

REQUIREMENTS OF TIMELY PERFORMANCE IN  
TIME AND VOYAGE CHARTERPARTIES  
- AN EXPLORATION OF THEIR  
IDENTITY, SCOPE AND LIMITATIONS UNDER ENGLISH LAW

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**Abstract**

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*By Tamaraudoubra Tom Egbe*

The importance of time in the performance of contractual obligations under sea carriage of goods arrangements are until now little explored. For the avoidance of breach, certain obligations and responsibilities of the parties to the contract need to be performed promptly. Ocean transport is an expensive venture and a shipowner could suffer considerable financial losses if an unnecessary but serious delay interrupt the vessel's earning power in the course of the charterer's performance of his contractual obligation. On the other hand, a charterer could also incur a substantial loss if arrangements for the shipment and receipt of cargo fail to go according to plan as a result of the shipowner's failure to perform his charterparty obligation timely and with reasonable diligence. With these considerations in mind, this thesis critically explores the concept of timely performance in the discharge of the contractual obligations of parties to a contract of carriage. While the thesis is not an expository of the occurrence of time in all the obligations of parties to the carriage contract, it focusses particularly on the identity, scope, and limitations of timeliness in the context of timely payment of hire, laytime and reasonable despatch. The thesis argues that, the applicable legal rules and principles regarding timeliness in the above contexts are obsolete, outdated and not fit for 21<sup>st</sup> century shipping practice. The applicable rules cannot continue to ignore the impact and influence which technological advancement has had in shipping practice. The thesis considers what reforms could and should be adopted in English law as to the appropriate approach to questions of timeliness in time and voyage charterparties. The issues engaged in the discussion are mainly from the perspective of the rules and principles extracted from decided cases under English law, but significant attention is accorded valuable position in the United States.

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## Table of Abbreviations

|       |   |
|-------|---|
| AC    | Appeal Cases                                    |
| AMC   | American Maritime Cases                         |
| Bing. | Bingham   |
| Burr. | Burrow's King's Bench Reports tempore Mansfield |
| Camp. | Campbell's Nisi Prius Cases                     |
| Ch.   | Law Reports, Chancery Division                  |
| CLC   | Commercial Law Cases                            |
| Cowp. | Cowper's King's Bench Reports                   |
| JBL   | Journal of Business Law                         |
| KB    | King's Bench                                    |
| LMCLQ | Lloyd's Maritime and Commercial Law Quarterly   |
| LRCP  | Law Reports, Common Pleas                       |
| NCB   | National Cargo Bureau                           |
| NCBC  | National Cargo Bureau Certificate               |
| NOR   | Notice of Readiness                             |
| QBD   | Queen's Bench Division                          |
| SDNY  | Southern District of New York                   |
| SMA   | Society of Maritime Arbitrators                 |
| TLR   | Times Law Report                                |
| USDA  | United States Department of Agriculture         |
| WIBON | Whether in Berth or Not                         |
| WIPON | Whether in Port or Not                          |
| WLR   | Weekly Law Reports                              |

# Chapter 1

## General Introduction

### 1.1 Background Context

Timely performance of contractual obligations is an important component of contracts of all kinds, particularly carriage of goods by sea contracts. Each party promises not only to perform his side of the bargain but expects the other to perform his obligation in a timely manner to achieve the purpose of the contract. Accordingly, where performance by either party occurs in a less than timely manner, this would encumber the other party from deriving fully, the expected benefits of the contract. The timely performance of contractual obligations is itself based on some level of trust placed on an express or implied promise by parties to fulfil their respective obligations which naturally flows from the structure of the contract. Arising from the fact that carriage of goods operations involve a wide variety of maritime persons<sup>1</sup> from different backgrounds and different expectations some of which were not contemplated during negotiations and other developments not anticipated that may occur as the contract progresses, parties often find that it is much easier to make a promise than keep it. Thus, delay in performance of contractual obligations by parties is a common challenge in carriage of goods contracts. In the context of carriage of goods by sea, the prompt performance of certain obligations and responsibilities is premised on the fact that time is of primary importance.<sup>2</sup>

The financial implications of not performing contractual obligations timely can be monumental. Since ocean transport are expensive to finance and run, a shipowner would suffer significant financial losses if the vessel's earning capacity is interrupted by the occurrence of an unnecessary but serious delay in the performance of obligations by the charterer. The charterer is not any different as he would suffer substantial loss in the event that already made arrangements for the shipment and receipt of cargo are disrupted due to a shipowner's failure to perform his contractual obligation timely and

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<sup>1</sup> These maritime persons may include but are not limited to the following: the shipper, the seller, the shipowner, etc.

<sup>2</sup> *Compania De Navigacion Zita SA v. Louis Dreyfus & Compagnie* [1953] 1 WLR 1399, 1401.



diligently. Therefore, the timely performance of contractual obligations is of primary importance to contractual parties.

Generally, the occurrence of delay in performance of contractual obligations has often given rise to problems. One of the challenges peculiar to the issue of delay is that it may be categorised in so many different ways, all of which may turn up different remedies.<sup>3</sup> The occurrence of a delay may lead to a breach of contract, such that the right of the innocent party to claim damages is often guaranteed<sup>4</sup> but the exercise of his right to terminate will largely depend on whether the breach is a sufficiently serious one.<sup>5</sup> However, in circumstances<sup>6</sup> where the delay gives rise to a failure of a condition precedent, an innocent party can refuse performance but would have lost his right to damages in the process.<sup>7</sup> Arguably, the disentitlement of the innocent party's right to damages in present circumstances is by no means exhaustive. The right of an innocent party to refuse performance and claim damages when faced with a failure in performance of a condition precedent can co-exist. To illustrate, a hirer under a hire-purchase agreement who fails to meet his commitment regarding the payment of the hire purchase price in circumstances which amount to a wrongful repudiation and therefore vests on the owner the right to terminate. If the owner does terminate, the hirer remains liable for instalments which had fallen due before termination and damages which stem from his wrongful repudiation of the contract.<sup>8</sup>

In other circumstances, the occurrence of a delay giving rise to a breach may be a breach of a condition<sup>9</sup> or some other breach going to the root of the contract,<sup>10</sup> which vests on the innocent party, the right to both terminate performance and claim damages.<sup>11</sup>

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<sup>3</sup> John E Stannard, *Delay in the Performance of Contractual Obligations* (OUP 2007) Para 6.01.

<sup>4</sup> *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Rlys of London Ltd* [1912] AC 673, 689 [HL]; *Robinson v Harman* (1848) 154 ER 363, 365; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas. 25, 39 [HL]. Recovery of Damages may be stunted if the time for performance of the obligation has not passed or on occasions where there is a lawful excuse for the failure in performance. For example, the existence of an exemption clause, waiver or estoppel. See *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391.

<sup>5</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

<sup>6</sup> For example, unilateral contracts.

<sup>7</sup> John E Stannard (n3) Para 6.01. See also *Busk v Spence* (1815) 4 Camp 329; 171 ER 105.

<sup>8</sup> Edwin Peel, *Treitel the Law of Contract* (14<sup>th</sup> Edn, Sweet & Maxwell 2015) para 18-020.

<sup>9</sup> Sale of Goods Act 1979, s 11(3); *Moshi v Lep Air Services Ltd* [1973] AC 331, 349-350 [HL].

<sup>10</sup> *Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 66

<sup>11</sup> *Ibid* 66.

However, a determination of whether a breach goes to the root of the contract so as to vest on the innocent party a right to terminate is often challenging. Such a determination often involves a 'multi-factorial assessment',<sup>12</sup> an exercise that has been subjected to differing interpretations. The remedies available to the innocent party may also include a recovery of damages or in more serious cases the innocent party may refuse performance, or even terminate or rescind the contract.

In a charterparty context, delay in performance may occur in different forms ranging from vicissitudes of the sea to congestion at either the load/discharge port or the unavailability of cargo or the inability of the vessel to load as per the agreed time or even circumstances beyond the control of either party to the contract like bad weather. Arguably, the circumstances that may lead to delay in performance of contractual obligations are almost infinite. Almost without exception the basic questions to be addressed when a time clause is under scrutiny is the same: has the time stipulation been met?<sup>13</sup> If not, who or what was responsible for the delay?<sup>14</sup> What were the consequences for the parties?<sup>15</sup> Is the contract discharged and, if so at what point and with what result? And, perhaps most importantly who should pay?<sup>16</sup>

The various approaches the courts have adopted or attempted to work out in addressing problems dealing with the timely performance of an obligation have often been inconsistent, chaotic and in some cases archaic. The applicable legal rules and principles adopted by English courts are obsolete, outdated and unfit for modern day shipping practice. The applicable rules cannot continue to ignore the impact and influence of technological advancement in ocean transport.<sup>17</sup> Consequently, it is the aim of this thesis to critically appraise and proffer solutions to those grey areas which have over the years led to controversy with attendant negative consequences to parties. As an example, it has often been unclear what the status of a timely payment of hire term

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<sup>12</sup> *Valilas v Januzaj* [2015] 1 All ER 1047[53] (Comm). See also *Telford Homes (Creekside) Limited v Ampurius Nu Homes Holdings Limited* [2013] 4 All E.R. 377[50]; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61[54].

<sup>13</sup> See generally Mark Lawson, 'Performance on Time: an Essential Condition?' [1990] *International Company and Commercial Law Review* 20.

<sup>14</sup> *Ibid* 20.

<sup>15</sup> *Ibid* 20.

<sup>16</sup> *Ibid* 20.

<sup>17</sup> Discussed in large detail in chapters 3, 4 and 5 of this thesis.

under a time charter is.<sup>18</sup> The courts have over the years struggled to decide whether such a term should be regarded as a condition of the contract or an innominate term. Although, a recent court of appeal decision<sup>19</sup> has shed light on the proper approach to adopt, the issue is not free from controversy.

Arguably, it is trite that an essential attribute of any law is that it should be clear, precise and capable of human comprehension.<sup>20</sup> Vagueness and incoherence not so much since that can only cause confusion and lead to devastating consequences for parties to the charterparty who have invested a lot financially towards the commercial venture. In addition, English law continues to play a pivotal role in the area of shipping law such that, it is usually the first point of reference for other major maritime nations. Therefore, if English law is to continue to maintain its status as one of the leading voices in commercial law circles, then the 'law must be clear, coherent and capable of rational presentation.'<sup>21</sup> It is this goal that this thesis seeks to achieve. The law regarding timely performance of contractual obligations in a carriage of goods by sea context has been vague, indeterminate and until now little explored. As a result, it is the sole objective of this thesis to restore some needed clarity to the law of timeliness.

It must be noted that in commercial matters, two things are of considerable importance: the rights and obligations of the parties to the contract on the one hand, and the remedies which attach to a wrongful failure to observe those contractual rights and obligations on the other. This thesis is not an expository of all the rights and obligations of parties to the carriage contract. It is only concerned with a category of obligations and rights in which the overarching requirement is timeliness as well as the remedies that follow from a breach of these. The thesis also serves to illuminate areas of controversy dealing with timeliness like, when is a vessel an arrived ship? What is the scope and meaning of readiness of a vessel? What is the effect of an unjustified deviation? Ultimately, this thesis is concerned with problems that may arise in

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<sup>18</sup> See *Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd* [2016] EWCA Civ. 982; [2017] 2 CLC 441. [CA] Cf. *Kuwait Rocks Co. v AMN Bulk Carriers Inc.* [2013] EWHC 865; [2013] 1 CLC 819. [Comm]

<sup>18</sup> [1980] AC 827.

<sup>19</sup> *Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd* [2016] EWCA Civ. 982; [2017] 2 CLC 441. [CA].

<sup>20</sup> John E Stannard (n3) v.

<sup>21</sup> Ibid.

construing obligations dealing with time as well as the courts attitudes in addressing these perceived problems.

The contexts which would dominate this thesis include: timely payment of hire under a time charter, issues involving the commencement of laytime and deviation. As earlier stated, it is the natural expectation by all parties that obligations under the contract are performed in a timely manner so as to fully achieve the purpose of the contract. However, what constitutes timely performance whether in the light of payment of the hire, arrival of the vessel, readiness to load/discharge, issuance of NOR, duty to proceed with reasonable dispatch and even the matter of delays, which is not clearly defined under the current state of the law is what the thesis seeks to address.

## **1.2 Research Objectives**

The objective of this thesis is threefold. The thesis is aimed at identifying and delimiting the scope of implied obligations of contractual parties having a time element. It also critically analyses the requirement of timeliness in the performance of these contractual obligations. Where necessary, the thesis would advance the need for reform in the current approach adopted under English law regarding time clauses.

## **1.3 Research Questions**

A variety of issues are readily apparent when addressing the issue of timeliness in a carriage of goods by sea context. The field of law in this area is rather complex and puzzling as the case law has over time developed in significant aspects but are not always consistent<sup>22</sup> which makes it evident that there is still room for clarification of the law. The time clauses which form the cornerstone of this thesis are the obligation to pay hire timely, laytime and deviation.

The issue of timeliness is a crucial component of the obligation to pay hire on time. When a charterer fails to meet this important obligation, the controversy often turns on what is the effect of such a breach? Does it give rise to a repudiation of the contract? Or should the repudiation of the contract be dependent on the seriousness of the breach? If the latter question is answered affirmatively, what criteria determines the level of

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<sup>22</sup> *Urban 1 (Blonk Street) Ltd v Ayres* [2013] EWCA Civ. 816; [2014] 1 WLR 756[43].

seriousness, sufficient enough to trigger the right of the shipowner to terminate for serious breach? This latter question is not easily discernible in view of the varying language adopted by the courts in expressing the test for serious breach.<sup>23</sup>

A second question which this thesis seeks to address is the 'arrived ship' conundrum. In other words, the thesis seeks to provide answer to the question 'at what material time can a vessel be considered an arrived ship under English law? Under English law, a vessel's arrival at the port has over the years necessitated much controversy. The approach adopted under English law is to treat a vessel as having arrived having arrived when it arrives at the usual waiting place where vessels lie *within the port* and is in the immediate and effective disposition of the charterer.<sup>24</sup> This thesis challenges the prevalence of this view, particularly its continued relevance in light of the current influence of technological advancement in ocean transport.

Other related issues involved in a consideration of the 'arrived ship' dilemma involves readiness of the vessel in a laytime context. A fundamental requirement for a vessel to be treated as an arrived ship is that the vessel must be in a state of readiness to either load or discharge. This thesis seeks to address the question regarding the scope of the obligation of the shipowner to make the vessel ready. Put differently, what is the scope and meaning of readiness in the context of arrival of the vessel at the port under a voyage charter? The various approaches adopted by the courts in a determination of the above question has been inconsistent and far from satisfactory. The courts have been torn between a narrow interpretation to the question of readiness and a more liberal interpretation. Under English law, at least the former approach appears to be winning the battle. Should the English law be reformed to reflect a more liberal approach?

Even after fulfilling the requirement of readiness, the shipowner is faced with yet another hurdle: communicating the vessel's state of readiness to the charterer, so as to trigger the commencement of laytime. The importance of this requirement is self-evident since without due notification, it is impossible for the charterer to be informed of the vessel's readiness so the loading or discharge of the vessel can commence in

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<sup>23</sup> Neil Andrews puts it at 7 tests. See Neil Andrews, 'Breach of Contract: a Plea for Clarity and Discipline' [2018] LQR 117, 128.

<sup>24</sup> *The Johanna Oldendorff* [1974] AC 479 [HL].

earnest. This thesis considers the status of an inchoate NOR as a contractual device for the trigger of laytime? It also considers the question regarding the commencement of laytime where an invalid notice is tendered and the charterer remains passive, doing nothing except commencing cargo operations. In such circumstances would it be necessary to issue fresh notices or would it suffice if the trigger of laytime attaches with the commencement of cargo operations?

Lastly, this thesis addresses the age-old problem of deviation from the agreed route under a contract of carriage. Divergent views exist regarding the scope and effect of a deviation for contractual parties. More to the point, there is a lack of clarity regarding the scope of the obligation to deviate from the carriage contract. Therefore this thesis considers the question whether the deviation doctrine should be extended to cover delay or other forms of non-geographical breaches or should its operation be restricted to its natural habitat, that is, geographical deviation. The thesis also considers the effect of a deviation and whether its occurrence gives rise to a displacement of the contract as a whole? The thesis also attempts to contextualise deviation cases in view of the abrogation of the fundamental breach doctrine and undertakes an inquiry as to whether they should be treated *sui generis* or subsumed under the general law of contract?

From the above, it is discernible that the problems associated with timely performance in carriage contracts vary and are multifaceted. Therefore, in seeking to address any of the perceived problems, a one-solution-fits-all approach would be counterproductive. Addressing such problems would require a more nuanced and tailored approach depending on the peculiar circumstances. This thesis therefore approaches the issue of timely performance by adopting varied approaches to each question considering that in the context of carriage of goods by sea, English law is often slow to adapt itself to current commercial realities in applying its principles to the complexities of maritime commerce.<sup>25</sup> Such attitude, it is argued, leads to inefficiency and incoherence in the legal regime relating to timely performance of contractual obligations. This thesis, therefore, attempts to reconcile the law as it currently relates to timely performance with contemporary conditions so that commercial absurdities and injustices as presented throughout the thesis are not allowed to fester. The implications of advancement in

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<sup>25</sup> *The Maratha Envoy* [1977] 1 QB 324, 349.

maritime technology as well as modern developments in mercantile practice must be allowed to have their effects in the way and manner the issue of timely performance is currently being perceived. It is this view, which this thesis attempts to advance.

## 1.4 Research Methodology

Research methodology has the dual task of accurately conceptualising problems and then proffering measures for overcoming them.<sup>26</sup> Failing the latter, methodology should at least account for the difficulties.<sup>27</sup> In view of this, this research adopts a doctrinal approach to scholarship which is aimed at 'identifying, analysing and synthesising the content of the law.'<sup>28</sup> Within common law jurisdictions, legal rules are to be found within statutes and cases but this alone cannot provide a complete picture of the law in any given situation.<sup>29</sup> For completeness, applying legal rules to the particular facts of the situation under consideration is vital.<sup>30</sup> Therefore, this research aims to apply existing legal principles to particular factual situations in order to enhance a broader understanding of the legal landscape. Doctrinal research is often characterised by the study of legal texts and, for this reason, it is often described colloquially as 'black-letter law.'<sup>31</sup> In this method, the essential features of the legislation and case law are examined critically and then all relevant elements are combined and synthesised to establish an arguably correct and complete statement of the law on the matter at hand.<sup>32</sup> In the present context, case law will predominantly be examined critically to reach a valid conclusion regarding the legal principles under consideration and to aid in carving a future path going forward.

However, with the increased growth of non-doctrinal and interdisciplinary scholarship, the place of doctrinal research in legal scholarship is under threat. For instance it has

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<sup>26</sup> George Meszaros, 'Researching the Landless Movement in Brazil' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 133.

<sup>27</sup> Ibid 133.

<sup>28</sup> Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2018) 9.

<sup>29</sup> Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in Built Environment* (Wiley-Blackwell 2008) 29.

<sup>30</sup> Ibid 29.

<sup>31</sup> Ibid 29.

<sup>32</sup> Terry Hutchinson (n 28) 10.

been argued in certain quarters by way of criticism that true legal scholarship involves a social legal interpretation of legal ideas.<sup>33</sup> Consequently, it may be argued that since doctrinal research does not involve such an inquest, it should be regarded as less compelling than other forms of research methods used by those in other fields particularly the social sciences.<sup>34</sup> While this may be true, it is argued in rebuttal that the doctrinal method still forms the basis for most, if not all, legal research projects.<sup>35</sup> Valid research is built on solid foundations such that before embarking on any form of empirical legal research, it is incumbent on the researcher to verify the authority and status of the legal doctrine being examined.<sup>36</sup> While it is admitted that non-doctrinal scholarship provides a new approach to the study of law in the broader social-political context with the use of other methods taken from disciplines in the social sciences and humanities,<sup>37</sup> it is argued that doctrinal research scholarship offers a different perspective to the study of law since the character of legal scholarship is derived from law itself.

In doctrinal research, the aim is to examine critically the essential features of the legislation and case law and then all the relevant elements are combined or synthesised to establish an arguably correct and complete statement of the law on the matter in hand.<sup>38</sup> In the present context, the focus is on case law, arbitration reports, books, and journal articles with the aim of combining the relevant elements to establish an arguably complete statement of the law regarding timely performance. Where necessary, this thesis endorses a comparative element and draw examples from the US to act as a guide for English law to emulate.

## **1.5 Structure of Thesis**

This thesis is divided into 7 chapters with each chapter sub-divided into sections. To assist the reader to navigate the text, ample referencing and cross referencing is provided. Chapter 1 provides an overview of timely performance. Chapter 2 addresses

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<sup>33</sup> R Cotterrell, 'Why must Legal Ideas be Interpreted Sociologically?' [1998] 25 (2) *Journal of Law and Society* 171, 192.

<sup>34</sup> Terry Hutchinson (n28) 9.

<sup>35</sup> Ibid 10.

<sup>36</sup> Ibid 10.

<sup>37</sup> Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2010) 5.

<sup>38</sup> Terry Hutchinson (n 28) 13.



the consequences of delay in a timely payment of hire context seeking to answer the question of the status of a timely payment of hire term in the event of a breach of that term? Was it a condition of the contract or an innominate term? Chapter 3 sought to address the question regarding when a vessel is considered an arrived ship under a port charter. Chapter 4 considers the meaning and scope of readiness in a laytime context. Chapter 5 examines the requirement of a tender of notice of readiness (NOR) in order to trigger the commencement of laytime. Chapter 6 addresses another aspect of timely performance regarding the obligation not to delay and reasonable despatch. While chapter 7 concludes the thesis by drawing out the points of convergence and divergence stated on the subject throughout the thesis with the hope of proffering solutions to the problems issues highlighted in the earlier chapters.

## **1.6 Original Contribution**

A common thread running through this thesis is timeliness in the performance of time and voyage charterparties. In all of the chapters discussed in this thesis, the question of timeliness was examined from a variety of angles which adds to the beauty of the research carried out. The thesis represents the first of its kind undertaking the topic of timely performance in the context of carriage of goods by sea. To the best of the researcher's knowledge, no work has looked at this topic, bringing all the issues under one umbrella and analysing them in such a holistic manner. Only two works exist dealing with the issue of timely performance holistically: John E Stannard's classical work titled 'Delay in the Performance of Contractual Obligations' published in 2007 and KE Lindgren's work titled 'Time in the Performance of Contracts' published in 1982. This thesis differs from both works as it situates the discourse of timely performance in a carriage of goods by sea context, an approach not adopted by the works referred to above. Consequently, this adds to the originality of this thesis.

Some other authors have attempted to address the subject of timeliness but have done so in a manner not anticipated by the thesis. For instance, Mark Lawson addressed the topic of timeliness from the perspective of whether performance on time is an essential condition of the contract but situated the discussion in the context of a sale of goods

contract.<sup>39</sup> Sir Terence Etherton also attempted a discussion of timeliness by engaging in a discussion of the principle of making time of the essence, again in the context of a sales contract involving the sale of land.<sup>40</sup> The author engaged in an assessment of historical relationship of law and equity in any assessment of whether a time provision is of the essence of the contract.<sup>41</sup> The author also sought to provide clarity and coherence to this area of the law regarding timeliness<sup>42</sup> which neatly ties in with the whole objective of this thesis. However, the essential distinction here lies in the fact that, this thesis situates the discussion of timeliness in the context of ocean transport, a context different from the above. There is an obvious distinction in the treatment of time stipulations under a sale of goods contract and a contract of carriage. In a sale of goods contract, time for shipment,<sup>43</sup> delivery and acceptance of goods<sup>44</sup> are treated as essential terms of the contract. However, in a carriage of goods by sea context, these presumptions do not necessarily apply.

This material distinction is what sets the thesis apart from other classical works dealing with timeliness. Other classical books like JW Carter on breach of contract<sup>45</sup> do not adequately address the subject of timeliness. Apart from one paragraph dedicated to a discussion on 'time for performance' not much was said on the subject of timeliness.<sup>46</sup> The classical works of Time charters,<sup>47</sup> Voyage charters<sup>48</sup> do not even address the subject of timeliness. Donald Davies classical book on commencement of laytime<sup>49</sup> only addresses the subject of timeliness from the perspective of when a vessel is to be considered an arrived ship. However, this thesis addresses the issue of timeliness not only from the perspective regarding when a vessel can be considered an arrived ship but other aspects relating to timely performance, like reasonable despatch and the status

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<sup>39</sup> Mark Lawson (n13) 20 (note).

<sup>40</sup> Sir Terence Etherton, Time Provisions at Common Law and Equity [2013] The Conveyancer and Property Lawyer 355.

<sup>41</sup> Ibid 355.

<sup>42</sup> Ibid 356.

<sup>43</sup> *ERG Raffinerie Mediterranee SPA v Chevron USA Inc (The Luxmar)* [2007] 2 Lloyd's Rep 542, 543 [2<sup>nd</sup> Col] [CA]

<sup>44</sup> *Hartley v Hymans* [1920] 3 KB 475, 484. See generally *Bowes v Shand* (1877) 2 App Cas. 455.

<sup>45</sup> JW Carter, *Carter's Breach of Contract* (Hart Publishing, 2012)

<sup>46</sup> Ibid para 4-02.

<sup>47</sup> Terence Coghlin; Andrew Baker, Julian Kenny & Ors, *Time Charters* (7<sup>th</sup> Edn, Informa Law 2014)

<sup>48</sup> Julian Cooke and Others, *Voyage Charters* (4<sup>th</sup> edn, Informa 2014)

<sup>49</sup> Donald Davies, *Commencement of Laytime* (4<sup>th</sup> edn, Informa 2006)

of a timely payment of hire term. Moreover, the thesis engages the issue of timeliness in sufficient detail identifying points of divergence and convergence which have not been argued elsewhere or argued in a manner different from arguments presented in this thesis.

Part of the originality of the work lies in its exploration of case law approaches to implied obligations to perform recognised responsibility in a timely fashion. In many instances identified in this research, there appear to be unwarranted divergences in the application of principles to particular problems and issues. Throughout, this thesis challenged the basis for the mentioned type of divergences and proffered solutions where necessary or to the extent circumstances allow. This thesis constitutes a monumental addition to existing literature in the field in relation to the relationship between certain contractual provisions and the common law implied obligations to perform timely a specified obligation. Where necessary, allusions are made to the equivalent provisions in international instruments like The Hague Rules 1924. An example in this context is the obligation not to deviate.<sup>50</sup> This obligation so far as the international instruments are concerned is stated by way of exceptions.<sup>51</sup> Whereas, at common law, this obligation is imposed as a liability such that the carrier must not deviate except where necessary.<sup>52</sup> The problem that often arises here is regarding the scope and effect of that obligation. Unfortunately, as to effect under international instruments, it appears to be established that in so far as deviation positively engages the exceptions provided, the carrier is relieved of liability.<sup>53</sup> At common law a different landscape appears to exist. The question that therefore arises is that when by reason of the deviation the cargo arrives untimely at the port of discharge, what is the effect of the deviation? To put the matter beyond doubt, is to treat delay as a separate liability.

Consequently, one of the issues examined by the thesis is the scope and legal consequences arising from untimely performance of the voyage. Arguably, this thesis would be found invaluable by judges and arbitrators hearing carriage of goods by sea

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<sup>50</sup> See Chapter 6 of this thesis.

<sup>51</sup> See the Hague Rules 1924, Art 4 r. 4.

<sup>52</sup> *Davis v Garrett* [1830] 6 Bing. 716; 130 E.R. 1456.

<sup>53</sup> In other words, if the occurrence of deviation operates to save life or property, the shipowner escapes liability.

cases, as well as professionals and other members of the shipping community. The thesis would also be extremely useful to academics involved in the design and delivery of modules relating to shipping law and practice and more generally commercial law students at both undergraduate and postgraduate level interested in the workings and requirement of timeliness in contracts of affreightment in Anglo-American jurisdictions.

## Chapter 2

### Punctual Payment of Hire

#### 2.1 Introduction

The importance of punctual payment of hire to contractual parties under a time charter is sacrosanct. The shipowner relies on prompt and regular receipt of hire to discharge financial commitments incurred in the provision of services under a time charter. For the charterer, a failure in making prompt payment of hire could necessitate the cessation of the provision of charter services by the shipowner or give rise to even more serious problems like the repudiation of the charter agreement. That notwithstanding, the consequences of delay that attaches to a failure in prompt payment of hire has often given rise to controversy. The current state of the law on this subject appears vague and hazy, particularly, in light of two recent English law decisions: *The Astra*<sup>1</sup> and *Spar Shipping v Grand China Logistics*.<sup>2</sup> The decision in *The Astra* although now overruled appears to suggest that a charterer in breach of the obligation to pay hire on time is in breach of a condition of the contract such that any breach entitles the owner to terminate the contract. On the other hand, the *Spar Shipping* case which now represents the orthodox view proposes that a breach by the charterer is a breach of an innominate term, such that, the accrual of the right to terminate the contract will depend on the seriousness of the breach. Clearly the courts have not spoken in unison concerning the status or character of the obligation to pay hire timely. It must be noted that *The Astra* is a first instance decision which was overruled by the Court of Appeal in the *Spar Shipping*. Consequently, the *Spar Shipping* decision will continue to bind the lower courts.

Against this backdrop, this chapter seeks to examine the consequences of delay in the event of a failure by the charterer to make prompt payment of hire. The chapter is divided into six sections including the introduction. Section two and three briefly addresses the nature of a punctual payment of hire term and the role played by the

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<sup>1</sup> *Kuwait Rocks CO v. AMN Bulkcarriers Inc. (The Astra)* [2013] 1 CLC 819. [Comm]. Discussed in greater detail in para 2.4 of this chapter.

<sup>2</sup> [2015] 1 CLC 356 affirmed on appeal [2016] 2 CLC 441 [CA]. The *Spar Shipping* decision is discussed in greater detail in para 2.4 of this chapter. See also *Tenax Steamship Co. Ltd v The Brimnes (Owners) (The Brimnes)* [1973] 1 WLR 386.

classification of contractual terms in determining the consequences of delay. Section four critically examines the justifications for treating a prompt payment of hire term as a condition of the contract. Section five appraises the proper test to be employed in determining the occurrence of repudiatory breach in the event that a failure to make prompt payment occurs. Section six concludes the chapter and argues that faced with the dilemma between whether a punctual payment of hire term is a condition or an innominate term, the latter view is to be preferred as this presents a just fair and equitable solution for contractual parties.

## **2.2 Nature of Obligation to Pay Hire on Time**

A ship-owner who leases his vessel under a time charter expects to be paid hire for the use and control of his vessel by the charterer. It is also expected that the payment of hire by the charterer is to be made in advance and promptly too, because in most cases the ship-owner would have other commitments<sup>3</sup> which would depend on the regular and punctual receipt of the hire. The obligation of the charterer to pay hire timely is absolute such that absent any special circumstances, it is sufficient to constitute default, if payment is not made: the question as to whether or not non-performance was deliberate or whether it was a case of negligence would not arise.<sup>4</sup> Accordingly, merely failing to pay hire on the agreed date is sufficient to trigger the owner's right to withdraw the vessel<sup>5</sup> and an exercise of such right is equivalent to a termination of the charter.<sup>6</sup> In order to protect the ship-owner from any delay in the charterer's discharge of the punctual payment of hire obligation, it is therefore the practice to include in standard form time charters, punctual payment of hire clauses and a right of withdrawal clause in the event of a breach.<sup>7</sup> The exercise of the right of withdrawal is a potent weapon at

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<sup>3</sup> For instance, the paying of wages to the crew, insurance premiums and maintenance of the vessel. See also *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 Lloyd's Rep. 253, 258 (Col 1). [HL]

<sup>4</sup> *A/S Tankexpress v Compagnie Financiere Belge des Petroles (The Petrofina)* [1949] AC 76, 91.

<sup>5</sup> *Mardoff Peach v. Attica Sea Carriers Corp. of Liberia (The Laconia)* [1977] AC 850, 867 [HL]; *International Bulk Carriers v. Evlogia Shipping Co. (The Mihaios Xilas)* [1978] 2 Lloyd's Rep. 186, 191. (Comm.)

<sup>6</sup> *Steelwood Carriers Inc. of Monrovia, Liberia v Evimeria Compania Naviera SA of Panama (The Agios Giorgis)* [1976] 2 Lloyd's Rep. 192, 202. See also Terence Coghlin; Andrew Baker, Julian Kenny & Ors, *Time Charters* (7<sup>th</sup> Edn, Informa Law 2014) Para 16.3. It is noteworthy that, where the shipowner's right to withdrawal is not expressly stated, withdrawal of the vessel for late payment of hire is impossible unless the late payment amounts to a repudiation of the charter.

<sup>7</sup> Paul Todd, *Principles of the Carriage of goods by Sea* (1<sup>st</sup> Edn, Routledge 2016) para 10.3.

the disposal of the ship-owner and if wielded appropriately could protect the ship-owner in the event that default in payment of hire persists. In any event, the inclusion of such a right reflects the premium placed by owners on a regular receipt of hire.<sup>8</sup> The right of the owner to withdraw the vessel is not only exercisable when there is a failure to pay hire timely or when no hire is paid, it also arises in circumstances where a payment although made timely but not made in full as per the agreed amount of hire and the outstanding balance is not paid by the agreed due date.<sup>9</sup>

The failure to pay hire timely may result in serious consequences for the charterer, namely an exercise of the owner's right to withdraw the vessel from the services of the charterer. The shipowner's right to withdraw is his defence mechanism against any failure to pay hire. In a rising market, shipowners would be desirous of getting their vessel re-delivered. Conversely, the charterers would be reluctant to redeliver the vessel and instead insist that the vessel does as many voyages as necessary out of the fixture. Given these contrasting approaches, it comes as no surprise that a prudent shipowner would lie in wait looking for any slip by the charterer in failing to pay hire since mere failure to pay hire is sufficient to trigger the right of withdrawal. To avoid such harsh consequences, it has been the practice to insert 'anti-technicality clauses' in charters which are designed to mitigate the rigours of withdrawal clauses.<sup>10</sup> Of course, anti-technicality clauses could be adapted to cater for cases where the failure to pay hire regularly was 'due to oversight, negligence, errors or omissions on the part of charterers or their bankers.'<sup>11</sup> Where an anti-technicality clause is inserted, the charterers are given the grace to make payment within an agreed number of 'clear banking days' and the owners are estopped from exercising their right to withdraw their vessel before the expiration of that grace period.<sup>12</sup> Upon expiration of the grace period, the owners in

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<sup>8</sup> *The Petrofina* [1949] AC 76.

<sup>9</sup> *The Agios Giorgis* [1976] 2 Lloyd's Rep 192, 201 [col 1]; See also *The Mihaios Xilas* [1978] 2 Lloyd's Rep. 186 for support of this view: an underpayment of hire entitled the owners to withdraw the vessel.

<sup>10</sup> *Time Charters* (n 6) para 16.90.

<sup>11</sup> *Ibid* 16.91. See also *Owneast Shipping Ltd v Qatar Navigation QSC (The Qatar Star)* [2010] EWHC 1663; [2010] 2 CLC 42. [Comm]

<sup>12</sup> *Time Charters* (n 6) para 16.91.

addition to their right to withdraw can withhold performance of their obligations while the hire remains unpaid and the hire continues to run.<sup>13</sup>

Determining the status of an obligation to pay hire punctually has proved contentious over the years. The contention here has often involved a determination regarding what consequences attach to a failure to pay hire timely. The current state of the law on this subject remains a subject of controversy in light of recent case law.<sup>14</sup> A resolution of the above issue may well lie in the examination of the classification of contractual terms.

### **2.3 Classification of Contractual Terms**

Usually once a breach of contract has been established by proof of one party's failure to perform a term of the contract, the question often arises whether or not the breach of the term entitles the innocent party to terminate the contract.<sup>15</sup> In order to determine the consequence of a breach, the courts have often relied on the tripartite classification of contractual terms into conditions, warranties and innominate terms. Of course, it is still a moot point whether there is any justification for having a tripartite classification or whether a better view is to have just conditions and other terms or essential and non-essential terms as the only classification of contractual terms.<sup>16</sup> While there are strong and cogent arguments for either view, the extant debate is outside the scope of this chapter. For present purposes, the tripartite classification of contractual terms shall be adopted since it is the prevailing view under English law and in other jurisdictions.<sup>17</sup>

For contractual parties, the legal consequences that attach to a breach of any of the above classifications of contractual terms vary. Where a contractual term is classified as a condition, any breach entitles the innocent party if he elects, to treat himself as discharged from further performance under the contract and entitled to claim damages

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<sup>13</sup> Ibid para 16.91. See also clause 11 of the New York Produce Exchange Form (NYPE 93) <[http://www.pfri.uniri.hr/~bopri/documents/Unit12a-nype93\\_000.pdf](http://www.pfri.uniri.hr/~bopri/documents/Unit12a-nype93_000.pdf)> accessed on 15/08/2018.

<sup>14</sup> *The Brimnes* [1973] 1 WLR 386; *The Astra* [2013] 1 CLC 819; *Spar Shipping v Grand China Logistics* [2015] 1 CLC 356; [2016] 2 CLC 441 [CA].

<sup>15</sup> JW Carter, *Carter's Breach of Contract* (Hart Publishing 2012) Para 4-02.

<sup>16</sup> *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61. (Dissenting view of Kirby LJ in Australia).

<sup>17</sup> See the majority view in Australia in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61; See also the New Zealand case of *Holmes v Burgess* [1975] 2 NZLR 311, 318-320 for an endorsement of this view. This same approach has been endorsed by the Singaporean Court of Appeal in *Sports Connection Private Ltd v Deuter Sports GmbH* [2009] 3 SLR 883[40].



for loss sustained by the breach.<sup>18</sup> He may also elect to affirm the contract and such affirmation entitles him to a claim in damages.<sup>19</sup> Irrespective of whether he decides to affirm<sup>20</sup> or terminate<sup>21</sup> the contract, his entitlement to a claim in damages is assured. In present context, the obligation to pay hire timely, for instance, would be treated as a condition if construction of the contract shows that timely payment was intended to be of the essence.<sup>22</sup> The significance of the above is that the shipowner enjoys a common law right to terminate for any delay in payment and the need to link the delay with any resultant loss could be dispensed with.

The underlying policy considerations for the existence of a common law right to terminate is that, it dispenses with the necessity of undertaking a factual inquest into whether the occurrence of a breach is 'serious and substantial';<sup>23</sup> an inquest which can prove divisive for judges or arbitrators while reaching a determination regarding the occurrence of a serious breach given the factual circumstance of each case may vary. In this way, it could be said that the common law right to terminate promotes certainty or as John Carter & Wayne Courtney prefer to phrase it 'commercial convenience',<sup>24</sup> such that, it is within the right of an innocent party to terminate the contract in the event of a breach, thereby dispensing with the need to answer the difficult question whether the breach amounted to a substantial failure in performance.<sup>25</sup> Therefore, it could be said that there is a strong preference for construing time stipulations in commercial contracts as conditions.<sup>26</sup> It is also easy to see why an innocent party may favour such a classification, since he is unperturbed regarding when to terminate the contract or treat the contract as repudiated.<sup>27</sup>

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<sup>18</sup> HG Beale & Others, *Chitty on Contracts* (31<sup>st</sup> edn, Sweet & Maxwell 2012) para 12-019; see also *Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 69; *Kwei Tek Chao v. British Traders & Shippers Ltd* [1954] 2 QB 459, 477; *Geys v. Societe Generale* [2013] 1 AC 523 [15].

<sup>19</sup> *Aruna Mills Ltd v Dhanrajmal Gobindram* [1968] 1 QB 655.

<sup>20</sup> *Ibid* 655.

<sup>21</sup> *New India Assurance Co. Ltd v Yeo Beng Chow* [1972] 1 WLR 786.

<sup>22</sup> *Lombard North Central Plc v Butterworth* [1987] Q.B. 527, 535.

<sup>23</sup> *Tradax International SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604, 612 [2<sup>nd</sup> Col] [Comm].

<sup>24</sup> JW Carter & Wayne Courtney, 'Breach of Condition and Express Termination Right: a Distinction with a Difference' [2017] Law Quarterly Review 395, 397.

<sup>25</sup> Edwin Peel (ed), *Treitel the Law of Contract* (14<sup>th</sup> edn, Sweet & Maxwell 2015) para 18-048. See also *Lombard North Central Plc v Butterworth* [1987] QB 527, 535.

<sup>26</sup> JW Carter & Wayne Courtney (n 24) 397.

<sup>27</sup> *Chitty on Contracts* (n 18) para 12-034.

The advantage that attaches to treating contractual terms as conditions is that it provides future assurances to the innocent party that once a similar breach occurs he immediately knows what action to take: exercise his right to terminate. However, such an approach means that his right to terminate is exercised irrespective of the gravity of the breach.<sup>28</sup> This also means that the innocent party's right to terminate is exercisable no matter how minor the breach is.<sup>29</sup> It is argued that, this could often lead to harsh consequences for the party in breach, since the innocent party may have suffered only trivial loss or damage as a result of the breach, but is nevertheless entitled to refuse further performance of his obligations under the contract. Consequently, the courts have had to step in by diminishing the very harsh consequences that often results from the treatment of contractual terms as conditions by 'adopting a more flexible and realistic approach to the consequences of breach and tending to encourage rather than discourage performance of the contract.'<sup>30</sup> This surely provides justification for the innominate term classification which would be discussed in latter parts of this section.

There is also another classification of contractual terms referred to as warranties. This class of contractual terms often concern 'some less important or subsidiary element of the contract'<sup>31</sup> such that, the occurrence of a breach does not entitle the innocent party to terminate on the premise that it can adequately be remedied by damages in monetary terms.<sup>32</sup> However, this principle of law regarding warranties is not on firm footing since, an argument could be had that a breach of a warranty term may justify termination if the occurrence of a substantial failure in performance can be proven.<sup>33</sup> However, the accuracy of this argument, is outside the scope of this chapter.

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<sup>28</sup> *Lombard North Central Plc v Butterworth* [1987] QB 527, 535.

<sup>29</sup> *Chitty on Contracts* (n 18) para 12-034.

<sup>30</sup> *Ibid* para 12-034. See also *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44, 70.

<sup>31</sup> *Treitel Law of Contract* (n 25) para 18-044. See also *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 70; *Sales of Goods Act 1979*, s 61 (1), s 11(3); *Chitty on Contracts* (n 18) para 12-031.

<sup>32</sup> *Ibid* para 18-044.

<sup>33</sup> An argument suggested in *Astley Industrial Trust Ltd v Grimley* [1963] 1 WLR 584, 599.

Quite distinct from either a condition or a warranty is yet another class of contractual terms: an innominate term.<sup>34</sup> These terms differ from conditions in that their breach does not itself give rise to a right to terminate; and from warranties in that the remedy that accrues to the injured party is not always restricted to a claim in damages.<sup>35</sup> The effect of non-performance of an innominate term is usually difficult to predict since by its nature, the consequence of breach may well turn on the type of breach:<sup>36</sup> whether trivial or severe. Where the breach is trivial, the injured party's remedy lies in a claim in damages; whereas, where the breach is of a severe character sufficient to deprive the injured party of substantially the whole benefit of the contract, only then can an injured party treat the contract as repudiated.<sup>37</sup> Consequently, an argument could be had that the innominate term adopts a flexible approach to the question of when to exercise the right to terminate. It is of course intended to work in favour of the guilty party such that, he is insulated from the innocent party's strict demand for punctual performance. In this way, the innominate term acts as a countermeasure to the drastic consequences that may result from an application of the classification of terms as conditions which culminates in the termination of the contract irrespective of gravity of breach.

Arguably, the downside of the innominate term classification is that, it creates uncertainty both at the stage when it ought to be determined whether or not a term is an innominate term and at the latter stage when the court is faced with an assessment regarding whether or not the breach is serious enough to justify termination by the innocent party.<sup>38</sup> It has also been argued that such a classification could give room for sloppiness in contractual performance such that the party in breach would be well aware that the contract cannot be terminated unless the breach is of a serious character and the only remedy available to the innocent party is damages.<sup>39</sup>

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<sup>34</sup> Sometimes referred to as an intermediate term. See *Bremer Handelsgesellschaft mbH v. Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 113.

<sup>35</sup> *Treitel Law of Contract* (n 25) para 18-050.

<sup>36</sup> *Bunge v. Tradax* [1981] 1 WLR 711, 717; *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 174, 193 (Lord Denning)

<sup>37</sup> *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 66. See also, *The Hansa Nord* [1976] QB 44, 82; *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, 928; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849.

<sup>38</sup> Neil Andrews and others, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 2011) Para 12-021.

<sup>39</sup> *Ibid* Para 12-021.

In the present context, the status of the punctual payment of hire term only ever becomes a subject of controversy, where there is a slip by the charterer in the timeous payment of hire which would lead the shipowner to exercise his right to withdraw. The exercise of that right to withdraw has often led to controversies regarding whether the legal consequences attached to the breach was that of a condition or innominate term. From the plethora of cases, there appears to be strong arguments for either side of the debate. However, with the recent Court of Appeal decision in *Spar Shipping v Grand China Logistics*,<sup>40</sup> the innominate term construction appears to have won the battle. Consequently, the next section seeks to examine the arguments either way for construing a punctual payment of hire term as either a condition or an innominate term.

## **2.4 Punctual Payment of Hire- Condition?**

Determining the status of an obligation to pay hire punctually has proved contentious over the years. The controversy has been drawn between either treating an obligation to pay hire punctually as either a condition or an innominate term. The current state of the law on this subject has remained controversial and particularly so, as either way there are supporting arguments.<sup>41</sup> But that is also where the problem lies, as parties to a carriage contract faced with this state of flux of the law on the subject are left uncertain on what to do when entering into such contracts. The rest of this section would be dedicated to a critical analysis of English case law with the hope of finding some solution to the proper classification of a time clause in the character of a timely payment of hire term.

The treatment of a time clause in the character of a payment of hire term as a condition stems from the idea that there is an assumed general presumption of treating time clauses as of the essence.<sup>42</sup> The expression ‘time is of the essence’ suggests that a breach of the covenant as to time for performance will entitle the innocent party to treat

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<sup>40</sup> [2015] 1 CLC 356 [CA]; See also *Tenax Steamship Co. Ltd v The Brimnes (Owners) (The Brimnes)* [1973] 1 WLR 386.

<sup>41</sup> *Grand China Logistics (Group) Co Ltd v Spar Shipping AS* [2016] 2 C.L.C 441[27] [CA]. See also *The Astra* [2013] 1 CLC 819; *The Brimnes* [1973] 1 WLR 386.

<sup>42</sup> *The Astra* [2013] 1 CLC 819 [110]; *United Scientific Holdings v. Burnley BC* [1978] AC 904, 924; *Bunge v. Tradax* [1981] 1 WLR 711, 719. cf. *British & Commonwealth Holdings Plc v Quadrex Holdings Inc.* [1989] 1 QB 842, 856.

the contract as at an end irrespective of the gravity of the breach.<sup>43</sup> Consequently, a time clause would be elevated to the status of a condition with the consequences that upon occurrence of a breach, an innocent party is entitled to terminate performance of the contract and to claim damages from the charterer.<sup>44</sup> This view formed the cornerstone of Flaux J's preference to treat a punctual payment of hire term as a condition of the contract in *The Astra*.<sup>45</sup>

Flaux J in the above decision, derived support for advancing this view from certain dicta expressed by Wilberforce LJ in *Bunge v Tradax*<sup>46</sup> where he suggested that in general, time was of the essence in mercantile contracts.<sup>47</sup> At this juncture, a perusal of the facts of *Bunge v Tradax*<sup>48</sup> may be apposite. Although, the facts in that case do not deal directly with a timely payment of hire provision, they may have some bearing as to why the court preferred a condition construction in determining the status of a time clause. The crux of the dispute was that the buyers agreed to buy from the sellers 15000 tons of Soya bean with shipment at 5000 tons each month from the months of May, June, and July at \$199 per metric ton. It was further agreed that the buyer shall give 'at least 15 days' notice of probable readiness of vessels...' The period of delivery was extended by one calendar month. The last day upon which the sellers could ship goods in performance of the contract was June 30, 1975. The last day for the buyer to give the requisite notice of probable readiness of vessels was June 12 but the notice was not given until June 17.

In view of the delay in giving the requisite notice, the sellers declared the buyers in default and claimed damages for a repudiation of the contract on the ground that breach of the term as to notice was breach of a condition. On whether such a term requiring the issuance of a 15-day notice of probable readiness of vessels was a condition, the court held that in general, time was of the essence in a mercantile contract; in such a

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<sup>43</sup> *Halsbury's Laws of England* (5<sup>th</sup> Edn, 2018) vol. 6, para 263 <LexisLibrary> accessed 06/07/2018. See also *Lombard North Central Plc v Butterworth* [1987] QB 527, 535.

<sup>44</sup> *Chitty on Contracts* (n 18) para 21-015. See also *Lombard North Central Plc v Butterworth* [1987] QB 527, 545, 546; *Scandinavian Trading Tanker Co. AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694, 703.

<sup>45</sup> [2013] 1 CLC 819[44] overruled by the Court of Appeal in *Grand China Logistics (Group) Co Ltd v Spar Shipping AS* [2016] 2 CLC 441 [CA]. This argument was advanced in *The Brimnes* [1973] 1 WLR 386, 407 but proved unsuccessful.

<sup>46</sup> [1981] 1 WLR 711.

<sup>47</sup> *Ibid* 716. See also *Stocznia Gdanska v Latvian Shipping Co. No. 2* [2003] 1 CLC 282 [76], [77], [80]

<sup>48</sup> *Bunge v Tradax* [1981] 1 WLR 711.

contract, where a term had to be performed by one party as a condition precedent to the ability of the other party to perform another term, especially an essential term such as the nomination of a single loading port, the term as to time for performance of the former obligation would in general fall to be treated as a condition.

However, it is argued that any reliance placed on *Bunge v Tradax* is misconceived and provides no support for treating a punctual payment of hire term as a condition. The nature of the time clause in *Bunge v Tradax* is different in material respects from a payment of hire term. The time clause in *Bunge v Tradax* concerned compliance with the issuance of a 15 day notice of probable readiness of the vessel; a failure to comply affected the discharge of the obligation to nominate a load port. Roskill LJ in the above case, acknowledged this as the 'most important single factor'<sup>49</sup> in any construction of the clause in question as a condition. In other words, the compliance of the service of a notice by the buyer was a condition precedent for the discharge of the obligation to nominate the load port by the seller. In contrast, a charterer's obligation to pay hire timely is an independent obligation such that, when it falls due, a shipowner is entitled to discharge performance irrespective of non-payment subject of course to the terms of the contract. Put differently, the obligation of the shipowner to continue providing services to the charterer is not dependent on whether a charterer pays hire timeously, as a charterer may repeatedly be late in the performance of his obligation and still enjoy the services provided by the shipowner.

It must be emphasized that the decision in *Bunge v Tradax*<sup>50</sup> concerned a contract of sale under a string contract. In these type of contracts, the need for certainty take on even greater importance, since the repudiation of one contract will affect others in the string.<sup>51</sup> Therefore, it is easy to see why the courts would readily construe a term as a condition since most members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions.<sup>52</sup> As Lord Lowry further observed, 'decisions would be too difficult if the

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<sup>49</sup> Ibid 729.

<sup>50</sup> Ibid 711.

