept of despatch.

Respecting chapter five of this work, inserting the laytime and demurrage clauses is a usual matter in the sale contracts especially international sale contracts. The problem of these kinds of clauses is regarding their construction, since these clauses are inserted to the sale contracts very concise, compendious and usually with no background definition, so this matters lead to some problems in finding the appropriate interpretation for the foregoing clauses. Indeed, the question is that whether the laytime and demurrage clauses in the sale contracts play the role of indemnity for the party who is responsible to pay the demurrage based on the charterparty or on the other hand they operate as independent clauses of the voyage charterparty. To clarify this question English legal system and American arbitration system are studied in chapter five as two major legal regimes. It seems that both regimes with some small

differences have the same approach regarding the matter. Through studying the awards which were sentenced from the courts and arbitrations of the mentioned regimes it is obvious that both systems tend to presume the independency of the laytime and demurrage clauses in the sale contracts. Though, the American law has a strict position respecting the matter. Although, it is not abnormal that the layitme and demurrage clauses of the sale contracts refer to the charterparties, these two contracts (charterparty and contract of sale) are independent and has to be deal with as separate agreements unless the clear words emphasise on applying laytime and demurrage clauses in the sale contract as indemnity. As it was mentioned this tendency to interpret the laytime and demurrage clauses in sale contracts as independent clauses is more powerful in the USA cases in comparison with the English cases.

At the end of this work it is notable that the law of laytime, demurrage and the related issues are not abstract matters which can be determined through the idea of scholars or related cases in the tribunals. Notably, if the outputs of tribunals are not based on the practical matters and real needs of the business and shipping engaged people as we can see in some cases for instance *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)*[262], these outputs will not be approvable from the side of the universal shipping society. In fact the law of laytime and demurrage as a dynamic and alive law needs the cooperation of the scholars, judges and the people who are engaged in the shipping business like ship-owners and businessmen, to cover the gaps and insufficiencies of the laytime and demurrage law in a practical and proper way.

[262] *Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1977] 2 Lloyd's Rep. 301.

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