<sup>51</sup> Paul Todd, Punctual Payment of Hire: Condition or Innominate Term? [2018] Lloyd's Maritime and Commercial Law Quarterly 20, 23.

<sup>52</sup> *Bunge v Tradax* [1981] WLR 711, 721.

term were innominate and years might elapse before the results were known.<sup>53</sup> The argument in favour of construing certain terms as conditions is further enhanced by difficulty in assessing damages arising from the breach.<sup>54</sup> The innominate construction creates uncertainty for courts and arbitrators, such that if the term as to time were regarded as innominate, different decisions would arise regarding the effect of a breach in very similar transactions and parties could never learn by experience what was likely to occur in a given scenario.<sup>55</sup> In contrast, a condition construction adds the desirable element of certainty such that contractual parties know precisely what their obligations are and be able to act with confidence in the legal results of their actions.<sup>56</sup> It is this certainty that makes the condition argument an attractive position for shipowner.

For the shipowner, the importance of receiving prompt payment assumes increased significance. The shipping vessel may have been placed on mortgage against terms which require the punctual payment of instalments to the bank with the addendum that any default would trigger an accelerated repayment of the loan which then crystallizes the bank's right to realise its security by selling the mortgaged vessel<sup>57</sup> in the event of repeated default. The matter is even more complex where the owner's vessel is part of a fleet which may have cross-default provisions under the mortgage arrangement.<sup>58</sup> The consequence of failure to pay one of the instalment to the bank in respect of one vessel timeously could have a drastic effect on the remainder of the fleet such that the bank may be entitled to repossess all of the vessels in the fleet a bid to realise its security.<sup>59</sup> In the circumstance described above, regular receipt of hire remains paramount, if the shipowner is to meet his financing obligations.<sup>60</sup> Therefore, it may be easy to rationalise the shipowner's preference for treating a timely payment of hire obligation as a condition. Added to this, is the fact that the payment of overhead costs like payment of

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<sup>53</sup> Ibid 720.

<sup>54</sup> *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 WLR 1129, 1133.

<sup>55</sup> *Bunge v Tradax* [1981] WLR 711, 720.

<sup>56</sup> *Chitty on Contracts* (n 18) Para 12-037.

<sup>57</sup> *Spar Shipping AS v Grand China Logistics Holding Co Ltd* [2015] 1 CLC 356[135].

<sup>58</sup> Ibid [135].

<sup>59</sup> Ibid [135].

<sup>60</sup> Ibid [135].

crew, and running of the vessel from day to day borne by the shipowner is reliant on punctual receipt of hire.<sup>61</sup>

While there may be valid reasons for treating timely payment of hire as a condition as examined in the prior paragraph, this author argues that, there is no thread of support either in law or statute for subsuming time for payment terms under the umbrella of a general presumption that time stipulations are of the essence or should be regarded as conditions of the contract. Rather, the general rule is that time for payment is not of the essence.<sup>62</sup> Therefore, it is argued that the application of *Bunge v Tradax* which advances the condition argument to present circumstances should be jettisoned. Section 10 of the Sale of Goods Act 1979 provides:

- 1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale.
- 2.) Whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract.

Of course, the argument could be had that there are stark differences between a sale of goods contract and a charterparty. Therefore, the transposition of sale of goods rules to present context, may leave much to be desired. Moreover, Section 10 of the Sales of Goods Act 1979 could be described as an exception to the general position as to time of payment being of the essence. However, this author argues to the contrary that, this is an insufficient reason for dismissing the rationality of the principle expressed in the section reproduced above. S 10(2) states the matter beyond doubt, the treatment of a time stipulation as a time of the essence provision is to be determined by the terms of the contract. It follows then that, without proper construction of the contract or any reference to contractual terms, it may be difficult to determine the consequence to be attached to the breach of a payment of hire term. Therefore, it would be erroneous to assume that a punctual payment of hire term without more reflects a time is of the essence provision. Clarke J in *Dalkia v Celtech*<sup>63</sup> settles the matter when he observes

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<sup>61</sup> *The Laconia* [1977] AC 850, 854.

<sup>62</sup> See Law of Property Act 1925, S41; *British & Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] 1 Q.B 842, 857. (CA); *Chitty on Contracts* (n 18) Para 12-037.

<sup>63</sup> [2006] 2 P. & C.R. 9[130].



‘Stipulations as to time of payment are not generally of the essence of a contract of sale or hire, or other similar commercial contracts unless a different intention appears from the terms of the contract.’ Therefore, without parties expressly making a time of the essence<sup>64</sup> or serving notice to make time of the essence,<sup>65</sup> any reliance on an assumed general presumption making time for payment of the essence is predicated on shaky foundations. Whether or not a time clause falls to be treated as a ‘time-of-the-essence’ provision is not automatic, but a question of construction of the contract.<sup>66</sup>

Arguably, in present context, time is of the essence of the contract in the sense that there is the occurrence of contractual breach if payment is a moment late.<sup>67</sup> Therefore, for the avoidance of breach, prompt compliance is often warranted. However, it is not of the essence in the sense that late payment is equivalent to a serious breach and gives rise to a repudiatory breach.<sup>68</sup> There is no support in law or statute for arriving at such a conclusion. Lowry LJ alluded to this fact in *Bunge v Tradax*<sup>69</sup> when he observed: ‘The treatment of time limits as conditions in mercantile contracts does not appear to me to be justifiable by any presumption of fact or rule of law, but rather to be a practical expedient founded on and dictated by the experience of businessmen...’<sup>70</sup> The above dicta by Lowry LJ is a notable drawback for any reliance on *Bunge v Tradax*<sup>71</sup> as providing any support for the condition argument. He appears to suggest that there is no thread of support either in law or presumption of fact for treating time clauses as conditions. Rather, any support to be derived from treating time clauses as conditions stems from the practical expedient attached to such construction by business men particularly shipowners who attach importance to the regular and punctual receipt of hire. Certainly, the assumed general presumption of treating time clauses as conditions did not sit well with Lowry LJ and the accounts for why he suggested that the argument for treating time clauses as conditions ‘must pay respect to the principle enunciated by Roskill LJ in

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<sup>64</sup> *Lombard North Central Plc v Butterworth* [1987] QB 527, 535.

<sup>65</sup> *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, 946-947.

<sup>66</sup> *Samarenko v Dawn Hill House Ltd* [2013] Ch. 36[9]; *Empresa Cubana de Fletes v Lagonisi Shipping Co Ltd (The Georgios C)* [1971] 1 QB 488, 494.

<sup>67</sup> *Ibid* 494.

<sup>68</sup> *Ibid* 494.

<sup>69</sup> [1981] 1 WLR 711.

<sup>70</sup> *Ibid* 719.

<sup>71</sup> *Ibid* 711.

*Cehave NV v Bremer Handelsgesellschaft mbH*<sup>72</sup> that contracts are made to be performed and not to be avoided.<sup>73</sup> In fact, later on in the judgment, Lowry LJ observed: 'The only arguments against treating the term as a condition appear to me to be based on generalities, whereas the considerations which are peculiar to this contract and similar contracts tell in favour of its being a condition.'<sup>74</sup> Therefore, the treatment of the time clause in *Bunge v Tradax* as a condition does not lie in any assumed general presumption that time clauses are conditions but such a conclusion can only be reached when the contract in question has been construed. Viewed this way, it is easy to dismiss the application of *Bunge v Tradax*<sup>75</sup> as not providing any general presumption of timeliness in the context of a punctual payment of hire term.

Nevertheless, if it be implied that an obligation requiring the charterer to pay hire timely is of the essence, then it would be unnecessary and counter-productive to include in such a time charter the express right of withdrawal because such an implication already elevates the term to a condition, with repudiation as the consequence of breach without regard to the gravity. On the contrary, the inclusion of an express right to terminate is suggestive of the fact that the non-payment is not to be treated as a breach of a condition because while a mere breach would only trigger a contractual right to bring the contract to an end through an exercise of the right to withdraw, it would not give rise to a claim in damages for loss of bargain.<sup>76</sup> Damages for 'loss of bargain' would only be available where there has been a substantial failure to perform other than as a consequence of the parties' express classification.<sup>77</sup> In addition, the inclusion of right to withdraw only operates as an impetus for prompt payment rather than a sanction for untimely payment. At best, *Bunge v Tradax*<sup>78</sup> can be explained as providing a strong preference to construe certain time stipulations as conditions, even though the contract does not include any express agreement to that effect.<sup>79</sup> That notwithstanding, its

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<sup>72</sup> [1976] QB 44, 71.

<sup>73</sup> [1981] 1 WLR 711, 719.

<sup>74</sup> Ibid 721.

<sup>75</sup> Ibid 711.

<sup>76</sup> *Spar Shipping AS v Grand China Logistics Holding Co Ltd* [2015] 1 CLC 356[114].

<sup>77</sup> *Treitel the Law of Contract* (n25) para 18-071.

<sup>78</sup> [1981] 1 WLR 711.

<sup>79</sup> JW Carter and Wayne Courtney (n24) 406.

application to time stipulations relating to payment is inconsequential and of no moment.<sup>80</sup>

Without a shadow of doubt, the payment of hire bears commercial significance for the shipowner who is burdened by financial commitments which depend to a large extent on the regular and punctual receipt of hire.<sup>81</sup> Therefore, the strong preference for treating timely payment of hire terms as a condition of the contract is understandable. Moreover, the policy consideration for classifying a term as a condition is hinged on the requirement of certainty in commercial contracts such that the breach of such a term will in a future case enable the injured party know where they stand at the moment of breach.<sup>82</sup> However, the cogency of this argument is diminished by the fact that any breach of the obligation no matter how slight, as to time of payment would suffice to bring the charter to an end. Consequently, the certainty that may have been achieved would be at the expense of justice and fairness to the parties since trivial or minor breaches will have drastic consequences<sup>83</sup> such that a charterer who is just a few minutes late in payment could become guilty of a repudiatory breach. A classic example is *The Afovos*<sup>84</sup> where the charterer was in default of payment of one semi-monthly payment of hire due to errors emanating from the charterers bank. At 16:40 hours on the due date of payment the owners through their agents notified the charterers (of anti-technicality clause) that a failure to pay hire on the due date would warrant the owners exercising their right to withdraw the vessel from the service of the charterers. Subsequently the owners issued a notice of withdrawal when they did not receive payment on the due date after which the charterers discovered the error and rectified it. A dispute arose as to whether the owners were entitled to withdraw the vessel from the service of the charterers. At first instance, Lloyd J. granted the owners a declaration that they were entitled to exercise their right to withdraw the vessel from the services of the charterer and that they had validly and effectively exercised their right to do so

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<sup>80</sup> Ibid 406.

<sup>81</sup> *The Scaptrade* [1983] 2 Lloyd's Rep. 253, 258 (Col 1). [HL]

<sup>82</sup> JW Carter & Wayne Courtney (n24) 397. See also Mark Lawson, 'Performance on Time: an Essential Condition?' [1990] International Company and Commercial Law Review 20, 23.

<sup>83</sup> *Grand China Logistics (Group) Co Ltd v Spar Shipping AS* [2016] 2 CLC 441 [59]. [CA]

<sup>84</sup> *Afovos Shipping Co SA v R Pagnan & Fratelli (The Afovos)* [1982] 1 WLR 848. [CA]

at that time.<sup>85</sup> This was subsequently overruled on appeal and held the view that the notice given at 1640 hours on June 14 was bad because it had been given before breach of the obligation to pay the hire; and (*per* Lord Denning M.R. and Griffiths L.J.) it was further defective in that it was a conditional notice which was only to operate “in case” payment was not received.<sup>86</sup>

The Court of Appeal recognised the difficulties and complexities associated with transactions dealing with the payment of hire. Griffith LJ observed:<sup>87</sup>

payments of this kind are normally made by telex through a number of banks, and it may well be that through some slip up the money does not arrive in the owner's account as quickly as the charterer has the right to expect. Once the charterer has instructed his bank to pay, he has no further direct control over the payment which is now in the banking chain.

Given the above observation, it is submitted that the justification of treating a time clause as a condition is without merit because on the flip side of the argument, it places the charterer in the unenviable position of bearing responsibility for any delay in payment which may in most cases, be beyond his control especially where such delay is attributed to an error or omission on the part of intermediaries which may lead to missing payment by a few hours or a couple of days. With the advancement of technology, the payment of hire is usually made by electronic means through a number of banks acting as intermediaries for the parties to the contract. Through oversight or omission occasioned by the working habits of banks and accountants and possible time differences should payment come from another country, slip-ups with regard to prompt payment may often occur.<sup>88</sup> Moreover, once the charterer mandates his bank to effect payment of hire, the chain of events from the time the instruction to pay is received by the bank until the time the owner receives actual payment is beyond his control.

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<sup>85</sup> *The Afovos* [1980] 2 Lloyd's Rep 469 [Comm].

<sup>86</sup> *The Afovos* [1982] 1 WLR 848, 853, 854, 856-858, 859 [CA] decision affirmed on further appeal to the House of Lords *The Afovos* [1983] 1 WLR 195, 201-204.

<sup>87</sup> *Ibid* 856 affirmed in *The Afovos* [1983] 1 W.L.R. 195. [HL] *Cf. The Petrofina* [1949] AC 76, 94 Per Wright LJ.

<sup>88</sup> Tan Lee Meng, 'The Shipowner's Right to withdraw his Vessel upon Non-payment of Hire' (1980) 22 Malaya Law Review 20. See for example, *Empresa Cubana de Fletes v Lagonisi Shipping Co Ltd (The Georgios C)* [1971] 1 Q.B. 488, 504.

Therefore, it would be a harsh outcome if the charterer is made to bear the brunt for the occurrence of any such omission.

It is conceded that certainty in construing contracts is the ideal to which the courts should aim,<sup>89</sup> and while treating a payment of hire term as a condition may achieve that because parties are assured regarding where they stand, an innominate term argument does not in itself impugn the integrity of this fundamental principle. The exercise of a contractual right to withdraw in the event of a breach has already achieved this certainty since parties are assured regarding the action to take: withdrawal of the vessel. Therefore, the treatment of a payment of hire term does not erode the importance of certainty in commercial contract construction. In fact, the flexibility achieved through an innominate term construction fulfils its role in mitigating the harsh realities that often occur as a result of strict adherence to common law rules which in turn ensure that justice and fairness is attained.

The conferral of an express right to terminate in the character of a right to withdraw has often been used as a catalyst for treating a payment of hire term as a condition of the contract.<sup>90</sup> Support for this view can be found in *The Astra*<sup>91</sup> where Flaux J held the view that the conferral of a right to withdraw was a strong indication that it was intended that the obligation to pay hire was a condition of the contract. A similar view was advanced by Rix LJ in *Stocznia Gdanska SA v Latvian Shipping Co.*<sup>92</sup> Popplewell J in the *Spar Shipping AS v Grand China Logistics Holding Co Ltd*<sup>93</sup> disagreed with this view and thus observed, 'The very inclusion of the contractual right of withdrawal for non-payment of hire suggests that in its absence there would be no such right. Such a provision would be otiose if the owner had the right at common law to put an end to the contract for any default in payment of hire as a breach of condition.'<sup>94</sup> This author argues that the view of Popplewell J is compelling and to be preferred. Given that a time

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<sup>89</sup> *The Scaptrade* [1983] 2 AC 694, 697.

<sup>90</sup> *The Astra* [2013] 1 CLC 819. See also *Stocznia Gdanska SA v Latvian Shipping Co (No.3)* [2003] 1 CLC 282[80] Cf. *The Brimnes* [1973] 1 WLR 386, 408.

<sup>91</sup> [2013] 1 CLC 819 [109].

<sup>92</sup> [2003] 1 CLC 282[80]

<sup>93</sup> [2015] 1 CLC 356; *The Brimnes* [1973] 1 WLR 386, 408.

<sup>94</sup> *Spar Shipping AS v Grand China Logistics Holding Co Ltd* [2015] 1 CLC 356 [195].

charter is basically a contract for services for the benefit of the charterer,<sup>95</sup> it follows that the underlying policy for insertion of a withdrawal clause is that it 'entitles the owner to cease providing those services.'<sup>96</sup> However, by giving the shipowner such entitlement, it does not convert a breach of the payment term into a condition. Although the importance of hire to a shipowner is sacrosanct,<sup>97</sup> arguably that importance alone in the absence of a withdrawal clause does not provide the shipowner with much comfort regarding what the consequences of a breach is. Therefore, the insertion of a right of withdrawal clause places the shipowner in a more assured position such that upon occurrence of a breach of hire obligation, there is only one decision: withdrawal of the vessel. Thus the insertion of a withdrawal clause puts it beyond doubt the consequences intended by contractual parties to flow from an exercise of a right to withdraw namely the cessation of the provision of services rendered by the shipowner to the charterer.

Granted, so far as termination is concerned, there is no distinction to be drawn between termination for a repudiatory breach and termination in the exercise of a contractual right to withdraw.<sup>98</sup> In both cases, the parties are released from any primary obligations falling due after termination but are still subject to any obligation which accrued prior thereto.<sup>99</sup> However, there are conceptual distinctions between a contractual right to terminate in the character of a right to withdraw and the conferral of a common law right to terminate through an express definition of a payment term as a condition or where time is made of the essence.<sup>100</sup> On the one hand, a common law right to terminate gives rise to recovery of loss of bargain damages,<sup>101</sup> on the other, a contractual right to terminate, once exercised does not.<sup>102</sup> Of course, the failure to recover loss of bargain damages through an exercise of a contractual right to terminate

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<sup>95</sup> *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia (The Laconia)* [1977] AC 850, 854.

<sup>96</sup> *Ibid* 870.

<sup>97</sup> See *The Scaptrade* [1983] 2 AC 694, 702; *The Laconia* [1977] AC 850, 870; *Spar Shipping AS v Grand China Logistics Holding Co Ltd* [2015] 1 CLC 356[135] for the importance of hire to the shipowner.

<sup>98</sup> Edwin Peel, 'The Termination Paradox' [2013] 4 LMCLQ 519, 522.

<sup>99</sup> *Ibid* 522.

<sup>100</sup> JW Carter and Wayne Courtney (n 24) 395.

<sup>101</sup> Loss of bargain damages represents compensation for loss of opportunity to receive the performance of the remaining unperformed obligations. See *Lombard North Central Plc v Butterworth* [1987] Q.B. 527, 535.

<sup>102</sup> JW Carter and Wayne Courtney (n 24) 395.

may be rebutted, if there are factual circumstances giving rise to an exercise of a common law right to terminate, say for instance, there was an unreasonable delay in the payment of hire. More to the point, a recovery for loss of bargain damages is heavily reliant on proof of a breach sufficient to discharge the innocent party,<sup>103</sup> in this case the shipowner. In contrast, triggering an express right to withdraw does not require any proof of breach in the nature described above since, any breach will suffice. In addition, parties to a time charter may treat a payment of hire term as a condition through the adoption of a 'time of the essence' device, however, the inclusion of a right of withdrawal in the event of delay, does not invalidate that construction,<sup>104</sup> neither does it define the payment term as a condition or otherwise rebut the presumption that time for payment is not of the essence.<sup>105</sup> Therefore, to say that the mere inclusion of a contractual right to withdraw operates to treat the payment of hire term as a condition of the contract is an exaggeration in itself.

The inclusion of anti-technicality clauses in charterparties essentially protect the charterers from the risk of termination on technical grounds,<sup>106</sup> however, it is silent about the nature of a payment of hire term and says nothing about the consequences that attach in the event of a breach. Therefore, any argument that its existence provides justification for treating a timely payment of hire term as a condition of the contract<sup>107</sup> is on shaky footing. Anti-technicality clauses were developed by the charter market to protect charterers from the serious consequences of a withdrawal, essentially in the cases of a failure to pay hire on time.<sup>108</sup> They were not devised to make time of payment of the essence.<sup>109</sup> Granted, the insertion of an anti-technicality clause may operate to mitigate the harsh consequences that attach in the event that the obligation to pay hire treated as a condition in the sense that 'a truly accidental failure to pay a single instalment of hire by 5 minutes would very likely come within the anti-technicality

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<sup>103</sup> Ibid 398.

<sup>104</sup> Ibid 405.

<sup>105</sup> Ibid 405. See also *Dalkia v Celtech* [2006] 2 P. & C.R. 9[131] for the presumption that 'time for payment is not essential'.

<sup>106</sup> An admission by Flaux J in *The Astra* [2013] 1 CLC 819[111].

<sup>107</sup> Ibid [111].

<sup>108</sup> *Grand China Logistics v Spar Shipping Ltd AS* [2016] 1 CLC 441[57]

<sup>109</sup> Ibid [57].

clause.’ However, the significance of this point is mitigated by the fact that a failure in complying with an anti-technicality clause would entitle the owners to exercise their right to terminate the charter and consequently claim damages for loss of bargain.<sup>110</sup>

Even the language of a typical anti-technicality clause does not suggest that it has the effect of making a payment of hire term a condition. For instance, the NYPE 1993 standard anti-technicality clause provides:<sup>111</sup>

Where there is a failure to make punctual payment of hire due to oversight, negligence, errors or omissions on the part of the charterers or their bankers, the charterers shall be given \_\_\_\_ clear banking days (as recognized at the agreed place of payment) written notice to rectify the failure, and when so rectified within those \_\_\_\_ days following the owners,’ the payment shall stand as regular and punctual. Failure by the Charterers to pay the hire within \_\_\_\_ days of their receiving the Owners’ notice as provided herein, shall entitle the Owners to withdraw as set forth in Sub-clause 11 (a) above.

The clause as reproduced above is designed merely to vary the harsh consequences that may result from the trigger of the contractual right to withdraw clause. It does not say for instance, that payment of hire is to be treated as a condition or that time of payment is to be treated as of the essence.<sup>112</sup> Its language is more naturally indicative of an option to cancel directed solely at future performance and not as something intended to impose new liability.<sup>113</sup> Therefore, a charterer is often given an opportunity to remedy his default and if the default continues, the shipowner is entitled to terminate the charter, thereby claiming damages for loss of bargain.<sup>114</sup> On the flip side, while treating a payment of hire term as a condition, may promote efficiency and stability since each party knows where they stand regarding the remedies exercisable in the event of a breach, the pitfall of such an approach is that, it creates room for opportunistic withdrawal of the vessel in the event of a breach, irrespective of the magnitude.

Considering that the freight market is extremely volatile, a shipowner would be more incentivised to exercise his right to withdraw in a favourable freight market such that, in

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<sup>110</sup> Ibid [57].

<sup>111</sup> NYPE 93, Time Charter New York Produce Exchange Form <[http://www.pfri.uniri.hr/~bopri/documents/Unit12a-nype93\\_000.pdf](http://www.pfri.uniri.hr/~bopri/documents/Unit12a-nype93_000.pdf)> accessed 04/05/2018.

<sup>112</sup> *Spar Shipping v Grand China Logistics Ltd* [2015] 1 CLC 356[187].

<sup>113</sup> Ibid [187].

<sup>114</sup> *Grand China Logistics v Spar Shipping Ltd AS* [2016] 1 CLC 441[57].



the event of a breach, he could easily withdraw his vessel from the services of the charterer in breach and renegotiate the charter elsewhere to a party willing to pay the prevailing market rate. This may account for why shipowners would easily advocate for treating a payment of hire term as a condition. However, in a bid to avoid opportunistic withdrawal, the commercially sensible approach would be to treat such failure in compliance as breach of an innominate term. Therefore, English courts must tread with caution, in trying to construe a payment of hire term as a condition since this may only end up in encouraging contractual avoidance as the shipowner would seek opportunities to exercise his right to terminate even for trivial breaches. As Roskill LJ observed, 'commercial contracts are made to be performed and not avoided.'<sup>115</sup> Therefore, where courts are presented with free choices between two possible constructions of contractual terms, the construction that ensures performance should be preferred rather than the one that encourages avoidance of contractual obligations.<sup>116</sup>

Moreover, while it may be true that a construction making the timely payment of hire a condition reduces the burden placed on the owner in deciding when to terminate if the charterers fail to pay hire<sup>117</sup> timely, it is argued that, that alone is an insufficient ground to justify such a construction. Such an outcome would lead to the undesirable result where a charterer is made to pay a heavy price for failure to pay hire on time even when such failure was not entirely attributable to the charterer or where the breach was trivial, an outcome avoided in *The Georgios C*<sup>118</sup> Lord Scarman in *Bunge v Tradax*<sup>119</sup> resolved any controversy regarding whether or not a term was either a condition or an innominate term as, 'If the stipulation is one, which upon the true construction of the contract the parties have not made a condition, and breach of which may be attended by trivial, minor or very grave consequences, it is innominate.' Applying this test to the present context, it is argued that a payment of hire term falls into the category of stipulations where trivial or grave consequences attach to the occurrence of a breach. A

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<sup>115</sup> *The Hansa Nord* [1976] QB 44, 71.

<sup>116</sup> *ibid* 71.

<sup>117</sup> Edward Yang Liu, 'Charterparty (Time) Renunciation of Breach' (2013) 07 Shipping & Trade Law. (Note)

<sup>118</sup> [1971] 1 QB 488. Although this case was thus overruled in *The Laconia* [1977] AC 850 [HL], however, the dicta relating to not treating a failure to pay hire as a repudiation remains valid since it was left unaffected by the decision in *The Laconia*.

<sup>119</sup> [1981] 1 WLR 711, 717.

charterer might be late in payment of hire by 5 minutes and he might be late by 14 days and the lateness may be either deliberate or accidental or it may even be attributable to no fault of his. Therefore, in the range of circumstances given above, it would be inequitable to treat a payment of hire term as a condition, where the consequences of a breach can vary dramatically from trivial to grave.<sup>120</sup>

Consequently, a construction of the punctual payment of hire term as a condition of the contract would lead to a situation where a shipowner could easily avoid his obligations at the slightest form of breach in a contract that was meant to be performed. Conversely, the consequence of construing the punctual payment obligation as an innominate term encourages performance and would lead to avoidance of the breach (non-payment) only if the breach is so severe that it goes to the root of the contract. It would be unorthodox for commercial parties to reach a consensus that the occurrence of trivial breaches would create an avenue for the exercise of a common law right to terminate by treating a breach of a timely payment of hire term as a breach of a condition equipped with all the drastic consequences that may follow. Therefore, it accords with commercial sense to tread with caution when construing a payment of hire term as a condition. The supposed uncertainty and inefficiency that are associated with an innominate term is a small price to pay compared to the inequitable realities that would occur if a condition construction is to be preferred.

Following from the foregoing, the case for construing a time clause as an innominate term is the fact that it caters for situations where the occurrence of breach is both serious enough to be treated as repudiatory and occasions where they are not. Whereas, the case against construing a time clause as a condition is that it fails to take into consideration a major element of time clauses: the range of breaches from trivial to serious such that, it applies a one-size-fits-all approach to both types of breaches in situations where the consequence of any breach should derive from considering the nature of the breach as well as the circumstances surrounding it as to determine whether it qualifies for a repudiatory breach or not without which the resulting consequence leads to an unfair and inequitable outcome for one of the parties.

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<sup>120</sup> *Shipping v Grand China Logistics* [2016] 2 CLC 441[55] [CA].

With the recent Court of Appeal decision in *Spar Shipping v Grand China Logistics*,<sup>121</sup> the orthodox view is that a timely payment of hire term is not a condition of the contract but an innominate term and rightly so. Therefore, the argument that a payment of hire term should be treated as a condition has lost all of its force. While the *Spar Shipping* decision does not provide a final resting place for the condition argument,<sup>122</sup> it at least provides some temporary relief for charterers regarding the status of a punctual payment of hire term. What is not definitive in the innominate term argument is how to identify with precision, the cut-off point when a failure to pay hire punctually would amount to repudiatory breach. Would repeated failures be the positive acts shipowners look out for? What number of failures would be sufficient to terminate for repudiatory breach? Would it be four, five, or even seven? While uncertainty as to the precise point when a breach could be considered serious enough to trigger the right of the owner to terminate is the main criticism against the innominate term argument, even this can easily be resolved through a proper construction of the contract.<sup>123</sup> The next section will examine the proper test to be employed in determining the occurrence of repudiatory breach in the event that a failure to make prompt payment occurs.

## **2.5 Identification of Repudiatory Breach - The Proper Test**

While the validity of construing a punctual payment of hire obligation as an innominate term is unassailable, the difficulty presented here is in determining the cut-off point when a person's unwillingness or inability to pay is serious enough to amount to a repudiatory breach.<sup>124</sup> Whether or not a breach of an innominate term gives rise to a right to terminate, often involves a 'multi-factorial assessment.'<sup>125</sup> The varying languages adopted by the courts in formulating the test for seriousness of breach have not been 'particularly helpful in analysing the law or in predicting the course of future

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<sup>121</sup> *Spar Shipping v Grand China Logistics* [2015] 1 C.L.C 356 [Comm].

<sup>122</sup> It would take a decision of the Supreme Court to finally bury any attempts to treat a time clause like the present as a condition.

<sup>123</sup> *Bunge v Tradax* [1981] 1 WLR 711, 719.

<sup>124</sup> See *Universal Cargo Carriers v. Citati* [1957] 2 QB 401, 426 where Devlin J noted the difficulty in identifying when a breach has gone to the root of the contract.

<sup>125</sup> *Valilas v Januzaj* [2015] 1 All ER 1047[53] (Comm). See also *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] 4 All E.R. 377[50]; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61[54]. (Australian Case)

decisions.’<sup>126</sup> On some occasions, the courts have expressed the test as ‘a breach must go to the root of the contract.’<sup>127</sup> On others, the courts have adopted certain terminology analogous to the doctrine of frustration in formulating the test of repudiatory breach in the context of delay: ‘whether the delay was such as to render performance of the remaining obligations under the contract of carriage radically different from those which the parties had originally undertaken.’<sup>128</sup> Still yet, the courts have also formulated the test for repudiation along the lines of ‘an intention to abandon and altogether refuse to perform the contract.’<sup>129</sup> The formulation of the test for repudiatory breach has also been expressed as whether the occurrence of breach ‘deprived the charterers of substantially the whole benefit.’<sup>130</sup>

Whatever test formulation is adopted, an innocent party still faces a dilemma as to determining the severity of a breach before he can rightly terminate the contract: If he terminates the charter too early, he risks being in repudiatory breach of the charter himself.<sup>131</sup> Terminating the charter too late, may also be construed as representing an affirmation of the contract which means that his right to treat the contract as repudiated is lost.<sup>132</sup> Such dilemma faced by the innocent shipowner, may account for why shipowners would prefer a breach of a timely payment of hire term as a condition because viewed that way, there is no question regarding whether a breach is serious enough to constitute repudiation of the charter; any breach would suffice. Although, it may be difficult to determine severity of breach with the present medley of tests adopted by the courts, it is argued that, this difficulty is not sufficient to warrant discrediting the sound practical considerations that result from an application of the test

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<sup>126</sup> *Treitel the Law of Contract* (n 25) para 18-031. See also *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] 4 All E.R. 377[50]

<sup>127</sup> *Federal Commerce & Navigation Co. Ltd v Molena Alpha Inc (The Nanfri)* [1979] AC 757, 778-779, 785 [HL]; *Davidson v Gwynne* (1810) East 12 East 381, 389; 104 ER 149, 152. See also a semantic variation in *The Nanfri* [1978] Q.B. 927, 945.

<sup>128</sup> *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ. 789; [2016] 2 CLC 272[25]; *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401, 430-431.

<sup>129</sup> *Tullett Prebon Plc & Ors v BGC Brokers LP & Ors* [2011] EWCA Civ 131; [2011] I.R.L.R. 420 [22]-[29]; *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168; [2011] 2 All E.R. 223[61]-[63].

<sup>130</sup> *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 72; *Urban 1 (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756[57]. See also *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, 380 for a slight variation of this test (*substantial part of the benefit*).

<sup>131</sup> Although it could be argued that such quick termination does not always amount to a repudiation. See the dictum of Lord Wilberforce in *Woodar Ltd v. Wimpey Ltd* [1980] 1 WLR 277, 284.

<sup>132</sup> *Stocznia Gdanska SA v. Latvian Shipping Co. No. 2* [2003] 1 C.L.C 282 [87].

for serious breach. In fact, the potential problems an innocent shipowner may face in an application of the test for serious breach in present circumstances may not be as acute as once thought. This is because the factual circumstances that aid a determination of severity of breach which could provide direction in subsequent cases involving termination for serious breach in a timely payment of hire context are discernible from a thorough examination of case law.

Where a charterer's breach of the obligation to pay hire timely creates an uncertainty as to future performance, the court would be more inclined to endorse a termination for repudiatory breach. An indication of such uncertainty is deductible from the charterer's conduct where he demonstrates an inability to meet his payment obligations.<sup>133</sup> In such circumstances, the right of the shipowner to terminate the contract is not impugned even where the charterer makes genuine efforts to meet payment obligations through an earnest search for funds. To illustrate, in *The Astra*<sup>134</sup> the charterers were in repudiatory breach of the charter as they were constrained financially and could not meet their financial commitments in respect of hire payment despite freight reduction concessions made to them by the shipowner due to the falling freight market.<sup>135</sup> The factual combination of the charterers attempt to renegotiate the charter and their threats of bankruptcy were crucial to the court's determination that the charterers were in repudiatory breach.<sup>136</sup> Similarly, in *Spar Shipping v Grand China Logistics*<sup>137</sup> the charterer faced cash flow difficulties caused by the fall in the market which made it difficult to meet its hire obligations.<sup>138</sup> Although, the charterer made promises that it expected some cash injection from its parent company to enable it pay its arrears, this never came to fruition until the shipowners were forced to withdraw the vessel.<sup>139</sup> The efforts made to source for funds did not help their cause as they were found to be in repudiatory breach.<sup>140</sup>

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<sup>133</sup> Chinyere Ezeoke, 'Assessing Seriousness in Repudiatory Breach of Innominate Terms' [2017] JBL 198, 215.

<sup>134</sup> [2013] 1 C.L.C 819.

<sup>135</sup> Ibid [6].

<sup>136</sup> Ibid [4], [5].

<sup>137</sup> [2015] 1 CLC 356 [Comm].

<sup>138</sup> Ibid [210].

<sup>139</sup> Ibid [210].

<sup>140</sup> Ibid [210]; [211].

In contrast, *The Brimnes*<sup>141</sup> represents a classic example of a scenario where the factual combinations necessary to sustain a claim in repudiatory breach were conspicuously missing. The only breach the charterer was guilty of was repeated failure to pay hire timely in 13 of 14 payments that were made.<sup>142</sup> There was no inference from the facts that the charterers evidenced an inability to pay<sup>143</sup> or encountered cash flow problems due to terrible market conditions or bankruptcy. Consequently, Brandon J hearing the matter had no choice but to absolve the charterers of any allegation of repudiatory breach, and rightly so.<sup>144</sup> A corollary of this is that, mere repeated late payment of hire without more may be insufficient to reach a conclusion that there was a repudiatory breach of charter.<sup>145</sup> Put differently, mere delay in meeting obligations regarding payment of hire without more would be insufficient to justify termination for repudiatory breach.<sup>146</sup> Moreover, the test for repudiatory breach remains the same even in cases of repeated breaches: the breach must go to the root of the contract.<sup>147</sup> Like in *Spar Shipping v Grand China Logistics*<sup>148</sup> and *The Astra*,<sup>149</sup> a factual combination of repeated late payment and some other indication of the charterer's inability to pay<sup>150</sup> would be required to found a repudiatory breach. Absent these, the shipowner runs the risk of being in repudiatory breach of the charter<sup>151</sup> if he terminates the charter.

A deliberate breach without more, is insufficient to found a termination for serious breach. For such a breach to justify termination, it must evidence 'an intention no longer to be bound by the terms of the contract.'<sup>152</sup> As Wilberforce LJ observed, 'The

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<sup>141</sup> *The Brimnes* [1973] 1 WLR 386.

<sup>142</sup> *Ibid* 409.

<sup>143</sup> See also *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 for a similar outcome.

<sup>144</sup> *The Brimnes* [1973] 1 WLR 386, 410.

<sup>145</sup> See *Decro-Wall International SA v. Practitioners in Marketing Ltd* [1971] 1 WLR 361, 369.

<sup>146</sup> However, demonstrating a willingness to pay would not operate to absolve a charterer of repudiatory breach. See *Spar Shipping v Grand China Logistics* [2015] 1 CLC 356[211] [Comm].

<sup>147</sup> *The Mihalis Angelos* [1971] 1 QB 164, 193.

<sup>148</sup> [2015] 1 CLC 356 [Comm].

<sup>149</sup> [2013] 1 C.L.C 819

<sup>150</sup> For example see *Decro-Wall International SA v. Practitioners in Marketing Ltd* [1971] 1 WLR 361, 369; or if the breach was of such magnitude as to destroy the shipowner's confidence in the ability of the charterer to make good payment of hire in a timely fashion or where the delay in payment was for an unreasonably long duration, or if the charterer became insolvent.

<sup>151</sup> *Decro-Wall International SA v. Practitioners in Marketing Ltd* [1971] 1 WLR 361, 374.

<sup>152</sup> *Freeth v Burr* (1874) LR 9 CP 208, 213.

"deliberate" character of a breach cannot, in my opinion, of itself give rise to a breach of contract of a "fundamental" character.'<sup>153</sup> The rationale: 'some deliberate breaches may be of a minor character and can be appropriately sanctioned by damages.'<sup>154</sup> Therefore, the mere deliberateness of a breach without more is not an appropriate yardstick in any determination of serious breach. Put differently, deliberateness may be a relevant factor, but it cannot by itself be the only denominator in any proof regarding serious breach.

Another factor often considered by the courts in any determination of serious breach is whether termination of the contract was premised on an ulterior motive. Where a charterer unfortunately defaults in hire payment in a thriving freight market, a shipowner would be more inclined to exercise his right to withdraw the vessel so he could charter the vessel to another charterer willing to pay the prevailing market rate. In circumstances described above, it could be said that the real motive for the shipowner's termination was not that there had been some failure in performance but that the contract had become a bad bargain because of change in market movements.<sup>155</sup> In such cases, English courts are generally reluctant to endorse termination for serious breach since the motive for withdrawal was obviously dishonest or ulterior. The rationale for such a firm stance rests on the dicta that 'contracts are made to be performed and not to be avoided according to the whims of market fluctuations.'<sup>156</sup> Therefore, a court would not allow itself to be used as a tool to enable the shipowner escape a bad bargain.

Arguably, meeting the threshold of serious breach before a right to terminate crystallizes is not as acute as can be observed from the cases referred to above. Consequently, the argument against construing a time clause as an innominate term for the sake of certainty or to the effect that that the shipowner would face difficulty in determining the cut-off point when repeated failures to pay the hire on time becomes a repudiatory breach in present circumstances, is perhaps overstated and without merit

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<sup>153</sup> *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 435.

<sup>154</sup> *Ibid* 435. For instance, a deliberate delay for one day in loading.

<sup>155</sup> *Treitel Law of Contract* (n 25) para 18-036.

<sup>156</sup> *The Hansa Nord* [1976] QB 44, 71.

and should be rejected. In consequence thereof, contractual breaches in the nature of a failure to pay hire on time should be examined purely on their own individual merits.<sup>157</sup> Parties must not snatch at breaches in a bid to free themselves from their contractual obligations.<sup>158</sup> Repudiation of a contract is a serious matter with extreme consequences and should not be inferred lightly.<sup>159</sup>

Considering that the decision in *Spar Shipping v Grand China Logistics* was delivered at the Court of Appeal, lower courts would remain bound by the decision in deciding any issues involving the status of a timely payment of hire term. However, this does not detract from the fact that the controversy regarding the status of a timely payment of hire obligation will continue to rage on except the Supreme Court intervenes and gives a definite ruling on this subject matter.<sup>160</sup> Given a different set of circumstances, the condition argument could still be introduced into English commercial law jurisprudence. For now, charterers can rest easy knowing that a breach of a time clause in present circumstances is not a condition of the contract but an innominate term. But for how long? Only time will tell. The next chapter addresses another aspect of timely performance which has proved problematic: when is a vessel considered an arrived ship under a port charter so as to trigger the commencement of laytime?

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<sup>157</sup> *The Nanfri* [1979] AC 757, 778.

<sup>158</sup> *Ibid* 778.

<sup>159</sup> *Ibid* 778.

<sup>160</sup> The higher courts like the Supreme Court and the Court of Appeal have at various times intervened to express their views on the subject. However, most of the views expressed have been obiter and therefore not binding on the lower courts.



## Chapter 3

### When is a Vessel an “Arrived Ship”? - An interplay between Principles and Commercial Convenience

#### 3.1 Introduction

Under a voyage charter, the arrival of the vessel at the port of loading or discharge is of crucial importance for contractual parties, since without due arrival of the vessel, commencement of cargo operations remain suspended and laytime<sup>1</sup> does not begin. Therefore, it is critical that the vessel arrives at either port or berth in a timely fashion in order to be adjudged an arrived ship. However, the question as to when a vessel is said to have arrived at the port so as to be considered an arrived ship in order to trigger laytime has created some controversy. By virtue of the decision of the House of Lords in *The Johanna Oldendorff*,<sup>2</sup> the approach under English law is to the effect that a vessel will only be considered as having arrived when it arrives at the usual waiting place where vessels lie *within the port* and is in the immediate and effective disposition of the charterer. A consequence of this approach is that if the location of the usual waiting place is outside the limits of the port, a vessel fails to meet a vital requirement of being considered an arrived ship under English law.

Against this backdrop, this chapter seeks to examine the concept of timely performance in the context of when a vessel may be considered an ‘arrived ship.’ The chapter also argues that the need for reform of the current approach adopted under English law is long overdue and the introduction of a range of contractual devices aimed at addressing any perceived problem of injustice<sup>3</sup> meted out by the current regime is only a stopgap measure and does not render unnecessary the need to reform this area of shipping law. It may be time now for the English approach to be clarified to recognise occasions where the shipowner may be forced to anchor at the usual waiting place located outside port limits due to circumstances outside his control. Such an approach would finally unify the English approach and the approach prevalent in the United States.

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<sup>1</sup> Time scheduled for the loading and discharge of cargo under a voyage charterparty.

<sup>2</sup> *The Johanna Oldendorff* [1974] AC 479. [HL]

<sup>3</sup> For instance, under the Reid test, the shipowner is deprived of substantial demurrage in the event that the vessel is outside port limits and it would not matter the distance. This clearly puts the shipowner in a disadvantage, particularly as the cargo owner could hide under the guise of non-arrival of the vessel and also escape liability for non-availability of cargo.

The rest of the chapter is structured as follows: Section two provides an overview of the nature of laytime. Sections three and four critically appraise the English law approach to the question as to when a vessel is deemed an arrived ship while also considering the United States approach to the arrived ship conundrum. Section five addresses the alternative approaches adopted by English courts in resolving the arrived ship problem. Section six next considers the second limb of the arrived ship test which is placing the vessel at the immediate and effective disposition of the charterer. Section seven concludes the chapter by examining the possibility of adopting a broader approach to the inquiry as to when a vessel becomes an arrived ship.

### **3.2 Nature of Laytime**

Under a voyage charter, the maritime adventure contemplated by parties to the contract can be divided into four stages: (1) the loading voyage; (2) the loading operation; (3) the carrying voyage and (4) the discharge operation.<sup>4</sup> These stages must be performed sequentially as there is no room for gap or overlap between the stages.<sup>5</sup> This would mean for instance that, a vessel must reach its specified destination before a NOR is issued and loading of the vessel can commence.<sup>6</sup> On the one hand, while stages one and three which are the loading voyage (getting the vessel to the loading port) and the carrying voyage (getting the vessel to the discharge port) stages are obligations exclusively within the control of the shipowner,<sup>7</sup> on the other, the loading and discharge operations stages are joint operations which require the cooperation of the shipowner and the charterer to be performed properly.<sup>8</sup>

In a voyage charter, the aim of the shipowner is to ensure that all stages are completed as economically as possible whilst making maximum profit on his capital investment.<sup>9</sup> For the charterer, ensuring minimal carriage cost of his cargo to its destination is the primary goal.<sup>10</sup> The time or duration of the carriage may be of minimal significance to

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<sup>4</sup> Ibid 556.

<sup>5</sup> John Schofield, *Laytime and Demurrage* (5th Edn, Taylor and Francis 2013) 1.12.

<sup>6</sup> Ibid 1.12

<sup>7</sup> *Aldebaran Compania Maritima SA Panama v Aussenhandel AG Zürich (The Darrah)* [1977] AC 157, 159. [HL]

<sup>8</sup> John Schofield (n5) para 1.12

<sup>9</sup> Ibid para 1.14.

<sup>10</sup> Ibid para 1.14.

the charterer<sup>11</sup> but for the shipowner, he expects a quick turn-round because for him, time is money.<sup>12</sup> Therefore, it is in the interest of both parties if each stage under the voyage charter is completed timely. However, it may be practically impossible to predict with accuracy how long each stage will last.<sup>13</sup> The impossibility here is exacerbated by the occurrence of unexpected delays in any of the stages. These delays could range from bad weather at both the loading and carrying voyages to congestion at the agreed destination affecting both the loading/discharge operations.<sup>14</sup> The occurrence of delay could result in the shipowner incurring significant losses such as the loss of freight at the market rate if the vessel is kept stationary.<sup>15</sup> The shipowner could also incur heavy overhead costs every day the vessel is kept waiting and this would naturally encroach on his profit margin thereby turning an expected profit into a realised loss.<sup>16</sup>

In fixing freight rates, it is not impossible to place the entire risk of loss from these delays on either the shipowner or charterer. However, such an approach could have untoward consequences. For instance, where delay is attributable to a failure by the charterer to provide cargo at the load port or a failure to take delivery, charterers run the risk of shipowners over-estimating the resulting loss since these are matters within the charterer's control.<sup>17</sup> The same argument could be made if the risk of congestion is placed squarely on the shoulders of the shipowner especially as there is an absence of detailed information to the charterer from those who handle cargo at the port regarding the condition of the port at the time of arrival of the vessel.<sup>18</sup> Conversely, placing the entire risk of delay on the charterers as in a time charter, could lead to a situation where in an isolated voyage, charterers take an exaggerated view of the loss that occur if delay is attributable to the vicissitudes of the oceans or the mechanical imperfections of the vessel.<sup>19</sup> Therefore, in matters like this, it is no surprise that commercial sense prevails to dictate the division of risk between the charterer and owner, which is achieved by

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<sup>11</sup> Ibid para 1.14.

<sup>12</sup> *Compania de Navigacion Zita SA v Louis Dreyfus & Cie* [1953] 1 WLR 1399, 1401. [Comm]

<sup>13</sup> *The Johanna Oldendorff* [1971] 2 Lloyd's Rep 96, 98. Donaldson J [Comm]

<sup>14</sup> Ibid 98.

<sup>15</sup> Hugo Tiberg, *Law of Demurrage* (5<sup>th</sup> edn, Sweet & Maxwell 2013) para 1-04.

<sup>16</sup> Ibid para 1-04.

<sup>17</sup> *The Johanna Oldendorff* [1971] 2 Lloyd's Rep 96, 98. [Comm]

<sup>18</sup> Ibid 98.

<sup>19</sup> Ibid 98.

agreeing to freight rates which cover the vessel getting to the load place and stay there for an agreed number of days carrying the cargo to the discharging place and stay there for a period of days.<sup>20</sup> This periods of days is known as the laydays or laytime through which the performance of the loading and discharge operations are completed.<sup>21</sup> Interestingly, if laytime is exceeded, the charterer pays the shipowner an additional sum to the shipowner known as demurrage.<sup>22</sup> If it takes a shorter time to complete, the shipowner refunds to the charterer a sum known as dispatch money.<sup>23</sup> Generally, fixing the contractual laytime serves two purposes: It limits the time within which the charterer's major obligation to load or discharge the vessel must be performed;<sup>24</sup> it also establishes as between owner and charterer the financial consequences of delay in completing the loading or discharging of the vessel on the voyage in question.<sup>25</sup>

Laytime provisions as contained in voyage charters generally fall into two categories namely: customary laytime and fixed laytime. Where the charterparty does not indicate a definite period during which the vessel is permitted to load or discharge her cargo, the law implies that the cargo would be loaded within a reasonable time.<sup>26</sup> This is usually referred to as customary laytime. Of course the time allowed for loading and discharging will vary from ship to ship and from time to time, as the period allowed cannot be determined in advance<sup>27</sup> especially as there is barely any reference to time for loading/discharging of cargo in the charterparty.<sup>28</sup> Under this category of laytime, the risk of delay is usually with the shipowner in the absence of any default by the charterer.<sup>29</sup>

However, there are occasions where the charterparty provides for a fixed period of time when the charterer can load or unload the cargo. This is referred to as fixed laytime and English law treats this as an absolute and unconditional engagement such that a failure

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<sup>20</sup> Ibid 99. See also *Inverkip Steamship Co. Ltd v Bunge & Co* [1917] 2 KB 193, 200. [CA]

<sup>21</sup> *The Darrah* (n 6) 164.

<sup>22</sup> *The Johanna Oldendorff* [1971] 2 Lloyd's Rep 96, 99.

<sup>23</sup> Ibid 99.

<sup>24</sup> *Transgrain Shipping BV v Global Transporte Oceanico SA (The Mexico 1)* [1988] 2 Lloyd's Rep. 149, 153.

<sup>25</sup> Ibid 151.

<sup>26</sup> *Postlethwaite v Freeland* [1880] 5 App Cas. 599, 608. [HL] Selborne LJ.

<sup>27</sup> John Schofield (n54) para 1.17.

<sup>28</sup> Ibid paras 1.17.

<sup>29</sup> Ibid paras 1.17.

to perform, makes the charterer liable to the shipowner in demurrage whatever maybe the nature of the impediments which prevent him from exercising performance and which causes the vessel to be detained beyond the time stipulated.<sup>30</sup> Laytime belonging to the second category is open to certain limitations. In other words, parties can agree that certain period or causes of delay are excluded from coming within the definition of laytime.

The use of customary laytime in modern voyage charterparties is now limited, even though it played a crucial role in the development of the law relating to laytime.<sup>31</sup> The law regarding laytime has seen an increased use of fixed laytime provisions. Perhaps the preference for fixed laytime is connected to the fact that it provides more certainty in the estimation of the length of the loading and discharge period while also offering more flexibility through the use of exception clauses in varying the apportionment of risk.<sup>32</sup> It is noteworthy to mention that, where the charterer is in excess of the agreed laytime, he is liable to pay the shipowner liquidated damages in the form of demurrage.<sup>33</sup> Conversely where the loading/discharge operation is completed within the laytime, the shipowner is liable under the charterparty to pay despatch money to the charterers.<sup>34</sup> The underlying aim of fixing laydays, providing for demurrage, and despatch money is to penalise delay in loading or discharge and to reward promptitude.<sup>35</sup>

As a general rule, laytime commences when three conditions are met. Firstly, the vessel arrives at the agreed destination subject to the terms of the charter;<sup>36</sup> secondly, the vessel must be in a condition ready and fit to load/discharge cargo; thirdly, a NOR must be issued to the charterer by the shipowner.<sup>37</sup> Where these conditions are fulfilled, it is generally accepted that laytime has commenced. However, with the commencement of laytime, it is common for the liability for delay to change from charterer to shipowner depending on the terms of the charter.<sup>38</sup> When this change occurs, it is often difficult to

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<sup>30</sup> *Postlethwaite v Freeland* (n26) 608.

<sup>31</sup> John Schofield (n5) para 1.20.

<sup>32</sup> *Ibid* para 1.21.

<sup>33</sup> Simon Baughen, *Summerskill on Laytime* (5<sup>th</sup> edn, Sweet & Maxwell 2013) para 1-02.

<sup>34</sup> *Ibid* para 1-02.

<sup>35</sup> *Compania de Navigacion Zita SA v Louis Dreyfus & Cie* (n 11)1402.

<sup>36</sup> The agreed destination may depend on whether the vessel is a berth or port charter. The next section discusses this in greater detail.

<sup>37</sup> *Leonis v Rank* [1908] 1 KB 499, 517-518.

<sup>38</sup> John Schofield (n5) para 1.22.

determine with precision when the vessel has arrived at the agreed destination. Over the years, controversy abounds as to when the vessel has met the requirement of arrival at the agreed destination under English law. Various views have been expressed as to the crucial time of arrival of the vessel at the agreed destination. Establishing with precision when the agreed destination is reached is crucial to determining when laytime can be said to commence and will thus remove all forms of ambiguity and uncertainty as to the intendment of parties to this important aspect of the transaction, the absence of which the current state of the law has tended to provide room for many disagreements on the correct interpretation of the commencement of laytime. Owing to the ambiguity in the current state of the law, the next section attempts to explore the controversy in relation to the commencement of laytime in a bid to determine when a vessel has arrived at the agreed destination.

### **3.3 Arriving at the Agreed Destination**

Whether a vessel is considered as having arrived at the agreed destination so as to trigger the commencement of laytime may well depend on whether the agreed destination is a berth or port.<sup>39</sup> In the case of a berth charter, the principle is fairly straightforward. A vessel is deemed to have arrived when it reaches the specified destination which is a berth. Upon arrival at the berth, it is said that the voyage is at its end and the commencement of loading or discharge of cargo may begin.<sup>40</sup> The arrival of the vessel at berth also triggers the commencement of laytime.<sup>41</sup> Until the vessel has arrived at the particular berth, the charterer is not obliged to load or unload the cargo and time spent while waiting within the limits of the berth, for a berth to become available in the event that there is none, is at the shipowner's expense.<sup>42</sup>

From the foregoing, determining the agreed destination for a vessel to be considered arrived is somewhat simple. However, applying the same rules when the agreed

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<sup>39</sup> The charterparty types are not limited to just a berth or a port charter. There are other forms like the dock charter. These are less common in practice and may be regarded as an offshoot of the port charter since a named dock shares some characteristics as a named port in that they are both geographical places within which berths lie. See Donald Davies, *'Commencement of Laytime'* (4<sup>th</sup> edn, Informa 2006) para 22.

<sup>40</sup> *The Johanna Oldendorff* [1974] AC 479, 556. [HL]

<sup>41</sup> *North River Freighters Ltd v President of India (The Radnor)* [1956] 1 QB 333, 341, 350. [CA]; *Cosmar Compania Naviera SA v Total Transport Corporation (The Isabelle)* [1982] 2 Lloyd's Rep 81, 85 [1<sup>st</sup> Col] [Comm]

<sup>42</sup> *The Johanna Oldendorff* [1974] AC 479, 557 [HL].

destination is a port has often led to problems. This is because a vessel sailing under a port charter is not mandated to reach a loading berth in order to become an arrived ship and so set lay days in motion.<sup>43</sup> It would suffice if she reached the named destination: the port itself.<sup>44</sup> The difficulty presented here would be, predicting with accuracy what part of the port would the vessel have to reach to be considered as having arrived especially as the limits of a port may be vast and extensive or uncertain in the case of a newly established port because the limits have not yet been defined by the relevant port authority.<sup>45</sup> More to the point, under a port charter, berth availability cannot be guaranteed upon arrival of the vessel. On rare occasions, a berth might be available and the vessel must proceed forthwith to the available berth and there anchor. This certainly identifies with the business purpose of the voyage which is to bring the vessel to a berth at which cargo operations can commence.<sup>46</sup>

In most occasions, the berth may not be available and the vessel due to congestion at the port would have to await for berth availability. The question then turns on who bears the risk of waiting at a port for a berth to become so available. The charterer would reject all notion of bearing risk and would much rather prefer the shipowner to bear all the risk because for him, time for loading and discharge does not begin until a berth is available.<sup>47</sup> Consequently, it would be commercially absurd to require the charterer to pay for time waiting to get to berth.<sup>48</sup> The shipowner on the other hand, is averse to bearing any risk for delay in waiting for berth since the charterer is vested with the duty of making cargo available at the port and also making arrangements for an available berth where discharge or loading can occur.<sup>49</sup> Therefore, a shipowner would ordinarily find it difficult to understand why he should be made to wait at his own expense when it is no fault of his that, the charterer failed to make a berth readily available.<sup>50</sup> It has also been difficult to decipher the proximity of the vessel to the port before she can be

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<sup>43</sup> *The Aello* [1961] 1 AC 135, 165 [HL].

<sup>44</sup> *Ibid* 165.

<sup>45</sup> *Leonis v Rank* [1908] 1 KB 499, 519. [CA]

<sup>46</sup> *The Johanna Oldendorff* [1974] AC 479, 557. [HL]

<sup>47</sup> *Van Nievelt Goudriaan Stoomvaart Maatschappij v. C. A. Forslind & Son, Ltd* [1925] 22 Lloyd's Rep. 49, 51 [1<sup>st</sup> Col].

<sup>48</sup> *Ibid* 51.

<sup>49</sup> *Ibid* 51

<sup>50</sup> *Ibid* 51.

regarded as having arrived in the event that there is no available berth?<sup>51</sup> Would it suffice if the vessel is within or outside port limits?<sup>52</sup> In view of the above, construing with precision when a vessel becomes an arrived ship is saddled with difficulty. For present purposes, it is important to address how the English courts have sought to resolve the problems that may occur when determining whether a vessel has arrived the agreed destination in the case of a port charter, to provide some illumination in resolving the controversy.

### **3.4 Judicial Approaches to the Arrived Ship Problem**

The approaches to the arrived ship problem at least under English law has been divergent and far from satisfactory. The first test aimed at addressing this problem was the 'commercial area test' proposed as far back as 1908 in the seminal case of *Leonis v Rank*.<sup>53</sup> This decision ranks as the first holistic attempt by an English court to address the potential difficulty that might arise when a vessel arrives at the port. The Court of Appeal sought to resolve this problem by construing a vessel's arrival at the port as arriving within the commercial area of the port.<sup>54</sup> The facts of the case are fairly simple. The charter provided that the ship should proceed as ordered by the charterers to a loading port Bahia Blanca in order to receive cargo. Laydays<sup>55</sup> were fixed with time for loading agreed to commence 12 hours after written NOR is given by the master to the charterers that the vessel is ready to receive cargo. She arrived on February 24 and anchored about a few ship's length from the railway pier. The place where the vessel anchored was not the usual place of loading but was merely a possible loading place. The master then gave NOR intimating the ship's readiness to load. The charterer's desired her to go alongside the pier which she eventually did but was delayed in getting into berth due to port congestion which continued for a month after which the shipowners claimed demurrage.

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<sup>51</sup> Simon Rainey, 'Arrival Readiness and the Commencement of Laytime' in Rhidian Thomas (ed), *The Evolving Law and Practice of Voyage Charterparties* (Informa, 2009) Para 7.18.

<sup>52</sup> Ibid Para 7.18.

<sup>53</sup> [1908] 1 KB 499 [CA].

<sup>54</sup> *Sailing Ship Garston Co v Hickie* [1885] 15 QBD 580, 587. [CA]

<sup>55</sup> This represents the number of days reserved for the performance of the loading or discharge operations of the voyage.



The charterers argued successfully that demurrage does not commence until the vessel has arrived at the usual waiting place nominated by the charterers as the risk of berths being occupied falls on the vessel and not the charterers.<sup>56</sup> The commercial court in deciding this issue held that the vessel was not an arrived ship as laydays commenced only after the vessel obtained berth alongside the pier.<sup>57</sup> On appeal, the appellate court decided in favour of the owners that the vessel was an arrived ship.<sup>58</sup> Kennedy LJ construed the arrival of a ship at a port to mean the arrival at the commercial area of the port, which makes the shipowner entitled to give NOR to load at the expiration of which laydays begin to count.<sup>59</sup>

The identification of the commercial area was a crucial element to the utility of this approach proposed by Kennedy LJ. It was identified as that part of the named port where the vessel being ready to load is effectively placed at the disposal of the charterers as near as circumstances permit to the actual loading spot and in a place where ships waiting for access usually lie.<sup>60</sup> In simple terms, an arrival at the usual waiting place where vessel's lie would satisfy the commercial area test,<sup>61</sup> such that, once a vessel arrives at that spot laytime could begin to count and the risk of delay in making a berth available falls squarely on the charterer. Interestingly, a vessel need not proceed into the actual loading place in order to meet the requirements of arrival under this approach. If that were so, it would be difficult to distinguish arrival of the vessel under a berth and port charter, as the arrival of a vessel under a berth charter is characterised by arrival at the berth, no more, no less. Under a port charter, no such requirement is mandatory since it may be difficult to guarantee the availability of a berth upon arrival at the port due to port congestion. Therefore the Court of Appeal was right in rejecting the reasoning of Channel J and construing the vessel as having arrived the port.

The 'commercial area test' stood as the correct position of the law for a long time and provided some illumination on an area of law that was often filled with controversy.

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<sup>56</sup> *Leonis v Rank* [1907] 1 KB 344, 349 [Comm].

<sup>57</sup> *Ibid* 355.

<sup>58</sup> *Leonis v Rank* [1908] 1 KB 499 [CA].

<sup>59</sup> *Ibid* 521.

<sup>60</sup> *Ibid* 521.

<sup>61</sup> *Ibid* 523.

However, the decision had its drawbacks as illustrated by the latter decision of *The Aello*.<sup>62</sup> The approach adopted by the court in resolving the arrived ship problem paid no heed to the geographical, fiscal and pilotage limits of the port but instead focused on the commercial area of the port. The judge's preference for attaching arrival at the port with arrival at the commercial area may have been borne out of the fact that they had 'a commercial contract to construe and commercial matters were to the fore.'<sup>63</sup> Arguably, the decision to settle for this approach in hindsight may have been misguided as it failed to anticipate the rapid growth and expansion of ports over the years which made delimiting the 'commercial area' of the port in future cases often problematic.<sup>64</sup> Perhaps, an approach which considered the legal, fiscal and pilotage limits of the ports as well as commercial considerations would have provided an unassailable resolution of the arrived ship problem.

*The Aello* mentioned earlier, represented the kind of difficulty faced in trying to properly interpret the commercial area of a port vis-à-vis current realities at the time. The result of that decision had a lasting effect on this area of law for a long time. In that case, a vessel was chartered to proceed to receive a cargo of wheat or maize or rye at or two safe ports in the river Parana and the balance of cargo in the port of Buenos Aires. At the date of the charterparty the system of traffic control did not permit vessels arriving to load maize to proceed beyond a point in the roads called the free anchorage (some 22 miles or 3 hours steam time from the dock area) until they had obtained a permit issued by the customs authority. Once permit had been obtained, the vessel could then proceed to the dock area, where vessels waiting to load grain usually lay while also waiting for an available berth. To deal with the congestion at the port, the port authorities changed the previous system of traffic control such that before a permit can be issued, a vessel must obtain a grain board certificate and also have a cargo ready to load.

*The Aello* arrived at the free anchorage ready to proceed into the dock area. The cargo owners also obtained the grain board certificate at a time when there was no congestion at the port. Unfortunately the charterers had no cargo available until sometime later. In

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<sup>62</sup> *The Aello* [1961] AC 135. [HL]

<sup>63</sup> Donald Davies (n 39) Para 3.

<sup>64</sup> *Ibid* Para 3.

view of this, the vessel was compelled to wait at the free anchorage until cargo became available. The charterers contended that the vessel was not an arrived ship until cargo became available ready to be loaded. For the shipowners, the argument was that the vessel was an arrived ship when it arrived the free anchorage. In a split decision, the court held that *The Aello* was not an arrived ship until cargo became available for when she was anchored in the free anchorage, she was not within the commercial ambits of the port which was the area where a vessel could be loaded when a berth became readily available.<sup>65</sup> The commercial area of the port was construed as the inner harbour or the dock area.<sup>66</sup> Any arrival short of those places did not qualify the vessel to be considered an arrived ship.

Deciding *The Aello*<sup>67</sup> on the strength of its facts alone would have been sufficient to dispose of the owners claim because *The Aello* by anchoring some 22 miles away from the port was not an arrived ship, as she was not at the usual place of loading neither was she within the commercial area of the port. The only reason she was anchored at the free anchorage was due to the direction of the port authorities which required all vessels loading maize to anchor at the free anchorage. Absent this direction, if the vessel had arrived at the free anchorage, the vessel was not an arrived ship as that was not the usual waiting place. Consequently, the construction placed on the commercial area test by the House of Lords was unnecessary. Perhaps, the circumstances of the case may have influenced the outcome of the decision where the usual waiting place for vessels although close to the port was temporarily congested and the port authority sought for a temporary fix to the congestion problem by directing all vessels arriving at the port to wait at a point though within the ambits of the port but was some 22 miles from the loading area. In the circumstance of arrival it was difficult to see how the vessel became an arrived ship<sup>68</sup> because it had not arrived at the usual waiting place. This set of circumstance was quite different from *Leonis v Rank*<sup>69</sup> where the vessel was only a few ships length off the pier alongside which loading took place. This material distinction

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<sup>65</sup> *The Aello* [1961] AC 135, 188.

<sup>66</sup> *Ibid* 209.

<sup>67</sup> [1960] AC 135.

<sup>68</sup> *The Aello* [1961] AC 157, 207 Per Lord Jenkins.

<sup>69</sup> [1908] 1 KB 499.

was crucial to the decision in *The Aello* since the vessel was anchored some 22 miles outside the port. Nevertheless, the test proposed in *The Aello* sought to link the arrival of a vessel at any given port to the arrival of that vessel to the arrival at a physical area 'where loading takes place'<sup>70</sup> or as Parker LJ put it 'that part of the port where a ship can be loaded when a berth is available.'<sup>71</sup> This test as proposed above originated from the Court of Appeal decision of Parker LJ in *The Aello*,<sup>72</sup> which, explains why it is frequently referred to as 'the Parker test.'

In the years that followed, the Parker test turned out in practice to be difficult to apply to the circumstances of individual cases.<sup>73</sup> A vessel which had arrived as close as it could possibly get to the port and could go no further because of a lack of berth or port authority restrictions was considered as not having arrived the port because the location of where she anchored or usual waiting place was outside port limits.<sup>74</sup> The decision also failed to recognise the impact of the increased size, capacity and speed of vessels, which made the distance between where the vessel anchored and the actual loading place irrelevant.<sup>75</sup> The consequences of such an approach turned up huge economic losses for the shipowner who had no recourse to compensation for time spent while his vessel was lying doing nothing except waiting for a berth to become available even though the vessel had completed the sea passage and was near to the loading berth as close as she could possibly get.

*The Delian Spirit*<sup>76</sup> best illustrates the kind of difficulty presented by *The Aello* approach. A vessel was chartered to sail to one or two safe ports in the Soviet Black Sea to load a cargo of oil alongside lighters and laytime was to commence from the time the vessel was ready to receive cargo. The vessel arrived at the roads off Tuapse, a small port but no loading berths at the jetty inside the breakwater were available. Moreover, port regulations placed restrictions on tankers waiting inside the breakwaters. Consequently, the vessel anchored at a point 1¼ miles from the jetty outside the break water. NOR was

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<sup>70</sup> *The Aello* [1958] 2 QB 385, 401.

<sup>71</sup> *Ibid* 401.

<sup>72</sup> [1958] 2 QB 385, 401. [CA]

<sup>73</sup> *Federal Commerce v Tradax Export (The Maratha Envoy)* [1978] AC 1, 9.

<sup>74</sup> Donald Davies (n 39) Para 4.

<sup>75</sup> *Ibid* Para 4.

<sup>76</sup> *Shipping Development Corporation v V/O Sojuzneftexport (The Delian Spirit)* [1972] 1 QB 103 [CA].

given for the vessel to begin loading which was accepted by the charterers but the vessel was prevented from moving into berth. She finally berthed and was also granted free pratique. Loading began at 21:50 hours and was completed 19:10 pm the next day. It was agreed that time spent at anchorage waiting for berth was to count as laytime, but a dispute on the quantum of demurrage payable by charterers was referred to arbitration.

In support of their claim for damages for detention, shipowners argued that the vessel was not an arrived ship when she anchored at the anchorage since there was a considerable distance between the anchorage area and the oil berths plus the area where the vessel anchored was not the usual place for loading oil vessels.<sup>77</sup> As such, the anchorage area did not form part of the commercial area of the port but the identity of the commercial area for oil tankers consisted of the harbour within the breakwater or the jetty.<sup>78</sup> The owners relied on *The Aello* as authority for their position,<sup>79</sup> a position already endorsed by the umpire on arbitration. Donaldson J rejected this line of argument and held that the vessel was an arrived ship since she was in that area of the port within which the master could effectively place his ship at the disposal of the charterers and was near as circumstances permitted to the actual loading spot.<sup>80</sup> *The Delian Spirit* exposed the difficulty in application of the Parker test especially with regard to individual cases. Its limited application to individual cases is indicative of the reason for its unpopularity in shipping circles.

The House of Lords soon had cause to revisit the meaning of an arrived ship in *The Johanna Oldendorff*.<sup>81</sup> Under a port charter, the shipowners agreed to let their vessel to the charterers for the carriage of grain to one of 6 ports. Time for discharge of the cargo was to count whether the vessel had arrived at berth or not. The vessel proceeded to the Liverpool/Birkenhead port wherein she anchored at the Mersey Bar which is the usual waiting place for grain ships discharging at the port. Although the Mersey Bar was within the legal limits of the port, it was still 17 miles from the docks. The vessel had to

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<sup>77</sup> Ibid 108.

<sup>78</sup> Ibid 108.

<sup>79</sup> Ibid 108.

<sup>80</sup> Ibid 114. This view was endorsed on appeal. See *The Delian Spirit* [1972] 1 QB 103, 122. [CA]

<sup>81</sup> *E.L. Oldendorff & Co. GmbH v. Tradax Export SA (The Johanna Oldendorff)* [1974] AC 479 [HL].

proceed there on account of berth unavailability. NOR was issued the same day and she had to wait there for a berth to become available. A dispute arose as to the entitlement of the shipowner to demurrage. In addressing the question regarding whether a vessel is an arrived ship, the House of Lords held that under a port charter a vessel reaches its specified destination when it arrives a position *within the port* and is *in such a position as to be at the immediate and effective disposition of the charterer*.<sup>82</sup> The position of the vessel in relation to the geographical and physical attributes of the port were rendered insignificant by *The Johanna Oldendorff* which had sought to correct the uncertainty created by *The Aello* decision. It follows therefore that for a vessel to be arrived, two requirements have to be fulfilled namely: arrival of the vessel at a position within the port and the vessel must be at the immediate and effective disposition of the charterers. This test sought to replace the unpopular Parker test previously adopted in *The Aello*. In view of the fact that Reid LJ of the House of Lords formulated this test while delivering the lead judgement in *The Johanna Oldendorff*, this test came to be known as the Reid test. The next section will seek to address the first of the two requirements advanced under the Reid test: arrival of the vessel within the port.

### **3.4.1 Arrival within the Port**

As per *The Johanna Oldendorff*, one of the cardinal requirements to be fulfilled for a vessel to be considered an arrived ship under a port charter is for the vessel to be in a position within the port.<sup>83</sup> Certainly a position within the port does not refer to just any position within the port, but a position within the commercial area of the port.<sup>84</sup> An area within the port where waiting vessels lie while waiting to berth may give an insight as to the precise position within the commercial area of the port.<sup>85</sup> Such an understanding is consistent with the commercial area test as pronounced by Kennedy LJ in *Leonis v Rank*.<sup>86</sup> However, ports differ in terms of size, topography and limits depending on the purpose for which the limits were defined.<sup>87</sup> These limits may be defined by law or

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<sup>82</sup> *The Johanna Oldendorff* [1974] AC 479, 535 [HL].

<sup>83</sup> Ibid 531.

<sup>84</sup> Ibid 531.

<sup>85</sup> Ibid 531.

<sup>86</sup> *Leonis v Rank* [1908] 1 KB 499 [CA].

<sup>87</sup> *Leonis v Rank* [1908] 1 KB 499, 519; See also John Schofield (n5) para 3.57.

custom and in the case of a newly established port for instance, the limits may be uncertain or not yet defined by any competent authority.<sup>88</sup>

Since port size and limits differ, it is not unusual that the usual waiting place be located outside the limits of the port.<sup>89</sup> This has given rise to the question whether a vessel though arrived at the usual waiting place which is located just outside the port area can be considered as an arrived vessel for the purpose of commencing laytime? Courts under English law have been very reluctant to hold vessels which arrived at usual waiting places located outside port limits as arrived ships.<sup>90</sup> The consequence of this is that a vessel which has arrived at a usual waiting place located say two miles off the port limits would be deemed as having not arrived. The case of *The Maratha Envoy*<sup>91</sup> accurately typifies an example of the general reluctance by English courts to extend the Reid test to include occasions where the usual loading place may be located outside the limits of the port. The facts of the case are fairly straightforward. The charterers chartered a vessel for the carriage of grain from the Great Lakes to North Europe. Time for discharge was to count whether in berth or not (WIBON). The vessel was set to proceed to the estuary of Weser which was a river with four ports with discharge of cargo to occur in one of the four ports. The only waiting area for large vessels was the Weser Lightship situated about 25 miles seaward off the mouth of the river. All the berths in the 4 ports were full. The vessel was forced therefore to anchor at the Lightship at 22 hours on December 7 1970. In order to qualify as an arrived ship, the vessel twice sailed up the river until she was off the nominated port of discharge before sailing back to the Lightship. She finally issued an effective NOR on 12<sup>th</sup> December, with the vessel remaining at the lightship until a berth became available at the nominated port of discharge where she finally discharged her cargo on December 30.

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<sup>88</sup> *Leonis v Rank* [1908] 1 KB 499, 519. [CA]; See also *Nicholson v Williams* (1871) LR 6 QB 632, 641.

<sup>89</sup> See for example, *The Delian Spirit* [1972] 1 QB 103 where the port of Tuapse was a small port and the usual waiting place was located outside the limits of the port. In addition the usual waiting area of the port in *The Maratha Envoy* [1978] AC 1 was also considered outside port limits. See also *Roland-Linie Schiffahrt G.M.B.H v Spillers Ltd.* [1957] 1 QB 109 where the usual waiting place was also located outside the port. Although, in this case the vessel was held to be an arrived ship, it is doubtful whether the vessel would be considered as having arrived the port having anchored in a usual waiting place outside port limits in view of the decision of the House of Lords in *The Johanna Oldendorff* [1974] AC 479 [HL].

<sup>90</sup> *The Johanna Oldendorff* [1974] AC 479 [HL]; *The Maratha Envoy* [1978] AC 1; *Navalmar UK Ltd v Kalemaden Hammedeler Sanayi ve Ticaret AS (The Arundel Castle)* [2017] 1 CLC 71.

<sup>91</sup> [1978] AC 1. [HL]

The shipowners claimed demurrage as the vessel became an arrived vessel when she sailed up river to the mouth of the nominated port. This view was rejected by Donaldson J at the commercial court and instead held that the vessel was arrived when she has come to rest within the port and is either at a place where usual waiting vessels lie or some other place within the port.<sup>92</sup> Allowing the shipowners appeal, the appellate court sought a different approach to the arrived ship question and subsequently held that a ship was an "arrived ship" under a port charter when she reached the usual waiting place for her port of destination and was at the disposition of the charterers for dispatch to a designated berth.<sup>93</sup> Therefore, when the vessel dropped anchor at the Wesser Lightship and was there waiting, she was an arrived ship.<sup>94</sup> The House of Lords finally laid the arrived ship question to rest and reaffirmed the importance of the Reid test when it held that a ship could not be an arrived ship unless she had reached a position within the port where she was at the immediate and effective disposition of the charterer.<sup>95</sup>

The reluctance by the House of Lords to revisit the Reid test is closely connected with the quest of providing legal certainty to the way in which the risk of delay from congestion at the discharging port is allocated between charterer and shipowner.<sup>96</sup> The necessity of legal certainty in commercial transactions means that parties who bargain in a free market on equal terms should stick to the terms of their agreement.<sup>97</sup> Justice would only be seen to have been done when the court gives effect to the agreement as bargained by the parties while also compensating the party who kept his side of the deal for any loss he sustains by the failure of the other party to fulfil his.<sup>98</sup> Therefore, the House of Lords sought to preserve the legal certainty created by *The Johanna Oldendorff*<sup>99</sup> in the allocation of risk of delay attributed to congestion at the ports where the port charter contains no special clause dealing with the subject of allocation of

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<sup>92</sup> [1975] 1 WLR 1372, 1378 [Comm]. Donaldson J felt constrained by *The Johanna Oldendorff* [1974] AC 479, 535, 536. [HL]

<sup>93</sup> [1977] QB 324, 339, 344.

<sup>94</sup> Ibid 324.

<sup>95</sup> *The Maratha Envoy* [1978] AC 1, 9, 10, 14.

<sup>96</sup> Ibid 9, 14.

<sup>97</sup> Ibid 8.

<sup>98</sup> Ibid 8.

<sup>99</sup> [1974] AC 479.



risk.<sup>100</sup> Therefore departing from the test proposed by Lord Reid in *The Johanna Oldendorff* would upset that certainty already assured by the Reid test.<sup>101</sup> Moreover, *The Maratha Envoy* fell to be decided four years from when *The Johanna Oldendorff* was decided. Therefore, it is easy to understand the reluctance of the House of Lords to revisit its decision so soon.<sup>102</sup>

However, it is argued that *The Maratha Envoy* represents a missed opportunity at finally reforming an area of law that has given rise to much controversy. It would be naïve to dismiss the crucial role played by geographical differences between ports and their individual characteristics in determining the meaning of an arrived ship under a port charter. No better example to illustrate this than *The Maratha Envoy*. The vessel had already arrived at the port but due to the size of the vessel, there was no waiting area for large grain vessels at the port of Brake. The usual waiting area for all vessels was at the light ship, located some 25 miles off the port. In circumstances where the port becomes congested and no berth was available, vessels would have to take their turn for a berth from the time of arrival at the waiting area. Now applying the Reid test, it then means that the vessel by arriving at the light ship was never an arrived ship since it did not arrive within the port. For the vessel to satisfy the requirements of the Reid test, the vessel must arrive at the usual waiting place located within the port and in the absence of such a place within the port, the vessel must wait for a berth to become available before this test is satisfied. This may seem rational because until the vessel arrives the limits of the port, the risk of the sea voyage remains with the shipowner. Perhaps the arrival of the vessel in the usual waiting place outside the limits of the port is a strong indication that the voyage stage of the charter is still subsisting and has not ended. Moreover, the four stages of a voyage charter as observed in *The Johanna Oldendorff*<sup>103</sup> were designed in such a manner that one stage does not begin until the other stage ends.<sup>104</sup> There is no room for overlap between the various stages. However, the unintended consequences of such an approach means that in circumstances similar

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<sup>100</sup> *The Maratha Envoy* [1978] AC 1, 9.

<sup>101</sup> *Ibid* 14.

<sup>102</sup> See the observation of Lord Diplock in *The Maratha Envoy* [1978] AC 1, 14.

<sup>103</sup> [1974] AC 479, 556. [HL]

<sup>104</sup> *The Maratha Envoy* [1978] AC 1, 14.

to the above where the usual waiting place is outside the port, no vessel would ever become an arrived ship except it arrives in berth. Such an approach, it is argued, pales into insignificance the distinction between a port charter and a berth charter.<sup>105</sup>

Although, in all forms of charter, the primary objective of a vessel is arrival at an available berth, a vessel need not arrive at the berth under a port charter for it to satisfy the requirement of arrival. Allocating the risk of delay to the shipowner in a port charter in cases where the vessel arrives at the usual waiting place located outside the port would invariably convert a port charter into a berth charter, because in the former, the risk only passes to the charterers when the vessel arrives in berth. It is argued that this would not reflect the intention of the parties who had a port charter in mind when entering the contract and not a berth charter. To preserve the distinction between port and berth charters, it is rational to treat the passing of risk as attaching when the vessel arrives at the usual waiting place irrespective of its location. This view is reinforced by the fact that in time past, the commercial area of a port was confined to its geographical, legal, fiscal or administrative limits and ships were often smaller and slower; wireless communication between vessel and port were still under conception,<sup>106</sup> and it therefore made sense to restrict the arrival of a vessel to arrival within port limits. However, with the increased size of ocean vessels, the requirement that vessels should wait at the usual waiting place within port limits becomes illusory.<sup>107</sup>

In modern times, ocean vessels are well equipped to get quickly to port limits as soon as the charterer nominates and communicates the availability of berth to the shipowner.<sup>108</sup> Therefore, the continued application of the Reid test, even when it is obvious that it is capable of working injustice for the parties is unjustifiable. The significance of the Reid test may also have been heightened by the fact that in the past a vessel was in no position to offer assurances that cargo discharge could be said to take place at a particular port until the vessel had reached a safe anchorage within the boundaries of

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<sup>105</sup> [1974] AC 479, 537. [HL] Morris LJ ‘...the distinctions between a berth charter, and a dock charter and a port charter are not to be blurred.’

<sup>106</sup> *The Maratha Envoy* [1977] 1 QB 324, 344. [CA]

<sup>107</sup> A classic example is *The Maratha Envoy* [1978] AC 1 where there was no waiting place within the port because of the size of the vessel.

<sup>108</sup> *The Maratha Envoy* [1977] 1 QB 324, 345. [CA].

the port.<sup>109</sup> Therefore, it is reasonably expected that a vessel could not be considered as having arrived at the port while substantial hazards could still affect adversely her arrival at the berth where cargo could be discharged.<sup>110</sup> The Reid test acted as a safety net for vessels caught in the above situation. In modern times, however, the significance of the Reid test has waned as shipping is less reliant on fair weather conditions and favourable winds. The master of a vessel can now be confident of making port at an agreed time even though he is miles away from the port irrespective of substantial hazards that lie along the way.

Although Lord Reid in *The Johanna Oldendorff*<sup>111</sup> was of the view that parties desirous of reaching a determination regarding whether a waiting place was within the port face no difficulties since the limits of the port can easily be delineated by reference to the exercise of powers held by port authorities,<sup>112</sup> it is argued to the contrary that, it may be easier to find the usual waiting place situate at any port than to find precise port limits<sup>113</sup> for the purpose of determining when a vessel is considered an arrived ship so as to trigger the commencement of laytime. In *The Arundel Castle*<sup>114</sup> a vessel arrived the port but could not berth due to port congestion. The vessel anchored at a location directed by the port authority and thereafter issued NOR. The court held that the NOR issued was invalid since it was given outside port limits. In defining port limits, the court was of the view that where there was a national or local custom that defined the limits of the port in question, those were the limits that would apply in the case of that port. Where there was no such a law, a good indication of the port limits was given by the area of exercise by the port authority of its powers to regulate the movements and conduct of ships.<sup>115</sup> However the decision did not clearly address the issue of what constituted the scope of port limits within which the vessel would have anchored to have qualified as an arrived ship which was the whole basis of the dispute. It is argued that the dispute regarding the scope of port limits in the present case could easily have been resolved if arrival attaches when a vessel *is at the usual waiting place irrespective*

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<sup>109</sup> Ibid 349.

<sup>110</sup> Ibid 349.

<sup>111</sup> [1974] AC 479.

<sup>112</sup> Ibid 535.

<sup>113</sup> John Wilson, *Carriage of Goods by Sea* (7<sup>th</sup> edn, Pearson 2010) 55.

<sup>114</sup> [2017] 1 CLC 71.

<sup>115</sup> Ibid 72.

*of the distance* because indeed there is always such a usual waiting place for vessels awaiting berth in all ports. Applying such an approach to *The Arundel Castle*, would have meant that the vessel by failing to arrive at the usual waiting place was not an arrived ship. Thus, there would have been no need to go into an inquiry regarding what the port limits are.

An application of the Reid test to individual cases could turn up some strange results and readily brings to the fore the injustice that often result from an application of such an approach. To illustrate, in *The Werrastein*<sup>116</sup> grain could only be discharged at the King George Dock. The dock was congested at the time of arrival of the vessel and all the berths were occupied. Even if there was no congestion at the dock, the vessel could also not be anchored in the dock vicinity due to its size. Consequently, the vessel was instructed by the dock authorities to anchor a usual waiting place, some 22 miles off port. The anchorage off port was not within the geographical, legal and fiscal limits of the port even though, it was one of the usual waiting places where large vessels lie. There was also no statutory delineation of the port limits as the boundaries of the port were uncertain. In circumstances, described above, the court found the vessel not to have arrived the port.<sup>117</sup> An application of the Reid test, would also lead to the same conclusion even though the location of the usual waiting place was just 22 miles outside the port limits.

Although, an application of the Reid test may have preserved some level of certainty, it does not satisfy justice and fairness which are principal tenets upon which any law is anchored. Viewed through commercial lenses, it is absurd that in current commercial climes, a vessel just 22 miles outside port limits is considered not arrived because it is not within port limits. It was as a result of such absurdity that made the shipowners in *The Maratha Envoy* engage in a needless voyage upriver twice in order to bring the vessel within the legalistic concept of an arrived ship.<sup>118</sup> This serves to illustrate the absurd consequences that may result from applying the Reid test as a 'blanket rule' to every given situation. Surely, once a berth is made available, the ability of the vessel to reach berth on time is not impaired by its arrival some 22 miles outside port limits.

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<sup>116</sup> *Roland-Linie Schiffahrt GmbH v Spillers (The Werrastein)* [1957] 1 QB 109.

<sup>117</sup> *Ibid* 109.

<sup>118</sup> *The Maratha Envoy* [1977] 1 QB 324, 353. [CA].

Granted, certainty in the law leave contractual parties with certain assurances regarding what actions to take in order to protect their positions, it must be emphasized that the focus of any law is justice and fairness and where these are sacrificed on the altar of a supposed certainty as seen in the present approach under English law, there is a need to review the law to reflect these tenets in line with best practices in other jurisdictions like America which adopt a more practical and liberal approach to the arrived ship conundrum.

Contrary to the popular view that it may be too late to reform the law in this area since any attempted reform might cause a major upheaval in commercial law circles,<sup>119</sup> it is argued that much needed change and reform is long overdue. While it may have been too soon as at 1978 when *The Maratha Envoy* fell to be decided to address the shortcomings of the Reid test, since *The Johanna Oldendorff* was decided only 4 years earlier, it is now over forty three years since the Reid test was first formulated. Accordingly, the time is long overdue for a simpler criterion to be adopted in determining when a vessel arrives the agreed destination: arrival in a laytime context should coincide with arrival at the usual waiting place irrespective of its location. A corollary of such an approach is that the passing of the risk of delay attaches when the vessel is at the usual waiting place. Such an approach dispenses with the need for the vessel to arrive within port limits which may be indeterminate in some cases. Arrival must then coincide with arrival at a position where the vessel is in the immediate and effective disposition of the charterer. Arrival at the usual waiting place will suffice to meet this criterion. Support for this practical and liberal approach lies in United States shipping law jurisprudence. The next sub-section explores this point.

### **3.4.2 American View**

A possible rationale for reforming English law on the meaning of an arrived ship to reflect a more liberal approach such that laytime is triggered once the vessel arrives at the usual waiting place irrespective of its location can be found in the United States shipping law jurisprudence. Courts and arbitrators in the United States have been less concerned with attempting to formulate a blanket rule applicable to the arrived ship

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<sup>119</sup> Ibid 329.

conundrum and instead have laid emphasis on specific facts about the port as well as specific conditions existing at the time of arrival at the port.<sup>120</sup> The courts have often relied on a combination of factors in arriving at a solution to the arrived ship problem: the understanding of commercial persons as to the customary place for vessels to wait for berth, the specific factors surrounding delay and the circumstances known to the parties at the time of the fixture as well as the limits of the port in a geographic, fiscal regulatory and statutory sense.<sup>121</sup>

*The Polyfreedom*,<sup>122</sup> is the leading award that best illustrates the United States approach to the arrived ship problem. The owners of the vessel agreed to carry a full cargo of grain belonging to the charterer from Port Cartier to Rotterdam. A dispute arose as to whether the owners were entitled to claim demurrage at the discharging port. One of the issues arising from the dispute was whether a vessel was considered as arrived if the waiting place is outside the limits of the port. By a majority decision, the panel of Arbitrators found in favour of the shipowners. The premise upon which the arbitrators in *The Polyfreedom* reached their decision is connected to the fact that charterers could use the peculiarities and geographical particularities of port limits to frustrate their contractual obligations.<sup>123</sup> This is particularly important where the charterer has failed to secure the necessary cargo ready for loading or has failed to nominate the relevant berth and a vessel having arrived at the usual waiting place could be prevented from commencing laytime because his vessel has arrived at the usual waiting place outside port limits, when the underlying reason for the delay in commencing laytime is the absence of cargo or a failure to nominate berth. All that is left for a shipowner who has arrived at a waiting place outside port limits is to proceed to berth upon its availability.<sup>124</sup>

The reasoning in *The Polyfreedom* was followed in *The Athena*<sup>125</sup> where the vessel arrived and anchored at the outer anchorage of the port and tendered NOR. The

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<sup>120</sup> Julian Cooke and Others, *Voyage Charters* (4<sup>th</sup> edn, Informa 2014) para 15A.39.

<sup>121</sup> *Ibid* para 15A.39.

<sup>122</sup> *Bulk Carriers Corp v Garnac Grain Co Inc. (The Polyfreedom)* [1975] AMC 1826.

<sup>123</sup> *Ibid* 1834.

<sup>124</sup> Especially in cases like *The Delian Spirit* [1972] 1 QB 103 where the usual waiting place is located one and a half miles just outside port limits. This would have been burdensome on the shipowner.

<sup>125</sup> SMS 1229 (1978).

anchorage was located outside port limits. She left the outer anchorage in a bid to ride out the heavy weather at sea only to return to the outer anchorage at a later date. Three days later, she finally proceeded to the inner harbour before she was able to finally berth. In holding the vessel as having arrived when notice was tendered, the arbitral panel was of the view that the vessel was as close to the loading berth as she could get when she anchored off the sea buoy and was therefore an arrived vessel as she met the criteria established in *The Polyfreedom* award. In *Yone Suzuki v Central Argentine Ry Ltd*<sup>126</sup> there was a charterparty which provided for the carriage of cargo of coal to Buenos Aires or as near there to as the steamer can get and laydays to commence 24 hours after the vessel arrives at or off port, whether steamer is in berth or not. It was held that the ship arrived at or off port when it reached the roads and lay days were to begin 24 hours thereafter notwithstanding that the roads which was the usual waiting place for that particular port lies some 20 miles from the basins and docks.<sup>127</sup> In *Cureton Lumber Co. v Hammond Lumber Co.*,<sup>128</sup> Foster J was of the view that under a port charter, a vessel was considered arrived for the purposes of issuing NOR when she arrived anchorage in the event that there was the usual occurrence of congestion at the ports.<sup>129</sup> There was no consideration as to the location of the anchorage because all that was left for the vessel upon arrival at the anchorage was to proceed to a dock as in that case<sup>130</sup> or a berth as secured by the charterer.<sup>131</sup>

In contrast, a different situation occurred in *Compania Naviera Puerto Madrin SA Panama v Esso Standard Oil*<sup>132</sup> where the owner of the vessel *The Don Manuel* claimed demurrage from the charterer for a carriage of cargo of petroleum products on consecutive voyages. The period of laytime was to last for three days for each of the voyages. On or about February 29, 1952, the defendants requested that *The Don Manuel* makes a voyage from the island of Aruba, in the Netherlands West Indies, to Chelsea, Massachusetts. On March 6<sup>th</sup>, Esso changed the destination to New York and, on March 13<sup>th</sup>, to New Haven. *The Don Manuel* left Aruba on March 9<sup>th</sup> for New Haven.

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<sup>126</sup> 27 F.2d 795 (2d Cir. 1928).

<sup>127</sup> Ibid 795.

<sup>128</sup> 29 F.2d 973 (5<sup>th</sup> Cir. 1929), 1929 AMC 229; *Thomas Bell v Stewart* 31 F.2d 44 (5<sup>th</sup> Cir. 1929).

<sup>129</sup> *Cureton Lumber Co. v Hammond Lumber Co* 29 F.2d 973, 974 (5<sup>th</sup> Cir. 1929).

<sup>130</sup> Ibid 975.

<sup>131</sup> See generally *Royster Guano v United States (The Lake Yelverton)* 300 F. 47, 50 (4<sup>th</sup> Cir. 1924).

<sup>132</sup> [1962] AMC 147.

On March 18<sup>th</sup>, the ship reached Sandy Point, 75 miles outside of New Haven and there issued a NOR to the charterers. At about 5:30 p.m. that same day, the vessel arrived at the New Haven sea buoy before finally berthing at the dock of Wyatt. Shipowners argued that laytime was to commence six hours after NOR was issued. The charterers did not deny receipt of the purported notice but argued that it was premature and invalid. The court in determining the dispute resolved the issue as to the validity of the NOR in favour of the charterers. The reason for the decision was premised on the fact that there was no evidence before the court that the port of new Haven exercised jurisdiction over vessels which arrived at the sandy point seventy five miles from the New Haven.<sup>133</sup>

The above decision is clearly at variance with *Yone Suzuki v Central Argentine Railway Ltd*<sup>134</sup> which is authority for the view that ‘the port is ordinarily the place where port authorities exercise jurisdiction.’<sup>135</sup> The outcome of the *Compania Naviera Puerto Madrin SA Panama v Esso Standard Oil*<sup>136</sup> decision accords with commercial good sense. The vessel here had not arrived the port neither had it arrived the usual place where vessels waiting for access load at the time the NOR was given signifying the vessel’s readiness. Therefore, the argument that the vessel should be considered an arrived ship so as to trigger laytime falls flat on its face. The liberal and practical approach preferred under the United States shipping law jurisprudence does not give shipowners the unlimited discretion to determine when he wishes to tender an effective NOR: arrival of the vessel at the usual waiting place is sacrosanct, no more, no less.<sup>137</sup>

Although the Reid Test endorsed in *The Johanna Oldendorff*<sup>138</sup> continues to remain the popular view under English law, the cases cited above under United States shipping law jurisprudence provide a strong basis for reformulating the test for determining when a vessel is considered an arrived ship. The position of the law as is currently espoused by English courts, presents some untoward situations to parties to the charter requiring

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<sup>133</sup> Ibid 158.

<sup>134</sup> 27 F.2d 795 (2d Cir., 1928)

<sup>135</sup> Ibid 802.

<sup>136</sup> Ibid 159.

<sup>137</sup> See for example *The Sally D* SMA 2379 (1987); *The Pooja* SMA 3798 (2003); *The Alkaïos* SMA 3582 (1999); *The Adventure I* SMA 3835 (2004).

<sup>138</sup> [1974] AC 479.



that there be a review towards a simpler approach where a vessel is considered as having arrived when it reaches the usual waiting place no matter the location. Arguably, the principle upon which Courts in the United States rely upon in construing when a vessel is arrived so as to trigger the commencement of laytime closely resembles the second limb of the Reid test as espoused in *The Johanna Oldendorff*.<sup>139</sup> the vessel must be at the effective and immediate disposition of the charterer. By arriving at the usual waiting place, it could be said that the vessel is at the effective and immediate disposition of the charterer such that the charterer need only nominate an available berth and the shipowner would be there in a moment's notice. Such a simple and liberal approach would have avoided the disputes that arose in *Leonis v Rank*,<sup>140</sup> *The Aello*,<sup>141</sup> *The Johanna Oldendorff*,<sup>142</sup> and *The Maratha Envoy*<sup>143</sup>, respectively.

An argument could be had that since 1978 when *The Maratha Envoy* was decided, the cases that have dealt with whether a vessel's arrival is within or outside the port have been few and far between.<sup>144</sup> Asides *The Darrah*,<sup>145</sup> which helped crystallize the principle that before a vessel is considered arrived it must have arrived within the port, not very many cases have addressed this point. This may be a strong indication that perhaps whether a vessel has arrived outside or within the port has not given rise to controversy sufficient enough to warrant a reform of the Reid test.<sup>146</sup> While the above may be true, it is argued that the reaction of the charter market with the introduction of the recent 'Laytime Definition for Charter Parties 2013'<sup>147</sup> suggests that there is some dissatisfaction with the current state of the law under English law as it affects the determination of an arrived ship. Therefore, it may be too premature to dismiss a lack of recent cases dealing on the subject as evidence of the matter being laid to rest.

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<sup>139</sup> Ibid 544. The observation of Viscount Dilhorne.

<sup>140</sup> [1908] 1 KB 499.

<sup>141</sup> [1961] AC 135.

<sup>142</sup> [1974] AC 479.

<sup>143</sup> [1978] AC 1.

<sup>144</sup> John Schofield (n5) para 3.65.

<sup>145</sup> [1977] AC 157. See also *The Arundel Castle* [2017] 1 CLC 71.

<sup>146</sup> John Schofield (n5) para 3.65.

<sup>147</sup> BIMCO Laytime Definitions for Charterparties 2013 <[https://www.bimco.org/Chartering/Clauses\\_and\\_Documents/Clauses/Laytime\\_Definitions\\_for\\_Charter\\_Parties\\_2013.aspx](https://www.bimco.org/Chartering/Clauses_and_Documents/Clauses/Laytime_Definitions_for_Charter_Parties_2013.aspx)> accessed on 20/10/2016. It is important to note that the Laytime Definitions only ever come into effect if adopted by parties to the charterparty contract as part of the terms of the charter.

Perhaps, the lack of disputes in this area is attributable to the popularity of the Laytime Definition 2013 such that any pressure for law reform is diluted.

The Laytime Definition for Charter Parties 2013 defined a port as ‘...any area where vessels load or discharge cargo and shall include, but not be limited to, berths, wharves, anchorages, buoys and *offshore facilities as well as places outside the legal, fiscal or administrative area where vessels are ordered to wait for their turn no matter the distance from that area.*’<sup>148</sup> Quite notably, the definition of a port as provided above includes vessel waiting places outside the legal, fiscal or administrative area irrespective of distance within the meaning of a port. Interestingly the above definition also includes *Offshore Facilities* as part of the areas that could be referred to as a ‘port.’ This definition appears a lot broader and to a large extent reflects the approach sought by Lord Denning at the Court of Appeal in *The Maratha Envoy*<sup>149</sup> that ‘a vessel should be an arrived ship when she has reached the usual waiting place for the port, even though it may be a few miles outside the limits of the port itself, the reason being that she had completed her carrying voyage and is at the disposition of the charterers as effectively as if she was inside the port itself in the vicinity of a berth.’

Arguably, the inclusion of offshore facilities as part of areas deemed within the definition of a port may appear too extensive and broad such that English courts would be reluctant to subscribe to such a view. Perhaps, a narrower definition which will include the phrase ‘*places outside the legal, fiscal or administrative area where vessels are ordered to wait for their turn no matter the distance from that area*’ would seem most appropriate. However, it is easy to see the rationale behind such an extensive definition adopted by BIMCO. The increased speed of vessels as well as the improved communication between vessel and port due to advancements in shipping technology may have played on the minds of the drafters of the BIMCO Laytime Definitions such that vessels can reach a berth upon availability with utmost speed wherever the actual waiting spot may be. Of course, the whole essence of the Laytime Definitions 2013 is as BIMCO’s Jean-Pierre Laffaye observed:<sup>150</sup>

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<sup>148</sup> Ibid.

<sup>149</sup> [1977] 1 QB 324, 339. [CA]

<sup>150</sup> <<https://www.tradewindsnews.com/drycargo/323408/laytime-language-revised>> accessed 09/04/19.

To bring much needed clarity to the shipping markets and iron out a good deal of uncertainty. In a tough market, the amount of time a vessel spends unloading or loading cargo is under great scrutiny, and it is therefore vital that imprecise laytime definitions and subtleties of interpretation do not provide grounds for expensive legal disputes when an interpretation is tested in the courts.

Whether the above goal has been achieved, is still up for debate. Nevertheless, it is argued that it may be time for the courts under English Law to forsake *the Reid Test* for a more liberal approach which makes the arrival of a vessel at the port to coincide with arrival at the usual waiting place for vessels even though this may be located a few miles off port limits. It would save cost, time and avoid unnecessary disputes, if the English courts adopt the simple test advocated by the vast majority of shipping commercial persons: the completion of the sea passage and at the immediate and effective disposition of the charterer.<sup>151</sup> Arguably, such an approach adopts a global view of the shipping landscape whilst also bringing fairness and justice to parties to the contract.

### **3.5 Alternative Approaches to the Arrived Ship Problem**

Ordinarily the shipowner would be disinclined to bear the risk of delay in the case of a congested port and decide to throw the risk of delay in waiting for an available berth on the charterer, since it is the charterer's duty to make cargo available at the port and also make arrangements for an available berth where discharge or loading can occur.<sup>152</sup> In a bid to throw the risk of delay on the charterer, parties may agree to insert 'special demurrage clauses'<sup>153</sup> in the charterparty. Shipowners usually follow this route in order to avoid the financial rigours which may arise from the application of the English common law to a vessel waiting at or off port limits.<sup>154</sup> These clauses operate to provide in express terms how the risk of delay is to be allocated.<sup>155</sup> These clauses generally have the effect that although the charterparty is in the character of a berth charter,

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<sup>151</sup> Donald Davies (n39) Para 14. Arguably, arrival of the vessel at the usual waiting place irrespective of location would suffice to satisfy the 'completion of the sea passage.' Although Lord Diplock in *The Darrah* [1977] AC 157, 165 expresses a different view.

<sup>152</sup> *Van Nievelt Goudriaan Stoomvaart Maatschappij v. C. A. Forslind & Son, Ltd* [1925] 22 Lloyd's Rep. 49, 51 [1<sup>st</sup> Col].

<sup>153</sup> A phrase coined by Hugo Tiberg in his book *Hugo Tiberg, The Law of Demurrage* (5<sup>th</sup> edn, Sweet & Maxwell 2015) para 7-14.

<sup>154</sup> Donald Davies (n39) Para 24.

<sup>155</sup> *The Maratha Envoy* [1978] AC 1, 9.

nevertheless the risk of the vessel waiting to enter the nominated berth or other loading/discharging place is placed primarily on the charterers.<sup>156</sup> They are best expressed by such phrases as 'time lost waiting for berth to count as loading/discharging time', 'Whether in Berth or Not' (WIBON), 'Whether in Port or Not' (WIPON), 'reachable on arrival', etc.<sup>157</sup> The obvious rationale for the insertion of such a clause is connected to the fact that time is money.<sup>158</sup> Therefore, if time permitted for loading or discharging is exceeded, the shipowner stands to be compensated as demurrage becomes payable by the shipowner.<sup>159</sup>

The increased use of these clauses within a laytime context is connected with the fact that, the Reid test usually applies to those charters in which there is no express provision concerning how the misfortune for risk of delay through congestion at the load/discharge port is to be allocated between charterer and shipowner.<sup>160</sup> Therefore, an argument could be had that even though the Reid test exist, parties are not by its existence restrained from negotiating special clauses which operate to cater for allocating the risk of delay among the parties.<sup>161</sup> English courts have consistently sought to give effect to these special clauses thereby permitting special time to run even when the ship cannot be considered as an arrived vessel<sup>162</sup> as per the Reid test.

While it is true that these special clauses have been adopted by parties to the charterparty to cater for occasions where sometimes the location of the usual waiting place is outside port limits, it is argued that these clauses do not sufficiently address the limitations of the Reid test. For instance, an application of the WIBON clause would not necessarily address the issue of whether a vessel can be considered as arrived if the vessel arrives outside port limits, a matter to be considered in considerable detail in the subsequent section. Perhaps the reason why parties have sought to negotiate special clauses to address occasions where the usual waiting place is not within port limits is as

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<sup>156</sup> *The Isabelle* [1982] 2 Lloyd's Rep 81, 85 [1<sup>st</sup> Col]; *Inca Compania Naviera SA v Mofinol Inc. (The President Brand)* [1967] 2 Lloyd's Rep 338 [Comm].

<sup>157</sup> *Ibid* 85; *The Maratha Envoy* [1978] AC 1, 10;

<sup>158</sup> *AET Inc Ltd v Arcadia Petroleum Ltd (The Eagle Valencia)* [2010] EWCA Civ. 713; [2010] 1 CLC 1073[1]. [CA]

<sup>159</sup> *Ibid* [1].

<sup>160</sup> *The Maratha Envoy* [1978] AC 1, 10.

<sup>161</sup> *The Maratha Envoy* [1978] AC 1, 10; *The Darrah* [1977] AC 157. See also *The Werrastein* [1957] 1 QB 109.

<sup>162</sup> Hugo Tiberg, *Law of Demurrage* (5<sup>th</sup> edn, Sweet & Maxwell 2015) para 7-14.

a result of their dissatisfaction with the current boundaries set by the Reid test. In other to avoid the uncommercial outcomes that may arise from an application of the Reid test, shipowners have resorted to an adoption of the clauses discussed below.

### **3.5.1 Whether in Berth or Not (WIBON)/Whether in Port or Not (WIPON)**

One of the commonly used clauses employed by the shipowner to advance the commencement of laytime is the WIBON clause. As the name implies, this clause was primarily designed to operate in berth charters but they have increasingly been used in port charters such that they advance the commencement of laytime whether the ship has berthed (a berth is readily available) or not (non-availability of berth).<sup>163</sup> In berth charters, the effect of the WIBON provision is that the contractual destination remains the berth but that time counts and NOR may be issued when the vessel is waiting for a berth to become available being ready so far as she is concerned ready to unload.<sup>164</sup> The clause also operates to transfer the risk of congestion from shipowner to charterer whilst also acting as a trigger to the start of laytime.<sup>165</sup> Although, the WIBON clause may operate to advance the commencement of laytime, the vessel must still satisfy the requirements of the Reid Test by being in a position within the port and at the effective disposition of the charterer.<sup>166</sup> In other words, the WIBON clause would not convert a vessel which ordinarily is not considered as an arrived ship into one.<sup>167</sup> Therefore, an insertion of a WIBON clause into a voyage charter would be of no benefit to a shipowner who is caught in the unfortunate situation where his vessel having arrived the port but due to unavailability of berth, has had to drop anchor at the usual waiting place located outside port limits. In such a situation as described above, a shipowner is best served by the introduction of a WIPON provision in the charterparty which means that if the designated loading or discharging berth and the usual waiting place at the port are unavailable for some reason, the vessel is entitled to tender the NOR from any

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<sup>163</sup> *Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd (The Kyzikos)* [1989] 1 AC 1264, 1276 [HL]; *Northfield Steamship Co v Compagnie L'Union Des Gaz* [1912] 1 KB 434, 440.

<sup>164</sup> *The Kyzikos* [1989] 1 AC 1264, 1266. [HL]

<sup>165</sup> *Carboex SA v Louis Dreyfus Commodities Suisse SA* [2013] QB 789 [13].

<sup>166</sup> Donald Davies (n39) para 26.

<sup>167</sup> *Carga Del Sur Compania Naviera SA v Ross T Smyth & Co Ltd (The Seafort)* [1962] 2 Lloyd's Rep 147. [Comm]

recognised waiting place off the port and this shall be sufficient to trigger the commencement of laytime.<sup>168</sup>

### 3.5.2 “Reachable on Arrival”

The obligation to have the berth physically reachable on arrival when the vessel arrives at the agreed destination plays a significant role under a port charter as it operates to vest the usual risk of congestion, bad weather and physical obstructions on the charterer.<sup>169</sup> Quite possibly, it could be argued that perhaps the adoption this clause particularly by shipowners was in response to the uncommercial consequences<sup>170</sup> that may result from the decision of the House of Lords in *The Aello*<sup>171</sup> where it was held that for a vessel to be considered as having arrived the agreed destination it ought to have reached the commercial area which is that part of the port where a vessel can be loaded when a berth is available albeit she cannot be loaded until a berth is available.<sup>172</sup> Through the use of this clause, shipowners now place the risk of delay if the vessel is unable to get to berth, on the charterer who guarantees that the vessel shall not be kept waiting at the port for a free berth to become available.<sup>173</sup>

Over the years, the interpretation of this clause by the courts appear to have been very favourable to shipowners who receive compensation in respect of delays attributable to the charterer’s negligence in failing to provide a berth which is reachable at the time of arrival of the vessel at or off port.<sup>174</sup> In the spirit of *The Johanna Oldendorff*, a vessel does not become an arrived ship when she arrives off the limits of the port. However, with the inclusion of the important clause ‘reachable on arrival,’ this principle as enunciated in *The Johanna Oldendorff* appears to be distorted such that, shipowners

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<sup>168</sup> BIMCO, BIMCO Laytime Definitions 2013, [28] <[http://apps.bimco.org/Chartering/Clauses\\_and\\_Documents/Clauses/Laytime\\_Definitions\\_for\\_Charter\\_Parties\\_2013.aspx](http://apps.bimco.org/Chartering/Clauses_and_Documents/Clauses/Laytime_Definitions_for_Charter_Parties_2013.aspx)> accessed 02/12/2016. See also *Pagnan & Fratelli v Finagrain Compagnie Commerciale Agricole et Financiere SA (The Adolf Leonhardt)* [1986] 2 Lloyd’s Rep 395, 403 [1<sup>st</sup> Col]. [Comm]

<sup>169</sup> Law and Sea, <[http://www.lawandsea.net/CP\\_Voy/Charterparty\\_Voyage\\_Laytime\\_Reachable\\_on\\_arrival.html](http://www.lawandsea.net/CP_Voy/Charterparty_Voyage_Laytime_Reachable_on_arrival.html)> See also the cases of *The Angel Lusi* [1964] 2 Lloyd’s Rep 28; *The President Brand* [1967] 2 Lloyd’s Rep 338. This clause is usually prevalent in the oil trade through the use of the ASBATANKVOY form.

<sup>170</sup> Ibid.

<sup>171</sup> [1961] AC 135. [HL]

<sup>172</sup> Ibid 135.

<sup>173</sup> *Harris & Dixon v Marcus Jacobs* (1885) 15 QBD 247, 250.

<sup>174</sup> Donald Davies (n39) para 45. See also *Sociedad Carga Oceanica SA v Idolinoele Vertriebsgesellschaft (The Angelos Lusi)* [1964] 2 Lloyd’s Rep. 28, 34.

may be given adequate compensation in the character of damages for breach of contract if there is no berth for the vessel to proceed to. Under such a situation it is of little or no significance if the vessel has not arrived within the port because, arrival under present circumstances does not mean arrival in the technical sense (arrival within the port so as to trigger the commencement of laytime) but arrival in the ordinary meaning of the word.<sup>175</sup> It could be safe to conclude that the expression 'arrival' in a reachable on arrival context is given a broad interpretation such that so long as the vessel has got as far as she can get without the nomination of a reachable berth, she has satisfied the requirement of the clause even where the vessel is still lying off port.<sup>176</sup>

While the current application of a reachable on arrival clause may seem shipowner-centric, it is argued that charterers who might feel disenchanted by its current application may do well to opt for a charterparty with no such provision or in the alternative ensure that the charterparty is appropriately worded to reflect the fact that risks of delay are transferred to the shipowner or shared.<sup>177</sup> A clearly worded exception transferring such risk of delay would operate to dilute the harsh effects of the reachable on arrival provision. This approach was tested in a *London Arbitration 7/91*<sup>178</sup> where the vessel was delayed by bad weather after arrival at the load port. Clause 6 of the Tanker Motor Vessel Voyage Charter provided that the ship was "to load... at a place or at a dock or alongside lighters reachable on her arrival, which shall be indicated by the charterers..." it was also agreed that laytime was to commence from the time the vessel is ready to receive...her cargo. There was also inserted in the charter party a bad weather exception clause and a general exceptions clause. The shipowners contended that the charterers were in breach of their reachable on arrival obligation and were accordingly not entitled to rely on either the bad weather or general exceptions clause. The charterers argued to the contrary and it was held that the argument of the charterer was correct as they were entitled to benefit from the exception to bad weather or if necessary the general exception clause and were accordingly entitled to succeed on that issue.

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<sup>175</sup> [1967] 2 Lloyd's Rep 338, 349. Roskill J Arrival in this sense means 'able to be reached.'

<sup>176</sup> Donald Davies (n39) para 46. See also *The President Brand* [1967] 2 Lloyd's Rep 338, 349, 350.

<sup>177</sup> Ibid para 51.

<sup>178</sup> (1991) 303 LMLN 4.

Given the right conditions, shipowners are not so protected by the insertion of a reachable on arrival clause. With the insertion of a carefully worded exceptions clause for instance, charterers can shift the burden of risk of delay from charterers back to the shipowners. Contrary to the observation of Lord Diplock in *The Maratha Envoy*,<sup>179</sup> it is argued that the insertion of special demurrage clauses in the character of reachable on arrival clauses in voyage charters do not provide a watertight mechanism by which shipowners could seek to avoid the consequences of the Reid test. Charterers could easily dilute the efficacy of any such clauses by inserting carefully worded exceptions clauses which the courts would readily give effect as evidenced in the *London Arbitration 7/91*.<sup>180</sup>

### 3.5.3 Time Waiting for Berth to Count as Laytime

Charterparties sometimes provide that once a particular point has been reached, all time waiting for berth will be paid for.<sup>181</sup> Alternatively, the charterparty could provide that time lost waiting for a berth shall count as laytime.<sup>182</sup> It is a common occurrence for shipowners to insert such clauses in port charters, particularly where the usual waiting place is outside the limits of the port<sup>183</sup> and there is likely congestion at the load port. This clause is often triggered in the event that there is no loading or discharge berth available and the vessel is unable to tender NOR at the waiting place. Then any time lost to the vessel is counted as if laytime were running. Such time ceases to count subject to the availability of berth and the proceeding of the vessel into berth. Arguably while the application of this clause in voyage charters is welcome, whether or not it is a lasting solution to situations where the vessel is anchored at the usual waiting place outside port limits is doubtful. This is premised on the fact that the operation of the clause in a voyage charter is often limited by the insertion of exclusion clauses which relieve the charterer of liability from events or hindrances outside his control.<sup>184</sup> Although a time-lost-waiting-for-berth provision throws the risk of delay on the charterers, the insertion

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<sup>179</sup> [1978] AC 1.

<sup>180</sup> (1991) 303 LMLN 4.

<sup>181</sup> Sir Bernard Eder, Howard Bennet, Steven Berry & Ors (eds), *Scrutton on Charterparties and Bills of Lading* (23<sup>rd</sup> Edn, Sweet & Maxwell, 2015) para 9-093.

<sup>182</sup> *The Maratha Envoy* [1978] AC 1, 10; See *The Darrah* [1977] AC 157.

<sup>183</sup> *Ibid* 10. See also *The Johanna Oldendorff* [1974] AC 479, 505; *The Adolf Leonhardt* [1986] 2 Lloyd's Rep 395, 397. [Comm]

<sup>184</sup> See *Navrom v Callitis Ship Management SA (The Radauti)* [1987] 2 Lloyd's Rep 276, 279 [Comm]. The case was affirmed on appeal in *The Radauti* [1988] 2 Lloyd's Rep 416 [CA].



of exclusion clauses in the character of force majeure clauses would operate to dilute such an effect. Therefore, it is argued that, to this extent special demurrage clauses in the character of a time-lost-waiting-for-berth provision does not provide a practical solution to the problematic issues created by the Reid Test. These standard clauses only act as stopgap measures and do not proffer a lasting solution to the problem of who bears the risk of delay when the vessel arrives the port. Moreover, they would not have been necessary if the solution to the risk of delay as proffered by the Reid test was adequate.

While parties to the contract may decide to incorporate any of the special clauses considered above into the charterparty, this practice does not obviate the need for a revision of the Reid Test towards a simple, clear and unambiguous definition of what constitutes an arrived vessel in the context of the vessel's arrival at the agreed destination. As it has been argued, shipowners may have sought to adopt these special clauses because the law has been commercially unjust in respect of the arrived 'ship' concept such that they have been forced into seeking special provisions to compensate themselves for the time that their money-making chattels are lying idle at anchorages because charterers are not able to provide loading or discharging berths.<sup>185</sup> Therefore, it is certainly preferable that the law on this subject is simple and commercially just rather than the law being commercially unjust with the parties having to negotiate a clause (sometimes in difficult commercial circumstances) in order to achieve commercial justice.<sup>186</sup> As mentioned earlier, the law in the US favours this approach.<sup>187</sup> As such, it may be time for English Law to adopt the above approach in defining when a vessel is considered as having arrived the port.

### **3.6 At the Immediate and Effective Disposition of the Charterers**

The second limb of the Reid test requires that the vessel should be at a place where she is at the immediate and effective disposition of the charterer. This implies that she must have substantially completed her voyage and must be at a place where she counts for

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<sup>185</sup> Donald Davies (n39) para 13.

<sup>186</sup> Ibid Para 13.

<sup>187</sup> See generally para 3.4.2 of this thesis. See also, *Ms Ilse* 18/09/1974 (Unreported) a Hamburg award which favoured this approach. Referred to in Johannes Trappe, 'Laytime Problems and Comparison of Law' (1986) 2 LMCLQ 251, 258.

turn, where she is in constant communication with the charterer and from which she can reach her berth without any delay of practical significance.<sup>188</sup> Arguably, modern forms of communication will enable the vessel to leave the waiting area so as to arrive as soon as a berth becomes vacant with the result that mere distance between the waiting area and the berth area shall not prevent the vessel from being at the disposal of the charterer.<sup>189</sup> Importantly, arrival at the usual waiting place in the absence of extraordinary circumstances would seem to fulfil this second ambit of the Reid test.<sup>190</sup> If the absence of a berth is due to the charterers fault or his failure to perform an absolute duty like the provision of cargo or an express promise of a free berth, the owner may have a counterclaim against the charterers in damages.<sup>191</sup>

As mentioned in preceding parts of this chapter, a determination of when a vessel is considered as an arrived ship is best resolved by attaching arrival at the port to arrival at the usual waiting place irrespective of its location whether in port or off port.<sup>192</sup> When the vessel arrives at such a place, she would be considered as being 'at the immediate and effective disposition of the charterer'.<sup>193</sup> Applying this approach would finally reconcile the English approach with the approach obtainable in the US. It is suggested in this context that two questions should prevail in the mind of the court in determining when a vessel is considered as having arrived the port: firstly, has the vessel arrived the usual waiting place such that it could be considered as being in the immediate and effective disposition of the charterer?; Secondly, is the usual waiting place under the jurisdiction of the port? A resolution of the above questions raised would neatly dispose of any underlying concern as to whether a vessel having arrived the port is an arrived ship especially in cases where the port limits are uncertain.

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<sup>188</sup> Hugo Tiberg, *The Law of Demurrage* (5<sup>th</sup> edn, Sweet and Maxwell 2013) 212. See also *The Johanna Oldendorff* [1973] 2 Lloyd's Rep 285, 307.

<sup>189</sup> *The Johanna Oldendorff* [1971] 1 Lloyd's Rep 106; Ibid 307. See also *The Prometheus* [1974] 1 Lloyd's Rep 350, 352. A view advanced in *The Maratha Envoy* [1978] AC 1 albeit unsuccessfully.

<sup>190</sup> *The Johanna Oldendorff* [1973] 2 Lloyd's Rep 285, 291.

<sup>191</sup> Hugo Tiberg, *Law of Demurrage* (5<sup>th</sup> Edn, Sweet & Maxwell 2013) 214.

<sup>192</sup> A similar approach has been suggested in Donald Davies (n 39) para 12; John Wilson, *Carriage of Goods by Sea* (7<sup>th</sup> edn, Pearson 2010) 55.

<sup>193</sup> This approach was advocated for and attained success in the Court of Appeal decision of *The Maratha Envoy* [1977] 1 QB 324 but failed on appeal. This is a variation of the interpretation of a vessel being at the immediate and effective disposition of the charterer' because applying the Reid test strictly it appears the usual waiting place must be within the port to satisfy the second requirement of the Reid test. See *The Kyzikos* [1987] 1 WLR 1565. [CA]

Although a shipowner may satisfy the obligation to arrive at the agreed destination, laytime cannot start until the vessel demonstrates a readiness to load or discharge. The exact scope and meaning of readiness in a laytime context has often led to controversy. The next chapter addresses questions revolving round the meaning and scope of readiness in a laytime context.

## Chapter 4

### Ascertaining Readiness of a Vessel for Commencement of Cargo Operations

#### 4.1 Introduction

The issue of readiness of the vessel and the commencement of laytime<sup>1</sup> are intricately woven together since readiness of the vessel is a necessary event that must occur before laytime can commence. The significance of this chapter stems from the fact that even though a vessel has arrived at the contractual destination, it would still not be an arrived ship until it is considered ready to load and has notified the charterer of the readiness. These issues would be matters of fact and the contrary would indicate the absence of readiness for loading or discharge on the part of the vessel. Furthermore, a failure to perform this requirement in a timely manner could have devastating consequences as to whether a vessel is to be considered an arrived ship to be able to trigger the commencement of laytime.

Under English law, for a vessel to be declared ready to load or discharge cargo, the vessel must not only be ready both in a physical and legal sense but must in all respects be ready to load or discharge.<sup>2</sup> The physical readiness of the vessel necessitates that the vessel is physically ready to load such that the charterer granted instantaneous access to the cargo holds<sup>3</sup> and the vessel must be fit to receive the agreed cargo<sup>4</sup> which means that the vessel must be clear and free from contamination,<sup>5</sup> any loading gear or special equipment instrumental to cargo operations must be fixed<sup>6</sup> and any overstowed cargo preventing the charterer access to his cargo must be removed.<sup>7</sup> On the other hand, readiness in a legal sense requires the vessel to be in compliance with port regulations

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<sup>1</sup> This refers to the time spent by the vessel in loading or discharging of cargo. See *Aldebaran Compania Maritima SA v Aussenhandel AG (The Darrah)* [1976] 1 Lloyd's Rep 359, 363 [1<sup>st</sup> Col].

<sup>2</sup> *Compania de Naviera Nedelka SA v Tradax International SA (The Tres Flores)* [1974] QB 264.

<sup>3</sup> *Lyderhorn v Duncan Fox* [1909] 2 KB 929

<sup>4</sup> John Wilson, *Carriage of Goods by Sea* (7<sup>th</sup> Edn, Longman) 59.

<sup>5</sup> *The Tres Flores* [1974] QB 264.

<sup>6</sup> *Sun Shipping Co. v Watson Youell* [1926] 24 Lloyd's Rep 28.

<sup>7</sup> *Ceylon v Societe Franco Tunisienne d'Armement Tunis (The Massalia) (No 2)* [1962] 2 QB 416 [Comm].

such that any necessary documentation instrumental to the arrival of the vessel is procured and the vessel satisfies health and safety requirements.<sup>8</sup>

A corollary of treating a vessel as being ready in every respect is that, if a vessel is not ready at the time NOR is issued, laytime cannot start and any notice issued is considered invalid. An application of this rule to every instance of vessel readiness has often led to unfair outcomes. For instance, an application of the English law approach would mean that, a vessel owner may be denied substantial demurrage in circumstances where although the vessel is not ready, the correction of the anomaly would require just minimal effort and time, thereby causing no delay to the commencement of cargo operations. A rigid application of this rule could also create an avenue for the charterer to escape liability in the absence of an available berth or cargo. This chapter therefore, seeks to re-examine the test of readiness as proffered under English law. It is hoped that an analysis along these lines would delimit the scope of the obligation to make the vessel ready to load or discharge.

The rest of the discussion is divided into 3 sections. Section 2 provides a summary of the readiness to load or discharge obligation in a laytime context with attendant subsections also addressing readiness in both a physical and legal sense. Section 3 concludes the chapter and advocates for a reform of the English law approach to the question of readiness of the vessel, that is, the adoption of the doctrine of practical and substantial readiness as this provides a fair and equitable resolution to the unintended consequences that result from an application of the current rule regarding readiness under English law. Such an approach will ensure that a shipowner does not lose substantial demurrage because of a tenuous anomaly and a charterer cannot avoid liability for berth or cargo unavailability already allocated to his remit.

## **4.2 Readiness to Load and Discharge in a Laytime Context**

Readiness of the vessel to load or discharge is essential to the commencement of laytime. A vessel may have arrived at the agreed destination and even issue a NOR, but without her being ready for the loading or discharge operation, laytime is prevented from commencing.<sup>9</sup> Thus, the commencement of cargo operations is hinged on the state

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<sup>8</sup> John Wilson (n4) 60.

<sup>9</sup> *Soufflet Negoce SA v Bunge SA* [2010] EWCA Civ. 1102; [2010] 2 CLC 468[12] [CA].

of readiness of the vessel. It is only when a vessel is ready in every respect that the commencement of cargo operations can occur. This would usually involve the availability of the vessel for the unfettered use of the charterers.<sup>10</sup> It also encompasses the complete readiness of the vessel holds as well as giving the charterer unrestricted control of the vessel, especially areas designated for the loading of cargo.<sup>11</sup> The vessel must also have the proper equipment<sup>12</sup> and be adjudged ready in a laytime sense such that, the shipowners can give a proper NOR when she becomes available to the charterers.<sup>13</sup> An important consequence of this is that the vessel must be ready in both a physical and legal sense.<sup>14</sup> Readiness in the contexts described above has however, assumed divergent meanings on some occasions. Subsequent sections would critically appraise these and situate what should be the actual scope of physical and legal readiness.

#### **4.2.1 Physical Readiness**

For a vessel to be treated as being ready to load, she must be in a state of physical readiness. To assert the fact of readiness, it is often the practice for the shipowner to give the charterer immediate and unrestricted access to all cargo space.<sup>15</sup> Conversely, if there are impediments that impact negatively on the charterer's access to cargo space, it would mean that the vessel is not in a state of physical readiness. For instance, a vessel would be unready to load if remnants of the previous cargo aboard the vessel remain to be discharged.<sup>16</sup> Along similar lines, a vessel would also be unready to load if access to charterer's cargo is impeded by overstowed cargo.<sup>17</sup> In addition, a vessel must also be cargoworthy such that it must be fit to receive the intended cargo. Consequently, the

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<sup>10</sup> *Government of Ceylon v Societe Franco-Tunisienne D'Armement Tunis (The Massalia)* [1962] 2 QB 416, 422.

<sup>11</sup> *Groves, Maclean & Co v Volkart Brothers* (1885) 1 TLR 454.

<sup>12</sup> *Sun Shipping Co. v Watson Youell* [1926] 24 Lloyd's Rep 28.

<sup>13</sup> Simon Baughen, *Summerskill on Laytime* (5<sup>th</sup> Edn, Sweet and Maxwell 2013) para 5-01.

<sup>14</sup> *Shipping Developments Corporation v V/O Sojuzneftexport (The Delian Spirit)* [1971] 1 Lloyd's Rep. 64, 70. [Comm]. This would be expanded further in subsequent parts of this chapter.

<sup>15</sup> *Lyderhorn v Duncan Fox* [1909] 2 KB 929, 940.

<sup>16</sup> *Ibid* 940.

<sup>17</sup> *Government of Ceylon v Societe Franco Tunisienne d'Armement Tunis (The Massalia) (No 2)* [1962] 2 QB 416; *Unifert International Sal v Panous Shipping Co (The Virginia M)* [1989] 1 Lloyd's Rep. 603 [Comm.]; *Transgrain Shipping BV v. Global Oceanico SA (The Mexico 1)* [1990] 1 Lloyd's Rep 507. [CA]

vessel holds must be clean and free from contamination.<sup>18</sup> It is also important to fix any equipment (loading gear) that will aid the loading operation or any special equipment required for particular cargoes must be readily available and in position.<sup>19</sup> The requirement of physical readiness can neatly be divided into three main strands namely: cargo spaces, equipment and over-stowed cargo.

Before NOR can be given and before laytime can commence, the general rule is that, a vessel must be in all respects ready to load.<sup>20</sup> This generic principle has over the years proven difficult to apply, particularly since the degree of readiness applicable in every given circumstance may sometimes vary. The readiness of a vessel is fact sensitive and cannot be addressed by sticking stubbornly to general rules. The adoption of an approach that is flexible enough to account for the differences in factual circumstances of vessel readiness is to be desired. The subsequent sub-sections will be dedicated to highlighting problems that may arise regarding the physical readiness of the vessel in different contexts.

#### **4.2.1.1 Cargo Spaces**

For a vessel to be regarded as being physically ready to load, the charterer must be allowed physical control of the vessel including unrestricted access to the cargo holds.<sup>21</sup> This right is expressed by saying that their rights extend to the 'whole reach and burthen of the ship'<sup>22</sup> which has been interpreted to mean giving the charterer access to 'the full space of the vessel proper to be filled with cargo.'<sup>23</sup> For a vessel to be considered completely ready in all her holds, the cargo holds must not only be accessible and but also clean.<sup>24</sup> Over the years, this latter requirement of cleanliness of cargo spaces before commencement of loading has given rise to much controversy. The common law requires strict compliance with the rule as to readiness of vessel, otherwise the vessel is not considered as having arrived at the port. However, the application of the strict rule

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<sup>18</sup> *The Tres Flores* [1974] QB 264; *Triton Navigation Ltd v Vitol SA (The Nikmary)* [2003] EWCA Civ. 1715; [2003] 2 CLC 1113. [CA]

<sup>19</sup> *Sun Shipping Co. v Watson Youell* [1926] 24 Lloyd's Rep 28.

<sup>20</sup> *The Tres Flores* [1974] QB 264.

<sup>21</sup> Simon Baughen (n13) para 5-05.

<sup>22</sup> *Weir v Union SS Co. Ltd* [1900] AC 525, 526.

<sup>23</sup> *Ibid* 532.

<sup>24</sup> *The Tres Flores* [1974] QB 264. [CA]

regarding readiness of the vessel has often led to some untoward outcomes because of uncertainty regarding what constitutes cleanliness. For example, what degree of cleanliness is required before a vessel can be described as ready in all respects?

In *The Tres Flores*,<sup>25</sup> the vessel was chartered to carry a cargo of bulk maize from Varna where the master agreed to take necessary measures to make the holds clean, dry without smell and in every way suitable to receive grain to the satisfaction of the charterer. Upon arrival of the vessel to pick up the cargo, she could not proceed into berth because there was no available berth. Thereafter the master issued a NOR that the vessel was ready to load a complete cargo of maize in accordance with the charterparty. The vessel was subsequently inspected by the port authorities and pests were found in the cargo. Consequently, fumigation was ordered which took 4½ hours to complete after which the charterers accepted the NOR. The shipowners claimed demurrage contending that laytime began to count from when the vessel arrived the port with the charterers contending that laytime started after the fumigation was completed. The matter was referred to arbitration and the two arbitrators found in favour of the shipowner.<sup>26</sup> Dissatisfied, the charterers appealed to the High Court where Mocatta J found in their favour and held that the vessel was not ready to load in view of the infestation of the cargo holds.<sup>27</sup> Mocatta J in dismissing the arguments of the shipowner, reiterated the strictness of the common law rules regarding readiness. The duty of the shipowner is to make his vessel fit for cargo and where this has not been done, his right to tender NOR remain suspended as long as his vessel remains unfit.<sup>28</sup> The Court of Appeal affirmed the decision of Mocatta J that since the vessel remained unfit by virtue of the infestation of cargo holds by pests, laytime only commenced at 14.00 hrs on December 1 when the fumigation of the vessel was completed.<sup>29</sup>

Interestingly, the shipowners in the present case appeared to have attached a great deal of importance to the requirement of the charterparty clause: taking *necessary measures*

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<sup>25</sup> [1972] 2 Lloyd's Rep 384[Comm]; [1974] QB 264. [CA]

<sup>26</sup> *The Tres Flores* [1972] 2 Lloyd's Rep 384, 388 [2<sup>nd</sup> Col] [Comm].

<sup>27</sup> Ibid 392 [2<sup>nd</sup> Col].

<sup>28</sup> Ibid 392 [2<sup>nd</sup> Col].

<sup>29</sup> *The Tres Flores* [1974] QB 264, 273, 274, 275, 277. [CA]



for the holds to be clean, dry, without smell and in every way suitable to receive grain.<sup>30</sup> This contention was firmly rejected at the commercial court,<sup>31</sup> and was abandoned by the shipowners in the Court of Appeal. As Mocatta J observed: 'holds which have pests in them are not suitable to receive grain whether the shippers/charterers will be satisfied with the holds in that condition or not...'<sup>32</sup> Therefore, the point regarding 'necessary measures' was a moot point. Admittedly, the charterparty clause in question was at variance with the nature of cargo. Taking necessary measures in cleaning cargo holds infested with pests as required by the charterparty clause would not satisfy the nature of a cargo of grains: only complete readiness in terms of the cleanliness of cargo holds would suffice.

However, while the requirement of complete readiness in the cleanliness of the vessel holds is fundamental, it may not be suitable for all situations. Take for instance the *London Arbitration 19/05*,<sup>33</sup> where the vessel was chartered for the carriage of a cargo of paraxylene from Haifa to two safe ports Taiwan. After the fixture was concluded, the charterers obtained an option from the owners for the vessel to load at Haifa and Iskenderun and in due course exercised that option such that when the vessel arrived at Haifa, she was intended to load at both ports. Two days after arrival at Haifa and the tender of notices of readiness, the charterer changed their mind saying that they only wanted to load at Haifa and not Iskenderun. Meanwhile the vessel had not berthed due to some problems between the charterers and the shippers and this resulted in another vessel taking the berth to which the vessel would otherwise have gone. Upon tender of a NOR, the vessel was inspected on behalf of the charterers and it was discovered that the vessel was not ready to load because certain tanks required further cleaning even though the tanks in question were not required for loading at Haifa but at the second port.

A dispute for demurrage arose and was referred to arbitration. The central issue for determination was regarding whether the vessel had to be fully ready in all her tanks for

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<sup>30</sup> *The Tres Flores* (n26) 384 [Comm].

<sup>31</sup> *Ibid* 393 [2<sup>nd</sup> Col].

<sup>32</sup> *Ibid* 393 [2<sup>nd</sup>Col].

<sup>33</sup> (2005) 676 LMLN 3.

a NOR to be valid. In resolving this issue, the panel held thus: a NOR had to be read in the context of the circumstances prevailing at the time it was given.<sup>34</sup> For present purposes, the relevant circumstances were that the ship was expected to load at two ports and upon getting to the first port, the tanks required for that port were in fact ready.<sup>35</sup> On that basis, and subject to the terms of the charter the vessel was in fact ready.<sup>36</sup> What was required was that she be ready to do what the charterers at that time and place wanted her to do: load a part cargo at Haifa and the vessel was perfectly capable of doing that.

The above arbitration dispute demonstrates the difficulty in application of the strict common law rules regarding readiness as established in *The Tres Flores*.<sup>37</sup> The application of the strict rules do not fit every circumstance as the above arbitration decision demonstrates. Nevertheless, the decision can be reconciled with commercial common sense such that, it may be futile to require that all cargo holds should be clean so as to reflect the principle in *The Tres Flores* even in cases where the circumstances require only minimal cleaning or a section of the cargo spaces to be clean in order to fulfil performance of the obligation to load or discharge. As Swinfen Eady LJ in *Armement Adolf Deppe v John Robinson & Co. Ltd*<sup>38</sup> observed while commenting on a completely different set of circumstances: 'The vessel 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.*'<sup>39</sup> Similarly, it would be unreasonable and may lead to unnecessary expenditure if the charterer expects the vessel to be ready in all its holds if only a part of the holds would be used to convey cargo.

Without a doubt, the test of readiness as enunciated in *The Tres Flores* appears harsh, particularly in relation to its application to cargo spaces as evidenced by the arbitration

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> [1974] QB 264.

<sup>38</sup> [1917] 2 KB 204. [CA]

<sup>39</sup> Ibid 208.

disputes discussed above. Efforts by shipowner interests to apply a more flexible and relaxed approach similar to the test advanced in *Armement Adolf Deppe v John Robinson & Co. Ltd*<sup>40</sup> have proved futile. However, there may be some merits in adopting the opposite view of a relaxed, flexible approach even though such an approach may lead to some 'uncertainty.'<sup>41</sup> The idea of readiness of a vessel especially as regards what constitutes the cleanliness of the vessel holds is highly subjective, such that, it is not in every case where fulfilling the obligation would require thorough cleaning. Sometimes the cleaning may only be superficial and minimal<sup>42</sup> and may take little or no effort in terms of time and manpower. In some other cases, the standard of cleanliness required may be thorough, rigorous and methodical particularly where the nature of the cargo is in the form of grain, food stuffs or clean liquid cargos (Naphtha, aviation spirit)<sup>43</sup> where the risk of contamination is very high. A case in point akin to the former, where minimal effort was required to make the vessel clean was *The Tres Flores*.<sup>44</sup> The cargo holds although unclean took only 4½ hours to clean costing a sum of just \$170 and such uncleanness did not cause any delay to the vessel. Still the courts insisted that the vessel was unready. Perhaps, the difficulty faced by the shipowners at the Court of Appeal was exacerbated by the fact that readiness must relate to when NOR was given.<sup>45</sup> It was this crucial point that served as a death knell on the success of the owners in *The Tres Flores*. Consequently, it did not matter much that the duration for rectifying the uncleanness was inconsequential nor was it material that the uncleanness did not cause any delay since the owners were already in breach.

Although, the charterers were successful in *The Tres Flores*, this does not suppress the argument that untoward consequences could occur from having an objective test apply to occasions where the degree of cleanliness required is minimal. A shipowner may be denied substantial demurrage in circumstances where minimal effort is required to make the cargo holds clean without occasioning delay to cargo operations. The courts

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<sup>40</sup> Ibid 204. [CA]

<sup>41</sup> A point raised by Roskill LJ in *The Tres Flores* [1974] QB 264, 277. 'The adoption of the test contended by Mr. Mustill would introduce an unwelcome element of uncertainty into this area of law.'

<sup>42</sup> Donald Davies, '*Commencement of Laytime*' (4<sup>th</sup> Edn, Informa 2006) Para 67.

<sup>43</sup> Ibid para 67.

<sup>44</sup> [1974] QB 264 [CA].

<sup>45</sup> Ibid 272 [CA].

under English law have neglected this consideration and have instead remained unsympathetic towards shipowners caught in situations where the vessel cargo holds only require minimal cleaning. Instead, they have sought to adopt the approach suggested by Colman J in *The Linardos*<sup>46</sup>...it is always open to the parties to ameliorate the black and white effect of this principle by express provisions to the contrary...<sup>47</sup> Put differently, parties could always modify the terms of the charterparty to reflect a relaxed approach regarding the physical readiness of the vessel by inserting specific clauses to achieve the desired result.

It is argued that the above approach suggested in *The Linardos* represents a temporary measure and would not mitigate the harsh consequences brought about by *The Tres Flores* test in the long run. As can be seen in the previous chapter, adopting the insertion of express provisions has not been very successful in resolving disputes regarding when a vessel is considered as having arrived at the contractual destination. As such, there is no guarantee it would achieve any success in the present context. In *London Arbitration 14/05*<sup>48</sup> a dispute involving a claim for demurrage fell to be decided. The charterers challenged the validity of the NOR while also arguing that the vessel was neither physically nor legally ready to discharge cargo without clearance from the harbour master. In response to this latter argument, the owners relying on *The Linardos*<sup>49</sup> argued that by clause 20 of the charter they had contracted out of the usual requirements and effect of NOR provisions. Clause 20 of the charter provides thus, 'Any time actually lost through lack of ship's power, breakdown or inefficiency of equipment or any neglect on the part of the vessel, its Owners, Masters or crew or their Agents affecting the loading or discharging operation shall not count as laytime.'

Regarding this argument, the tribunal sought to distinguish the instant case from the decisions in *The Linardos*<sup>50</sup> and *The Jay Ganesh*<sup>51</sup> on the premise that there was a significant difference in the wordings of the clauses in the instant case and the clauses

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<sup>46</sup> *Cobelfret NV v Cyclades Shipping Co. Ltd (The Linardos)* [1994] 1 Lloyd's Rep 28.

<sup>47</sup> Ibid 31 [Col 1] See also *United Nations Food & Agriculture Organisation v. Caspian Navigation Inc. (The Jay Ganesh)* [1994] CLC 1013, 1018 [Comm.]

<sup>48</sup> (2005) 669 LMLN 3.

<sup>49</sup> [1994] 1 Lloyd's Rep 28.

<sup>50</sup> Ibid 28.

<sup>51</sup> [1994] CLC 1013.

in *The Linardos* or *The Jay Ganesh*.<sup>52</sup> While the clauses in both the *Jay Ganesh* and *Linardos* were very clear and directed specifically at the vessel's readiness to load or discharge, the present clause lacks clarity and makes no specific reference to the state of readiness of the vessel to either load or discharge.<sup>53</sup> Rather the clause referred merely to the merely to time being lost as a result of loading or discharging operations being affected by the causes listed.<sup>54</sup> Consequently, contracting out of the 'black and white' effects of the principles regarding vessel's readiness to load involves more than just inserting express provisions to the contrary. Such express provisions if inserted, must make specific reference to the readiness of the vessel to load for it to be sufficient to vary the usual requirements regarding the tender of a valid NOR.<sup>55</sup> Moreover, even when parties to the contract agree to the use of express clauses to cater for the harsh consequences that may result from an application of *The Tres Flores* test, the courts are saddled with the dilemma of determining what the intention of the parties were, an exercise that has proved difficult over the years.<sup>56</sup>

A possible solution to mitigate the harsh realities brought by *The Tres Flores* principle is to adopt the doctrine of 'practical and substantial readiness' already prevalent in the US. The general tenor of this doctrine suggests that a notice can be validly tendered even if there is an inadequacy of vessel readiness and that inadequacy can be remedied within a short timeframe without occasioning delay. An application of this doctrine would dispense with the necessity to make the vessel ready in all respects. In *Chemical Trading Inc v Meridian Resources and Development Inc*.<sup>57</sup> a vessel scheduled to carry a cargo of methanol arrived the load port and tendered NOR. However, loading could not commence immediately, due to the fact that another vessel was already in the process

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<sup>52</sup> (2005) 669 LMLN 3. See also London Arbitration 19/07 (2007) 723 LMLN 2 decided along similar lines.

<sup>53</sup> Ibid 3.

<sup>54</sup> Ibid 3. Causes listed include lack of ship's power, breakdown or inefficiency of equipment or any neglect on the part of the vessel, etc.

<sup>55</sup> Simon Baughen (n13) para 5-48.

<sup>56</sup> See for instance, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101. See generally Anne De Moor, 'Intention in the Law of Contract: Elusive or Illusory?' [1990] 106 LQR 632; Gillian Black, 'Formation of Contract: the Role of Contractual Intention and Email Disclaimers' [2011] 2 Juridical Review 97; DW McLauchlan, 'Common Assumptions and Contract Interpretation' [1997] 113 LQR 237; George Leggatt, 'Making Sense of Contracts: The Rational Choice Theory' (2015) 131 LQR 454; David McLauchlan; A better way of making sense of contracts? [2016] 132 LQR 577.

<sup>57</sup> *In the matter of the Arbitration between Chemical Trading Inc. and Meridian Resources and Development Inc*. SMA 2904 (1992).

of taking on 4000 metric tons of methanol. The defendants agreed to absorb any resulting demurrage caused by the delay which could be attributable to the lack of berth. When the vessel finally berthed and her tanks inspected, several tanks were rejected due to residue from earlier non-methanol cargoes. The crew proceeded to fix the tanks involved and after a second inspection was carried out, the tanks were then accepted to load methanol. Relying on the promise of the defendants to absorb any resulting demurrage, the claimants proceeded to institute a claim in demurrage from the defendants. The defendants refuted the calculation of demurrage and a dispute arose. The panel of arbitrators held that where a vessel had a defect when NOR is tendered, but that defect can be remedied in a short time after berthing, and where there is a long delay between the tender of NOR and the berthing of the vessel due to berth unavailability, then the doctrine of 'practical and substantial readiness' could be invoked to conclude that time waiting for berth should count as laytime.<sup>58</sup>

Similarly, in *West Pacific International Inc. v Stellar Chartering & Brokerage Inc.*<sup>59</sup> the vessel arrived at the Southwest Pass (Mississippi River) but could not berth due to fog conditions. The vessel had to anchor at the pilot town anchorage. While at the anchorage the vessel suffered engine failure and had to be subjected to repairs. While undergoing repairs, the vessel sought to carry out additional cleaning of cargo holds which had earlier been rejected by the National Cargo Bureau (NCB). The holds were finally passed as clean following which the vessel's NOR was tendered and accepted by the charterer. A dispute arose regarding the validity of the tendered NOR. The charterers, sought to use the repairs to the vessel as a tool to stop the running of laytime after issue of NOR. Although, the panel ruled against the shipowner, it rejected the charterer's argument that since the original NOR was invalid, the vessel was bound to present a second NOR before laytime can begin to run. Instead, the panel held that, it would be sufficient if time is prevented from running until the vessel was 'substantially ready.'<sup>60</sup>

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<sup>58</sup> Ibid.

<sup>59</sup> *In the matter of the arbitration between West Pacific International Inc. Owner of the MV Geminy and Stellar Chartering & Brokerage Inc as Charterer under a Baltimore Berth Grain Form C Charterparty dated January 11 1993 SMA 3227 (1995).*

<sup>60</sup> Ibid

From both the *Chemical Trading* and *West Pacific International* arbitral decisions, it is deductible that maritime arbitrators in the United States exhibit a bias towards a degree of 'practical and substantial readiness' in favour of 'complete readiness.' The rationale for this preference is easily discernible, as such an approach enables the trigger of laytime with the resultant effect that time waiting for berth which is a risk ordinarily borne by the charterer would count as laytime. Thus, in the *Chemical Trading* dispute, it took only a few hours to rectify the defect in the vessel tanks and it was held that those hours should be deducted from the laytime calculation, and rightly so. Of course, if after the vessel berths and the owners are unable to satisfy the charterers regarding the readiness of the vessel, such delay would not form part of the computation of laytime.<sup>61</sup> In fact, the latter dispute referred to above, exhibited a preference for the 'substantial readiness' doctrine rather than the complete readiness doctrine prevalent under English law, and rightly so. As Siciliano AJ observed 'I am satisfied that the U.S. Coast Guard inspection which took place January 23rd is precisely the sort of limited deficiency envisioned by the principle of "practical and substantial readiness".'<sup>62</sup>

In *Armada Bulk Carriers, Ltd v Delta Bakeries*<sup>63</sup> the vessel M/V Glory was to load and transport 34,000 metric tons of bulk wheat from one or two safe berths, one safe port US Gulf or Mississippi River to Alexandria, Egypt where the owners guaranteed that vessels arrival 'draft'<sup>64</sup> will not exceed 32 feet of salt water. The vessel upon arriving off the port of Alexandria, tendered NOR which was rejected. It is important to note that, due to storm conditions, the port of Alexandria had been closed for 4 days. Thus, at the time of the vessel's arrival, Alexandria was still closed to traffic and the Master was forced to remain outside the commercial port limits awaiting permission and a pilot to enter the inner anchorage. That permission was subsequently received and the vessel was finally able to anchor at the inner anchorage of the port. The vessel was thereafter inspected and it was found that the vessel was overdraft and the cargo in question required fumigation as it contained insects. The vessel was then instructed to reduce its

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> *The matter of the arbitration between Armada Bulk Carriers Ltd, Jersey as Disponent Owner of the M/V Top Glory and Delta Bakeries, as Charterer* (1999) SMA 3538.

<sup>64</sup> This is the vertical distance between the surface of the water and the lowest point of the vessel (Hull). The presence of draft determines the minimum depth of water a vessel can safely navigate in. <<https://www.thoughtco.com/what-is-vessel-draft-2292989>> accessed 24/09/2018.

draft by disposing excess ballast and fresh water while the cargo also had to be fumigated. Following from this, the vessel then berthed and discharge commenced. The panel sought to determine what effect the vessel's overdraft condition had on the shipowners claim for demurrage. Applying the 'practical and substantial readiness' doctrine, the panel held that the vessel's overdraft was not the root cause of the delay but attributed this to the port closure, the occupation of the berth by another vessel and the need to fumigate the cargo.<sup>65</sup> However, the time spent reducing the vessel's draft water would be excluded from any computation for demurrage.<sup>66</sup>

As can be discerned from the arbitration disputes considered above, the preference for a degree of 'practical and substantial readiness' by arbitrators exhibits an equitable resolution of any unresolved issues regarding the state of readiness of a vessel. The inequity of the English law approach is readily exposed when considering the fact that a vessel's state of readiness may well depend on the state of readiness of the charterer. For example, if the charterer has not made appropriate arrangements for a berth to be readily available so that loading or discharge can commence in earnest or no arrangement has been made for provision of cargo, it would be inequitable to expect the vessel to be in a state of complete readiness.

From the foregoing, it is recognised that while a shipowner is compensated through payment of demurrage, his entitlement to demurrage should not be at the expense of interrupting the running of laytime on account of the vessel not being in a state of absolute readiness. The neater approach, it is argued, would be to let laytime run from the moment NOR is tendered and only deduct from the running of laytime any time spent by the owner in correcting deficiencies regarding readiness. If a shipowner upon reaching berth still has unresolved issues regarding the readiness of his vessel, such delay would not form part of the computation of laytime.<sup>67</sup> In the *Chemical Trading* dispute referred to above, it took only a few hours to rectify the defect in the vessel tanks and those hours were deducted from the laytime calculation, and rightly so. An application of this approach to *The Tres Flores* would prevent the loss of substantial demurrage for the shipowners especially as the vessel could not be inspected until 5

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<sup>65</sup> *The matter of the arbitration between Armada Bulk Carriers, Ltd v Delta Bakeries* (1999) SMA 3538.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*



days after arrival and the rectification of the defect in readiness took only 4½ hours. The correction of deficiencies of readiness through the fumigation of the cargo holds and the running of laytime could run concomitantly, such that, the time spent rectifying readiness could be deducted in the computation of laytime. This neatly resolves any controversy regarding the readiness of the vessel. Certainly, if after arrival at the berth and rectification is still unsatisfactory, the time spent in correcting the default would form no part of laytime.

The consequences that result from an application of the English approach could work injustice for contractual parties especially for shipowners, since charterers could be shielded from potential liability due to a failure to provide berth<sup>68</sup> or even failure to provide cargo. Charterers could easily hide under the toga of deficiency of readiness in a bid to escape liability. Of course, an adoption of the practical and substantial readiness doctrine would necessitate a complete reformulation of the requirement that the state of readiness of the vessel must coincide with the time the NOR is tendered.<sup>69</sup> Such an approach would finally breathe new life into the inchoate notice device, such that on occasions when a vessel is not fully ready to load or discharge, and a notice is already given, such notice would not be invalidated for the singular reason that it was issued before the vessel was ready. Once a notice has been issued the need for a fresh notice can be dispensed with since that notice is 'inchoate' such that laytime is triggered only when the vessel becomes ready.<sup>70</sup>

An application of *de minimis* rule to mitigate the harsh effects of the strict rule as to the condition of the vessel holds<sup>71</sup> has been suggested as a possible solution to the unintended consequences of *The Tres Flores* decision. However, it is doubtful how far-reaching such an application will go in assuaging the hardship brought by *The Tres Flores* rule on shipowners. Arguably, the *de minimis* rule may only be of help to shipowners in limited circumstances,<sup>72</sup> since uncertainty continues to exist regarding the degree of

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<sup>68</sup> For instance, see *The Tres Flores* [1974] QB 264 where although there was no berth available, the court by treating the NOR issued as invalid also prevented the charterers from escaping liability for the time spent waiting for berth.

<sup>69</sup> *The Tres Flores* [1974] QB 264. [CA]

<sup>70</sup> *The Massalia (No 2)* [1962] 2 QB 416.

<sup>71</sup> *The Tres Flores* [1974] QB 264, 274. [CA]

<sup>72</sup> Donald Davies (n42) para 64.

uncleanliness that ought to be covered by the *de minimis* rule. As Donald Davis observed 'what degree of uncleanliness falls under the *de minimis* rule is a matter of conjecture.'<sup>73</sup> An example of this is *The Tres Flores*<sup>74</sup> case where at the High Court, the application of the *de minimis* rule was raised and the court was of the view that it did not avail the shipowners even though rectifying the uncleanliness of the vessel holds only took 4½ hours and cost a sum of just \$170.94 to clear up the infestation.<sup>75</sup> Without a doubt, the argument could be had that an application of the *de minimis* rule would only thrive in circumstances where the uncleanliness is trivial or very minor<sup>76</sup> for it to be adjudged inconsequential. Therefore, it may be unhelpful to the shipowner in the majority of cases where the margin of readiness is likely minor as in *The Tres Flores*.

#### **4.2.1.2 Overstowed Cargo**

Readiness in the context of cargo space also extends to readiness in circumstances where cargo is overstowed. As a natural consequence of the ocean voyage, it is the shipping practice to carry different parcels of cargo on the same voyage in the same vessel but under different contractual arrangements entered into directly by the owner. The character of these contractual arrangements may take the form of multiple charters or a charter permitting the shipowner to complete the vessel with other cargo. A typical clause granting the shipowner the liberty to complete with other cargo is the Centrocon completion clause namely:

Owners have the liberty to complete with other...merchandise from port to port en-route for owners risk and benefit, but...same not to hinder the...discharging of this cargo.

As a general rule, a valid NOR cannot be tendered in respect of the cargo which has been overstowed until all that cargo is accessible.<sup>77</sup> Under English law, any notice given while the cargo in question is inaccessible, is rendered invalid and can only be cured through the issuing of a fresh notice.<sup>78</sup> This approach it is argued, is not easily reconcilable with the prevailing English approach to readiness as espoused in *The Tres Flores*.<sup>79</sup> Moreover,

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<sup>73</sup> Ibid para 69.

<sup>74</sup> *The Tres Flores* [1972] 2 Lloyd's Rep 384. [Comm.]

<sup>75</sup> Ibid 394 [col 2].

<sup>76</sup> Donald Davies (n42) para 69.

<sup>77</sup> *The Massalia (No 2)* [1962] 2 QB 416.

<sup>78</sup> *The Mexico 1* (n17) 507.

<sup>79</sup> [1974] QB 264.

there is a palpable tension between the test of readiness in an overstowed cargo context and the operation of a time lost waiting for berth provision. This tension is even more acute in circumstances where there is port congestion and vessels have to wait their turn until a ready berth becomes available so that the loading or discharge operation can commence.<sup>80</sup>

Where a vessel is compelled to wait her turn outside port limits due to congestion, the time spent waiting for berth would operate to extend the voyage stage of the maritime adventure and cast the loss occasioned by the delay upon the shoulders of the shipowners. In a bid to cast the financial burden attached to such delay on the charterer, shipowners have resorted to an adoption of a contractual device known as 'time lost waiting for berth to count as laytime.'<sup>81</sup> However, there is a palpable tension regarding the operation of this clause in circumstances where the vessel is compelled to wait for an available berth due to berth congestion but the vessel is adjudged not ready to load or discharge due to over-stowage of cargo,<sup>82</sup> even though NOR had been tendered at the time the vessel arrived in port and laytime had commenced. One view is that, since time lost has a direct correlation with laytime and since the original notice tendered is rendered invalid by virtue of the vessel's unreadiness at the time of tender, the commencement of laytime is put on ice such that the time lost while waiting for berth does not count as laytime.<sup>83</sup> The competing view is that time lost while waiting for berth should count as laytime, irrespective of the invalidity of the original notice. It is argued that, this latter view is to be preferred since this gives validation to the intention of the parties which is to provide compensation for the vessel owner for time spent waiting for berth. Although such an approach is at variance with the general tenor of laytime which is, in the absence of a valid NOR, laytime cannot start, an equitable solution could be achieved if the time spent in remedying the unreadiness of the vessel is deducted from the laytime or demurrage computations. This approach is quite popular under United

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<sup>80</sup> *The Darrah* [1976] 2 Lloyd's Rep 359, 362 [1<sup>st</sup> Col].

<sup>81</sup> The operation of this clause is redundant in circumstances where the vessel is arrived within the port.

<sup>82</sup> As per *The Massalia* [1962] 2 QB 416, the test for readiness in the context of overstowed cargo is one of accessibility. Therefore reference to an overstowed cargo refers to circumstances where the vessel is not accessible and notice is tendered when the vessel arrives at the usual waiting place outside the port to give effect to the time lost waiting for berth provision.

<sup>83</sup> A view advanced by the charterers in *The Massalia* [1962] 2 QB 416.

States legal jurisprudence, such that although a vessel might be unready at the time notice was given, the time taken to remedy the unreadiness is deducted from laytime computations with the consequence that the vessel owner does not lose substantial demurrage for waiting for an unavailable berth and the charterer is not made to pay compensation to the shipowner unfairly in that circumstance.<sup>84</sup>

In certain English maritime law arbitrations, the above approach has been favoured. For instance, *London Arbitration 3/93*<sup>85</sup> the vessel was chartered on the Gencon form for the carriage of a part-cargo of bagged fishmeal. The fishmeal was loaded in the bottoms of each of the ship's five holds. It was then overstowed by another similar cargo which was carried under an entirely separate charter for different charterers. Both sets of cargo had to be discharged at the same berth. When the vessel arrived at the discharging port, there was no berth available which meant she had to wait 12 days from the point of arrival until a berth became available. When a berth became available, discharge of the overstowed cargo commenced while discharge of the part cargo fishmeal commenced later the same day. Irrespective of the over-stowage of cargo, the vessel would still have had to wait as long for the berth as she in fact did. A claim for demurrage arose. The charterers argued that no valid NOR could be tendered under the charter until the part cargo of fishmeal was accessible as per *The Massalia*.<sup>86</sup> The owners did not dispute that proposition but sought to rely on a 'Time lost in waiting for berth to count as discharging time' provision. The arbitration panel found in favour of the vessel owners on the grounds that the time lost as per the provision in question must have referred to time lost in waiting for the berth *for the cargo in question*, not for some other cargo. That requirement was satisfied in the present case. Moreover, the owners' contentions led to a just result in that even if the cargo had not been overstowed, as much time would have counted against it because there was no berth available for it.

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<sup>84</sup> For example see *In the matter of the Arbitration between Chemical Trading Inc. and Meridian Resources and Development Inc.* Society of Maritime Arbitrators 2904 (1992). See generally, *In the matter of the arbitration between West Pacific International Inc. Owner of the MV Gemini and Stellar Chartering & Brokerage Inc as Charterer under a Baltimore Berth Grain Form C Charterparty dated January 11 1993; The matter of the arbitration between Armada Bulk Carriers Ltd, Jersey as Disponent Owner of the M/V Top Glory and Delta Bakeries, as Charterer* (1999) SMA 3538. SMA 3227 (1995).

<sup>85</sup> LMLN 351 -17 April 1993.

<sup>86</sup> [1962] 2 QB 416. See also Pg. 95 note 89 of this thesis; pg. 117-119 of this thesis.

Similarly, in *London Arbitration 14/82*<sup>87</sup> charterers were to load a part cargo of fertilizer. Clause 4 provided that time lost in waiting for berth was to count as laytime. Clause 11 also provided that the charterers were liable for demurrage at the discharge port. The vessel arrived off the discharge port on 26<sup>th</sup> January 1978 and tendered NOR to both the receivers of the fertilizer and the receivers of other part cargoes. There was no berth available due to many vessels waiting to discharge fertilizer: the average waiting time before berthing was 40 days. On 1<sup>st</sup> February 1978 the vessel shifted to the Inner Harbour and on the following day a written NOR to discharge, was issued by the vessel and received by the agents of the fertilizer receivers. However, because of over-stowage of other cargoes, the vessel was not in fact ready to discharge fertilizer until February 12<sup>th</sup>. The other part cargoes were discharged between February 2<sup>nd</sup> and March 4<sup>th</sup> when discharge was interrupted. On March 7<sup>th</sup>, for the first time, a fertilizer berth became available to this ship and discharge of fertilizer commenced, being completed on March 17<sup>th</sup>. Discharge of the remaining part cargo resumed on March 13<sup>th</sup> and was completed on March 17<sup>th</sup> and the vessel sailed the next day. The owners claimed demurrage. The arbitration panel held that the owners were entitled to succeed. If the ship had had the same cargoes on board on arrival at the discharge port, but none of them had obstructed access to the fertilizer, the first NOR would still be valid and laytime would still have commenced at 08 00 on January 28<sup>th</sup>.

Both arbitrations referred to above, reflect the ‘purposive approach’<sup>88</sup> adopted by English maritime arbitration panels in resolving any friction resulting from the application of a time lost waiting for berth clause to circumstances where the vessel was not in a state of readiness or as in present context where the overstowed cargo was not accessible. As evidenced from *London Arbitration 3/93* referred to above, the fact that the tendered notice was invalid due to the unreadiness of the vessel at the time of tender, assumed less significance, such that full effect was given to the ‘time lost in waiting for berth’ provision. By giving full effect to the provision, fairness and justice are restored to the computation of laytime in circumstances where the vessel is in a state

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<sup>87</sup> LMLN 71-22 July 1982. See also *London Arbitration 3/93* LMLN 351 -17 April 1993; *London Arbitration 11/93* LMLN 356-26 June 1993; *London Arbitration 3/84* LMLN 114- 14 March 1984.

<sup>88</sup> Donald Davies (n42) para 39.

of unreadiness. In *The Massalia*,<sup>89</sup> the court was of the view that, the inclusion of time lost waiting for berth as part of time for discharge in an overstowed cargo context accords with good commercial sense. By applying the natural meaning of the words, the court was able to give effect to the intention of the parties. The unintended consequences that might occur by not making the commencement of laytime dependent on the actual readiness of the vessel at the time notice was tendered, may be averted by a deduction from laytime or demurrage computations, the time spent in remedying the unreadiness of the vessel or in the alternative, a tentative 'calculation can be made as to when the vessel would have been ready if she had in fact moved to a berth at the time of her arrival at or off port.'<sup>90</sup>

#### **4.2.1.3 Equipment**

It is not in dispute that in determining the readiness of a vessel in a laytime context, any vessel equipment which is pertinent to cargo operations has to be in a ready state. However, the degree of readiness has often been controversial, with English courts struggling to proffer a solution to the above dilemma. They have struggled to fit the strict rules of readiness requiring a vessel to be in a state of complete readiness, into the present context. The controversy here has often revolved around balancing an adoption of the strict rules referred to earlier with the rule that the requirements of readiness would be met, if the equipment is made readily available for use at the moment it is required.<sup>91</sup> The rationale for this latter rule is that, it would be an exercise in futility to require equipment relevant to loading to be ready while the vessel is waiting at the usual waiting place before going into berth,<sup>92</sup> especially as the loading operation does not occur until the vessel proceeds into berth. A corollary of the above would be that upon arrival at berth, vessel equipment need be in a ready state, such that there is no debate regarding the readiness of the vessel when notice is eventually given. The failure of the vessel equipment in being ready could be the crucial factor that might erode the commencement of laytime since any NOR tendered would be rendered invalid.

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<sup>89</sup> *The Massalia* [1962] 2 QB 416.

<sup>90</sup> *Ibid* para 39. A version of this latter alternative was alluded to in *The Darrah* [1976] 2 Lloyd's Rep 359, 364 [1<sup>st</sup> Col].

<sup>91</sup> Donald Davies (n42) para 72.

<sup>92</sup> *Ibid* para 72.

The Court of Appeal decision in *Armement Adolf Deppe v John Robinson & Co. Ltd*<sup>93</sup> would set the tone for the discussion. The vessel arrived at the port of discharge laden with cargo but could not berth because there were no berths available. She finally dropped anchor at the buoys. She was subsequently allowed to berth once a berth became available whereupon discharge spanned 9 days. Discharge could have commenced at the buoys, but the charterers did not desire it. While the vessel was anchored at the buoys, the claimant owners had not taken off the vessel hatches neither had they made arrangements for the stevedores to bring all their discharging gear on board. The dispute before the court was as regards whether the vessel was ready to discharge cargo at this point even though the hatches had not been taken off and the stevedores did not bring their gear on board the vessel at this time.

The claimants in the above case argued that the vessel was ready when it arrived at the buoys, and if the charterers were desirous to receive delivery there, the owners would have made necessary arrangements. The court held overruling the commercial court, that '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.'<sup>94</sup> 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.<sup>95</sup> The reasoning behind the court's decision was best expressed by Bankes LJ that '...upon the evidence that all parties concerned—namely, the dock officials, the consignees and the representatives of the ship - were all of one mind, and that no one desired or required the discharge to commence until the vessel arrived at her berth.'<sup>96</sup> Given these circumstances, the rigging of the gear while the vessel lay at the buoys was a useless thing to do.'<sup>97</sup>

The reasoning in the judgment is infallible. An application of strict rules regarding readiness is unworkable in the context of vessel equipment and could no doubt lead to

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<sup>93</sup> [1917] 2 KB 204 [CA].

<sup>94</sup> Ibid 208, 210.

<sup>95</sup> Ibid 208.

<sup>96</sup> Ibid 210.

<sup>97</sup> Ibid 210.

strange results: the avoidance of liability by the charterer where a vessel arrives at the port but could not berth due to the unavailability of berth. Although, a charterer cannot guarantee the availability of berth due to port congestion, however, an argument that a vessel is in a state of unreadiness simply because there are slight discrepancies regarding the readiness of the vessel equipment simply shuts its eyes to the bigger problem: the loss of substantial demurrage for the shipowner who would want to be compensated for the charterers failure to secure berth.

The decision in *Sun Shipping v Watson and Youell*<sup>98</sup> produced a different outcome from the *Armement Adolf Deppe v John Robinson & Co Ltd*.<sup>99</sup> It was agreed that a vessel was to be ready in all her holds to load a cargo of grain. The time allowed for loading the quantity was 914 days and the owners contended that they were entitled to demurrage for 434 days. The charterers, disputed the computation of demurrage since the vessel was not ready in all her holds when loading the up-river portion of the cargo. The rationale here was that the vessel had not finished putting up her shifting boards, which were fixed to prevent the grain working from one side to the other. Therefore, she was not ready in all respects. A dispute arose, which was referred to arbitration. The question for determination was whether the vessel was ready to load even though the shifting boards were not fixed. The umpire answered in the affirmative that the vessel was ready as there was no evidence of any delay caused by fixing of the shifting boards. On appeal to the commercial court, Rowlatt J differed from the above view when he held that in the absence of shifting boards, the ship was not ready to load.<sup>100</sup>

The outcome of this decision is startling and representative of the untoward consequences that may result from a strict application of the rule regarding readiness: 'a vessel is not ready to load until she was ready to load a complete cargo.'<sup>101</sup> Comparing the above decision with the *Armement Adolf Deppe v John Robinson & Co Ltd*<sup>102</sup> decision, the difference in outcome is particularly glaring since the latter supports the view that when a vessel arrives at the port awaiting orders to berth, such a vessel is

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<sup>98</sup> [1926] 24 Lloyd's Rep 28.

<sup>99</sup> [1917] 2 KB 204.

<sup>100</sup> *Sun Shipping v Watson and Youell* [1926] 24 Lloyd's Rep 28, 29.

<sup>101</sup> *Ibid* 28.

<sup>102</sup> [1917] 2 KB 204.



ready to discharge in the sense that there is nothing preventing her from being made ready at once if desired.<sup>103</sup> There is nothing to suggest that this decision was brought to the attention of Rowlatt J seeing that it was decided 5 years prior to the decision in *Sun Shipping v Watson and Youell*.<sup>104</sup> As such, it may be impossible to know whether the outcome would have been different if Rowlatt J had the benefit of the *Armement Adolf Deppe v John Robinson & Co Ltd*<sup>105</sup> decision. Nevertheless, it is argued that treating a vessel as unready because there was an absence of shifting boards is unfair and cruel to the shipowners.

Proceeding on a factual analysis, it is argued that, the strict rule as to readiness has not been satisfied in the *Sun Shipping v Watson and Youell*<sup>106</sup> decision. Rather, the facts support the treatment of the vessel as ready since the absence of shifting caused no apparent delay in the loading operation. That singular factor should count for something even though it was dismissed as insignificant and of no moment.<sup>107</sup> This line of argument was advanced albeit unsuccessfully in *The Tres Flores*<sup>108</sup> where although the vessel holds were unclean, that the resulting cleaning of the vessel took 4½ hours and caused no apparent delay to the loading operation of the vessel, but the court still found the vessel unready to load.<sup>109</sup> Although, the rationale behind *The Tres Flores* decision may be understandable given that cleanliness of holds is of primary importance before any cargo can be received<sup>110</sup> due to cargo peculiarities. However, it may be difficult to equate the absence of shifting boards to the uncleanness of cargo holds as they do not present the same challenges. As an example, it may be possible to commence the loading of cargo while some of the shifting boards are already put in place, but in a cleanliness of cargo holds context, it may be difficult to commence loading of the vessel if the holds are to some extent unclean since that could lead to the risk of cargo contamination depending on the nature of the cargo sought to be loaded. Moreover, the charterers in

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<sup>103</sup> Ibid.

<sup>104</sup> [1926] 24 Lloyd's Rep 28.

<sup>105</sup> [1917] 2 KB 204.

<sup>106</sup> [1926] 24 Lloyd's Rep 28.

<sup>107</sup> Ibid 29.

<sup>108</sup> [1974] QB 264.

<sup>109</sup> Ibid 264.

<sup>110</sup> Ibid 264.

*Sun Shipping v Watson and Youell*<sup>111</sup> had not got their cargo ready and snatched at any excuse to avoid demurrage. Therefore, it is no surprise they advocated for the application of the strict rule regarding readiness, since on such an application, they were successful in knocking down a couple of days' worth of demurrage.

In *The San George*<sup>112</sup> the vessel arrived at Buenos Aires laden with cargo and there was a collapse of the mainmast due to steps taken in extinguishing a fire in the store room. Temporary repairs were carried out and the vessel was declared seaworthy for the homeward voyage. No 3 hold was occupied by bunker coal and the shipowner issued a NOR thereby declaring the vessel ready to load. The NOR was rejected by the charterer as the vessel in question had no mainmast or after derricks; and that the No 3 hold still contained bunker coal. This led to the cancellation of the charterparty. The shipowners sought to claim damages and the dispute was referred to arbitration and the umpire held that the vessel was not ready to load in that the vessel was without mainmast or after derricks and the No 3 hold was not free for grain. Therefore, the charterer was entitled to cancel. On appeal, the commercial court was of the view that the evidence of the absence of a mainmast and after derricks (all defects which could be remedied in good time if the method of loading required their use) was inadequate to discharge the onus on the charterer of showing that the defects in the ship's equipment were such that she would probably be unready or unable to employ or assist in any reasonable method of loading.<sup>113</sup> On further appeal to the Court of Appeal, the court in upholding the decision of Devlin J approached the issue regarding the readiness of the vessel differently. In their view, there was a real distinction to be drawn between a cargo space and gear.<sup>114</sup> The charterer is entitled to the control of the whole of the cargo space from the outset of the voyage while he has no such control over the loading gear.<sup>115</sup> Therefore, the strict rules of readiness applicable to cargo space should not be so stringently applied to a different context like vessel equipment.<sup>116</sup>

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<sup>111</sup> [1926] 24 Lloyd's Rep 28.

<sup>112</sup> *Noemijulia v Minister of Food (The San George)* [1949] 83 Lloyd's Rep 500 [KB] [Comm.]; [1951] 1 KB 223 [CA].

<sup>113</sup> [1949] 83 Lloyd's Rep 500, 507. [Comm.]

<sup>114</sup> [1951] 1 KB 223 [CA].

<sup>115</sup> *Ibid* 235.

<sup>116</sup> *Ibid* 235.

It may be that the justification for the decision in *The San George* may have been influenced by the fact that since the instant case involved a cancelling clause, the consequence of any irregularity regarding the readiness of the vessel would be a cancellation of the charter rather than the payment of demurrage as in laytime cases.<sup>117</sup> Naturally cancelling clauses aim to protect the charterer from the untoward consequences that may result in the event that a vessel arrives its destination late. Unsurprisingly, Devlin J described the nature of a cancelling clause as ‘a forfeiture clause’ such that its application must be treated with caution because ‘it would be a misfortune if defects of no real significance in the adventure were to be used as a means of throwing up the charter at the last moment.’<sup>118</sup> Therefore, it is possible to distinguish this case from laytime cases which appear to adopt a more stringent approach to the question of readiness.

Despite the strong influence of the cancelling clause in *The San George* decision, it is no surprise that as a matter of principle this case is on all fours with *Armement Adolf Deppe v John Robinson Co. Ltd*. Arguably, while there may be some sense in applying strict rules regarding readiness to cleanliness of cargo holds as in *The Tres Flores*, the same cannot be said of their application to vessel equipment. Any such attempt should be vigorously resisted as such an approach would yield unjust results such that a charterer could escape liability for unavailability of berth or even an absence of cargo under the guise that the vessel was not ready because vessel equipment are in an unready state. Therefore, it appeals to commercial sense, that a more nuanced approach be adopted in any construction foisted on readiness in a vessel equipment context.

In spite of the common sense and practical justice that stem from a more nuanced approach to construing readiness in a vessel equipment context, it appears the recent judicial approach under English law is to favour an extreme approach to readiness in a vessel equipment context.<sup>119</sup> The rationale for adopting such a stern stance is provided

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<sup>117</sup> *Aktiebolaget Nordiska Lloyd v J Brownlie & Co (Hull) Ltd (The Gevalia)* [1925] 22 Lloyd’s Rep. 79, 80.

<sup>118</sup> [1951] 1 KB 223, 228. See also *Mansel Oil & VITOL SA v Troon Storage Tankers SA* [2009] EWCA Civ. 425; [2009] 1 CLC 782 [1].

<sup>119</sup> For example see *Unifert International Sal v Panous Shipping Co (The Virginia M)* [1989] 1 Lloyd’s Rep 603.

by Hobhouse J in *The Virginia M*<sup>120</sup> when he found the alternative approach as suggested in *Armement Adolf Deppe v John Robinson & Co Ltd*<sup>121</sup> as ‘absurd and wholly unbusinesslike’ if ‘laytime must be treated as starting even though, within a matter of minutes or hours of its doing so, it is interrupted owing to the incapacity of the ship to continue.’<sup>122</sup>

It is however, argued to the contrary that, rendering the alternative approach referred to in the preceding paragraph, as ‘absurd and unbusinesslike’ is a stretch too far. There is no absurdity in treating laytime as starting even though it is interrupted due to incapacity of the vessel to continue with cargo operations. There is good commercial sense in such an approach since the logic of the argument has worked in different circumstances like the interruption of loading or discharging due to adverse weather conditions<sup>123</sup> or in order to bunker.<sup>124</sup> In such circumstances the shipowner is barred from claiming demurrage since the delay was either due to certain unforeseen events outside his control or his fault.<sup>125</sup> Thus, it could be argued further that, there is no difference in principle between the interruption of laytime due to breakdown of vessel equipment and an incidence of weather<sup>126</sup> or bunkering. Accordingly, it serves practical justice to apply these principles in the case of readiness in a vessel equipment context.

#### **4.2.2 Legal Readiness**

A vessel’s readiness is not complete by meeting only the requirements elucidated above regarding physical readiness. The general rule is that, for a vessel to be considered in a state of legal readiness, she must have in her possession all the necessary papers which aid her ability to proceed immediately to the loading or discharge place if required by the charterer.<sup>127</sup> This common law requirement was necessary so as to prevent any legal impediment to the commencement of loading/discharging when the charterers are

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<sup>120</sup> *The Virginia M* [1989] 1 Lloyd’s Rep 603.

<sup>121</sup> [1917] 2 KB 204.

<sup>122</sup> *Ibid* 607 [1<sup>st</sup> Col].

<sup>123</sup> *Compania Naviera Azuero SA v British Oil & Cake Mills Ltd* [1957] 2 QB 293, 303, 304; *Alvion Steamship Corporation Panama v Galban Lobo Trading Co SA of Havana (The Rubystone)* [1955] 1 QB 430, 445, 446.

<sup>124</sup> *Ropner Shipping Company, Ltd v Cleaves Western Valleys Anthracite Collieries, Ltd* [1927] 27 Lloyd’s Rep 317.

<sup>125</sup> *Budgett v Binnington* [1891] 1 QB 35.

<sup>126</sup> Donald Davies (n42) para 75.

<sup>127</sup> *Ibid* para 78.

ready to do so.<sup>128</sup> However, the requirement of legal readiness is subject to just one exception: where the presentation of legal documentation is a mere formality only required by the port authorities, the commencement of cargo operations is to continue without hindrance.<sup>129</sup> The rationale for this exception is provided by Donaldson J in *The Delian Spirit*<sup>130</sup> if the legal documentation can be acquired 'at any time without the possibility of delay to the loading'<sup>131</sup> or discharge process, then its absence is not an essential condition to the arrival of the vessel at the port.

Vessel owners are vested with the responsibility of procuring legal documentation that concern the vessel as required by port authorities. However, it is quite possible that documentation may also be required for the cargo and in its absence, the readiness of a vessel may be impaired. Where the latter circumstance is the case, the charterer rather than the owner is saddled with the responsibility of acting with reasonable diligence in obtaining these permits especially in cases where the permit is a necessity to be met before a vessel can be regarded as an arrived ship.<sup>132</sup> In contrast, where the vessel concerned has already reached the specified destination and the permit is needed for her to proceed further, then its absence does not normally prevent her from becoming an arrived ship, unless there is a clause to the contrary.<sup>133</sup>

Under the requirement of legal readiness, the relevant authorities that would usually issue clearances are the customs, immigration and health authorities.<sup>134</sup> It is the norm that for a vessel to be legally ready, it must have free pratique, be free from any quarantine restrictions and be fully documented unless the parties have either dispensed with any of those requirements in their charterparty.<sup>135</sup> In addition, the authorities might want to inspect the vessel's documentation regarding the ship's certificate of registry, the cargo manifest, the official log book, crew list, list of dutiable

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<sup>128</sup> John Schofield, *'Laytime and Demurrage'* (7<sup>th</sup> edn, Informa Law 2017) para 3.172.

<sup>129</sup> *Shipping Developments Corporation SA v V/O Sojuzneftexport (The Delian Spirit)* [1971] 1 Lloyd's Rep 64, 70[1<sup>st</sup> Col] [Comm]. The case was affirmed on appeal in [1971] 1 Lloyd's Rep 506, 510 [2<sup>nd</sup> Col] [CA].

<sup>130</sup> Ibid 64.

<sup>131</sup> Ibid 70.

<sup>132</sup> *Sunbeam Shipping Co. Ltd v President of India (The Atlantic Sunbeam)* [1973] 1 Lloyd's Rep 482, 488.

<sup>133</sup> John Schofield (n128) Para 3.172.

<sup>134</sup> Ibid Para 3.176. See also *Agrimpex Hungarian Trading Co for Agricultural Products v Sociedad Financiera de Bienes Raices SA (The Aello)* [1961] AC 135, 174[HL].

<sup>135</sup> Simon Baughen, (n13) para 5-09.

stores and ship's articles.<sup>136</sup> Individual ports may add to this list depending on what local custom or national law require.<sup>137</sup> A failure to obtain any of the above could be the difference between whether a vessel is legally ready or not in a laytime context especially if their absence deny the charterers the availability of the vessel. Another aspect of legal readiness is vessel compliance with the International Ship and Port Facility Security Code (ISPS Code). If the port authority is convinced that the vessel is in breach, the vessel may upon further investigation be denied port entry and ultimately prevented from becoming an arrived ship for laytime purposes until compliance with the ISPS code is obtained. In the absence of express clauses in a charterparty, vessel owners are likely to incur monumental losses in the event that there is a failure to comply with the ISPS code.

#### **4.2.2.1 Free Pratique<sup>138</sup> & Quarantine**

In a strict sense, a vessel will be considered unready to load or discharge on arrival unless and until the port authorities have granted the vessel free pratique. This would often mean that the general health of the vessel including her crew is without blemish.<sup>139</sup> Once the port authorities are satisfied with the general health of the vessel, the vessel is granted entry into the port.<sup>140</sup> The failure of a vessel to be granted free pratique may have serious consequences for her such that she would not be considered as arrived and the commencement of laytime as well as the charterers unrestricted access to cargo holds is seriously impaired.<sup>141</sup> Moreover, she may be required to wait at a quarantine anchorage until clearance is given.<sup>142</sup>

Regarding the importance of a grant of free pratique to the arrival of a vessel at the port, English courts have sang discordant tunes. Two decisions stand out as illustrations of the

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<sup>136</sup> John Schofield (n128) Para 3.176.

<sup>137</sup> Ibid Para 3.176.

<sup>138</sup> Free pratique is essentially the licence given to a ship to enter a port on the assurance that she is free from contagious diseases. See Jamie Green, 'Laytime and Free Pratique' <<http://www.standard-club.com/media/2179926/laytime-and-free-pratique.pdf>> accessed on 09/10/2017.

<sup>139</sup> *AET Inc. Ltd v Arcadia Petroleum Ltd (The Eagle Valencia)* [2010] EWCA Civ. 713; [2010] 1 CLC 1073[2].

<sup>140</sup> Ibid [2].

<sup>141</sup> See generally *Smith v Dart & Son* (1884) 14 QBD 105 (CA).

<sup>142</sup> *The Eagle Valencia* (n139) [3].

divergent approaches under English law regarding whether the absence of free pratique impedes the arrival of a vessel at the port: *The Austin Friars*<sup>143</sup> and *The Delian Spirit*.<sup>144</sup>

In *The Austin Friars*<sup>145</sup> the court sought to decide whether charterer's right to cancel the charter had crystallised since the vessel was not ready by midnight, October 10. The vessel had sailed from Constantinople in ballast on an approach voyage to the port of Galatz where she collided with another steamship enroute which caused her go back to Constantinople for temporary repairs. After completion of these repairs, she re-embarked on the voyage to Galatz arriving there at 2300 hrs on the 10<sup>th</sup> of October. She was unable to be boarded nor was she allowed to leave until free pratique had been given by the port doctor. Free pratique was finally given the following morning but unfortunately the charterparty had provided that the charterers could cancel the charter if the vessel was not ready by midnight 10<sup>th</sup> October. In view of the fact that free pratique was only granted the next day, the charterers exercised their option to cancel the charter. The court held that the vessel was not ready by midnight on the agreed date and so the charterers were within their rights to cancel the charter.

*The Austin Friars* decision upon first glance, may seem harsh, however, it does illustrate the attitude of the common law courts in the past regarding conditions to be satisfied before laytime commences.<sup>146</sup> The issuance of a NOR before the crystallization of the right to cancel may have been disabled by the fact that the vessel still had to be granted free pratique before she is able to proceed to the agreed destination in order to give NOR. However, reliance on this decision as support for the view that a NOR was not valid without free pratique portrays a misunderstanding of the obvious distinction between a vessel that is yet to be granted free pratique and one that has refused clearance. As Donaldson J observed 'the mere fact that a vessel has not obtained free pratique does not prevent the ship from becoming an arrived ship.'<sup>147</sup> In contrast, a vessel that was refused clearance and required to wait at a quarantine anchorage until clearance is

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<sup>143</sup> (1894) 10 TLR 633.

<sup>144</sup> [1972] 1 QB 103.

<sup>145</sup> (1894) 10 TLR 633.

<sup>146</sup> Donald Davies (n42) para 78.

<sup>147</sup> *The Delian Spirit* [1971] 1 Lloyd's Rep 64, 70. See also dicta of Lord Denning MR in *The Delian Spirit* [1971] 1 Lloyd's Rep 506, 510.

given<sup>148</sup>is prevented from becoming an arrived ship. Therefore, it comes as no surprise the recent attitude of English courts to treat the grant of free pratique as a formality that does not prevent the giving of NOR.<sup>149</sup>An application of this rule will see the vessel in *The Austin Friars* as having arrived since notice would have been issued before the option to cancel was exercised by the charterers.

The recent attitude of the courts under English law is to the effect that the grant of free pratique is not an essential condition to be fulfilled before a vessel can be considered an arrived ship. This much is discernible from *The Delian Spirit*<sup>150</sup> where the subject of free pratique was given adequate consideration. The charterers directed the vessel to the Tuapse port and she arrived the roads at 01 00 hours on 19<sup>th</sup> February 1964. On the morning of that day, written NOR to load was issued by the master, which was accepted by the charterers' agents. The vessel lay in the roads until 08 00 hours on 24<sup>th</sup> February 1964, when she was ordered by the charterers to go alongside a loading berth inside the breakwaters which surrounded the harbour at Tuapse. Upon arrival at the berth at 13 20 hours, free pratique was granted at 16 00 hours. One of the issues sought to be considered was whether the arrival of the vessel at the port was impeded if free pratique had not been obtained. On this issue Donaldson J was of the view that 'it is an idle exercise to obtain free pratique before the time for loading unless it is required for the ship's purposes, and if it is a fact that it can be obtained at any time and without the possibility of delaying the loading, the mere fact that it has not been obtained, does not prevent the ship from becoming an arrived ship.'<sup>151</sup> This view was reinforced with the observation of Lord Denning MR on appeal: 'if a ship is known to be infected by a disease such as to prevent her from getting her pratique, she would not be ready to load/discharge. But if she has apparently a clean bill of health, such that there is no reason to fear delay, then even though she has not been given her pratique, she is entitled to give NOR and laytime will begin to run.'<sup>152</sup>

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<sup>148</sup> *The Eagle Valencia* (n139) [3].

<sup>149</sup> *Ibid* [4].

<sup>150</sup> [1971] 1 Lloyd's Rep 64[Comm]; [1971] 1 Lloyd's Rep 506 [CA].

<sup>151</sup> [1971] 1 Lloyd's Rep 64, 70 [1<sup>st</sup> Col].

<sup>152</sup> [1971] 1 Lloyd's Rep 506, 510 [2<sup>nd</sup> Col].



The approach endorsed by the court in *The Delian Spirit* in a resolution of the effects of free pratique on whether a vessel can be considered as having arrived, accords with practical common sense and aligns the law in conformity with current shipping realities. A corollary of this is that the failure to treat free pratique as an essential condition to the arrival of the vessel at the agreed destination, does not erode the right of parties to include in their contract additional clauses that make the grant of free pratique assume increased significance.<sup>153</sup> For instance, parties could agree that time is to begin to run six hours after free pratique has been granted.<sup>154</sup> This then means that time does not run, until free pratique is granted. Absent such express clauses, the general rule is that the grant of free pratique is not an essential condition to be fulfilled before a vessel is considered in a state of readiness.<sup>155</sup>

The charterers in *The Delian Spirit*<sup>156</sup> had incurred liability for unavailability of berth, since at the time NOR was tendered and accepted, no berth was available. Therefore in a bid to escape liability in the form of demurrage for the time spent waiting for a berth to become available, the charterers sought to challenge the failure to grant free pratique before commencement of loading. If the court had ruled that the grant of free pratique was an essential condition, the NOR already tendered and accepted becomes invalid. Conversely, by treating the grant of free pratique as an inessential requirement to the readiness of a vessel, the already tendered NOR remains valid. It follows therefore, that if a vessel arrives at the usual waiting place, her voyage having come to an end,<sup>157</sup> the shipowner is within his rights to issue NOR. If after notice is given, free pratique was refused. The commencement of laytime could be suspended until such a time that adequate clearance is given. In such circumstance, the grant of free pratique is no longer a mere formality but essential to the readiness of the vessel. This point was not addressed in *The Delian Spirit*. However, in *The Apollo*,<sup>158</sup> a charter was concluded on the New York Produce Exchange form where the owners let their vessel to the charterers

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<sup>153</sup> *The Eagle Valencia* (n139) [4].

<sup>154</sup> *Ibid* [4].

<sup>155</sup> *The Delian Spirit* [1971] 1 Lloyd's Rep 506.

<sup>156</sup> *Ibid* 506.

<sup>157</sup> This only applies to a port charter. Arrival at the usual waiting place within the port, would suffice to give notice. However, under a berth charter, the vessel must have arrived the berth to be able to give notice. See *The Johanna Oldendorff* [1974] A.C. 479.

<sup>158</sup> *Sidemar SpA v Apollo Corp (The Apollo)* [1978] 1 Lloyd's Rep 200 [Comm.]

for a period of three years with the proviso that where there is a loss of time resulting from any cause whatsoever which prevents the full working of the vessel, payment of hire shall cease for the period of time lost and if upon voyage the speed be reduced, the time so lost and any extra fuel consumed shall be deducted from the hire. In 1972, the vessel discharged at Naples and two members of the crew were disembarked and taken to hospital afflicted with acute gastro-enteritis and suspected typhus. The vessel was ordered to Lower Buchanan, Liberia to load a cargo at the Lamco Iron Ore berth. There were no further cases of illnesses on board and on March 27 she anchored off the port of Lower Buchanan. At the time of arrival, the only available loading berth was occupied. The vessel was thereafter inspected by health officers who were informed of what had happened in Naples. The examination was completed at 3:30 hours on March 28, but free pratique was not granted until 10:30 on March 29. At 10:36 on March 29, the vessel proceeded towards the loading berth and began loading. On free pratique, Mocatta J observed:<sup>159</sup>

Here, the obtaining of free pratique was no mere formality owing to the illness of the two members of the crew, who had to be discharged to hospital at the vessel's previous port of call suffering from suspected typhus. Where the obtaining of health clearance is a mere formality, I think the very minor delays, if any, involved in obtaining it would bring the off-hire clause into play, since the ship would be able to render the service then required of her. But in the present case, the obtaining of free pratique was no mere formality and there was good cause for the careful testing and disinfection that was carried out before free pratique was given involving a delay of 29½ hours. In my judgment, the action taken by the health authorities, did prevent the full working of the vessel and did bring off hire clause into play.

Although, *The Apollo*<sup>160</sup> did not involve issues concerning the commencement of laytime, the decision highlights the consequences that may result from the treatment of a failure of free pratique as something more than a mere formality. Given the peculiar circumstances where two crew members already suffered from serious illness, it made commercial sense that the vessel had to be carefully tested before free pratique was given. It was also a commercially sensible outcome that the period of testing which amounted to a 29½ hours delay led to the operation of the off hire clause such that the charterer is excused from paying hire while the vessel is proscribed from performance

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<sup>159</sup> Ibid 205 [col 2].

<sup>160</sup> [1978] 1 Lloyd's Rep 200 [Comm].

of the charter service. Similarly, in a laytime context, the period pertaining to which a vessel is tested before free pratique is given could be deducted from the computation of laytime especially in circumstances where a vessel had been waiting for berth, and some days later pratique is refused. Although, Donald Davies suggests that in such circumstances, the NOR is rendered invalid and the commencement of laytime is thus impaired,<sup>161</sup> it is argued to the contrary, that the invalidity of NOR and any impairment to the commencement of laytime could be avoided, if the time spent in obtaining free pratique is deducted from the computation of laytime. This provides an easy resolution of any issues regarding the effect of a grant of free pratique.

Under English law, a resolution of issues regarding the effect of a grant of free pratique is prefaced by the strict application of rules of readiness: a valid NOR can only be given when a vessel is indeed ready.<sup>162</sup> Therefore, if after the giving of notice, the vessel was found unready due to a failure to obtain free pratique, such a notice is invalid and can only be cured by an issue of fresh notice.<sup>163</sup> Such an outcome is best illustrated by *The Eagle Valencia*<sup>164</sup> where the vessel arrived at the port of Escravos and NOR was tendered at 1148 hours on the 15<sup>th</sup> of January 2007. The charterparty also provided that a failure to obtain free pratique after tender of NOR could render NOR invalid. The vessel was finally boarded by the port health authorities at 0730 hours on the 16<sup>th</sup> January, 2007 and free pratique was granted 0830 hours same day. The vessel was required to wait at the anchorage until the 19<sup>th</sup> of January 2007 when the vessel finally berthed and loading commenced. A dispute arose as to whether laytime commenced at the load port six hours after notice was tendered at 1148 hours on 15<sup>th</sup> January 2007 or only when the vessel berthed at 1542 hours on 19<sup>th</sup> January 2007. Walker J found the tendered NOR valid.<sup>165</sup> Overturning this decision, Longmore LJ on appeal upheld the charterers appeal. It was his view that if free pratique is granted within 6 hours of the tender of NOR, then the tendered NOR becomes valid.<sup>166</sup> However, if it is not so granted within 6 hours of

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<sup>161</sup> Donald Davies (n42) para 78.

<sup>162</sup> *The Linardos* [1994] 1 Lloyd's Rep 28, 31 [2<sup>nd</sup> Col].

<sup>163</sup> See *The Mexico 1* [1988] 2 Lloyd's Rep 149, 154 [2<sup>nd</sup> Col] [Comm]; [1990] 1 Lloyd's Rep 507, 512[2<sup>nd</sup> Col] [CA] where the court rejected any concept of an inchoate notice.

<sup>164</sup> *The Eagle Valencia* [2010] 1 CLC 1073.

<sup>165</sup> *The Eagle Valencia* [2009] 2 CLC 567 [Comm].

<sup>166</sup> *The Eagle Valencia* [2010] (n139) [12].

the notice, then the notices ceases to be valid as this does not prevent the tender of a fresh notice once free pratique has been given and time will then run after 6 hours from the tender of that fresh NOR.<sup>167</sup>

Although, the approach suggested by Longmore LJ above may have been ‘an eminently workable scheme’<sup>168</sup> with regard to present circumstances, it is argued that there is much to be gained from extending the application of the doctrine of practical and substantial readiness already prevalent under United States shipping law jurisprudence to circumstances such as this, where notice has been issued, and the vessel failed to be granted free pratique. Laytime can be suspended for the duration it takes to get clearance and can only commence after clearance has been granted. Such an approach, it is argued presents a fair and equitable solution to the issue of readiness in the context of a failure to grant free pratique. Applying such an approach to *The Eagle Valencia*, would see the notice tendered remain valid, and the grant of free pratique although not granted within 6 hours of the tender of notice, would be sufficient to meet the requirement of practical and substantial readiness. Granted, the grant of free pratique was not in compliance with the dictates of the charter which required its grant to be 6 hours after the tender of NOR, it is however, argued that the slight delay in obtaining free pratique had no severe consequences for the charterer but for only the shipowner who may have lost substantial demurrage particularly as there was no available berth open till the 19<sup>th</sup> of January 2007. Even when the shipowner sought to correct the tender of notice by tendering a new notice, they were unfortunately caught by the demurrage time bar which provided that a claim for demurrage must be made within 90 days.

Of course, the guiding principle under English law remains that a vessel must be ‘ready in all respects.’ Therefore, by failing to obtain free pratique within 6 hours of tender of notice, the vessel from a literal application of the above principle was not ready. It is argued that, the strict English law approach to vessel readiness only fosters an environment where the charterer escapes liability for berth unavailability and a shipowner runs the risk of losing substantial demurrage for failing to adhere to a principle that may have little or no effect on the speed in performance of the loading or

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<sup>167</sup> Ibid [12].

<sup>168</sup> Ibid [12].

discharge operations. It is on this basis that, an adoption of the practical and substantial readiness doctrine is to be preferred. An even stronger basis for the adoption of this rule is premised on the fact that, a charterer who has agreed to load or unload within a fixed period of time, remains answerable for the non-performance of loading or discharge obligations after the commencement of laytime, since once commenced, laytime continuous to run and can only be interrupted by laytime exceptions, interruptions to laytime or due to fault of owner.<sup>169</sup> Therefore, since the compliance with free pratique rules are within the remit of the shipowner, it is only equitable that the charterers are not made responsible through the continuous running of laytime, except, they are at fault in some way.<sup>170</sup> It only appeals to common sense that during the period where the vessel is not at the disposal of the charterers through an omission of the shipowners, laytime should remain suspended rather than the current rule where laytime is deemed not have started at all and can only commence when all anomalies have been corrected.

The commencement of laytime is not just dependent on whether a vessel is deemed an arrived ship or whether the vessel is ready to load or discharge. The vessel must also be able to give notice of readiness to the charterer, indicating the vessel's readiness to commence cargo operations. However, the issuance of a notice of readiness by the shipowner, has often led to controversies surrounding circumstances when the issued notice is valid. The giving of notice of readiness is rendered valid in circumstances when the vessel is indeed ready to commence cargo operations. In circumstances where a vessel is not fully ready to commence cargo operations and a notice is already given, such notice would not be invalidated for the singular reason that it was issued before the vessel was ready. The next chapter engages a critical examination of the issues surrounding the validity of NOR under English law.

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<sup>169</sup> *William Alexander & Sons v Aktieselskabet Dampskabet Hansa & Others* (1919) 25 CC 13, 15 (HL).

<sup>170</sup> See for example *The Atlantic Sunbeam* [1973] 1 Lloyd's Rep 482 where the charterers failed to procure the jetty challan document from port commissioners in time.

## Chapter 5

### Notice of Readiness to Load

#### 5.1 Introduction

In the previous chapter, the scope and meaning of readiness in a laytime context was considered. This chapter next examines the requirement of NOR before the commencement of cargo operations. The giving of notice is an essential requirement before laytime commences. A vessel may be in a state of readiness and may have arrived at the port so that by virtue of geographical position it can be regarded as an arrived ship. However, without the issue of notice, laytime cannot start. Unless and until the charterer has been notified of the shipowner's performance of his obligation, the charterer will be unable to know when laytime is to begin. It is therefore not surprising that a NOR has been rightly described as 'the key which unlocked the holds of the vessel and allowed loading to begin.'<sup>1</sup>

Nevertheless, disputes involving the validity of a tendered notice have continued to abound. Under English law, there is a strict approach to the tender of NOR: for notice to be valid, the vessel must be ready at the time the notice is given<sup>2</sup> and must have arrived within port limits. A corollary of this strict approach is that, a slight defect in vessel readiness or a failure to arrive within port limits could render a tendered notice invalid. The harsh consequences that emanate from such strict application of rules regarding validity of notice is that laytime never started and the shipowner runs the risk of losing substantial demurrage or even pay despatch if a fresh notice is not issued in the circumstance. In a bid to avoid these harsh consequences, shipowners have sought to introduce the concept of an inchoate notice,<sup>3</sup> but without much success.

Against this backdrop, this chapter critically examines the validity of a NOR in light of the attitude of English courts to an invalid notice. The objective of this chapter is to examine whether there is any scope for application of the inchoate notice doctrine. A starting point would be to examine circumstances when a NOR be regarded as invalid. Given the attitude of English courts towards an invalid notice, what steps can a shipowner take to

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<sup>1</sup> *Sofial SA v Ove Skou Rederi (The Helle Skou)* [1976] 2 Lloyd's Rep 205, 214[1<sup>st</sup> Col].

<sup>2</sup> *The Tres Flores* [1974] QB 264 [CA].

<sup>3</sup> Often refers to notice tendered in circumstances when the vessel is not in a state of readiness.

avoid the harsh consequences that attaches to the tender of an invalid notice. This chapter will also focus on circumstances when an invalid notice has been tendered and the charterer remains passive except commence cargo operations. The courts are often saddled with a dilemma: when does laytime start? In addressing the above concerns, this chapter is divided into 4 sections including the introduction. Section 2 provides an overview of the problem associated with the giving of notice. Section 3 engages in a discussion regarding the status of an inchoate notice with particular focus on the roles played by the doctrine of waiver. Section 4 which is the conclusion, makes the point that given the attitude of English courts to the concept of an inchoate notice, shipowners would have to negotiate into their contracts, tailored clauses aimed at addressing the complexities commonly associated with validity of NOR. Such an approach means, that parties can decide to treat the tender of an inchoate or premature notice as sufficient trigger the start of laytime. Courts faced with interpreting such specific clauses would have no option but to give them their full effect.

## **5.2 Nature of NOR and the Commencement of Laytime**

Upon arrival at the contractual destination for the loading of cargo, it is often a requirement that before the commencement of cargo operations, the ship owner must tender notice of readiness (commonly referred to in the shipping community as “NOR”) indicating that the vessel has ‘arrived the port or berth as the case may be and is ready to load or discharge.’<sup>4</sup> This is usually embodied in an express clause in the charterparty, such that laytime will not begin until such a notice has been served or until a specified number of hours after service of the notice has elapsed.<sup>5</sup> The NOR therefore, operates as a notification that the vessel is ready to commence cargo operations and this state of readiness must exist at the time notice was given.<sup>6</sup>

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<sup>4</sup> Volayrules 93, Voyage Charterparty Laytime Rules 1993 para 19. <<http://www.lawandsea.net/supplements/VoylayRules93.html>> accessed 21/08/2017. This has since been replaced by the Laytime Definitions for Charterparties 2013. However, the definition regarding Notice of Readiness remains unchanged.

<sup>5</sup> *Galaxy Energy International Ltd v Novorossiys Shipping Co (The Petr Schmidt)* [1997] CLC 402. [Comm].

<sup>6</sup> Julian Cooke & Others, *Voyage Charters* (4<sup>th</sup> edn, Informa Law 2014) para 15.29.

The underlying policy for the giving of NOR is consistent with the common law exception expressed in *Vyse v Wakefield*.<sup>7</sup> In that case, Lord Abinger CB was of the view that 'where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him.'<sup>8</sup> Parke B in the same case appears to express the position as to notice more felicitously than Lord Abinger CB. He observed, 'the general rule is that a party is not entitled to notice unless he has stipulated for it.'<sup>9</sup> He then elaborated on certain classes of cases where the nature of the transaction requires notice to be given by implication of the law.<sup>10</sup> The obligation of the shipowner to give the charterer NOR falls within the indicated type of cases where there is no express stipulation for the furnishing of notice.

Another way of putting the matter can be found in *Bunge Corp. v Tradax Export*<sup>11</sup> which concerned the question whether an FOB buyer's failure to give timely notice of probable NOR to load was a breach of a condition, entitling the seller to treat the failure as a repudiatory breach. The court recognised that service of notice was a condition precedent to the seller's performance of his obligation to load in that without the notice, the seller could not possibly have knowledge of when to get the goods to the port of loading. Clearly, the basis of the requirement for the buyer to give the stated NOR to load lies in commercial common sense, arising from the nature and object of the notice. Applied to the present context, the shipowner has an obligation to present an arrived ship in order to trigger the charterer's obligation to put the goods on board during the laytime. Unless and until the charterer has been notified of the shipowner's performance of his obligation, the charterer is unable to know when his own obligation commences.

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<sup>7</sup> (1840) 6 M & W 442; 151 ER 485. See also *Makin v Watkinson* [1870] LR 6 Ex. 25, 28 applying the earlier authority of *Vyse v Wakefield* (1840) 6 M & W 442; Donald Davies, *Commencement of Laytime* (4<sup>th</sup> Edn, Informa 2006) para 99.

<sup>8</sup> *Vyse v Wakefield* (1840) 6 M & W 442, 453; 151 ER 485, 489.

<sup>9</sup> *Ibid* 453.

<sup>10</sup> *Ibid* 454.

<sup>11</sup> [1981] 1 WLR 711.



The giving of NOR upon arrival of the vessel hinges on the idea that it is a notice of pre-existing facts namely, arrival of the vessel at her contractual destination and her readiness to load or discharge.<sup>12</sup> This means that at the time of the giving of NOR, the above stated facts namely: arrival of the vessel at her contractual destination and readiness to load or discharge must be true at the time notice is given.<sup>13</sup> Consequently, where the facts stated in the notice are non-existent at the time of giving the notice, laytime cannot begin to run and such a notice tendered is often regarded as invalid.<sup>14</sup> Put differently, if the shipowner tenders notice when the ship is not in fact ready to commence cargo operations or is not in a position geographically where the vessel can be said to be an arrived ship,<sup>15</sup> such a tendered notice is inaccurate and would be treated as invalid and a nullity. In the circumstance, laytime cannot begin. The commencement of laytime may necessitate the tender of a fresh, accurate notice when the ship is actually ready to load or discharge.<sup>16</sup> Such an outcome accords with commercial sense since it would be unduly burdensome to place an expectation on the charterer to keep checking whether the vessel is ready or not<sup>17</sup> or at what time the vessel is considered as having arrived the port. An invalid notice may also attain validity if the necessary inference of waiver can be made from the conduct of the charterer.<sup>18</sup>

The issuance of notice in the above context must be distinguished from occasions where there has been a breach of a provision in the charterparty which requires that notice should be issued at particular times of the day even though the vessel was in all respects ready to load.<sup>19</sup> In the event that the latter case occurs, it is argued that such a notice is in all respects valid.<sup>20</sup> There ought to be a distinction between notices that are factually untrue (inadequate) and ones that are although factually true but issued at an incorrect time (untimely). Timeliness has nothing to do with whether notices are nullities.<sup>21</sup> For

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<sup>12</sup> Simon Baughen, *Summerskill on Laytime* (6<sup>th</sup> edn, Sweet & Maxwell 2017) para 5-30.

<sup>13</sup> *Graigwen v Anglo Canadian* [1955] 2 Lloyd's Rep 260, 266 [2<sup>nd</sup> Col] [Comm].

<sup>14</sup> *The Petr Schmidt* (n5) 403 [Comm] affirmed [1998] CLC 894 [CA].

<sup>15</sup> For example, *Navalmar UK Ltd v Kale Maden Hammaddeler Sanayi ve Ticaret AS (The M/V Arundel Castle)* [2017] EWHC 116; [2017] 1 CLC 71.

<sup>16</sup> *The Petr Schmidt* (n5) 403.

<sup>17</sup> *Ibid* 403.

<sup>18</sup> *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day)* [2003] 1 CLC 537.

<sup>19</sup> *The Petr Schmidt* (n5) 402.

<sup>20</sup> *Ibid* 405.

<sup>21</sup> *Ibid* 405.

present purposes, determining whether a NOR is invalid would involve more than just a contractual breach like not giving notices timely. If timeliness became a rationale for declaring a notice invalid, it would lead to the awkward scenario where a notice issued 5 minutes outside the stipulated time would be rendered invalid without the charterer ever having the opportunity to inform the shipowner that he rejects the notice.<sup>22</sup> Of course, the uncommercial consequences that may result from such an approach is immeasurable.

Granted, requiring notices to be issued at certain times of the day may have some practical benefits like assisting charterers with office management and charterers would not have to grapple with notices coming at odd hours,<sup>23</sup> however, it fails to take into cognisance the requirements necessary for the validity of NOR as handed down through a long line of English law decisions.<sup>24</sup> To reiterate, for notice to be regarded as valid: The vessel must have duly arrived at the contractual destination and in fact be ready to load (or discharge).<sup>25</sup> Anything short of this renders the notice invalid. However, an absence of timeliness does not. Although, parties have unfettered rights to agree what clauses they deem fit to insert in their contracts, however, English law does not treat the time of giving notices as a condition to the trigger of laytime. Consequently, without an express provision to that effect, any argument that the failure to give notice at the stipulated times affects adversely the validity of the notice becomes untenable. As Peter Gibson LJ observed, 'a notice given outside the period provided for contractually may be 'uncontractual,' but it does not follow that it is a nullity, unless the circumstances of the contract or the nature of the subject-matter make it essential that the notice should be given within that period.'<sup>26</sup>

### **5.3 Validity of Notice of Readiness**

While it is settled that a NOR is not rendered invalid because it was tendered outside contractually stipulated hours, the status of a notice which was given before the vessel

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<sup>22</sup> Ibid 404.

<sup>23</sup> The argument of the charterers in *The Petr Schmidt* (n5) 402, 406.

<sup>24</sup> *The Johanna Oldendorff* [1974] AC 479; *The Maratha Envoy* [1978] AC 1; *The Arundel Castle* [2017] EWHC 116; [2017] 1 Lloyd's Rep 370 [Comm].

<sup>25</sup> This would include readiness in both a physical (cleanliness of vessel holds, vessel equipment) and legal sense (compliance with documentary requirements like free pratique, entry into custom houses, etc.)

<sup>26</sup> *The Petr Schmidt* [1998] CLC 894, 900 [CA].

was in fact ready to commence cargo operations has often given rise to controversy. The default position is that, a notice given by the shipowners acknowledging on its face that the vessel is in fact not ready but would be ready at a time in future would of course be regarded as a bad notice at least under English law.<sup>27</sup> Consequently, on occasions when the vessel is not fully ready to load, or cargo is inaccessible during discharge or when one of the requirements of laytime has not been fulfilled<sup>28</sup> and a notice is given, such notice would be regarded as invalid for the singular reason that it was issued in fact before the vessel was ready. To rectify such a situation, it is often the case that a fresh, accurate notice is tendered when the ship is actually ready to load.<sup>29</sup>

The courts approach to the question of validity of notice has often varied over the years. For instance, in *The Massalia*,<sup>30</sup> the dispute involved a flour cargo which was overstowed with other cargo for a voyage from Antwerp and Bordeaux to Colombo. The vessel arrived at and anchored in the outer anchorage of the port of Colombo at 0612 hours on October 18, 1956. NOR to discharge was given at 0900 hours on the same day even though no berth was available until 0615 hours on Wednesday, October 24. Although the vessel was ready in every respect to begin discharge, it would not have been possible to discharge the flour cargo which was overstowed until most of the Port Said cargo had been discharged. The vessel began discharging her cargo at 0730 hours on October 24. All the flour cargo was not freely accessible for discharging until 0400 hours on Saturday, October 27. A disagreement ensued regarding when laytime commenced. The charterers took the view that it began to run when access to all holds became available. The shipowners argued to the contrary that time commenced when the vessel was alongside berth. On a claim for demurrage, Diplock J found for the charterers that laytime began to run only when the vessel was ready to discharge the flour cargo.<sup>31</sup> However, the dispute took a different turn regarding whether the vessel ought to include the time used in waiting for an available berth as part of the discharging time. Both the charterer and shipowner differed on this point. In resolving this point, Diplock

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<sup>27</sup> *The Tres Flores* [1974] 1 QB 264, 272 [CA].

<sup>28</sup> Summerskill on Laytime (n12) para 5-30. See also *Surrey Shipping Co. Ltd v. Compagnie Continentale (France) SA [The Shackleford]* [1978] 1 WLR 1080.

<sup>29</sup> *The Petr Schmidt* (n5) 403.

<sup>30</sup> *The Massalia (No 2)* [1962] 2 QB 416. [Comm].

<sup>31</sup> *Ibid* 424.

J observed obiter, 'when NOR is given before the vessel was in fact ready, no further notice is required. There was a notice already given. It could not take effect until the vessel was in fact ready for discharge.'<sup>32</sup>

The obiter statement of Diplock J in *The Massalia*<sup>33</sup> appears to suggest that the invalidity of the tendered NOR was cured by the subsequent accessibility to the cargo in question. Therefore, Diplock J saw no need to tender a fresh notice. This decision could be considered as the progenitor of the inchoate notice doctrine such that although a notice is rendered invalid at the time it was issued, it could still become valid when the facts which make the notice good come into existence.<sup>34</sup> Although, Diplock J gave no detailed reasoning behind his decision, it may be argued that, the outcome of the decision appealed to commercial sense. Therefore, there was no need for Diplock LJ to engage in a detailed reasoning behind his decision. Proceeding on a factual premise, the charterers made no attempt to intimate rejection of the notice at the time of tender. They instead proceeded to discharge cargo at the other hatches at the time of the notice, and so needed no notice to get ready.<sup>35</sup> Had they intimated their rejection of the notice, the outcome of the decision would have been different.

The commercial reasoning behind Diplock J's decision in *The Massalia*<sup>36</sup> appears to be at variance with the whole object of giving an NOR which was aimed at informing the charterers that the vessel has arrived at the agreed place and is in a state of readiness either to load or discharge and the period of time within which they have agreed to load or discharge the vessel is measured from that moment.<sup>37</sup> Therefore, a notice which when issued is inaccurate as to its content, cannot be said to discharge its primary function which is to notify the charterer of the vessel's readiness and subsequent arrival at the port. Proceeding on a logical premise, it follows that a notice issued before the vessel arrived the port in point of geographical position or before a vessel is ready would

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<sup>32</sup> Ibid 428.

<sup>33</sup> Ibid 416.

<sup>34</sup> Donald Davies, 'Voyage Charterparties- Notice of Readiness' (Cedric Barclay Lecture delivered at the International Congress of Maritime Arbitrators XV held in London 17<sup>th</sup> March 2004) <[https://www.ukpan.di.com/fileadmin/uploads/uk-pi/legal/31%20Davies\\_D.pdf](https://www.ukpan.di.com/fileadmin/uploads/uk-pi/legal/31%20Davies_D.pdf)> Accessed 19/11/2018.

<sup>35</sup> *The Massalia* (n 30) 428.

<sup>36</sup> Ibid 416.

<sup>37</sup> *PV Christensen v Hindustan Steel Ltd (The Maria LF)* [1971] 1 WLR 1369, 1374.

indeed be rendered invalid. The only way to cure such defect would be to issue a fresh notice<sup>38</sup> or find elements of an implied agreement or waiver from the conduct of the charterer.<sup>39</sup>

Subsequent decisions following *The Massalia*<sup>40</sup> appear to depart from that decision. For instance, in *The Maria LF*<sup>41</sup> the tendered notice was one of anticipated readiness, such that at the time notice was tendered, the vessel was not in fact ready. The NOR clause was expressed thus 'the vessel *would be* in all respects ready to receive her cargo at 00.00 hours on Sunday, October 29.' The court per Donaldson J was reluctant to follow the decision in *The Massalia*<sup>42</sup> and instead held that the notice given by the master to the charterers was a notice of anticipated readiness to load and since by implication it informed the charterers that the vessel was unready to load at the time it was given. Therefore, the notice could not be relied upon as a notice of actual readiness. Donaldson J was particularly critical of the approach adopted by Diplock J in *The Massalia*. He was of the view that the approach adopted in *The Massalia* would yield uncommercial results such that it may be difficult to determine when laytime commences without necessarily engaging in an inquiry regarding the precise time when the vessel in fact became ready.<sup>43</sup>

The inchoate notice argument was again, advanced by the shipowner in the seminal case of *The Mexico 1*.<sup>44</sup> The case involved a cargo of maize and beans which was overstowed with other completion cargo pursuant to the charter agreement. Upon arrival at the discharging port, NOR to discharge was given early on January 25, 1985. As the maize cargo was overstowed by other cargo all of it did not become accessible for the purposes of discharge until 1025 hours on February 6 and the cargo of beans which was also overstowed did not become fully accessible for discharge until 11 30 hours on February 19. In the event the cargo was discharged between February 19 and April 21 and the owners claimed demurrage. A dispute arose. Evans J hearing the dispute on appeal at

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<sup>38</sup> *Zim Israel Navigation Co Ltd v Tradax Export SA (The Timna)* [1970] 2 Lloyd's Rep 409, 411.

<sup>39</sup> *The Happy Day* [2003] 1 CLC 537.

<sup>40</sup> *The Massalia* (n 30) 416.

<sup>41</sup> n37 1369.

<sup>42</sup> *The Massalia* (n 30) 416.

<sup>43</sup> *The Maria LF* (n37) 1374.

<sup>44</sup> [1988] 2 Lloyd's Rep. 149; [1990] 1 Lloyd's Rep 507. [CA]

the commercial court sought to resolve the question regarding the status of an inaccurate notice.<sup>45</sup> The shipowners strenuously argued that an inaccurate notice if not rejected, was at best an 'inchoate' notice such that it takes effect as soon as the vessel is in fact ready and the charterers or their agents to whom the notice is addressed either know or have the means to know the fact.<sup>46</sup> This latter argument by the shipowner was accommodated by the arbitrators in *The Mexico 1* before the matter was referred to the Commercial Court.

The arbitrators in *The Mexico 1* preferred to treat the original notice tendered as inchoate, becoming complete and effective when the maize cargo became fully accessible.<sup>47</sup> The rationale for reaching this conclusion: on receipt of the initial NOR the charterers would have made some preparation to unload the cargo and must have established contact with the port agents whose assistance in that respect would have been required.<sup>48</sup> However on appeal to the commercial court, Evans J in resolving this question held:<sup>49</sup> '...an inaccurate notice is "invalid" or a "nullity" when given and there is no support in the authorities for the "inchoate" status which the owners suggest...' Clearly Evans J was unpersuaded by the latter argument of the shipowners to treat a notice given before a vessel was ready as inchoate. Instead, he preferred to treat such a notice as no notice, invalid in its entirety.<sup>50</sup> His reasons appear to be well founded considering that the fixing of laytime, puts a constraint on the time available to the charterer within which he is to perform his obligation to load or discharge the vessel.<sup>51</sup> Consequently, when the charterparty requires that NOR be given, the charterer is entitled to insist that laytime cannot begin until the notice is given.<sup>52</sup> This position endorsed by Evans J received the Court of Appeal's approval on the appeal of the case, thereby laying to rest any notion of an inchoate NOR.<sup>53</sup> Thus far, it could be argued that the support for the inchoate notice at least under English law remains thin. *The*

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<sup>45</sup> Ibid 151 [Col 2].

<sup>46</sup> Ibid 152 [Col1]. Of course, shipowners relied on *The Massalia* (n 30) 416 to advance this view.

<sup>47</sup> Ibid 152 [Col 1]

<sup>48</sup> Ibid 152 [Col 1]

<sup>49</sup> Ibid 152 [Col 2].

<sup>50</sup> Ibid 153 [Col 1].

<sup>51</sup> Ibid 153 [Col 1].

<sup>52</sup> Ibid 153 [Col 1].

<sup>53</sup> *The Mexico 1* (n44) 507 [CA]. The Court of Appeal only upheld the decision of Evans J on the NOR point but reversed his conclusion on the second issue of an inference of waiver or estoppel.

*Massalia*, if placed in juxtaposition with other English authorities on the subject of validity of NOR, stands isolated even though the decision may not have been overruled by subsequent decisions.

The rejection of the concept of an inchoate notice under English law may be connected to the fact that the commencement of laytime does not operate independent of the giving of notice. Therefore, the argument could be had since the commencement of laytime is hinged on the giving of notice, it would be difficult to maintain that the circumstances would be different when the master gives a NOR that is inaccurate regarding the readiness of the vessel.<sup>54</sup> Such inaccurate notice cannot operate to trigger laytime. The difficulty here is particularly exacerbated by the fact that in most charterparties, it is absolutely clear what must be done to trigger the commencement of laytime: NOR must be given<sup>55</sup> and in its absence laytime cannot start. Viewed this way, it is easy to see the rationale behind the rejection of the inchoate notice argument.

Maritime arbitrators at least under English Law appear to have been split regarding an application of the strict rule enunciated in *The Mexico 1* in determining whether an inchoate notice can operate to start laytime. For instance, in *London Arbitration 10/94*<sup>56</sup> the vessel, laden with a cargo of grain, was chartered for a voyage from the US Gulf to Spain. The vessel duly arrived at the pilot station of the loading port at 0742 on Thursday 31<sup>st</sup> January and tendered NOR. The USDA<sup>57</sup> and NCB<sup>58</sup> declared the main holds fit to carry cargo. Loading commenced the next day with notice having been accepted. After the inspection of the main holds, it was discovered that the vessel would require some of the wing tanks for the carriage of cargo. The wing tanks were subsequently inspected and passed fit by both the USDA and NCB at 0645 on February 1. Two NOR's were borne and they both stated that they had been tendered at 1100, 31<sup>st</sup> January even though they both recorded the times of events which occurred after the time notice was said to be tendered. Given the requirement that the NOR should be accompanied by the pass of NCB and the USDA inspectors relating to the six holds and such wing tanks as should

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<sup>54</sup> Ibid 512 [2<sup>nd</sup> Col].

<sup>55</sup> The vessel must also have arrived the contractual destination and must be ready to load. This was discussed at length in Chapters 3 and 4 of this thesis.

<sup>56</sup> LMLN 387- 3 September 1994.

<sup>57</sup> United States Department of Agriculture (USDA)

<sup>58</sup> National Cargo Bureau (NCB)

be required for loading, the charterers contended that any notice tendered at 1100 on 31 January could not be a valid NOR as neither the holds nor wing tanks had been passed at that time. They relied on *The Mexico 1* as authority for their position that the subsequent passing of the vessels holds by the inspector did not validate that notice so as to trigger the commencement of laytime.

The arbitral tribunal held that, although it is unclear when the second NOR was prepared, it appeared to have been prepared by the master as soon as he became aware that the wing tanks were to be inspected. On the other hand, it also appeared that the master did not wish to retract from the earlier NOR given at 1100 am on 31 January, presumably believing that it was in the owners' interest for a notice to be given immediately on arrival even though it was not possible for the vessel to tender a valid notice at that time. There was evidence that the notice had been accepted at 0800 on 1 February by the charterers' agents. Since that was the earliest time at which a valid NOR could have been tendered, that acceptance had to be to some effect. Either the notice should be treated as if it had been given again or a fresh one had been given at that time. Distinguishing *The Mexico 1* from the present case, the panel observed: In *The Mexico 1*, the NOR was purportedly accepted by the charterers at a time when the vessel was not ready for discharge.<sup>59</sup> In the present case, the acceptance took place at a time when the vessel was ready for discharge and a valid NOR could have been tendered.<sup>60</sup>

Similarly, in *The Petr Schmidt*,<sup>61</sup> the vessel was ready to load in a laytime sense with the only drawback being that NOR was tendered outside the time stipulated in the charter. Of course, the charterers quite strenuously sought the application of the strict rule in *The Mexico 1* to advance the notion that the NOR, although tendered at a time when the vessel was ready, should be regarded as invalid because it was tendered outside the stipulated time of the charter. Right from the commercial court to the Court of Appeal, the charterer's line of argument was firmly rejected.<sup>62</sup>

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<sup>59</sup> *London Arbitration 10/94* LMLN 387- 3 September 1994.

<sup>60</sup> *Ibid.*

<sup>61</sup> [1997] CLC 402 [Comm]; [1998] CLC 894 [CA].

<sup>62</sup> *Ibid* 894.



In contrast, in *London Arbitration 14/86*<sup>63</sup> the arbitral panel sought to decide whether a NOR had been validly given considering the laytime clause provided that before tender of notice, vessel had to be dry and clean, free from residues of previous cargo to charterers satisfaction provided the NOR was supported with NCBC.<sup>64</sup> The NOR was tendered at 1200 on 6<sup>th</sup> June. The vessel then had to wait at anchorage until 20<sup>th</sup> June. At 0400 on the 20<sup>th</sup> June, the pilot came on board the vessel and it then proceeded to berth arriving at 1045 after which free pratique was granted. At 1015 on 21<sup>st</sup> June, a surveyor certified the holds were clean and dry in compliance with the relevant charterparty clause. Loading subsequently commenced at 1015 on 21<sup>st</sup> June. The NOR was not formally accepted by the shippers until 0800 on 22<sup>nd</sup> June. The owners were of the view that a valid NOR was served on 6<sup>th</sup> June and did not become valid until 1015 on 21<sup>st</sup> June when the certificate was issued. For the charterers, such an argument was untenable, moreover, they were entitled to a reasonable time to consider the NOR and decide whether to accept it. While this latter argument concerning reasonable time failed, the court held that, in the present case, there were clear, unambiguous and express terms that the vessel had to be in free pratique and had to have been inspected and certified as clean before NOR was given.<sup>65</sup> These requirements were condition precedents<sup>66</sup> such that, no valid NOR could be given until both had been complied with.<sup>67</sup> Accordingly, the NOR was not valid until 10 15 on 21 June.<sup>68</sup>

The arbitral decisions referred to above is indicative of the uncertainty regarding the scope of application for an inchoate notice as a trigger for the commencement of laytime. The arguments for the adoption of an inchoate notice are also shipowner-centric such that by tendering such a notice, the shipowners would have discharged their obligations under the charterparty, thereby passing the buck as it were, to the charterers who now have to fulfil their obligations regarding the loading or discharging of the vessel which then acts as a trigger to the commencement of laytime. For charterers, adopting such an approach would lead to unfairness considering that the

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<sup>63</sup> LMLN 179-11 September 1986 4.

<sup>64</sup> National Cargo Bureau Certificate

<sup>65</sup> n61 4.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid. See also *London Arbitration 26/89* LMLN 262- 18 November 1989 for a similar outcome.

terms of the charter may have been concluded on the tender of a valid and effective notice. As Langley J observed, an application of the inchoate notice to the start of laytime 'would effectively rewrite the parties' contract in effect to delete the clear requirements for a particular notice.'<sup>69</sup> Consequently, any derogation of the provisions of the charter would require express terms, rather than a straight adoption of the inchoate notice device.

Certainly, the argument might be had that, making tender of notice dependent on actual readiness of the vessel might be commercially unreasonable since a notice tendered before a vessel is ready becomes effective at a later time when the vessel is ready, the charterers are well aware of the vessel's arrival and subsequent readiness. However, this argument too has been jettisoned by English Courts.<sup>70</sup> The only time that mere awareness of the vessel's readiness would dispense with the requirement of a valid notice is only when giving of notice is not a formal requirement as per the charterparty.<sup>71</sup> Moreover, adopting such an approach would erode the parties' freedom of contract<sup>72</sup> especially since as per the charterparty they provide for the giving of notice as a prerequisite for the commencement of laytime. Consequently, unless there was a further agreement or the inference of special factors like waiver,<sup>73</sup> laytime in the circumstances described above never started at all. A shipowner would therefore have to keep on giving notice.

The concept of an inchoate notice has also been rejected in circumstances where notice was tendered before a vessel was by point of geographical position an arrived ship. This was exactly the situation in *The Agamemnon*.<sup>74</sup> A vessel was chartered under a charterparty on the Gencon form for a voyage from Baton Rouge. NOR was given before the vessel had arrived Baton Rouge. The question for determination was when laytime commenced in circumstances where the only NOR given was issued prematurely as the vessel had not reached the place specified in the charterparty for the giving of nNOR.

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<sup>69</sup> *The Happy Day* [2001] 1 CLC 813, 823[Comm].

<sup>70</sup> See *The Mexico 1* (n44) 513 [CA].

<sup>71</sup> *Franco-British Steamship v Watson and Youell* [1921] 9 Lloyd's Rep 282.

<sup>72</sup> Despoina Aspragkathou, 'the Happy Day and Issues of Invalidity of a Notice under English Law' (2007) 38 Journal of Maritime Law and Commerce 191, 193.

<sup>73</sup> These issues would be explored in further detail in subsequent parts of the chapter.

<sup>74</sup> *TA Shipping Ltd v Comet Shipping Ltd (The Agamemnon)* [1998] CLC 106. [Comm]

The Arbitrators were of the view that NOR should be treated as having been given and accepted at 1025 on 7 October when the vessel only arrived at Baton Rouge as near as she could to the berth and that consequently laytime commenced later that same day. The charterers clearly dissatisfied with the arbitral award appealed to the commercial court where the owners sought to resist the claim of the charterers by advancing the inchoate notice argument. They premised this argument on the fact that the charterers knew or ought to know when the vessel arrived at Baton Rouge, an argument already rejected by Mustill LJ in *The Mexico 1*. Therefore, laytime could not commence before the vessel started to load at 1015 on 9 October. Thomas J hearing the matter on appeal held: The NOR was given before the vessel arrived at the Baton Rouge anchorage and was not a valid notice because the vessel had not reached a point as close to the loading berth as she might be permitted to approach.<sup>75</sup> Moreover, at the time the notice was given, the owners had not complied with the terms of the charterparty for the giving of notice.<sup>76</sup> It was not a valid notice and could not operate to commence laytime.<sup>77</sup> No further notice was given and nothing happened to make laytime start.<sup>78</sup> Thomas J in the instant case lends support to *The Mexico 1* to the extent that for a NOR to be considered effective to start laytime running, it must be given when the conditions as contained in the charterparty have been met.<sup>79</sup> Therefore, a notice that is given before those conditions are met is not a valid notice<sup>80</sup> for the purposes of commencement of laytime.

The case of *The Agamemnon* illustrates the strict approach adopted by English courts viz: *The Mexico 1* regarding the concept of an inchoate notice. Although maritime arbitrators are split regarding the introduction of the inchoate notice, they remain sympathetic to shipowners and are more liberal in their reception of the inchoate notice. Their reception of the inchoate notice device mirrors the substantial and practical readiness doctrine advanced in United States shipping law jurisprudence, a doctrine already explored in the previous chapter. That doctrine suggests that a notice can still be rendered valid even if there is an inadequacy of vessel readiness which can be

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<sup>75</sup> Ibid 110.

<sup>76</sup> Ibid 110.

<sup>77</sup> Ibid 111.

<sup>78</sup> Ibid 111.

<sup>79</sup> Ibid 112.

<sup>80</sup> Ibid 112.

remedied within a short time without occasioning delay.<sup>81</sup> Therefore, a vessel need not be ready in all respects before a valid notice can be tendered.<sup>82</sup> The resultant effect of this approach is that in circumstances where the vessel has arrived port with notice already tendered and a minor defect regarding the vessel readiness is discovered as in *The Tres Flores*,<sup>83</sup> the need to issue a further notice could be dispensed with since laytime automatically commences when the defect has been rectified. The time spent correcting the defect forms no part of laytime and is deducted from laytime computations. The consequences that may emanate from the strict approach adopted under English law could work injustice for the shipowner particularly as charterers could potentially escape liability from a failure to provide berth or even cargo.<sup>84</sup> It is not impossible that upon the arrival of the vessel at the port, the charterer has no cargo available. In the circumstance, a tender of notice at the port would be treated as invalid if given outside port limits or if the vessel is not in a state of actual readiness, whereas, a charterer would escape liability for non-availability of cargo under the pretext that the notice tendered was defective. The introduction of the substantial and practical readiness doctrine to English law avoids such an outcome. It is argued that the introduction of such a doctrine into English shipping law jurisprudence would ultimately necessitate a major reform in the approach currently prevalent under English law, an outcome which has not had much success.

With the cases of *The Mexico 1*<sup>85</sup> and *The Agamemnon*,<sup>86</sup> it can be said that English courts remain rigid and apathetic towards the concept of an 'inchoate' notice. Even when the matter came up for determination in *The Happy Day*,<sup>87</sup> the court remained unsympathetic to the inchoate notice argument. The vessel was chartered on an amended Synacomex form for a voyage from Odessa to one or two safe berths at a number of named ports including Cochin. For laytime to start, the vessel, required a

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<sup>81</sup> See chapter 4 of thesis.

<sup>82</sup> For instance, *In the matter of the Arbitration between Chemical Trading Inc and Meridian Resources and Development Inc* SMA 2904 (1992).

<sup>83</sup> [1974] QB 264.

<sup>84</sup> Ibid 264.

<sup>85</sup> *The Mexico 1* (n44) 507. [CA].

<sup>86</sup> *The Agamemnon* [1998] CLC 106. [Comm]

<sup>87</sup> *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day)* [2001] CLC 813 [Comm]; [2003] 1 CLC 537. [CA]

written NOR to be given. Upon arrival at Cochin, the vessel could not immediately enter the port because she had missed her tide. Nevertheless, the master issued NOR. Since the charter was a berth charter and there was no congestion at berth, the NOR given outside the berth was valid.<sup>88</sup> The vessel entered the port on the next tide and berthed after which discharge commenced. No further NOR was given. The vessel's agents and the charterer's agents then signed a statement that the NOR had been tendered and accepted. The owners claimed demurrage and the charterers counterclaimed for despatch relying on *The Mexico 1*<sup>89</sup> and *The Agamemnon*<sup>90</sup> to advance the argument that since no valid NOR was ever given, laytime never commenced. The Arbitrators rejected the contention of the owners that laytime could start at the commencement of discharge without a valid NOR but held that laytime commenced on Tuesday 29<sup>th</sup> which was the day it would have commenced had a valid NOR been given. Dissatisfied the charterers appealed. Langley J relying on *The Mexico 1* held that that the notice had never been accepted by the charterers but had merely been acknowledged as received, that acknowledgment having been given on the implied assurance that the ship was at the berth or ready for discharge.<sup>91</sup> The fact that it had not been specifically rejected, and discharge had commenced as planned, did not remedy the lack of a valid notice.<sup>92</sup> To hold otherwise would be to rewrite the parties' contract.<sup>93</sup>

Endorsing the principle in *The Mexico 1* Potter LJ held:<sup>94</sup>

In a case where the NOR has been given which is invalid for prematurity the doctrine of "inchoate" notice is not available to the owners to start laytime running as soon as the vessel becomes ready to unload (even though the charterers are aware that it is in fact ready). Time will not start to run until valid NOR is given, in the absence of an agreement to dispense with such notice or unless there is a waiver or an estoppel binding upon the charterers in respect of the necessity to start notice.

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<sup>88</sup> See *Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd (The Kyzikos)* [1989] 3 WLR 858. [HL]

<sup>89</sup> [1990] 1 Lloyd's Rep 507. [CA].

<sup>90</sup> [1998] CLC 106. [Comm]

<sup>91</sup> *The Happy Day* [2001] 1 CLC 813. [Comm]

<sup>92</sup> *Ibid* 813.

<sup>93</sup> *Ibid* 813.

<sup>94</sup> *The Happy Day* [2003] 1 CLC 537[38] [CA].

As Mustill LJ observed in *The Mexico 1*,<sup>95</sup> an adoption of the current approach under English law comes about not because courts are more pedantic than commercial men, but because the commercial men who wrote the charterparty chose to make laytime contingent on the happening of a particular event.<sup>96</sup>

Following from the foregoing, if the intention is to dispense with the vessel's readiness as a prerequisite to the giving of a valid notice, it may become necessary to insert specific clauses in the charter to reflect this,<sup>97</sup> or the alternative would be for the shipowner to go on giving notice.<sup>98</sup> The insertion of specific clauses was an approach endorsed in *The Linardos*<sup>99</sup> where the parties to the charterparty agreed to the insertion of the clause 'Time commencing...18 hours after NOR has been given by the master, certifying that the vessel has arrived and is in all respects ready to load whether in berth or not... any time lost subsequently by vessel not fulfilling requirements for...readiness to load in all respects, including Marine Surveyor's Certificate...or for any other reason for which the vessel is responsible, shall not count as notice time or as time allowed for loading.'<sup>100</sup> Clause 24 of the charter agreement made provision for the tender of a certificate by the master to the effect that the vessel holds were clean state prior to the tender of NOR with the acceptance of NOR contingent on receipt of a certificate issued by an independent surveyor. NOR was given on October 4 when there was no available berth and the vessel was not yet ready to load because her holds were insufficiently clean. The vessel finally berthed on October 7 but she was adjudged unready by a marine surveyor who found rust and water in her hatches. She was eventually accepted as ready the next day.

Colman J in resolving the above dispute regarding the start of laytime was of the view that the express provisions of clause 4 of the charter operated to contract out of the normal rule that the vessel must be ready at the time of the giving of the notice.<sup>101</sup>

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<sup>95</sup> [1990] 1 Lloyd's Rep 507.

<sup>96</sup> Ibid 513 [2<sup>nd</sup> Col].

<sup>97</sup> Summerskill on Laytime (n12) para 5-48.

<sup>98</sup> *The Mexico 1* (n44) 513 [2<sup>nd</sup> Col].

<sup>99</sup> *Cobelfret NV v. Cyclades Shipping Co. Ltd (The Linardos)* [1994] 1 Lloyd's Rep 28. See also *United Nations/Food and Agriculture Organisation-World Food Programme v Caspian Navigation Inc (The Jay Ganesh)* [1994] 2 Lloyd's Rep 358.

<sup>100</sup> Ibid 28.

<sup>101</sup> Ibid 32 [1<sup>st</sup> Col].

Colman J further observed, If it were not for the insertion of this clause, 'owners whose vessel, having given NOR at the anchorage and then had to wait for a period of several days or even weeks because no berth was available, was found on getting into berth to need one final washing of one or more of her cargo spaces, perhaps only a few hours work, could lose the benefit of all time lost at the anchorage. This printed form of this charterparty avoids that very commercially unbalanced result.'<sup>102</sup>

While adopting the approach endorsed in *The Linardos* would bring benefits to parties of the contract,<sup>103</sup> it could be counterproductive, if not drafted properly. The application of canons of construction by the courts to any drafted clause may operate to cut down the effect of any poorly drafted clauses which is found to be ambiguous and does not give effect to the intention of the parties.<sup>104</sup> Consequently, parties must tread with caution when inserting specific clauses to cater for circumstances where notice may be given before the vessel is indeed ready.

### **5.3.1 Options open to the Shipowner**

The attitude of English courts to the concept of an inchoate notice device is hardly comforting. Any chance of the doctrine ever seeing the light of day has been dead and buried through a combination of the cases of *The Mexico 1*<sup>105</sup> and *The Happy Day*<sup>106</sup> decisions. Even a modification of the inchoate notice argument through the substantial and practical readiness doctrine might be far reaching in reflecting the intention of parties to the contract which make the start of laytime contingent on the tender of a valid notice. In a bid to avoid the drastic consequences that often result from an application of the English law approach, shipowners are repeatedly encouraged to engage in the good practice of giving further notices as the situation demands.<sup>107</sup> An approach along these lines, neatly resolves any uncertainty that may arise on the part of the shipowner who is unsure regarding whether a notice already tendered is valid since any notice given before a vessel is treated as ready is treated as no notice, at least

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<sup>102</sup> Ibid 32 [1<sup>st</sup> Col].

<sup>103</sup> Such as providing some certainty regarding when laytime starts tailored to meet the needs of individual parties.

<sup>104</sup> *Rainy Sky SA and Others v Kookmin Bank* [2011] UKSC 50; *Investment Compensation Scheme Ltd v Westbromich Building Society* [1998] 1 WLR 896.

<sup>105</sup> [1990] 1 Lloyd's Rep 507.

<sup>106</sup> [2003] 1 CLC 537 [CA]

<sup>107</sup> *The Timna* (n 38) 411.

under English law. The giving of further notice also operate to give effect to the intention of the parties who make the commencement of laytime contingent on the giving of valid notice.

The insertion of specific provisions in the charter presents an alternative for shipowners to get around the apathy suffered by the inchoate notice at least under English law. Through carefully worded specific provisions, shipowners can make the inchoate notice the trigger point for the start of laytime with the effect that laytime starts to run as soon as the vessel is ready to load. The major flaw suffered by the inchoate notice argument as raised in *The Mexico 1*<sup>108</sup> and *The Happy Day*<sup>109</sup> was that the parties in both cases had already made provisions for the mechanism by which laytime is to commence: a valid notice. It follows then that if parties want to utilise a different mechanism, for instance, an inchoate notice, they must do so through the insertion of carefully worded clauses to give effect to such provisions. Such a clause may be worded thus:<sup>110</sup>

NOR, if premature shall take effect for purposes of laytime at the earliest time it would have been timely; provided that under local custom and practice or particular circumstances, it was reasonable for the master to give NOR when he did so and such NOR was not intended to deceive the charterers about the vessel arrival or the then existing state of her immediate readiness to perform under the charter.

The above clause clearly lays to rest any protest regarding the adoption of an inchoate notice as a trigger for the commencement of laytime. Restricting the application of a premature or inchoate notice to taking effect at the earliest time the notice when issued would have been timely accords with good commercial practice. With the insertion of such a clause, a shipowner need not worry about giving fresh notice if it is found that the notice earlier issued is premature. Interestingly the above clause also contains a proviso that the premature notice as tendered was not intended to mislead the charterers regarding the arrival of the vessel as well as the existing state of her immediate readiness to perform under the charter. This proviso serves as a protection for a shipowner in circumstances where notice was given before the vessel was an arrived ship geographically and occasions where the readiness of the vessel is defective.

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<sup>108</sup> [1990] 1 Lloyd's Rep 507.

<sup>109</sup> [2003] 1 CLC 537 [CA]

<sup>110</sup> Michael Marks Cohen, 'Happy Day Re-visited' (2003) 34(2) The Arbitrator 9 <[http://www.smany.org/pdf/arbitrator/THE\\_ARBITRATOR\\_APR2006\\_BACK\\_THROUGH\\_OCT1999.pdf](http://www.smany.org/pdf/arbitrator/THE_ARBITRATOR_APR2006_BACK_THROUGH_OCT1999.pdf)> accessed 21/11/2018.



Such a proviso dispenses with the need for the strict approach to a NOR clause prevalent under English law which makes the start of laytime contingent on the giving of a valid notice.

The inclusion of carefully worded clauses could also operate to render as valid notices issued when there is evidence that the vessel is in a state of substantial and practical readiness. The doctrine of substantial and practical readiness has been exhaustively addressed in the previous chapter. A corollary of this doctrine is that upon tender of the invalid NOR, the need to tender a second NOR could be dispensed with. Essentially, the application of the doctrine is effective in resolving any difficulty regarding the readiness of a vessel as well as validity of notice.<sup>111</sup> The rationale for such an approach stems from the unfair consequences that may result from treating a notice as invalid, because a vessel was in an unready state especially if the defect in vessel readiness could be remedied without causing any delay to commencement of cargo operations.<sup>112</sup>

It is conceded that the above suggested approach is not easily reconcilable with the current practice under English law which makes the start of laytime contingent on the issue of a valid notice,<sup>113</sup> therefore, anything outside this, would not be reflective of the intention of the parties. However, it is argued that nothing prevents contractual parties from contracting out of the English law approach which makes the start of laytime contingent on the giving of a valid notice. Parties may have to resort to the insertion of express clauses to reflect the mechanism with which they want the start of laytime to be triggered. For instance, the Amwelsh 93 Charter adopts this approach by making the tender of notice contingent on the readiness of the vessel but also contains a caveat: *'If after inspection, the vessel is found not to be ready in all respects to load/discharge, time lost after the discovery thereof, until the vessel is again ready to load/discharge, shall not count as laytime.'*<sup>114</sup> Adopting such an approach dispenses with the 'inconvenient

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<sup>111</sup> Despoina Aspragkathou, 'The Doctrine of Practical and Substantial Readiness' (2007) 10(1) Lloyd's Shipping and Trade Law 4.

<sup>112</sup> Ibid 4.

<sup>113</sup> *The Mexico 1* (n11) 513[2<sup>nd</sup> Col].

<sup>114</sup> Gencon Charter 94, Clause 6c <<http://www.lawandsea.net/1documents/gencon94.pdf>> accessed 16/11/18; Amwelsh 93 Charter, Clause 6(b) <[http://www.fleetle.com/a/d/pdf/amwelsh\\_93.pdf](http://www.fleetle.com/a/d/pdf/amwelsh_93.pdf)> accessed 16/11/18. See also Nipponcoal Charterparty, Clause 5b <<http://usbc.com.ua/public/NIPPONCOAL.pdf>> accessed 16/11/18; Australian Wheat Charter 1990, Clause 18 <[http://www.fleetle.com/a/d/pdf/austwheat\\_1990.pdf](http://www.fleetle.com/a/d/pdf/austwheat_1990.pdf)> accessed 16/11/18.

consequence’<sup>115</sup> that stems from requiring the shipowners to continually giving NOR if unsure as to the readiness of his vessel or the validity of his notice.<sup>116</sup> It also means that the charterer would not have to pay for time spent by the shipowner in rectifying the defect in the vessel readiness. For the shipowner, he would not lose valuable time and demurrage spent at the port for either an available berth or cargo. Another approach adopted in the BIMCO GRAINCON charter particularly clause 18(c) dealing with commencement of laytime is:<sup>117</sup>

Following receipt of NOR laytime will commence at 0800 on the next day not excepted from laytime. Time actually used before commencement of laytime shall count. *Regardless of whether a valid NOR has been tendered laytime or time on demurrage shall begin at 0800 on the next day not excepted from laytime following the commencement of loading or discharging of the cargo.*

This clause was certainly tailored to address the complexities commonly associated with the giving of a premature notice. The insertion of this clause means a shipowner can avoid the inconvenient consequence of giving fresh notices or the need to prove elements of waiver<sup>118</sup> in circumstances where an invalid notice is tendered.<sup>119</sup> By this clause, the start of laytime is contingent on the commencement of loading or discharge and not whether the notice given was valid. The necessity of the charterer to intimate rejection of an invalid notice is also dispensed with. Likewise, the shipowner need not prove the necessary elements of waiver in order to give validity to an invalid notice. In effect, both charterer and shipowner are protected by the inclusion of this clause. Another solution advanced by Donald Davies would be for shipowners to insert a notice of arrival (NOA) clause in their charterparties whereby the laytime clock starts ticking as soon as the vessel arrives off the pilotage area for the port (or for a stipulated number of hours after the notice of arrival is tendered) and the vessel is in all respects ready to commence loading/discharging, whether in berth or not or whether or not a NOR is tendered, and laytime is only suspended for the laytime exceptions and/or breaches of

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<sup>115</sup> *The Mexico 1* [1990] 1 Lloyd’s Rep 507, 513[2<sup>nd</sup> Col].

<sup>116</sup> *The Timna* (n 38) 411.

<sup>117</sup> BIMCO GRAINCON, Clause 18(c) <<http://www.fleetle.com/a/d/pdf/graincon.pdf>> accessed 21/11/2018.

<sup>118</sup> A point to be explored in further detail in the next section.

<sup>119</sup> *Despoina Aspragathou* (n72) 213.

contract by the owners which occasion delay to the charterers.<sup>120</sup> Such an approach as suggested, is also capable of reducing to the barest minimum, disputes commonly associated with giving of NOR.

In spite of these suggestions given above, English courts still have the last say on the matter. Until the courts under English law attempt to reform the law in this area, it would be in the best interest of a shipowner to either go on giving notice or engage the use of express clauses to better reflect the mechanism, by which laytime could be said to commence. Shipowners may also give validity to an invalid notice if they can prove the necessary elements of waiver as the next section would show. In circumstances when a premature notice has been issued and the charterer remains passive regarding whether he seeks to accept or reject the notice but instead commences cargo operations, there is a lack of clarity regarding when laytime is expected to commence. The commencement of laytime in the circumstances may necessarily involve the inference of a special agreement or special factors like waiver. The next section sheds some light on this controversy.

### **5.3.2 Status of an 'Inchoate' Notice - the rightful place of Waiver?**

As mentioned earlier, in a case where NOR had been given but was invalid because it was given prematurely, an inchoate notice is unavailable to the shipowners such that laytime could commence as soon as the vessel became ready even though the charterers were aware of the vessel's readiness.<sup>121</sup> However, an issue that has generated some controversy is where such a notice is tendered and the charterer remains passive, doing nothing except commencing cargo operations. In such circumstances, it is often unclear when exactly laytime begins. Mustill LJ in *The Mexico 1* faced with a similar dilemma saw the matter fit to be 'reserved for detailed exploration if it should arise in the future.'<sup>122</sup> Interestingly, the charterers in *The Mexico 1* had conceded that laytime commenced when discharge of the vessel began.<sup>123</sup> Consequently, Mustill LJ was not constrained to reach a determination on the issue but instead accepted the concession

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<sup>120</sup> Donald Davies, 'Commencement of Laytime' (4<sup>th</sup> edn, Informa 2006) para 111.

<sup>121</sup> Although, if the charterparty is of such a nature where written notice is not a requirement, then the awareness of the charterer becomes a crucial factor in determining whether the vessel was ready. See *Franco-British Steamship Co. v. Watson Youell* [1921] 9 Lloyd's Rep. 282, 284.

<sup>122</sup> *The Mexico 1* (n44) 510 [Col 2] [CA]

<sup>123</sup> A concession also made in *The Agamemnon* [1998] CLC 106.

made, thus, leaving the matter open for debate. Although, Mustill LJ appreciated the utility in linking the commencement of laytime to the commencement of cargo operations in circumstances where an invalid notice had been tendered, but he expressed his reservation regarding the practicability of such an approach, since it might be difficult to find the 'necessary elements of waiver from the bare fact that a discharge was carried out.'<sup>124</sup> His view was premised on two factors namely an absence of a 'bilateral agreement to vary the charter'<sup>125</sup> or an absence of circumstances where the 'parties have conducted themselves on the mutual assumption that their legal relations take a certain shape.'<sup>126</sup> Mustill LJ found it difficult to infer the necessary elements of waiver from the mere fact that a discharge was carried out after the giving of an invalid notice.<sup>127</sup>

While there might be some cogency in the view expressed by Mustill LJ, such view leaves the shipowner with a heavy burden to bear in establishing appropriate facts which suggest that the charterers have either varied the charterparty or adjusted their legal relations so that laytime commences, after an invalid NOR had been tendered prior to the commencement of cargo operations.<sup>128</sup> However, with the Court of Appeal decision in *The Happy Day*,<sup>129</sup> this view by Mustill LJ should be treated with caution. Potter LJ in the appellate decision, outlined circumstances where laytime can commence in the event that there was an absence of a valid notice.<sup>130</sup> Of particular interest is the commencement of laytime when no valid NOR has been served in circumstances where discharge commences without the charterers expressing any reservation to the earlier (invalid) notice or any indication that a further notice is required.<sup>131</sup> It is argued that this concession by Potter LJ is to be preferred as the presence of an inference of waiver,

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<sup>124</sup> *The Mexico 1* [1990] 1 Lloyd's Rep 507, 510 [Col 1].

<sup>125</sup> *Ibid* 514[2<sup>nd</sup> Col].

<sup>126</sup> *Ibid* 514[2<sup>nd</sup> Col].

<sup>127</sup> *Ibid* 510 [Col 1]. See also dicta of Langley J in *The Happy Day* [2001] 1 Lloyd's Rep 754,762; *Glencore Grain Ltd v Goldbeam Shipping Inc. Goldbeam Shipping Inc. v Navios International Inc. (The Mass Glory)* [2002] 2 Lloyd's Rep 244, 253 [Col 2].

<sup>128</sup> Donald Davies, Voyage Charterparties- Notice of Readiness <[https://www.ukpandi.com/fileadmin/uploads/uk-pi/legal/31%20Davies\\_D.pdf](https://www.ukpandi.com/fileadmin/uploads/uk-pi/legal/31%20Davies_D.pdf)> pg. 4 Accessed on 13/11/2017.

<sup>129</sup> [2002] 2 Lloyd's Rep 487.

<sup>130</sup> *Ibid* 509.

<sup>131</sup> A view which gained favour in *The Mexico 1* [1988] 2 Lloyd's Rep. 149, 153 [Comm] but rejected by Mustill LJ on appeal in *The Mexico 1* [1990] 1 Lloyd's Rep 507 [CA].

estoppel or an implied agreement, permits the seamless evolution of a tendered notice, from an invalid notice into a valid one, an argument once found to be untenable by Mustill LJ in *The Mexico 1*.<sup>132</sup> Viewed differently, the argument could be had that, the factual combination of commencing loading or discharge operations without expressing any reservation regarding an invalid NOR gives rise to the presumption that the vessel has arrived the contractual destination and is ready at the immediate and effective disposition of the charterer.<sup>133</sup> It may be difficult to argue any differently considering that without arrival at the contractual destination and readiness of the vessel, the commencement of cargo operations becomes nigh impossible. Consequently, it becomes valid to argue that the factual combination of arrival at the contractual destination and commencement of either load or discharge 'dispenses with the need to serve a NOR.'<sup>134</sup>

Interestingly, the inference of waiver or estoppel<sup>135</sup> in present circumstances, were arguments advanced by shipowners in *The Mexico 1*, *The Agamemnon* and *The Mass Glory* without success. However, shipowners were able to find success in the Court of Appeal decision in *The Happy Day*. Arguably, the elements of waiver as found by Potter LJ rests on the passivity of the charterers in failing to intimate their rejection of the invalid NOR as well as their commencement of cargo operations without intimating their rejection of the notice. In any view, had they expressly rejected the NOR, the outcome would have been different and this would have left the owners with only one option: serve a further NOR. Interestingly, the doctrine of waiver could be inferred in circumstances where a repudiation of the contract has occurred or where a tender of performance which does not conform to the terms of the contract exists.<sup>136</sup> The controversy under consideration neatly falls under the latter circumstance, since tender of performance by means of a valid NOR has been substituted with tender by means of an invalid NOR. Consequently, the charterer is faced with a choice regarding what course

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<sup>132</sup> *The Mexico 1* [1990] 1 Lloyd's Rep 507 [CA].

<sup>133</sup> Arfan Khan, 'the Commencement of Laytime in a Voyage Charterparty' (2003) JBL 284, 285.

<sup>134</sup> Ibid 285.

<sup>135</sup> The points on estoppel and implied agreements were rejected by Potter LJ in *The Happy Day* [2002] 2 Lloyd's Rep 487, 505.

<sup>136</sup> *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391, 398 [1<sup>st</sup> Col]. [HL]

of action to take. For the necessary elements of waiver to exist, it has been held that there must be:<sup>137</sup> an unequivocal representation either by words or conduct regarding the enforcement of his legal rights; knowledge of the full facts and circumstances giving rise to a choice between two inconsistent courses of action and in all cases, once the choice has been made, it is final and binding with the consequence that he loses his right to reject the tender of performance as not contractual.<sup>138</sup>

Relying on the facts in *The Happy Day*, all of the elements of waiver were present. The NOR was served on charterers before the vessel arrived its contractual destination considering that this was a berth charter.<sup>139</sup> Upon arrival at the berth, the vessel commenced cargo operations and did not receive any intimation of rejection from the charterers nor their agents regarding the earlier tendered notice.<sup>140</sup> The agents of the charterers also accepted instructions to discharge the vessel without any reservations of the charterer's position regarding the validity of the NOR.<sup>141</sup> As Potter LJ observed, 'Although, the charterers are not obliged to indicate rejection of the NOR, however, their failure to do so in addition to their assent to the commencement of discharge operations provided the necessary impetus to suggest that they had waived their reliance on any invalidity in the NOR and any requirement for a further notice.'<sup>142</sup>

Although, from the facts adduced above in support of an inference of waiver, the charterers by their passivity or silence regarding the validity of the NOR appeared to have waived their rights to later reject notice, it is argued that, their silence alone is insufficient to constitute an unequivocal representation sufficient enough to reach an inference of waiver.<sup>143</sup> For the necessary elements of waiver to be inferred, what is required, is their silence in a failing to intimate rejection of the invalid notice along with a combination of some other steps taken or assented to under the contract.<sup>144</sup> That

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<sup>137</sup> Ibid 398. [1<sup>st</sup> Col]

<sup>138</sup> Ibid 399. [1<sup>st</sup> Col].

<sup>139</sup> *The Happy Day* [2002] 2 Lloyd's Rep 487, 507 [2<sup>nd</sup> Col]. [CA]

<sup>140</sup> Ibid 507 [2<sup>nd</sup> Col].

<sup>141</sup> Ibid 507 [2<sup>nd</sup> Col].

<sup>142</sup> Ibid 507 [2<sup>nd</sup> Col]. [CA]

<sup>143</sup> *Allen v Robles* [1969] 1 WLR 1193, 1196. [CA]; *Wahbe Tamari & Sons and Jaffa Trading Co. v Colprogeca-Sociedade General Dibras, Cafes e Produtos Colonias Lda* [1969] 1 Lloyd's Rep 18, 23 [1<sup>st</sup> Col]; *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109, 117 [1<sup>st</sup> Col] [HL].

<sup>144</sup> *The Happy Day* [2002] 2 Lloyd's Rep 487, 507 [1<sup>st</sup> Col] [CA]

other step, would be the commencement of cargo operations without any intimation of their rejection of the notice. Therefore, if charterers remain silent regarding whether they accept or reject an invalid notice and then proceed to commence cargo operations, they had waived their rights to reject the notice at a later time. Proceeding on this analysis, it now appears the dicta expressed by Donaldson J in *The Helle Skou*<sup>145</sup> is valid and indeed the correct position of the law. After rejecting the view that a charterer can reject a premature notice after accepting it, Donaldson J observed, 'a NOR which is rightly rejected is a nullity, save to the extent that, with the express or implied agreement of the charterers, it may be left with them instead of being re-served and will then take effect when it truly represents the facts.'<sup>146</sup> Unfortunately, this authority was not cited before Mustill LJ in *The Mexico 1*, it would have been interesting to see whether the dicta would have provided some guidance for Mustill LJ in any way. Arguably, considering that the charterers in *The Mexico 1* had already conceded that laytime commenced when discharge began, it may not have had much effect on the outcome of the decision.

On any view, it could be argued that treating the commencement of cargo operations as the trigger point for the start of laytime appeals to good commercial sense in circumstances where a master serves an invalid NOR on the charterers before the vessel becomes an arrived ship for instance, and the charterers or their agents proceed to do nothing to indicate their rejection of the invalid notice but instead commence cargo operations, then it is safe to say that the charterers have waived their rights to rely on the invalidity of the notice as a tool to derail the running of laytime. Moreover, it is not out of place for a reasonable shipowner would assume an intention and acceptance by the charterers that laytime should start to run without the formal requirement of a fresh notice, such intention and acceptance being unequivocally communicated by involvement in cargo operations.<sup>147</sup> Of course, it would be uncommercial and a sign of bad faith for the charterers to reserve their rights to waive the NOR and later rely upon the invalidity without disclosing their intention, knowing fully well that if they did, as per

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<sup>145</sup> *Sofial v Ove Skou Rederi (The Helle Skou)* [1976] 2 Lloyd's Rep 205. [Comm].

<sup>146</sup> Ibid 214.

<sup>147</sup> Ibid 508 [1<sup>st</sup> Col].

commercial practice, the shipowners would be bound to serve a fresh notice to protect his position.<sup>148</sup>

While the reasoning in *The Happy Day* appears valid and represents a significant victory for shipowners alike, shipowners are not out of the woods yet and may wish to exercise caution. It would be in their interest to go on giving further notices, since *The Happy Day* does not cover every possible scenario involving the tender of an invalid notice but only deals with situations where the invalidity was as a result of NOR being tendered before the vessel arrived at the agreed contractual destination as per the charterparty.<sup>149</sup> In a different circumstance, like the one in *The Mexico 1* which arose as a result of the tender of NOR at a time when the cargo aboard the vessel was inaccessible due to overstowed cargo, a charterer could argue that the principle enunciated in *The Happy Day* is not of general application particularly because the circumstances giving rise to invalidity in both cases are different. Consequently, it would not be unreasonable on the part of any court hearing such an argument to rightfully distinguish the application of the principle in different circumstances. Moreover, it may be commercially unreasonable for shipowners to expect that the concepts of waiver or estoppel or an implied agreement could be relied on as a device to rectify any invalidity arising from a tendered NOR. This is premised on the fact that every case would turn on its fact. Therefore, to avoid such an outcome, it may be wise for shipowners to go on giving further notices if there is any doubt regarding the validity of the notice.

Shipowners may also be careful not to mistake the outcome in *The Happy Day* as authority for the hypothesis that time begins from the commencement of cargo operations. Reference must be made to the charterparty provisions for the mechanism governing the start of laytime. The only circumstances that may make the commencement of cargo operations the trigger point for the commencement of laytime is if the parties agree to such provision or in occasions where there was an invalid NOR and the charterers by their conduct fail to intimate their rejection of the NOR, then by commencing cargo operations, it may be said that laytime has begun. Absent any waiver,

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<sup>148</sup> Ibid 508 [1<sup>st</sup> Col].

<sup>149</sup> A similar situation arose in *The Agamemnon* [1998] CLC 106 where notice was given before the vessel was considered as having arrived the contractual destination.



estoppel or an implied agreement, the commencement of cargo operations would not automatically start laytime.

Another aspect of timeliness that has often proved controversial is related to the consequences that attach when there is a failure to prosecute the voyage with reasonable despatch. The next chapter would engage in a critical analysis of the interplay between delay and the obligation to prosecute the voyage with reasonable despatch.

## Chapter 6

### Obligation to Prosecute the Voyage with Reasonable Despatch and without Delay

#### 6.1 Introduction

The doctrine of deviation has over the years had a chequered history. Divergent views<sup>1</sup> exist on the effect of a deviation on parties to the contract. Historically, the occurrence of a deviation has always been treated as a fundamental breach such that once a carrier deviates, the innocent party is entitled to treat the contract as going to the root of the contract and to declare himself as no longer bound by any of the contractual terms irrespective of whether the deviation was slight.<sup>2</sup> The effect of this doctrine meant that the shipowner was deprived from relying on exclusion clauses inserted into the contract for his benefit. The shipowner is entitled only to rely on the limited common law exceptions since the occurrence of a deviation basically made the shipowner a common carrier or an insurer of cargo. This also meant that the shipowner remained liable for breach even in circumstances where the deviation resulted in no loss or damage to cargo. This chapter re-examines the continued efficacy of the traditional concept of deviation in view of the abolition of the fundamental breach doctrine brought about by the decision in *Photo Production Ltd v Securicor Ltd*.<sup>3</sup> It remains uncertain whether the occurrence of unjustifiable deviation operates automatically to prevent the shipowner from relying on exception clauses.

Against this backdrop, this chapter is divided into 5 sections. Section 2 addresses the origins and nature of the obligation not to deviate. Sections 3 and 4 examine the meaning of the expression departure from the usual and customary course as well as the operation of the liberty to deviate clauses. Section 5 addresses the effect of an unjustified deviation after the abolishing of the fundamental breach doctrine and in particular deals with the question as to whether or not the abolishment of the doctrine in a contract law context operates to strike down deviation cases. The chapter argues

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<sup>1</sup> For divergent views on the effect of a deviation see generally *Joseph Thorley v Orchis SS Co* [1907] 1 KB 660 *cf. International Guano v Robert MacAndrew & Co* [1909] 2 KB 360; *James Morrison v Shaw, Savill* [1916] 2 KB 783.

<sup>2</sup> *Tate & Lyle Ltd v Hain Steamship Co Ltd* [1936] 55 Lloyd's Law Rep. 159.

<sup>3</sup> [1980] AC 827.

that given the abolition of the fundamental breach doctrine, the harsh effects associated with the occurrence of a deviation has lost all of its force. The advancement of technology in the area of speed of ocean vessels mean that a vessel might deviate and still meet its obligations under the contract without causing delay. Moreover, the frequent use of contractual devices like held-covered clauses and shipowner's liability insurance, have all but diluted the necessity of attaching serious consequences to the occurrence of deviation. Whether such serious consequences should attach upon occurrence of a deviation, should be determined by the construction of the contract and not by any general rule which makes the occurrence of a deviation a serious breach of the charterparty provisions. Therefore, the doctrine of deviation with such serious consequences ought to be buried along with the fundamental breach doctrine.

## **6.2 Origins and Nature of the Obligation to Prosecute the Voyage with Reasonable Despatch.**

At common law, a carrier is under an implied obligation to prosecute the voyage by the usual and customary route with reasonable despatch and without deviation.<sup>4</sup> An unreasonable delay<sup>5</sup> in prosecuting the voyage or a voluntary departure<sup>6</sup> from the usual and customary route would amount to a deviation. Deviation has been defined as a 'deliberate going off the normal route for the voyage.'<sup>7</sup> For Richard Aikens, a deviation is a 'geographical departure from the agreed or permitted route.'<sup>8</sup> While both definitions are expressed in varying terminology, one thing is consistent, deviation normally involves a deliberate departure from the agreed voyage. A corollary of this is that a negligent departure would not likely qualify as a deviation but as a negligence in navigation which is usually an excepted peril.<sup>9</sup> Consequently, in *Rio Tinto Co. Ltd v Seed Shipping Co. Ltd*<sup>10</sup> the master who had serious health problems had set course for SSE instead of SSW which was the normal route and the vessel became grounded. The court held that the master did not intend to deviate as he did not adopt another road but got

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<sup>4</sup> *The Tafaka* [1990] 1 Lloyd's Law Report 536.

<sup>5</sup> *Scaramanga v Stamp* (1880) 5 CPD 295, 299

<sup>6</sup> *Rio Tinto Co Ltd v Seed Shipping Co* (1926) 24 Lloyd's Law Rep 316.

<sup>7</sup> Sir Guenter Treitel & FMB Reynolds (eds), *Carver on Bills of Lading* (4<sup>th</sup> edn, Sweet & Maxwell 2017) para 9-038.

<sup>8</sup> Richard Aikens & Others, *Bills of Lading* (2<sup>nd</sup> edn, Informa law 2016) para 10.291.

<sup>9</sup> *Carver on Bills of Lading* (n5) para 9-038.

<sup>10</sup> (1926) 24 Lloyd's Rep 316.

himself in a ditch at the side of the road which he was intending to follow.<sup>11</sup> This just illustrates that not every departure will qualify as a deviation. For a departure to qualify as a deviation, the departure must be deliberate. In the instant case, it was difficult to prove that the departure was deliberate considering the peculiar circumstances of the case where the master was evidently in distress occasioned by serious health problems which played a part in the departure from the agreed voyage. In contrast, where a vessel deviates off the normal route to load bunkers for instance, so as to be able to meet up subsequent voyages, would be treated as a deviation since the decision to load bunkers is evidence of a deliberate departure from the normal route, hence a deviation. What is clear from the above is that, a negligence in navigation would not qualify as a deviation unless the party alleging the deviation can prove that the departure from the normal route was deliberate and even when deliberate, it would not qualify as a breach of contract unless it is outside the scope of deviations protected by common law or statute. Historically, the origins of the doctrine could be traced back to the 18<sup>th</sup> century and finds root in marine insurance where an insurer is considered discharged from liability in the event that a vessel without lawful excuse deviated from the voyage contemplated by the policy.<sup>12</sup> A consequence of this is that cargo which was previously insured become uninsured once the vessel deviates which invariably means that the insurer is considered discharged from liability from the moment the deviation occurs<sup>13</sup> and was regarded as having intended to accept only those risks inherent in the expeditious prosecution of the voyage by the usual commercial route.<sup>14</sup> Where the vessel without excuse departed from the customary route or unreasonably delayed the voyage, the policy of insurance was defeated.<sup>15</sup> In *Lavabre v Wilson*<sup>16</sup> Lord Mansfield expressed it this way: 'The true

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<sup>11</sup> Ibid 320, 321.

<sup>12</sup> Marine Insurance Act 1906, s 46; see generally *Alexander Elliot v William Wilson* (1776) 4 Bro. PC 479, 2 ER 320; *Thames & Mersey Marine Insurance Co. Ltd v HT Van Laun & Co.* [1917] 2 KB 48, 53; Martin Dockray, 'Deviation: a Doctrine all at Sea?' [2000] 1 LMCLQ 87.

<sup>13</sup> Marine Insurance Act 1906, s 46; See also *Green v Young* [1702] 2 Salk. 444; 91 ER 385.

<sup>14</sup> James F Whitehead III, 'Deviation: Should the Doctrine apply to On-Deck Carriage?' (1981) 6(1) Maritime Lawyer 37.

<sup>15</sup> Ibid 37.

<sup>16</sup> (1779) 1 Douglas 284.

objection to a deviation is not the increase of the risk...It is, that the party contracting has voluntarily substituted another voyage for that which has been insured.'<sup>17</sup>

Upon deviating, the contract of carriage was treated as void such that the shipowner was deprived of any exculpatory provisions in the contract.<sup>18</sup> The carrier basically became an insurer of cargo, immediately becoming strictly liable for any loss occasioned cargo.<sup>19</sup> The extent of his liability was such that any loss or damage sustained during and after the deviation was attributed to him even in the absence of a nexus between the deviation and the loss or damage.<sup>20</sup> Arguably, the genesis of this harsh rule could be attributed to the fact that upon deviation from the contractual route, a cargo more often than not lost its insurance cover.<sup>21</sup> Consequently, it seemed only fair that the shipowner rather than the charterer be made to bear the burden of any damages resulting from the deviation.<sup>22</sup>

An illustration of the origins of deviation is the old case of *Davis v Garrett*<sup>23</sup> where the plaintiff put on board the defendant's barge, a cargo of lime, to be shipped from the Medway to London. Upon commencement of the voyage, the master of the barge deviated unnecessarily from the usual course, and during the deviation a gale storm wetted the lime, and the barge was on fire which led to the loss of the whole cargo and vessel. The plaintiff sought to recover the loss of the cargo and the defendant put up a defence that there is no connection between the deviation of the vessel and the loss of cargo since it was quite possible that the gale storm which led to the loss of cargo could have still occurred had the vessel proceeded in her direct course. As cogent as this argument may seem, Tindal CJ was left unpersuaded and he proceeded to find the defendant liable. For he observed 'if this argument were to prevail, the deviation of the master which is undoubtedly a ground of action against the owner would never, or under only peculiar circumstances, entitle the plaintiff to recover.'<sup>24</sup>

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<sup>17</sup> Ibid 291.

<sup>18</sup> James F Whitehead III (n14) 37.

<sup>19</sup> CP Mills, 'The Future of Deviation in the Law of the Carriage of Goods' (1983) LMCLQ 587,

<sup>20</sup> See for instance *Joseph Thorley v Orchis SS Co* [1907] 1 KB 660; James F Whitehead III (n14) 37.

<sup>21</sup> Ibid 38.

<sup>22</sup> Ibid 38.

<sup>23</sup> (1830) 6 Bing. 716.

<sup>24</sup> Ibid 723.

It follows therefore, that upon occurrence of a deviation, the circumstances upon which a shipowner could avoid liability was severely limited such that he only escapes liability if he shows that the loss or damage would still have occurred even though the deviation had not occurred.<sup>25</sup> While the argument of the defendant in the *Davis v Garrett* might appear to be on firm grounds, it was fraught with practical difficulties. It may be difficult as Tindal CJ observed, if a vessel were to run aground in the course of a deviation, no one can be certain that the same would occur if the vessel was in her proper course.<sup>26</sup> Rightly so, such a defence sought to be maintained by the defendant would only ever avail the defendant if he was able to prove not only that the same loss might have happened but that it must have happened if the act complained of had not been done.<sup>27</sup> Clearly, it would be near impossible for the defendant to meet such a high threshold. Perhaps the attractiveness of the court's approach lies in the well-established common law rule that 'no wrong-doer can be allowed to apportion or qualify his own wrong.'<sup>28</sup> Consequently, the occurrence of any loss during the operation of his wrongful act and which is attributable to his wrongful act would of course debar him from setting up as a defence to the action, the bare possibility of a loss, if his wrongful act had never been done.<sup>29</sup> The court in *Davis v Garrett*<sup>30</sup> was prepared to imply a duty on the vessel owner, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual course.<sup>31</sup>

### 6.3 Departure from the Usual and Customary Course

At common law, the owner of a vessel impliedly agreed to proceed without unnecessary deviation from the usual and customary course.<sup>32</sup> Consequently, it could be argued that a deviation would require a deliberate and unjustified departure from the usual and customary course the vessel must adopt in prosecution of the voyage from the load port to the discharge port.<sup>33</sup> In the absence of evidence to the contrary, the usual route

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<sup>25</sup> *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783.

<sup>26</sup> *Davis v Garrett* (1830) 6 Bingham 716, 723.

<sup>27</sup> *Ibid* 724.

<sup>28</sup> *Ibid* 724.

<sup>29</sup> *Ibid* 724.

<sup>30</sup> *Ibid* 716.

<sup>31</sup> *Ibid* 725.

<sup>32</sup> *Ibid* 725.

<sup>33</sup> Stephen Girvin, *Carriage of Goods by Sea* (2<sup>nd</sup> edn, OUP 2011) para 25.03.

would be presumed to be the direct geographical route.<sup>34</sup> However, that is hardly the end of the matter as in most cases, the usual route differs from the direct geographical route, for either navigational or other reasons<sup>35</sup> such as the need to avoid harsh weather conditions or even draught restrictions for a particular vessel<sup>36</sup> While the direct geographical route is perceived as the yardstick with which a determination of the usual and customary route is premised, this does not preclude the shipowner from demonstrating that an alternative route is the customary route.<sup>37</sup>

For parties to the contract, determining the route to which a vessel is to proceed assumes increased significance. For insurance purposes, determining what the agreed route is may aid the insurer in providing insurance for the carriage of cargo within an identifiable route.<sup>38</sup> Lord Esher MR in *Leduc v Ward*,<sup>39</sup> recognising the importance of a determination of the voyage route to parties to the contract, was prepared to identify the agreed route as 'the ordinary track by sea of the voyage' and 'any departure from the track in the absence of necessity would be a deviation.'<sup>40</sup> However, attached to the identification of the agreed route as 'the ordinary sea track' are practical difficulties which Lord Esher MR was prepared to acknowledge.<sup>41</sup> Unlike trade by rail or road where there are exact roads or tracks set out for the carriers to stick to, marine travel happens in open sea<sup>42</sup> where there are no easily delineable tracks. Moreover, in determining what sea route is usual and reasonable, various commercial and navigational considerations come to the fore.<sup>43</sup> To illustrate, in the old sailing ship days, routes were chosen in order to make use of trade winds, and varied from season to season, and between the same termini there might be several usual routes.<sup>44</sup> Now in modern times

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<sup>34</sup> *Reardon Smith Line Ltd v Black Sea Baltic General Insurance Company* [1939] AC 562; *Achille Lauro v Total* [1968] 2 Lloyd's Rep. 247, 251.

<sup>35</sup> *Ibid* 562.

<sup>36</sup> Stephen Girvin (n33) para 25.03.

<sup>37</sup> *Achille Lauro FU Gioacchino & Co. v Total Societa Italiana per Azioni* [1969] 2 Lloyd's Rep 65, 67-68.

<sup>38</sup> A concern raised by Lord Esher MR in *Leduc v Ward* [1888] 20 QBD 475, 481.

<sup>39</sup> [1888] 20 QBD 475.

<sup>40</sup> *Ibid* 481.

<sup>41</sup> *Ibid* 481.

<sup>42</sup> Sarunas Basijokas, 'Is the Doctrine of Deviation only a Historical Record Today?' (2012) UCL Journal of Law and Jurisprudence 114, 118.

<sup>43</sup> *Reardon Smith v. Black Sea Insurance* [1939] A.C. 562, 575.

<sup>44</sup> *Ibid* 575.

in all long ocean voyages, the need to replenish bunkers (coal or oil) has to also be considered.<sup>45</sup>

#### **6.4 Liberty to Deviate**

The stringency of the implied obligation not to deviate is often diluted by the incorporation of an express term in the contract known as 'liberty to deviate' clauses.<sup>46</sup> These clauses aim to protect the shipowner from the serious consequences of deviation as they typically permit carriers to travel by any route such that a deviation from the ascertained route would not constitute a breach of contract.<sup>47</sup> At common law, liberty to deviate clauses were drafted widely such that if taken literally, there could be no application of the deviation doctrine at all, because almost anything is permissible under the contract.<sup>48</sup> This approach was borne out of the old prevailing practice where parties were vested with unfettered freedom to contract.<sup>49</sup> However, this unfettered freedom was abused by shipowners who were often the stronger party to the detriment of cargo owners who were the weaker party, such that judges put a curb on it by adopting what Lord Denning called a 'secret weapon': true construction of the contract.<sup>50</sup> Consequently, by wielding this secret weapon, English courts appear to attach a restrictive interpretation to the construction of liberty to deviate clauses such that only ports which are substantially ports which will be passed on the named voyage are covered by a liberty to deviate clause.<sup>51</sup> A corollary of this is that a widely drafted liberty to deviate clause affords no protection to a deviating shipowner and would be 'construed strictly and contra proferentem'<sup>52</sup> by the court. However, in circumstances where the Hague Visby Rules 1968 apply, widely construed liberty to deviate clauses which operate to allow deviations beyond the limits permissible under Article IV r. 4 are

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<sup>45</sup> Ibid 575.

<sup>46</sup> For instance, see Clause 3 of the GENCON 1994.

<sup>47</sup> Margaret M Lennon, 'Deviation then and now-when COGSA's per Package Limitation is Lost' [2002] 76 St. John's Law Review 437, 443.

<sup>48</sup> Ibid 443.

<sup>49</sup> See Lord Denning's expository on the history of the freedom of contract principle: *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 296-297.

<sup>50</sup> Ibid 297.

<sup>51</sup> *Leduc v Ward* (1888) 20 QBD 475, 482; *Glynn v Margetson & Co* [1893] AC 351, 354.

<sup>52</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 292. *Contra proferentem* is derived from the Latin maxim 'verba chartarum fortius accipiuntur contra proferentem' which means a contract is interpreted against the person who wrote it.



cut down by Article III r. 8 which provides that any clause which relieves the carrier from liability for loss or damage beyond the limits of the rules is null and void.

While the attitude of some English courts is to attach a narrow interpretation to a widely construed liberty to deviate clause,<sup>53</sup> it is argued that, this view is not on firm foundations. It may be argued that there is support in English case law for the alternative view that given a properly drafted liberty to deviate clause, it is possible for a shipowner to redefine the contract voyages to include voyage calls that would otherwise be deviations absent the liberty to deviate clause.<sup>54</sup> This solution was adopted in *Connolly Shaw Ltd v A/S det Norfjeldske D/S*<sup>55</sup> where the court after a consideration of both *Leduc v Ward*<sup>56</sup> and *Glynn v Margetson & Co.*<sup>57</sup> was of the view that 'in so far as the liberty clause that has been reserved can be used without frustrating the contract, then there is no reason for disregarding it in construing the contract.'<sup>58</sup> This approach adopted by the court accords with the modern approach to contractual interpretation.<sup>59</sup> Historically, the courts approach has been to construe a contractual provision against the party seeking to rely on it in order to diminish or exclude his basic obligation or any common law duty which arises apart from contract.<sup>60</sup> This came to be referred to as the *Contra Proferentem* rule.

It could be argued that this approach was adopted in the cases of *Leduc v Ward*<sup>61</sup> and *Glynn v Margetson*.<sup>62</sup> However, with the long line of cases starting with *Investment Compensation Scheme Ltd v Westbromich Building Society*,<sup>63</sup> it is doubtful whether the

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<sup>53</sup> *Cunard Steamship v Buerger* [1927] AC 1, 8-9. [HL]

<sup>54</sup> Charles Debattista, 'Fundamental Breach and Deviation in the Carriage of Goods by Sea' [1989] JBL 22, 33.

<sup>55</sup> *Connolly Shaw Ltd v A/S det Norfjeldske D/S* [1934] 49 Lloyd's Rep 183. See also *Frenkel v MacAndrews* [1929] AC 545, 546 [HL].

<sup>56</sup> (1888) 20 QBD 475.

<sup>57</sup> [1893] AC 351.

<sup>58</sup> [1934] 49 Lloyd's Rep 183, 190 [2<sup>nd</sup> Col].

<sup>59</sup> *Mannai Investment Co. Ltd v Igo Starlife Assurance Co Ltd* [1997] AC 749, 768,771; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 [21]-[26]; *Investment Compensation Scheme Ltd v Westbromich Building Society* [1998] 1 WLR 896, 912-913.

<sup>60</sup> *Youell v Bland Welch & Co. Ltd* [1992] 2 Lloyd's Rep 127, 134. [1<sup>st</sup> Col]

<sup>61</sup> (1888) 20 QBD 475.

<sup>62</sup> [1893] AC 351.

<sup>63</sup> [1998] 1 WLR 896. See also *Mannai Investment Co. Ltd v Igo Starlife Assurance Co Ltd* [1997] AC 749, 768,771; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 [21]-[26].

*Contra Proferentem* rule still bears significance.<sup>64</sup> For emphasis sake, the modern approach to contractual term construction is to ascertain the meaning which a contractual provision would convey to a reasonable man having all the background knowledge which would reasonably have been available to the parties in the situation they were at the time of the contract.<sup>65</sup> Applying this approach to present circumstances, it is argued that the primary concern of a cargo owner would normally be receipt of his cargo in good order and condition as at when due. Consequently, if the shipowner is able to deviate as per the liberty to deviate clause and achieve this singular objective, then the courts should exercise restraint before tearing down a liberty to deviate clause because it was construed widely. Such an approach would not correspond with what a reasonable business person circumstanced as the actual contractual parties would have had in mind.<sup>66</sup>

From the cases of *Leduc v Ward*<sup>67</sup> and *Glynn v Margetson*<sup>68</sup> which favour the adoption of the *contra proferentem* rule, there is no indication that the above approach to construction was ever considered by the judges in those cases. The courts were quick to cut down a widely construed liberty to deviate clause without paying heed to the reasonable man test endorsed by a long line of cases.<sup>69</sup> The cases endorsing the reasonable man test were decided long after *Leduc v Ward* and *Glynn v Margetson* and this may account for why the outcome of the decisions are at variance with modern contractual canons of construction. Consequently, it could be argued that the outcome of *Leduc v Ward* and *Glynn v Margetson* on this point might have been different if the judges deciding these cases had the benefit of *Investment Compensation Scheme Ltd v Westbromich Building Society*.<sup>70</sup>

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<sup>64</sup> Some authors still advocate for the continued preservation of the *Contra Proferentem* rule. See for instance, Edwin Peel, Whither Contra Proferentem? In Andrew Burrows and Edwin Peel (eds), *Contract Terms* (OUP, 2007) 53.

<sup>65</sup> *Investment Compensation Scheme Ltd v Westbromich Building Society* [1998] 1 WLR 896, 912-913.

<sup>66</sup> *Mannai Investment Co. v Eagle Star Life Assurance Co. Ltd* [1997] AC 749, 768. Lord Steyn.

<sup>67</sup> (1888) 20 QBD 475.

<sup>68</sup> [1893] AC 351.

<sup>69</sup> *Investment Compensation Scheme Ltd v Westbromich Building Society* [1998] 1 WLR 896, 912-913; *Mannai Investment Co. Ltd v Igo Starlife Assurance Co Ltd* [1997] AC 749, 768, 771; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 [21]-[26].

<sup>70</sup> [1998] 1 WLR 896, 912-913.

It is argued that in present circumstances, the proper approach would have been to give effect to a widely construed liberty to deviate clause and only cut it down if it negates the main object of the contract. This will certainly accord with contractual canons of construction endorsed in a long line of cases.<sup>71</sup> More to the point, the current practice is to adopt the *contra proferentem* rule as a weapon of last resort,<sup>72</sup> only to be wielded where the language of the clause in question is one-sided and genuinely ambiguous, capable of bearing two distinct meanings.<sup>73</sup> However, in circumstances where a liberty to deviate clause is expressed in clear terms and does not destroy the main object of the contract, it should be given full effect irrespective of whether it was drafted widely. The right of commercial parties to continually allocate between them risks of something going wrong in their contractual relationship in any manner they deem fit<sup>74</sup> ought to be preserved. The primary task of the court should be to construe the clause in a manner which corresponds with its business purpose.<sup>75</sup> An adoption of the *contra proferentem* rule in the present context does not achieve this objective and therefore ought to be jettisoned.

From *Connolly Shaw Ltd v A/S det Norfjeldske D/S*,<sup>76</sup> it is deductible that the only grounds for cutting down a widely drafted liberty to deviate clause is if it amounts to a frustration of the contract as for instance where the main object of the contract was the carriage of perishable goods.<sup>77</sup> In such circumstances, it would be unreasonable to give effect to a widely drafted deviation clause because that could affect adversely the main object of the instant contract. Such an outcome is reminiscent of the doctrine of fundamental breach<sup>78</sup> which posits that upon occurrence of a serious breach, the party in breach is prevented from relying on the exception clauses in a bid to escape liability.<sup>79</sup>

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<sup>71</sup> *Investment Compensation Scheme Ltd v Westbromich Building Society* [1998] 1 WLR 896, 912-913; *Mannai Investment Co. Ltd v Igo Starlife Assurance Co Ltd* [1997] AC 749, 768,771; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 [21]-[26];

<sup>72</sup> *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp (No.1)* [2000] CLC 878 [27].

<sup>73</sup> *Transocean Drilling UK Ltd v Providence Resources PLC (The GSF Artic III)* [2016] EWCA Civ. 372; [2016] 2 Lloyd's Rep. 51[20]. *K/S Victoria Street v House of Fraser (Stores Management) Ltd and Others* [2012] Ch. 497 [68].

<sup>74</sup> *Nobahar-Cookson & Anor v Hut Group Ltd* [2016] EWCA Civ. 128; [2016] 1 C.L.C. 573 [19].

<sup>75</sup> *Ibid* [27].

<sup>76</sup> [1934]49 Lloyd's Rep. 183.

<sup>77</sup> As was the case in *Connolly Shaw Ltd v A/S det Norfjeldske D/S* [1934]49 Lloyd's Rep. 183.

<sup>78</sup> The question of fundamental breach would be addressed in subsequent sections.

<sup>79</sup> *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co. Ltd* [1970] 1 Q.B. 447, 467.

Similarly in the present context, a shipowner is barred from relying on a liberty to deviate clause if the occurrence of deviation operates to frustrate the contract. However, since the doctrine of fundamental breach has been laid to rest,<sup>80</sup> the continued relevance of the *Connolly Shaw Ltd v A/S det Norfjeldske D/S* decision becomes questionable. However, Lord Diplock did concede in *Photo Production Ltd v Securicor Ltd*<sup>81</sup> that: parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract.<sup>82</sup> Consequently, applying the above assertion could mean that the continued relevance of *Connolly Shaw Ltd v A/S det Norfjeldske D/S* is preserved and the restrictive approach adopted by the courts in *Leduc v Ward* and *Glynn v Margetson* be jettisoned: a properly drafted liberty to deviate clause should be given full effect even though widely drafted and should only be cut down if it negates the main object of the contract, thereby amounting to a frustration of the contract.

## 6.5 Effect of an Unjustified Deviation?

The legal effect of an unjustified deviation abounds with controversy. It remains uncertain whether the occurrence of unjustifiable deviation operates automatically to prevent the shipowner from relying on exception clauses?<sup>83</sup> Historically, the approach adopted by the courts regarding this question has been diverse and convoluted. A starting point is *Joseph Thorley v Orchis SS Co*<sup>84</sup> where cargo was shipped under a bill of lading with a proviso that the shipowners are exempted from liability for loss arising from negligence of stevedores employed during the discharge of cargo. The ship deviated from the contractual voyage and in the process of discharging the vessel at the agreed port of destination, the cargo was damaged through the negligence of the stevedores employed by the shipowners. Cargo owners sought to recover the amount of the loss and the court held that the defendants by reason of the deviation, failed to perform the bill of lading contract, were not entitled to set up by way of defence the

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<sup>80</sup> See *Photo Production Ltd v Securicor Ltd* [1980] A.C. 827.

<sup>81</sup> Ibid 827.

<sup>82</sup> Ibid 850.

<sup>83</sup> Ibid para 6.51.

<sup>84</sup> [1907] 1 KB 660. This decision was premised on *Balian v. Joly, Victoria & Co* (1890) 6 Times L. R. 345, an earlier decision whose foundations are still suspect. See also Martin Dockray, 'Deviation: a Doctrine all at Sea?' [2000] LMCLQ 76, 87.

exception clause contained therein. The court per Collins MR endorsed the view that the undertaking not to deviate has the effect of a condition and if that condition is not complied with, the contract is displaced and such a breach goes to the root of the contract.<sup>85</sup> Consequently, the occurrence of a deviation automatically displaces the contract such that the shipowner is deprived of relying on the contractual provisions in the event of a claim under the contract.

Interestingly, the occurrence of deviation in *Joseph Thorley v Orchis SS Co*<sup>86</sup> had no bearing on the damage to cargo.<sup>87</sup> The damage to cargo was attributable to the negligence of the stevedores during discharge of the vessel. Still yet, the shipowners were proscribed from relying on exception clauses in the bill of lading which exempted the shipowner from liability in the event that there was loss to cargo occasioned by the negligence of stevedores in the discharge of the vessel. In the court's view, the occurrence of a deviation was sufficient to deprive the shipowner from exceptions in the bill of lading irrespective of whether or not the deviation had a causative effect on the loss to cargo. A logical argument would be that the deprivation of reliance on bill of lading exception clauses by the shipowner should only arise in cases where the primary loss to cargo was the deviation of the vessel and the loss occurred during the wrongful act of deviation.<sup>88</sup> This argument is consistent with the outcome of *Davis v Garrett*<sup>89</sup> where a cargo of lime was loaded on the defendant's barge and the vessel deviated unnecessarily from the usual course. During the deviation, a storm wetted the cargo of lime and the barge caught fire which led to the entire loss of cargo. However, the logic expressed above was rejected in *Joseph Thorley v Orchis SS Co*<sup>90</sup> and instead, an analogy more closely connected to the operation of marine insurance was proffered as justification for the approach in *Joseph Thorley v Orchis SS Co*.<sup>91</sup> Cozens-Hardy LJ<sup>92</sup> relied on certain dicta in *Lavabre v Wilson*<sup>93</sup> to advance this view: 'The true objection to a

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<sup>85</sup> *Joseph Thorley v Orchis SS Co* [1907] 1 KB 660, 666-667.

<sup>86</sup> *Ibid* 660.

<sup>87</sup> Damage in this case was attributed to the negligence of the stevedores during the discharge of cargo.

<sup>88</sup> Argument of T.E. Scrutton KC in *Joseph Thorley v Orchis SS Co* [1907] 1 KB 243, 244 [Comm].

<sup>89</sup> (1830) 6 Bingham 716; 130 ER 1456.

<sup>90</sup> [1907] 1 KB 660.

<sup>91</sup> *Ibid* 660.

<sup>92</sup> *Ibid* 669. See also *Joseph Thorley v Orchis SS Co* [1907] 1 KB 660, 668.

<sup>93</sup> (1779) 1 Douglas 284; 99 ER 185, 189.

deviation...is that the party contracting has voluntarily substituted another voyage for that which has been insured.’ The court in *Joseph Thorley v Orchis SS Co*<sup>94</sup> had succeeded in transplanting the effect of a deviation on insurance, which is displacing the contract from the moment of breach irrespective of the increase in the risk<sup>95</sup> to a carriage of goods by sea context. The logic of the insurance rationale can be expressed thus: ‘if I insure you on a direct voyage from A to B and you then go from A to B via C, that is a different voyage from the one I insured and I am entitled to deny cover on the premise that it was not this that you promised to do.’<sup>96</sup>

The decision in *Joseph Thorley v Orchis*<sup>97</sup> was rather strange in outcome. Although, there might be some ‘superficial logic’<sup>98</sup> in treating the effect of a deviation in both an insurance and carriage of goods context along similar lines,<sup>99</sup> such an approach may be misguided and unwarranted considering that both contexts are different. Consequently, the application of the same rule to both contexts may be counterproductive and turn up inconsistent results. Under an insurance contract, it is quite possible for parties to release themselves from performance of their various contractual obligations after the occurrence of a deviation through the return of premium taken.<sup>100</sup> However, with the carriage contracts this is almost impossible as at the time the deviation is discovered, performance of the contract could be said to have occurred through the delivery of the goods at the discharge port.<sup>101</sup> The cargo owner cannot now give back the benefit he has received in taking delivery of the goods.<sup>102</sup> Therefore, the *Joseph Thorley v Orchis SS Co*<sup>103</sup> already stands on faulty logic and should now be jettisoned and rejected.<sup>104</sup> Moreover, at the time *Joseph Thorley v Orchis SS Co*.<sup>105</sup> was decided, there was little or

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<sup>94</sup> [1907] 1 KB 660.

<sup>95</sup> Marine Insurance Act 1906, S46 for the effect of deviation. (Displaces the contract from the moment of the deviation).

<sup>96</sup> Simon Baughen, Does Deviation still Matter? [1991] LMCLQ 70, 72.

<sup>97</sup> [1907] 1 KB 660.

<sup>98</sup> Simon Baughen (n96) 72.

<sup>99</sup> An outcome achieved in *Joseph Thorley v Orchis SS Co* [1907] 1 KB 660, 669. per Cozens-Hardy LJ

<sup>100</sup> Simon Baughen (n96) 72. See also Marine Insurance Act 1906 s. 83.

<sup>101</sup> Ibid 72.

<sup>102</sup> Ibid 72.

<sup>103</sup> [1907] 1 KB 660.

<sup>104</sup> Carver on Bills of lading (n7) para 9-053.

<sup>105</sup> Ibid 660.

no support either in statute or case law to warrant the approach adopted by the court.<sup>106</sup>

The orthodox view at the time, was always to treat the shipowner as liable for loss or damage to cargo which occurred during the deviation.<sup>107</sup> Liability for losses after the occurrence of the deviation at the time remained uncertain and without authority.<sup>108</sup> In addition, such an outcome is not easily reconcilable with earlier decisions such as *Freeman v Taylor*<sup>109</sup> where the court was of the view that the occurrence of a deviation did not vest in the cargo owner the right to put the contract to an end except 'it put an end to the whole object the freighter had in mind at the time of chartering the ship, in that case the contract might be at an end.'<sup>110</sup> In view of this, *Joseph Thorley v Orchis SS Co* stands isolated and 'inconsistent with a great deal of established law.'<sup>111</sup> The confusion created by the *Thorley v Orchis*<sup>112</sup> case were long lasting and in the long run carved a path for the development of the doctrine of deviation, such that the occurrence of a deviation operates to prevent a shipowner from relying on contractual provisions irrespective of whether the damage to cargo occurred before<sup>113</sup> or after the deviation or whether or not there was a causal connection between the cargo damage and the deviation.<sup>114</sup>

From the discussion thus far, it is discernible that a resolution of the effects of a deviation through the courts has had a chequered past which has led to the treatment of every deviation as serious enough to displace the contract of carriage irrespective of whether the occurrence of loss is attributable to the deviation. A corollary from the above was that, the shipowner made to weather the drastic consequences that attached to the occurrence of a deviation no matter how slight. The consequences that attached

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<sup>106</sup> Although *Balian v Joly, Victoria & Co* (1890) 6 Times L. R. 345 was already decided, it does not provide sufficient justification for such an outcome.

<sup>107</sup> Martin Dockray (n12) 89.

<sup>108</sup> *Scaramanga v Stamp* (1880) 5 CPD 295, 299.

<sup>109</sup> (1831) 8 Bing. 124; *MacAndrew v Chapple* (1866) LR 1 CP 643.

<sup>110</sup> *Freeman v Taylor* (1831) 8 Bing. 124, 132-133.

<sup>111</sup> Martin Dockray (n12) 90.

<sup>112</sup> [1907] 1 KB 660.

<sup>113</sup> For instance, *International Guano v Robert MacAndrew & Co.* [1909] 2 KB 360 Cf. *James Morrison v Shaw, Savill* [1916] 2 KB 783.

<sup>114</sup> Simon Baughen (n96) 74.

to a deviation were so drastic that in peculiar circumstances, it could be said to also strike down positive obligations. In *US Shipping Board v Bunge y Born*<sup>115</sup> it was held that the occurrence of a deviation operated to wipe-out the shipowners contractual right to demurrage which does not affect the right of the charterers the duty to discharge within reasonable time.<sup>116</sup> This meant that even though, there was no causal nexus between the occurrence of a deviation and the loss occasioned to cargo, the right of the shipowner to the exceptions in the bill of lading as well as positive obligations are impinged.

In view of the problems highlighted above regarding the legal effect of a deviation, the need for a general review of the law became imperative. An opportunity for that review came in the seminal case of *Tate & Lyle Ltd v Hain Steamship Co. Ltd.*<sup>117</sup> In a sales transaction, the claimants had bought a cargo of sugar on CIF terms. Under the charterparty, the sellers of the cargo chartered the vessel belonging to the defendants for a voyage to Cuba and there load at one or two Cuban ports and a port in San Domingo. The vessel was at the time in West Indian waters, and was instructed to sail to Casilda by the shipowner's agents in accordance with the seller's request. Following seller's further request, a night letter telegram was sent by the ship's agents ordering the captain to sail to Santiago and then to San Pedro (San Domingo). This message was never delivered due to an alleged default of the postal authorities in Cuba. The vessel did proceed to Santiago from Casilda in accordance with the instructions of the seller but failed to call at San Pedro as per the new instructions. The Vessel was then recalled to San Pedro after discovery of the mistake whereupon further cargo was loaded and having loaded the vessel became grounded on her way which led to her sustaining very bad damage. General average expenses was incurred by the shipowners. Most of the cargo was re-shipped into another vessel. Interestingly, there was no causal connection between the stranding of the vessel and the change of voyage.

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<sup>115</sup> [1924] 18 Lloyd's Rep 422.

<sup>116</sup> Ibid 423. Cf. *Thorley v Orchis SS Co* [1907] 1 KB 660, 666,667, 669 where it was doubtful whether the occurrence of a deviation operated to wipe-out the shipowners right to freight.

<sup>117</sup> [1936] 55 Lloyd's Law Rep. 159.



In determining whether the occurrence of a deviation displaced the contract, Roche J held that the occurrence of a deviation displaces the contract such that the exceptions clauses ceases to have effect with the outcome that the carrier is carrying on other terms under which he is responsible among other things for stranding.<sup>118</sup> The House of Lords (now Supreme Court) rejected this view and held that the occurrence of deviation reflects a serious breach of contract by the shipowner, such that, however slight the deviation is, the other party is entitled to treat it as going to the root of contract and to declare himself as no longer bound by the any of the contract terms.<sup>119</sup> Wright LJ was more succinct in his treatment of a deviation: the occurrence of an unjustifiable deviation was a fundamental breach of a contract of affreightment.<sup>120</sup>

The *Tate & Lyle* decision provided a new technical explanation for the effect of deviation on a contract of carriage of goods by sea.<sup>121</sup> It appeared to discard the previous view that the occurrence of a deviation automatically displaced the contract.<sup>122</sup> Instead, by opting to bring the contract to an end when faced with the occurrence of a deviation, exclusion clauses are rendered ineffective while the innocent party is not bound to honour his promise to pay for freight on delivery.<sup>123</sup> Conversely, in treating the contract as subsisting, the party in breach is entitled to rely on exclusion clauses while the innocent party is bound to honour the terms of the contract<sup>124</sup> including his promise to pay freight. Although, the outcome in the *Tate & Lyle Ltd* case could be justified on the premise that a deviation changes the voyage so radically that a contract entered on the basis of the original adventure is inapplicable to the new adventure,<sup>125</sup> it is argued to the contrary that, the decision is not easily reconcilable with modern commercial realities. For instance, with technological advancement, it is not impossible for a vessel to make a minor deviation, return to the agreed route and then deliver the cargo timely without incurring loss or damage to cargo. Given the above circumstance, it would

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<sup>118</sup> *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1933] 47 Lloyd's Rep. 297, 300 [2<sup>nd</sup> Col] [Comm.] aff'd on appeal in [1934] 49 Lloyd's Rep. 123, 130 [1<sup>st</sup> Col]. [CA] Scrutton LJ.

<sup>119</sup> *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 55 Lloyd's Law Rep. 159, 173, 174 [HL].

<sup>120</sup> *Ibid* 177 [2<sup>nd</sup> Col].

<sup>121</sup> Martin Dockray (n12) 97.

<sup>122</sup> View advanced in *Joseph Thorley v Orchis SS Co Ltd* [1907] 1 KB 660.

<sup>123</sup> *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 55 Lloyd's Law Rep. 159, 180.

<sup>124</sup> *Ibid* 178 [1<sup>st</sup> Col] [HL]. Per Lord Wright.

<sup>125</sup> *Ibid* 178 [1<sup>st</sup> Col].

appear an application of the *Tate & Lyle Ltd* decision, vests on an innocent party the right to bring the contract to an end, avoid payment of freight<sup>126</sup> or demurrage<sup>127</sup> at the port of discharge which become due under the contract, simply because there has been a deviation.<sup>128</sup> The decision also gives rise to another problem: in the event that a vessel deviates, and the charterer opts to treat the contract as subsisting after which the vessel and cargo are lost, a shipowner could argue that he could rely on exclusion clauses to avoid liability even though the loss actually occurs in circumstances beyond the contemplation of parties to the contract.<sup>129</sup>

Admittedly, the occurrence of a deviation has severe consequences for the cargo owner's insurance policy. However, this severity is mitigated by the increased use of held covered clauses<sup>130</sup> and Shipowner's Liability Insurance (SOL).<sup>131</sup> Therefore, any argument for the continued utility of the *Tate & Lyle Ltd v Hain Steamship Co. Ltd* decision is unmeritorious.

Moreover, an argument could be had that, the decision is inconsistent with general contract law principles<sup>132</sup> even though Lord Atkin in the aforementioned case appeared to rest his reasoning on the ordinary law of contract.<sup>133</sup> However, with the decision in *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd*,<sup>134</sup> it is doubtful whether the ordinary rules of contract would support such an outcome reached in *Tate & Lyle Ltd v Hain Steamship Co. Ltd*, since, in that case the court recognised certain contractual breaches whose remedies depends entirely on the nature of the breach and

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<sup>126</sup> It appears payment of freight on a *quantum meruit* basis may be on uncertain ground. See Lord Goff & Gareth Jones, *The Law of Restitution* (7<sup>th</sup> Edn, Sweet & Maxwell 2007) para 2053, 2054.

<sup>127</sup> *United States Shipping Board v Bunge Y Born* [1924] 18 Lloyd's Rep 422 [Comm]

<sup>128</sup> Anthony Rogers & Others, *Cases and Materials on the Carriage of Goods by Sea* (4<sup>th</sup> Edn, Routledge 2016) 94.

<sup>129</sup> *Ibid* 94.

<sup>130</sup> *The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep. 424. Held covered clauses protects the cargo by providing cargo insurance irrespective of the occurrence of any deviation in return for additional payment. See also Sheldon A Vogel, *The Hull Policy: The Perils and Held Covered Clauses* (1967) 41 Tulane Law Review 259, 276. See also dicta of Lord Atkin in *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 55 Lloyd's Rep. 159, 173 [2<sup>nd</sup> Col].

<sup>131</sup> The American Club, <<http://www.american-club.com/page/shipowners-liability-insurance>> accessed 25/06/18. Shipowners can take up additional insurance which comes in handy in the event of a deviation.

<sup>132</sup> Anthony Rogers & Others (n130) 95.

<sup>133</sup> *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 55 Lloyd's Law Rep. 159, 174 [1<sup>st</sup> Col] See for instance, contract law cases dealing with fundamental breach: See *Mallet v Great Eastern Railway Co.* [1899] 1 QB 309; *Lilley v Doubleday* [1881] 7 QBD 510.

<sup>134</sup> [1962] 2 QB 26.

consequences.<sup>135</sup> It could be argued that the doctrine of deviation according to the general rules of contract falls in this category of contract. The reason for this is not farfetched: granted the occurrence of a deviation may result in delay, lead to loss of cargo and insurance cover,<sup>136</sup> however, the occurrence of a minor deviation may cause no distress to the cargo owner. A vessel might depart from the route but still arrive on time at the right time, without incident to the cargo and the cargo insurance still in force with no additional premium payable.<sup>137</sup> On occasions, when no distress is caused the cargo owner, the operation of a rule of law denying the shipowner reliance on contractual terms is unjust and not attuned to commercial reason.

By way of analogy, the harsh consequences that attach to a deviation are not attached to a seaworthiness obligation which may result in more serious damage to the cargo owner. The rationale for this is that the seaworthiness obligation can be 'breached by the slightest failure to be fitted in every way for service.'<sup>138</sup> Consequently, since a breach of the obligation not to deviate may or may not have serious consequences to the detriment of the charterer and may also be breached with the slightest departure from the voyage route, it is argued that there is no justification for attaching such severe consequences to a breach of the obligation. However, if the parties are desirous of providing an election to terminate the contract in the event of a deviation, they could do so by inserting a contractual provision akin to a cancellation clause as it were, without any reference to the consequences of a breach of contract.<sup>139</sup> Such an approach coincides with parties right to state clearly in express terms whether a breach of a particular contractual stipulation goes to the root of the contract such that, it is glaring that the parties contemplate that any breach of it entitles the injured party at once to treat the contract as at an end.<sup>140</sup> However, if the parties do not adopt such a provision in their contract that any deviation shall give the innocent party the right to be

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<sup>135</sup> Ibid 64.

<sup>136</sup> Anthony Rogers & Others (n130) 95. With the operation of held cover clauses, it is doubtful whether the occurrence of a deviation would have any drastic effect on cargo insurance.

<sup>137</sup> Ibid 95.

<sup>138</sup> *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 62.

<sup>139</sup> Simon Baughen (n96) 84.

<sup>140</sup> n227 63.

discharged from future performance of the contract, then it is of no concern to the courts to make good their omission.<sup>141</sup>

However, in spite of the perceived difficulties with the *Tate & Lyle Ltd v Hain Steamship Co. Ltd* decision, it was inevitable that attempts would be made to apply *the Hain* approach to other types of contract and to suggest that an exemption clause in any type of contract could be rendered ineffective by the occurrence of a serious breach.<sup>142</sup> Viewed this way, it could be said that the doctrine of fundamental breach was a progeny of *Tate & Lyle Ltd v Hain Steamship Co. Ltd* such that that when there is a 'breach of a fundamental term in the contract giving the other party a right to rescind it, unless and until with full knowledge of all the facts, he elects to affirm the contract and not rescind it, the special terms in the contract go and cannot be relied upon by the defaulting party.'<sup>143</sup> The adoption of this doctrine may have been a response to the growing injustice suffered by consumer individuals in dealing with traders on standard form written terms.<sup>144</sup> In the face of well drafted and comprehensive clauses, the existing common law methods of control proved inadequate.<sup>145</sup> Within the doctrine of deviation the courts saw an opportunity to address this problem created by exemption clauses by the adoption of a judicial weapon in the form of the fundamental breach doctrine which became the norm of general application in a law of contract context.<sup>146</sup> However, while this rationale accords with common sense, it is argued that it was insufficient to justify the continued adoption of the fundamental breach doctrine. The fear that exemption clauses would be construed widely is mitigated by the strict interpretation of exemption clauses as they are strictly construed against the party seeking to rely on them and the application of the contra-proferentum rule.<sup>147</sup>

Nevertheless, the doctrine of fundamental breach and its application to the occurrence of a deviation held sway and was widely accepted in English courts as a rule of thumb

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<sup>141</sup> Simon Baughen (n96) 84.

<sup>142</sup> Martin Dockray (n12) 97.

<sup>143</sup> *Alexander v Railway Executive* [1951] 2 KB 882, 889, 890. Per Devlin J

<sup>144</sup> C.P. Mills (n19) 589.

<sup>145</sup> *Ibid* 589.

<sup>146</sup> *Ibid* 589.

<sup>147</sup> *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 427. See also *Leduc v Ward* (1888) 20 QBD 475; *Glynn v Margetson & Co.* [1893] AC 351, 355, 357.

that determined whether a party can rely on an exclusion clause as contained in the contract.<sup>148</sup> Interestingly, the application of the doctrine relies on displacing the contract from the date of repudiation<sup>149</sup> which in this case could mean moment of deviation. However, such an approach is at best out of sync with well-established contractual principles that a repudiation does not operate to automatically discharge the contract but gives an election to the innocent party to either terminate the contract or treat it as subsisting.<sup>150</sup> Such an application as illustrated in *Tate & Lyle Ltd v Hain Steamship Co. Ltd*<sup>151</sup> does not sit comfortably with the present context since, in the event of a breach, a bill of lading holder would be less desirous to bring the contract to an end, once goods are enroute. Upon practical realities, he would want the cargo to be delivered at the discharge port specified in the bill of lading contract rather than offloaded at the next convenient port, as a mere volunteer would be entitled to do.<sup>152</sup>

A peculiar problem with the doctrine involved a question of interpretation as it remained unclear whether the doctrine should be left to operate as a rule of substantive law or to be made subject to rules of construction. The danger with adopting the former approach is that the doctrine applies irrespective of what the intention of the parties were.<sup>153</sup> This ultimately meant that in a deviation context, every deviation would be serious enough to displace the contract and prevent the shipowner from benefiting from exclusion clauses. However, adopting the latter approach would of course mean that whether the occurrence of a deviation is serious enough to displace the contract would be dependent on the peculiar circumstance of each case.

In spite of all these problems inherent in the fundamental breach doctrine, it was not until 1967 that the House of Lords (now Supreme Court) made the first attempt to strike down the harsh consequences that stem from an application of the doctrine. In *Suisse Atlantique Societe d'Armement SA v NY Rotterdamsche Kolen Centrale*,<sup>154</sup> the shipowners entered into a carriage contract with the charterers for consecutive voyages

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<sup>148</sup> See for example *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866, 868-869. Per Lord Denning.

<sup>149</sup> *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 55 Lloyd's Law Rep. 159, 182 [1<sup>st</sup> Col].

<sup>150</sup> *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] QB 26. See also *Heyman v Darwins Ltd* [1942] AC 356; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

<sup>151</sup> [1936] 55 Lloyd's Law Rep. 159.

<sup>152</sup> Simon Baughen (n96) 84.

<sup>153</sup> Mills (n19) 591.

<sup>154</sup> [1967] 1 AC 361, 423 [HL].

from US ports to Northern European Continental ports for a two year period wherein lay days were exceeded during loading and discharging operations. The shipowners dissatisfied with the demurrage rate sued for an additional sum as damages alleging that if loading and discharging had been completed within laytime, six or nine additional voyages would have been possible.

The main question before the courts was whether the claimants as shipowners were entitled to recover any damages (after demurrage payments had been received) suffered by them due to a failure to load and discharge the vessel within the agreed laydays since the charterparty was rendered less profitable to the claimants by consequent loss of voyages or voyage time. Both the commercial court and Court of Appeal resolved this issue in favour of the defendants and the case of the claimants failed. On appeal to the House of Lords,<sup>155</sup> the claimant sought to inquire whether if the delays attributed to the conduct of the charterers entitled the shipowners to treat the charter as repudiated, render the demurrage provisions as inapplicable and also entitle the owners to make full recovery of the loss they suffered or whether it sufficed if the owners were entitled to demurrage only. It was the shipowner's contention that delays in the loading and discharge of the vessel amounted to a fundamental breach of contract and that accordingly the demurrage clause was not applicable as it was an exceptions clause.

On the effect of a fundamental breach, the court was of the view that there was no rule that a fundamental breach of a contract nullifies an exceptions clause. Rather, the matter was one of construction whether the clause was intended to apply to such a breach as occurred. If a breach by one party entitles the other to repudiate the contract, but he affirms it, the exceptions clause continues in force unless on its construction it was intended not to operate in those circumstances.<sup>156</sup> Interestingly this point was raised for the first time on appeal and the House of Lords were unanimous in their rejection of the doctrine of fundamental breach but did so in varying language.<sup>157</sup> Whatever the case, they preferred any disentitlement to rely on exclusion clauses in the event of a fundamental breach to be resolved by a construction of the contract rather

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<sup>155</sup> A question raised for the first time on appeal to the House of Lords.

<sup>156</sup> *Suisse Atlantique Societe d'Armement SA v NY Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 423.

<sup>157</sup> *Ibid* 392, 398, 399.

than any substantive rule giving effect to such a drastic outcome. Of course the approach adopted is to be welcomed and is consistent with the view of Pearson LJ in *U.G.S. Finance Ltd. v. National Mortgage Bank of Greece and National Bank of Greece, S.A*<sup>158</sup> Pearson LJ observed:<sup>159</sup>

As to the question of fundamental breach, I think there is *a rule of construction* that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary, it is a rule of construction based on the presumed intention of the contracting parties.

In the years leading up to the *Suisse Atlantique* case and even beyond, the doctrine of fundamental breach gained traction as a rule of substantive law.<sup>160</sup> However, adopting such an approach left question marks regarding how far an application of the doctrine would go<sup>161</sup> and provides no satisfactory solution to the occurrence of a deviation.<sup>162</sup> Arguably, it could be said that the fundamental breach doctrine as a rule of substantive law is guilty of faulty logic. As Malcolm Clarke argues, if the party in breach is barred from relying on exception clauses since the contract has been destroyed by the occurrence of the breach, then the innocent party should equally be prevented from relying on the broken promise as a tool to obtain damages for breach particularly as the contract has in any event been destroyed.<sup>163</sup> If the contract has been destroyed by the breach, it remains questionable on what basis the innocent party seeks to rely on his broken promise since the contract is no more. It would be unjust to allow the innocent party to wield his sword (broken promise) as it were and then prevent the party in breach from reaching out for his shield (exclusion clauses) in defence because the contract is no more.

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<sup>158</sup> [1964] 1 Lloyd's Rep. 446.

<sup>159</sup> Ibid 453.

<sup>160</sup> Lord Denning MR had always championed the doctrine of fundamental breach as a rule of substantive law. See *Photo Productions Ltd. v. Securicor Transport Ltd* [1978] 1 W.L.R. 856 [CA]; *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936, 940; *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co. Ltd* [1970] 1 QB 447; *Yeoman Credit v Apps* [1962] 2 QB 508.

<sup>161</sup> *Suisse Atlantique Societe d'Armement SA v NY Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406.

<sup>162</sup> Ibid 406.

<sup>163</sup> Malcolm Clarke, 'Fundamental Breach of Charterparty' [1978] LMCLQ 472, 474.

In spite of the rejection of this doctrine by the House of Lords in the *Suisse Atlantique* case, the doctrine appeared to have survived and continued to be applied as a rule of thumb in determining the consequence of serious breaches<sup>164</sup> rather than treating the matter as a rule of construction. An application of the doctrine led to uncertain results regarding the fate of an exemption clause which may depend on whether an injured party elects to affirm the contract after the occurrence of a fundamental breach; if he affirms, full effect would be given to the intention of the parties; if he does not, the clause will cease to have any effect irrespective of the intention of the parties.<sup>165</sup> Considering the uncertainty surrounding the application of the doctrine of fundamental breach as created by the courts, it was only a matter of time before parliament intervened<sup>166</sup> with the enactment of the Unfair Contract Terms Act (UCTA) 1977 which aimed to provide statutory protection for consumers while exemption clauses in a commercial context would be controlled by common law principles and the constructional ideas espoused in the *Suisse Atlantique* case.<sup>167</sup> Even with the introduction of the Act, the problems created by the application of the fundamental breach doctrine remained, particularly as the act was restricted to apply only to consumer contracts and not extended to commercial contracts.<sup>168</sup>

Since the doctrine was a creature of the courts, it only made sense that any resolution of any problem arising from its application should stem from the courts and not by way of statutory intervention. Consequently, it took the decision of the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*<sup>169</sup> to finally sound the death knell on the fundamental breach doctrine. Wilberforce LJ in that case observed: 'I have no second thoughts as to the main proposition [in *Suisse Atlantique*] that the question whether,

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<sup>164</sup> For example see *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd* [1970] 1 QB 447, 466 [CA]; *Photo Productions Ltd. v. Securicor Transport Ltd* [1978] 1 W.L.R. 856 [CA] (this case was overruled on appeal by the House of Lords [1980] AC 827; *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936, 940.

<sup>165</sup> The Law Commission and the Scottish Law Commission, Exemption Clauses Second Report (Law Com. No.69) before the House of Commons 5/08/1975. Para 42<<https://s3euwest2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/LC.-069-SC.-039-EXEMPTION-CLAUSES-SECOND-REPORT.pdf>> Accessed 09/04/2018.

<sup>166</sup> A solution alluded to by Reid LJ in the *Suisse Atlantique Societe d'Armement SA v NY Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406.

<sup>167</sup> CP Mills (n19) 592.

<sup>168</sup> n165 para 54.

<sup>169</sup> [1980] AC 827. [HL]



and to what extent, an exclusion clause is to be applied to a fundamental breach or a breach of a fundamental term, or indeed to any breach of contract is a matter of construction of the contract.’<sup>170</sup> Lord Wilberforce further made an observation regarding the application of fundamental breach to deviation cases:<sup>171</sup>

...I suggested in the *Suisse Atlantique* that these cases can be regarded as proceeding upon normal principles applicable to the law of contract generally viz., that it is a matter of the parties' intentions whether and to what extent clauses in shipping contracts can be applied after a deviation, i.e., a departure from the contractually agreed voyage or adventure. It may be preferable that they should be considered as a body of authority *sui generis* with special rules derived from historical and commercial reasons.

As mentioned earlier, the *Photo production Securicor* case sounded the death knell for the fundamental breach doctrine. The continued utility of the doctrine was suspect since it remained uncertain regarding the degree of seriousness to be attached to the occurrence of breach for it to meet the threshold of fundamental breach proceeding on a factual analysis. Even if that hurdle is crossed, it remains to be determined the point at which the doctrine would be fundamental in a legal sense.<sup>172</sup> It was also unclear how the date of termination is to be fixed: is it at the time of breach or at the time of the party's election or some other time?<sup>173</sup> The operation of the doctrine introduced more difficulties than solutions. Consequently, it came as no surprise that the doctrine was effectively laid to rest in *Photo Productions v Securicor Ltd.*<sup>174</sup>

Although the *Photo Production v Securicor Ltd* proved to be the final straw for the fundamental breach doctrine, it has often been the subject of debate whether the application of the doctrine still survived in view of the fact that deviation cases which generally endorsed the doctrine were left unaffected by the decision in *Photo Production v Securicor Ltd*. This debate was borne out of Wilberforce LJ's description of deviation cases as 'a body of authority *sui generis* with special rules derived from historical and commercial reasons.'<sup>175</sup> In view of this, an argument could be had that by describing deviation cases as *sui generis*, and the failure of the court to overrule the

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<sup>170</sup> Ibid 842.

<sup>171</sup> Ibid 845.

<sup>172</sup> *Photo Production v Securicor Ltd* [1980] AC 827, 843.

<sup>173</sup> Ibid 843.

<sup>174</sup> [1980] AC 827.

<sup>175</sup> Ibid 845.

deviation cases, the *Tate & Lyle Ltd v Hain Steamship Co. Ltd* decision is still good law. A contrary view would be that, since the doctrine has been considered dead and buried by the decision in the *Photo Production* case, then conversely its application in a deviation context should also suffer the same fate. In view of this debate, the next section critically examines the arguments for both sides in order to reach a determination whether or not the doctrine of fundamental breach survived.

#### **6.5.1 Status of Deviation Post-*Photo Production v Securicor Ltd***

With the treatment of deviation cases as ‘a body of authority sui generis’ by Wilberforce LJ in *Photo Production v Securicor Ltd*, it has been a subject of controversy regarding the status of deviation post-*Photo Production v Securicor Ltd*. Since, the *Tate & Lyle Ltd v Hain Steamship Co. Ltd* decision has not been overruled by the House of Lords, an argument can be had that the decision stands, is still the prevailing law on the subject, especially in a deviation context. In view of this controversy, it is important to review the place of deviation considering the death of the fundamental breach doctrine. Certain deviation cases decided after the *Photo Production* case suggests that the doctrine of fundamental breach did not survive even though the deviation cases are considered sui generis. Lloyd LJ in *The Antares (Nos 1 and 2)*<sup>176</sup> favoured the view that deviation cases should now be assimilated into the ordinary law of contract.<sup>177</sup> Lloyd LJ in a different case *State Trading Corp. of India Ltd v M. Golodetz Ltd*,<sup>178</sup> also endorsed a similar approach but particularly observed, ‘I do not see how the deviation cases and in particular the view of Lord Wright in *Hain v Tate & Lyle* that the effect of a deviation is to deprive the shipowners of their right to rely on the contractual exceptions, can be justified on the ground that deviation cases are in a class of their own.’<sup>179</sup>

However, proponents of the survival of the fundamental breach doctrine would argue that the cases cited above provide no support for the burial of the doctrine in deviation cases considering that the cases were not strictly deviation cases.<sup>180</sup> For instance, *The Antares (Nos 1 & 2)* was a decision concerning a specie of quasi-deviation in the form of

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<sup>176</sup> *Kenya Railways v Antares Co. Pte Ltd (The Antares) (Nos 1 and 2)* [1987] 1 Lloyd’s Rep. 424.

<sup>177</sup> Ibid 430 [1<sup>st</sup> Col].

<sup>178</sup> [1989] 2 Lloyd’s Rep. 277.

<sup>179</sup> Ibid 288 [2<sup>nd</sup> Col].

<sup>180</sup> Sarunas Basijokas (n42) 136.

on-deck carriage while *State Trading Corp. of India Ltd v M. Golodetz Ltd* was a sales of goods case. Consequently, the statement that all problems connected with deviation in a geographic sense should now be read as to accommodate the reasoning in *The Antares* and *State Trading Corp. of India Ltd v M. Golodetz Ltd* leaves much to be desired.<sup>181</sup> In addition, *The Antares (Nos 1 and 2)* deals exclusively with a situation which is catered for by an application of the Hague-Visby Rules and is silent regarding whether its application extends to cover carriage contracts to which the Hague-Visby rules has no application.<sup>182</sup> Some would also argue that both *The Antares (Nos 1 and 2)* and *State Trading Corp. of India Ltd v M. Golodetz Ltd* provide guidance for the courts regarding what treatment should be accorded deviation cases at best and nothing more. Consequently, the treatment of deviation cases as *sui generis* still applies.

It may be an attractive proposition to divorce the deviation cases from the ordinary rules of contract, and treat deviation cases as *sui generis* with special rules, however, it is argued to the contrary, that this view although adroitly presented, is unsound and could be counterproductive as it places deviation cases on equal footing with the now overruled decision in *Harbutt's Plasticine v Wayne Tank and Pump Co. Ltd*.<sup>183</sup> In that case, the defendants under a contract designed and installed equipment in the claimant's factory for the storing and dispensing of heavy wax. The contract included an indemnity clause favourable to the claimant such that their liability was limited to the total value of the contract (£ 2,330). On the day the equipment was switched on, it burst into flames which led to the destruction of the whole factory. The plaintiffs were reimbursed under their insurance policy for all but £ 3,000. The trial judge found in favour of the claimant and awarded them substantially the whole sum claimed with interest set at 6% for the three years before the judgment. On appeal, the court held that since there was a fundamental breach, the clause limiting liability ceased to operate. Lord Denning MR<sup>184</sup> along these lines particularly observed:<sup>185</sup>

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<sup>181</sup> Ibid 136.

<sup>182</sup> Ibid 136.

<sup>183</sup> [1970] 1 Q.B. 447.

<sup>184</sup> Lord Denning MR had always championed and the doctrine of fundamental breach. See *Photo Productions Ltd. v. Securicor Transport Ltd* [1978] 1 W.L.R. 856 [CA]; *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936, 940. Although in *Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd* [1959] AC 576, 587 Lord Denning appeared to tow a different line as he preferred to see the matter as one of construction.

<sup>185</sup> *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co. Ltd* [1970] 1 Q.B. 447, 466.

Such then is established as law that when there is “a fundamental breach accepted by the innocent party” that is, when the innocent party has an election to treat the contract as at an end and does so. The position must, I think, be the same when the defendant has been guilty of such a fundamental breach that the contract is automatically at an end without the innocent party having an election. The innocent party is entitled to sue for damages for the breach and the guilty party cannot rely on the exclusion or limitation clause: for the simple reason that he by his own breach has brought the contract to an end; with the result that he cannot rely on the clause to exempt or limit his liability for that breach.

The view advanced above has now been laid to rest by the *Photo Productions Ltd. v. Securicor Transport Ltd.*<sup>186</sup> As a matter of logic, if it is said that the occurrence of a deviation deprives the shipowner of all the exception clauses contained in the contract, it remains unclear where to draw the line. Once all exception clauses go, would the shipowner also be deprived of relying on time limitation clauses and arbitration clauses?<sup>187</sup> It stands to reason that if the insertion of such clauses (limitation and arbitration clauses) is predicated on an agreement between parties to predict how disputes are to be resolved in future, then, it would be illogical if such clauses were to be discarded at exactly the point when the dispute had assumed such epic proportions as to encourage parties to sever their contractual ties.<sup>188</sup> This impeccable logic was endorsed by Macmillan LJ in *Heyman v Darwins*<sup>189</sup> when dealing with the question regarding whether the repudiation of a contract abrogated an arbitration clause.<sup>190</sup> Now if the argument adduced above accords with commercial sense, then it stands to reason that by way of analogy, the same rules do apply to exclusion clauses.

A related argument might be that in quasi-deviation cases, the courts prefer to adopt a constructionist approach as opposed to treating the ineffectiveness of exclusion clauses in the event of a breach as a rule of law.<sup>191</sup> Therefore, there is no reason why the preferred approach of the courts cannot be extended to a deviation context in general. To illustrate, in *The Berkshire*<sup>192</sup> where the carriage contract provided for the carriage of cargo to Massawa, the carriage contract incorporated the provisions of the United

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<sup>186</sup> [1980] AC 827.

<sup>187</sup> Charles Debattista (n54) 28.

<sup>188</sup> Ibid 28.

<sup>189</sup> [1942] AC 356.

<sup>190</sup> Ibid 373.

<sup>191</sup> See *J Evans v Andrea Merzario* [1976] 1 WLR 1078; *The Berkshire* [1974] 1 Lloyd's Rep. 185.

<sup>192</sup> *The Berkshire* [1974] 1 Lloyd's Rep. 185.

States Carriage of Goods by Sea Act, 1936. Clause 1 provided that the carrier shall not be liable for any delay for non-delivery or misdelivery or loss of or damage to the goods occurring while the goods are not in the actual custody of the carrier. The vessel left Houston for Massawa but on the charterers instructions the goods were discharged at Jeddah and transhipped in another vessel not belonging to the shipowners for on-carriage to and delivery at Massawa. On arrival at Massawa the goods were found to be damaged by sea water and the receivers claimed £5119.56 damages for breach of contract. The shipowners denied liability. The court per Brandon J held that on true construction of the liberty clause (Clause 11) it did not give the shipowners the liberty to discharge the goods at Jeddah and forward them by transhipment in another vessel to Massawa from there. By doing so the shipowners were in breach of contract.<sup>193</sup> The court also held that by discharging the goods at Jeddah and transhipping them into another ship not owned or operated by them the shipowners made a fundamental departure from the method of performing the contract contemplated by the parties at the time it was made, and the shipowners were therefore prevented from relying on the exception in cl. 1 of the bill of lading.<sup>194</sup>

Interestingly in the above context, the court favoured an approach of construction in construing the scope of the particular clause at issue. The court did not proceed on the tacit assumption that the contract had been repudiated just by the mere occurrence of breach. Certainly, if the court had opted to apply the approach endorsed in *Tate & Lyle Ltd v Hain Steamship Co. Ltd*,<sup>195</sup> the receivers would have been denied the right to sue for breach of contract.<sup>196</sup> The courts have dealt with quasi-deviations by applying the general law of contract.<sup>197</sup> Surely, if the Judges in the above case saw any merit in adopting the *Tate & Lyle Ltd v Hain Steamship Co. Ltd* approach, it would have played on their minds when reaching a conclusion regarding the effect of a quasi-deviation. After all, historically both types of deviations have always been said to have the same

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<sup>193</sup> Ibid 190 [2<sup>nd</sup> Col]; 191.

<sup>194</sup> Ibid 190 [2<sup>nd</sup> Col].

<sup>195</sup> [1936] 55 Lloyd's Rep. 159.

<sup>196</sup> Simon Baughen (n96) 93.

<sup>197</sup> Ibid 93.

effect.<sup>198</sup> In addition, the occurrence of an unauthorised deck stowage is potentially a far more serious mode of performance outside the 'four walls of contract' than a mere geographical deviation.<sup>199</sup> Consequently, the court's readiness to deal with such breaches under ordinary contractual principles is a cogent reason for applying such principles to geographic deviations as well.<sup>200</sup>

It may well be that the justification for treating deviation cases as having survived the abolition of the fundamental breach doctrine lies in the fact that the original habitat of deviation lies in bailment. In other words, its origins as a doctrine peculiar to bailment means that it is unique in bringing about an automatic non-application of the exception clauses as from the moment the deviation commences, without the need for an election to that effect by the injured party.<sup>201</sup> This may account for Wilberforce LJ's preference to treat deviation cases as *sui generis* with special rules derived from historical and commercial reasons. As Charles Debattista observed, 'to extrapolate from the general law of contract into specific rules as to deviation is to confuse chalk with cheese: the two areas of law have quite separate pedigrees and to analyse one in terms of the other is to crowd rather than enlighten understanding of either.'<sup>202</sup> Consequently, the only way to accommodate the deviation rule in a law of contract context is to treat it as *sui generis*.<sup>203</sup>

However, the above argument provides little or no justification for the continued survival of deviation cases in view of the abolition of the fundamental breach doctrine. At best, the arguments provide historical details behind the development of deviation and nothing more. Moreover, it is self-contradictory to suggest that the doctrine should survive the developments in general law of contract effected by the *Photo Production* case when the premise of the House of Lords decision in *Hain SS Co. Ltd v Tate & Lyle*<sup>204</sup> was to treat the occurrence of a deviation as falling within the ordinary law of contract<sup>205</sup>

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<sup>198</sup> Especially in American jurisdictions where the occurrence of quasi deviation as a specie of deviation is quite prominent.

<sup>199</sup> Simon Baughen (n96) 93.

<sup>200</sup> *Ibid* 93.

<sup>201</sup> Brian Coote, 'the Effect of Discharge by Breach on Exception Clauses' [1970] 28 Cambridge Law Journal 221, Sheldon Vogel (n130) 235.

<sup>202</sup> Charles Debattista (n54) 31.

<sup>203</sup> *Ibid* 31.

<sup>204</sup> [1936] 55 Lloyd's Rep. 159.

<sup>205</sup> *Ibid* 174 [1<sup>st</sup> Col].

and not bailment. It may be that at the time *Hain* fell to be decided, the fundamental breach doctrine was popular and so treating the occurrence of deviation as being covered by the law of contract was a sensible outcome. However, with the abolition of the doctrine via *Photo Production Ltd v Securicor Ltd*, it is too late in the day to suggest a divorce of deviation from the ordinary law of contract since *the Hain Case* treated it as within the realms of contract law. Such an approach would be tantamount to shifting 'the goal posts' metaphorically speaking. In addition, Wilberforce LJ's treatment of deviation in the *Photo Production* case as a 'body of authority sui generis,' should be treated with caution considering his previous analysis of this issue in the *Suisse Atlantique* case. He had previously opined quite emphatically that the operation of general principles of contract was sufficient to address the problems that may arise from the occurrence of a deviation and the creation of a special rule should be dispensed with.<sup>206</sup> Clearly, this view cannot be reconciled with his latter view that deviation cases should now be treated sui generis.

Proponents of the survival of the deviation doctrine would argue that the treatment of deviation cases as a body of authority sui generis is easily justifiable since the origin of deviation cases has always resonated with the need to protect the cargo-owner against loss of his insurance cover, so the shipowner is clothed with the toga of an insurer of cargo, subject only to the exceptions of a common carrier.<sup>207</sup> While this argument is deserving of merit, it has lost all or much of its force with the advent of held covered clauses<sup>208</sup> which are aimed at protecting the cargo by providing cargo insurance irrespective of the occurrence of any deviation in return for additional payment.<sup>209</sup> Shipowners are not left without protection as they can also take up additional insurance known as Shipowner's Liability Insurance (SOL) which comes in handy in the event of a deviation.<sup>210</sup> Consequently, it may not be unreasonable to question the continued relevance of the deviation doctrine.

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<sup>206</sup> *Suisse Atlantique Societe d'Armement SA v NY Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 434, 435.

<sup>207</sup> *The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep. 424.

<sup>208</sup> *Ibid* 424.

<sup>209</sup> Sheldon Vogel (n130) 276. See also dicta of Lord Atkin in *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 55 Lloyd's Rep. 159, 173 [2<sup>nd</sup> Col].

<sup>210</sup> The American Club, <<http://www.american-club.com/page/shipowners-liability-insurance>> accessed 25/06/18

Moreover, the value of the deviation doctrine with such harsh consequences from a practical standpoint may also have been diminished especially because of the adoption of 'liberty to deviate' devices by shipowners. The incorporation of a liberty to deviate device into carriage contracts present shipowners with extensive latitude in determining the scope of their voyages. Although, the use of liberty to deviate clauses vested with a wide ambit may have faced a crackdown by courts through the application of the contra proferentem rule,<sup>211</sup> it is argued that a carefully worded addition of the expression 'any call under this clause shall not be deemed to be outside the contract voyage' may operate to water down the harsh effects of the occurrence of a deviation<sup>212</sup> particularly if the decision in *Connolly Shaw Ltd v A/S det Norfjeldske D/S*<sup>213</sup> is anything to go by. As Charles Debattista again observed, 'by redefining the contract voyage to encompass calls which would otherwise be deviations, surely the carrier will have blunted the secret weapon of the courts.'<sup>214</sup> application of contra proferentem in a bid to protect the cargo owner.

From a commercial standpoint, it may be doubtful whether the historical treatment of deviation as such a serious matter since 18<sup>th</sup> century onwards is even justifiable. Granted, the occurrence of a deviation may lead to drastic results like changing the risks of a voyage considerably or cause loss of insurance cover for the cargo owner or provoke a dispute between insurer and an insured cargo owner about the adequacy of additional premium.<sup>215</sup> It may even lead to delay or damage to cargo,<sup>216</sup> however, it is argued that, all of this does not still justify the harsh consequences normally attached to the occurrence of a deviation. This is because, it is not impossible for a minor deviation to occur which may have no effect at all on the cargo owner such that a vessel may unjustifiably depart from the agreed route but still deliver cargo without a speck of damage, without delay, at the right place and with no adverse effect on the insurance policy.<sup>217</sup> A rule that any deviation makes a contract of affreightment completely

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<sup>211</sup> *Leduc v Ward* [1888] 20 QBD 475; *Glynn v Margetson & Co* [1893] AC 351.

<sup>212</sup> Charles Debattista (n54) 33.

<sup>213</sup> [1934]49 Lloyd's Rep. 183. See also *Frenkel v MacAndrews* [1929] AC 545. [HL]

<sup>214</sup> Charles Debattista (n54) 33.

<sup>215</sup> Martin Dockray (n12) 97.

<sup>216</sup> *Ibid* 97.

<sup>217</sup> *Ibid* 98.



unenforceable in such circumstances is absurdly disproportionate to the legitimate aims of the law.<sup>218</sup>

In addition, the occurrence of deviation is usually no more serious than other gross fault of the carrier, yet no other breach has such a serious consequence. For instance, the Supreme Court in *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd*<sup>219</sup> refused to attach harsh consequences to the occurrence of a breach of the seaworthiness obligation even though the occurrence of such a breach could turn up extreme consequences more severe than that of a deviation. Consequently, it is quite puzzling that a shipowner who tenders an unseaworthy vessel which leads to extreme consequences where crew and cargo are lost still gets the benefit of exclusion clauses<sup>220</sup> but a shipowner who simply deviates is to be denied such benefits. As James Whitehead III observed, 'the penalty for which the shipowner would pay by loss of the benefit of the various contractual and statutory exemption clauses is disproportionate to the gravity of the wrong.'<sup>221</sup> Put differently, the punishment may not fit the offense.

Without a doubt, the deviation doctrine has played a prominent role in the development of English shipping law. This chapter contends that while treating deviation cases as a 'body of authority sui generis' as suggested by Wilberforce LJ in *Photo Production Ltd v Securicor Ltd*<sup>222</sup> may appear attractive, such an approach, however, could lead to uncommercial consequences especially as the doctrine of fundamental breach has been abolished under the general law of contract. Consequently, it would be counter-productive to retain a doctrine that was already considered unhelpful and abandoned in a different but related context. Moreover, the original rationale (its importance for insurance purposes) for attaching harsh consequences to the breach of the doctrine has been diluted by the adoption of held covered clauses and adoption of liberty to deviate clauses. In light of this, it may be better to treat the occurrence of deviation by adopting ordinary contractual principles rather than treating deviation cases as special cases with their own special rules. It is recognised that this is only a desired outcome as it would

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<sup>218</sup> Ibid 98.

<sup>219</sup> *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 37-38.

<sup>220</sup> James F. Whitehead III (n14) 49.

<sup>221</sup> Ibid 49.

<sup>222</sup> [1980] AC 827.

take a definitive ruling of the Supreme Court to finally lay to rest the controversy in this area.

## Chapter 7

### Concluding Remarks

The timely performance of contractual obligations in carriage of goods by sea contracts remains of paramount importance to contractual parties. However, the issue of timeliness in carriage of goods by sea contracts has had an enigmatic past. This stems from the fact that the approaches adopted by the courts in addressing issues of timely performance have been varied, inconsistent and in some cases obsolete. Given that the timely performance of contractual obligations continues to give rise to problems, the treatment of the subject within the context of carriage of goods by sea is timely. This thesis has examined the question of timely performance via three main themes namely, payment of hire in a timely fashion, laytime and delay. As mentioned in the introductory bits of this thesis, a nuanced approach is recommended in tackling the problems associated with timely performance in carriage contracts considering that this area of commercial law remains complex and any problems raised are multifaceted. A one-solution-fits-all approach is definitely not the way to go. The conclusions reached regarding the above after a critical appraisal of the concept of timely performance are discussed below.

One of the concluding points of the thesis is centred on the need for a balance between certainty and flexibility in any assessment of timely performance of contractual obligations. The importance of certainty to commercial transactions is sacrosanct. Contractual parties need to know where they stand in the event of a breach of a time clause like the punctual payment of hire. The law must be capable of guiding the behaviour of parties to the contract. As Lord Mansfield observed in *Vallejo v Wheeler*<sup>1</sup> ‘in all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.’<sup>2</sup> Along similar lines, Lord Hoffman referred to ‘a sound practical intuition that the law of contract is an institution designed to enforce promises with a high degree of predictability.’<sup>3</sup> Therefore, there is much force in the argument that time clauses in the

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<sup>1</sup> (1774) 1 Cowp 143.

<sup>2</sup> Ibid 153.

<sup>3</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 [37].

character of a punctual payment of hire term be treated as a condition of the contract. Such an approach has the advantage of determining the precise moment of breach which initiates the injured party's right to terminate the contract. After all, the law needs to be capable of producing consistent results in its application to a breach of a timely payment of hire term.<sup>4</sup>

While the importance of certainty to commercial transactions is sacrosanct, this thesis has argued, that for obligations having a time element, its importance is diluted by the need for flexibility for parties to the contract. The need for flexibility in commercial contracts is reinforced by the view that a breach of a time clause in the character of a punctual payment of hire term could range from trifling to serious.<sup>5</sup> Consequently, treating such a term as a condition only gives shipowners the right to terminate the charter wantonly in the event of a breach as a means to either escape a bad bargain or terminate on technical grounds especially where the breach is a minor one. Although, Wilberforce LJ in *Bunge v Tradax*<sup>6</sup> was of the view that in time clauses, only one sort of breach is possible which is to be late. However, the nature of a timely payment of hire does not support such an assertion considering that a breach of such a term can range from trivial to serious. In such circumstances, treating a timely payment of hire term as a condition of a contract would work manifest injustice for parties to the contract. Consequently, classifying punctual payment of hire stipulations as an innominate term would promote the interests of justice and fairness by preventing the aggrieved party, in this case the shipowner from terminating on trivial or unmeritorious grounds.<sup>7</sup> Arguably the concept of certainty that a condition construction promotes can still be achieved through the exercise of the contractual right to terminate the contract without the full consequences of repudiation attaching to it.<sup>8</sup> Since the principal function of both conditions and express contractual provisions is to ensure certainty so far as the right to terminate is concerned,<sup>9</sup> it is argued therefore that, the inclusion of express rights of withdrawal clauses in most time charters negates the argument for construing a

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<sup>4</sup> JW Carter, *Carter's Breach of Contract* (Hart Publishing 2012) para 5-15.

<sup>5</sup> See generally the Court of Appeal decision in *Spar Shipping AS v Grand China Logistics* [2016] EWCA Civ. 982; [2016] 2 CLC 441.

<sup>6</sup> [1981] 1 WLR 711, 715.

<sup>7</sup> Chapter 2 of this thesis.

<sup>8</sup> *Spar Shipping Co. Ltd v Grand China Logistics* [2015] 1 CLC 819[161].

<sup>9</sup> Edwin Peel, *Treitel the Law of Contract* (14<sup>th</sup> Edn, Sweet & Maxwell 2015) para 18-071.

punctual payment of hire term as a condition of the contract for the sake of certainty. The express right of withdrawal already spells out the consequence of being late in hire payment: withdrawal of the vessel from the services of the charterer. In addition, if punctual payment of hire is the lifeblood of the owner on which he is entitled to insist, a withdrawal clause which is equivalent to an option to cancel offers sufficient protection to the commercial interest of the owner such that once exercised he is free to employ his vessel elsewhere trusting in the performance of a different charterer to pay hire fully and punctually.<sup>10</sup>

Since this thesis advocates for the treatment of a time for payment of hire clause as an innominate term, the remaining point left to be considered is what level of seriousness is sufficient enough to trigger the right of the shipowner to terminate for serious breach? In view of the conclusion of this thesis, the potential hurdle faced by shipowners would be determining what the cut-off point is in order to sustain a claim when a serious breach has occurred. This thesis has argued that the problem created by such a task is not so acute since in present contexts, all the shipowner has to do is prove the inability of the charterer to make good payment. If the charterer struggles with the charter market or is potentially insolvent or suffers from cash flow problems, the likelihood that the court would find him in repudiatory breach is almost certain. However, if the only indication of an inability to pay is a repeated late payment without more, the chances of success for the shipowner is slim. Therefore, shipowners are encouraged to wait-and-see the consequences of default in payment before deciding accordingly as to whether to terminate or carry on the contract.

Certainty in commercial transactions may be a desirable concept as highlighted in the paragraphs above, however, the law must be capable of distinguishing, 'sometimes narrowly, between different circumstances.'<sup>11</sup> A 'one-size-fits-all' approach would of course yield inequitable results particularly in the context of treating a vessel as having arrived the port when it arrives at a position within the port and is in such a position as

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<sup>10</sup> *Spar Shipping Co Ltd v Grand China Logistics* (n 5) 397.

<sup>11</sup> Lord Mance, Should the Law be certain? The Oxford Shrivall Lecture given in the University Church of St Mary The Virgin, Oxford on 11/10/2011 [17] <[https://www.supremecourt.uk/docs/speech\\_111011.pdf](https://www.supremecourt.uk/docs/speech_111011.pdf)> accessed 25/04/2019.

to be at the immediate and effective disposition of the charterer.<sup>12</sup> An application of this rule in a practical sense would mean that in circumstances where arrival of the vessel at the port is nigh impossible,<sup>13</sup> a vessel would be deemed as having arrived the port if it arrives at the usual waiting place designated for vessels waiting their turn to go into port. However, the significance of the *Johanna Oldendorff*<sup>14</sup> stems from the fact that the location of the usual waiting place described above must be within port limits.<sup>15</sup> Therefore, it then means that vessels which arrive at ports who do not have defined limits as in new ports or due to the port topography the location of the usual waiting place is outside port limits, would be deemed as having not arrived the port. An application of *The Johanna Oldendorff* decision, would mean that a vessel located 2 miles outside port limits, would be deemed as not having arrived the port even though the vessel only narrowly missed out on being anchored on the correct side of the port so as to come within the meaning of within the port.

This thesis has challenged the continued relevance of this prevailing approach under English law particularly because of the manifest injustice it could work for parties to the contract. Considering the fact that the nature, size, limits of ports differ, it is not cast in stone that the usual waiting place for ports would be located inside port limits. In fact, the above considerations make it likely that the usual waiting place could be located outside port limits.<sup>16</sup> It is questionable why the shipowner should be made to suffer loss of substantial demurrage in circumstances outside the control of the shipowner. The potential consequences that attach to a failure of a vessel to arrive at the usual waiting place within port limits are enormous. Such an arrival could bring to question the readiness of the vessel and even the validity of the notice tendered. The approach could also yield extraordinary outcomes. To illustrate, a vessel which arrives at the usual waiting place situated some 5 miles off port limits would be deemed as having not arrived simply because she was not on the other side of the 'fictional line.'<sup>17</sup>

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<sup>12</sup> See generally *The Johanna Oldendorff* [1974] AC 479, 535. [HL]

<sup>13</sup> This could be due to port congestion or berth unavailability.

<sup>14</sup> *The Johanna Oldendorff* [1974] AC 479.

<sup>15</sup> *The Arundel Castle* [2017] 1 CLC 71[14].

<sup>16</sup> For example *The Delian Spirit* [1972] 1 QB 103; *The Maratha Envoy* [1978] AC 1; *Roland-Linie Schiffahrt G.M.B.H v Spillers Ltd* [1957] 1 QB 109.

<sup>17</sup> Ewa Szeinduchert, Notice of Readiness and The Arrived Ship and entering the laytime and demurrage regime – revisiting “The Johanna Oldendorff” (1973) and 45 years later taking a trip round “The Arundel

It may be correct that the need to preserve the allocation of risks of delay between charterers and shipowners as well as the revered place of certainty in English commercial law provide justification for the English law approach. However, it is argued to the contrary that the desire to provide contractual parties with a fair and equitable approach far outweigh any of the above considerations. Although, legal certainty may have left contractual parties in an assured position regarding what actions to take in order to protect their respective positions, however, it must be emphasised that the focus of any law is justice and fairness, and where these are sacrificed on the altar of certainty as exemplified in the present approach under English law, the need to review the law to reflect best practices as adopted in other jurisdictions<sup>18</sup> becomes imperative. As Lord Mansfield observed, ‘the most desirable object of all judicial determinations, especially in mercantile ones...is to do justice.’<sup>19</sup> Therefore, reforming the current approach under English law to vessel arrival at the port is imperative.

This thesis has suggested a more practical and liberal approach to the arrived ship conundrum such that, a vessel is considered as having arrived at the port, if it arrives at the usual waiting place where vessels anchor to wait their turn, irrespective of its location. Such an approach has the advantage of treating a vessel as having arrived the port if it reaches a point as close as practicable to the designated berth and can prove that it was impossible and impracticable to get any nearer. It also treats as less significant the geographical location of the waiting area.<sup>20</sup> A variant of the suggested approach has gained prominence under United States shipping law jurisprudence such that in a number of cases it has been held that a vessel is deemed an arrived ship when it arrives at the usual waiting place irrespective of its geographical location.<sup>21</sup> The rationale given by courts in the United States for this approach is that the vessel at the time of arrival was as close to the loading berth when she dropped anchor<sup>22</sup> and could proceed no further. This approach however, does not vest in shipowners the unfettered

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Castle” (2017) <<https://www.standard-club.com/media/2533661/nor-arundel-castle-2.pdf>> accessed 25/04/2019.

<sup>18</sup> For example, America.

<sup>19</sup> *Alderson v Temple* (1768) 4 Burr 2235, 2239.

<sup>20</sup> Donald Davies, *Commencement of Laytime* (4<sup>th</sup> edn, Informa 2006) para 12. See also John Wilson, *Carriage of Goods by Sea* (7<sup>th</sup> edn, Pearson 2010) 55 for a similar view.

<sup>21</sup> *The Athena* SMS 1229 (1978).

<sup>22</sup> *Ibid*

freedom, according to his whims and caprices to determine when to tender an effective NOR. Anything short of arrival at the usual waiting place will be deemed unsatisfactory.<sup>23</sup>

Linking arrival of the vessel to arrival at the usual waiting place irrespective of the geographic location means that a vessel can be considered in the immediate and effective disposition of the charterer and is the neater approach. Furthermore, justifications for this alternative approach is emboldened by the crucial role played by technological advancement in shipping. Ocean transport has in recent years experienced increase in vessel speeds as well as massive improvements in communication between vessel and port, such that the reasons for adhering to the Reid test as embodied in *The Johanna Oldendorff* decision is of little or no significance. Vessels are now vested with the capacity to reach a berth upon availability at a moment's notice and with utmost speed irrespective of the location of the actual loading place. Consequently, it may be time for English Courts to forsake the Reid test and adopt a more liberal approach to the arrived ship conundrum. This approach would dispense with disputes involving whether a vessel is within the port or not or what the scope of a particular port limit is. The advantage of such an approach is without question as it would save time, cost and avoid unnecessary disputes for parties to the contract. Moreover, such an approach adopts a global view of the shipping landscape whilst also bring fairness and justice to parties to the contract. Although, it has been suggested that leaving matters at the stage of description provided in *The Johanna Oldendorff* is the better course,<sup>24</sup> this thesis has argued to the contrary that, any delay in reforming the law under English law as it currently stands represents a missed opportunity at finally reforming an approach that has proved anachronistic and no longer fit for purpose. This thesis also examined the second requirement necessary for the commencement of laytime: readiness of the vessel.<sup>25</sup> The significance of such an inquest lies in the fact that although a vessel may have arrived at the contractual destination, laytime would not start if the vessel is not considered ready to load. Put differently, vessel readiness is a condition precedent to the commencement of laytime and the giving of NOR. English

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<sup>23</sup> See for instance, *Compania Naviera Puerto Madrin SA Panama v Esso Standard Oil* [1962] AMC 147.

<sup>24</sup> *The Arundel Castle* [2017] 1 CLC 71[20].

<sup>25</sup> Chapter 4 of thesis.



law currently, adopts a strict approach to the interpretation of readiness for purposes of laytime such that before laytime can be said to commence, a vessel must be in every respect ready to load. Any slight deviation from the above, may be the difference between a shipowner earning or losing substantial demurrage. The courts application of these strict rules to factual circumstances have often been inconsistent and has given rise to strange outcomes particularly as the degree of readiness required may vary, depending on the circumstance. For instance, cargo holds may sometimes require thorough cleaning and in other cases minimal effort is required. In an equipment context, no serious implications result from not having the equipment ready at the time of commencement of cargo operations. A vessel can still be in a state of readiness without causing any delays to the commencement of cargo operations. The same arguments could be proffered in other contexts like the grant of free pratique and overstowed cargo.

This thesis has advocated for a nuanced approach to the concept of readiness in a laytime context such that a vessel is considered to have fulfilled the requirement of readiness, when the vessel is in a state of 'practical and substantial readiness.' The suggested approach permits the running of laytime from the moment NOR is tendered and only deduct from the running of laytime, time spent in correcting any deficiency regarding vessel readiness. There is much to be gained from an adoption of this approach since it is tailored to meet the subjective nature of an amorphous concept like vessel readiness. Such an approach avoids the untoward situations a shipowner could face in justifying his entitlement to demurrage which in most cases he stands to lose because his vessel is not in a state of absolute readiness. The chances of a charterer escaping liability in circumstances when there is no available berth or no cargo is available is reduced since even though a vessel is not in a state of absolute readiness, notice is tendered and laytime commences.

Although an adoption of this approach would give rise to uncertainty, however, uncertainty would be a happy price to pay considering the subjective nature of the issue of readiness. Meeting the requirements of vessel readiness may sometime require superficial or minimal cleaning<sup>26</sup> and may take little or no effort in terms of time and

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<sup>26</sup> See for instance *The Tres Flores* [1974] QB 264 where it took 4½ hours to clean the cargo space without causing delay.

manpower. On other occasions, methodical or thorough cleaning may be required especially where the nature of the cargo is in the form of food, grain or liquid cargo where the risk of contamination is very high. Another potential drawback, for an adoption of the practical and substantial readiness doctrine would be the necessity to completely overhaul the English law requirement that the state of readiness of the vessel must coincide with the time the NOR is tendered.<sup>27</sup> Under English law, the commencement of laytime is contingent on the giving of a valid notice by the shipowner. A notice which is given prior to when a vessel is considered ready would be treated as invalid. Therefore, the English approach towards validity of notice makes it difficult to accommodate the doctrine of practical and substantial readiness. Therefore, any application of the doctrine would necessitate a substantial shift in the English law approach to validity of NOR. Nevertheless, an application of the doctrine of practical and substantial readiness could finally give legitimacy to an inchoate or premature notice such that on occasions when a vessel is not fully ready to commence cargo operations and a notice is already given, such notice would not be invalidated for the singular reason that it was issued before the vessel was ready. The above drawbacks do not obviate the need to reform the English legal approach to vessel readiness.

English Courts continue to adopt a one-size-fits-all approach in determining vessel readiness. The English approach appears to have been emboldened by the observation of Colman J in *The Linardos*<sup>28</sup> ‘...it is always open to the parties to ameliorate the black and white effect of this principle by express provisions to the contrary.’ Put differently, if parties feel hard done by, they are free to negotiate express clauses regarding the physical readiness of the vessel that will yield the desired result. This thesis argued that this alternative approach to reform, is only a stopgap measure and would not ameliorate the harsh effects that stems strict application of rules regarding readiness. To mitigate the harsh effects of this test, this thesis also suggests confining the application of the test to cases where the vessel is already anchored at berth but is found unready due to

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<sup>27</sup> *The Tres Flores* [1974] QB 264. [CA]

<sup>28</sup> *Cobelfret NNV v Cyclades Shipping Co Ltd (The Linardos)* [1994] 1 Lloyd’s Rep 28, 31; *United Nations Food & Agriculture Organisation v Caspian Navigation Inc. (The Jay Ganesh)* [1994] CLC 1013, 1018.

uncleanliness of cargo holds.<sup>29</sup> But on occasions where the vessel is anchored at the usual waiting place, waiting to berth, then a more liberal approach similar to that endorsed in *Armement Adolf Deppe v John Robinson & Co Ltd*<sup>30</sup> such that a vessel even though unclean at the waiting place can be made clean before a berth is made available.<sup>31</sup> This is premised on the fact that where immediate discharge is not contemplated, failure to make the vessel immediately ready does not prevent the running of laytime.<sup>32</sup> The decision that laydays can begin for a vessel under a port charter, even though she is in a spot where loading or discharge is impracticable should necessarily involve some adaptation of the significance of ready to load to those circumstances.<sup>33</sup> The subjectivity of the obligation to make the vessel ready is of importance and this affects adversely the adoption of an objective standard like 'readiness in every respect'.

This thesis has also addressed issues regarding the third requirement necessary for the commencement of laytime namely, the giving of NOR. In this context, the thesis examined the current treatment of a premature NOR under English law. The current law under English law is that a NOR issued at a time the vessel is not ready to discharge is invalid.<sup>34</sup> Such notice remains bad notice and there is no room for accepting such notice as becoming good when the facts the notice represent become alive. The only device to cure a bad notice in circumstances described above, is to go on issuing fresh notices.<sup>35</sup> Shipowners may avoid the inconvenient consequences that attach to the giving of fresh notices and instead indicate a preference for express contractual provisions that could make an inchoate notice the trigger point for the commencement of laytime. Such an approach has the benefit of resolving any uncertainty a shipowner might have regarding whether a notice already tendered is valid without the need to issue a new notice.

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<sup>29</sup> Argument of the shipowners in *The Tres Flores* [1974] QB 264, 269. But was firmly rejected by the court. See *The Tres Flores* [1974] QB 264, 274.

<sup>30</sup> [1917] 2 KB 204. [CA]

<sup>31</sup> An approach adopted in a different context in *Armement Adolf Deppe v John Robinson & Co Ltd* [1917] 2 KB 204, 209, 210. [CA]

<sup>32</sup> *The Tres Flores* [1974] QB 264, 269.

<sup>33</sup> *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co (The Aello)* [1961] AC 135, 174, 180, 219.

<sup>34</sup> *Christensen v Hindustan Steel Ltd (The Maria LF)* [1971] 1 WLR 1369; *The Mexico 1* [1990] 1 Lloyd's Rep 507; *The Happy Day* [2003] 1 CLC 537 cf. *Ceylon v Societe Franco Tunisienne d'Armement Tunis (The Massalia) (No 2)* [1962] 2 QB 416. [Comm].

<sup>35</sup> *Zim Israel Navigation Co Ltd v Tradax Export SA (The Timna)* [1970] 1 Lloyd's Rep 409, 411

Through the adoption of tailor-made clauses, shipowners can devise a mechanism through which laytime is to start. They might prefer to make the start of laytime contingent on the giving of an inchoate notice or on any notice given while the vessel is in a state of practical and substantial readiness. Such an approach dispenses with the need to tender further notices which ultimately lays to rest any argument regarding the validity of notice. In most standard form contracts, the trend is to provide for tailor-made provisions which deal with the commencement of laytime. For example, the BIMCO Grain Charter provides:<sup>36</sup>

Following receipt of notice of readiness laytime will commence at 0800 on the next day not excepted from laytime. Time actually used before commencement of laytime shall count. *Regardless of whether a valid notice of readiness has been tendered laytime or time on demurrage shall begin at 0800 on the next day not excepted from laytime following the commencement of loading or discharging of the cargo.*

The clause provided above was certainly devised to address the complexities commonly associated with the giving of notice. The insertion of properly drafted clauses similar to the one indicated above, can bring immense benefits to contractual parties. For the shipowner, he avoids the inconvenient consequence of giving fresh notices or the need to prove elements of waiver in circumstances where an invalid notice is tendered.<sup>37</sup> On the other hand, the operation of this clause means that, the charterer need not intimate rejection when faced with an invalid notice since, by virtue of the clause, the start of laytime is contingent on the commencement of cargo operations rather than whether a valid notice was tendered. In effect, both charterer and shipowner are protected by the inclusion of this clause.

In circumstances where a premature notice has been issued and the charterers remain silent and do nothing to intimate their rejection of the notice but commence cargo operations, this thesis has argued that, treating the commencement of cargo operations as the trigger for the commencement of laytime is the better solution and appeals to good commercial sense. The charterers, by their silence and giving of assent to the commencement of cargo operations have waived their right to rely on any invalidity of

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<sup>36</sup> BIMCO GRAINCON, Clause 18(c) <<http://www.fleetle.com/a/d/pdf/graincon.pdf>> accessed 21/11/2018.

<sup>37</sup> Despoina Aspragkathou, 'the Happy Day and Issues of Invalidity of a Notice under English Law' (2007) 38 Journal of Maritime Law and Commerce 191, 213.

notice as a tool to derail the running of laytime. From the lens of a shipowner, it is not unreasonable to retain the assumption that the charterers through their silence and commencement of cargo operations indicate an intention and acceptance that laytime should start to run without the formal requirement of an issue of fresh notice. Of course, if the charterers had indicated a rejection of the notice in unequivocal terms, the shipowners would be duty bound to issue a fresh notice to protect their position.<sup>38</sup> The shipowners cannot feign ignorance regarding the rejection of such notice and attempt to introduce the inchoate notice argument. In such circumstances, the law would step in to aid the charterers. In addition, it would be a sign of bad faith for a charterer to retain their right to waive NOR and also rely on the invalidity of the notice as a means to derail the running of laytime.<sup>39</sup> The above approach does not give any room for arbitrariness on the part of the shipowner to then treat the commencement of cargo operations as the trigger for the start of laytime. Such an approach has no basis in law. At all times, the mechanism for the commencement of laytime is determined by the charterparty provisions. The only circumstances that make the commencement of laytime coincide with the start of cargo operations is if parties agree to such provisions expressly or if the charterers through their conduct remain silent and commence cargo operations in the event of the tender of an invalid NOR. Absent the above, the commencement of cargo operations would not automatically start laytime.

The obligation of the shipowner not to deviate from the contract voyage has over time generated controversy. One such controversy is the effect of a deviation. With the abolition of the fundamental breach doctrine in *Photo Production v Securicor Ltd*<sup>40</sup> the argument could be had either way whether the harsh consequences that attached through the operation of the doctrine of fundamental breach still lived on through deviation cases.<sup>41</sup> This thesis has argued that deviation cases are not to be treated as *sui generis* even though that might be an attractive proposition. Cases decided post-*Photo*

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<sup>38</sup> *Glencore Grain Ltd v Flacker Shipping Ltd (The Happy Day)* [2002] 2 Lloyd's Law Rep 487, 508.

<sup>39</sup> *Ibid* 508.

<sup>40</sup> [1980] AC 827. HL.

<sup>41</sup> *Ibid* 845. HL; Sarunas Basijokas, 'is the Doctrine of Deviation only a Historical Record Today?' [2012] 1(2) UCL Journal of Law and Jurisprudence 114, 136. *Cf. Kenya Railways v Antares Co. Pte Ltd (The Antares) (Nos 1 and 2)* [1987] 1 Lloyd's Rep. 424, 430 [1<sup>st</sup> Col]; *State Trading Corp. of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 288.

*Production v Securicor Ltd* do not support such a view and instead preferred to subsume the treatment of an unjustified deviation as part of the general law of contract.<sup>42</sup> As a matter of logic, if it is said that the occurrence of a deviation deprives the shipowner of all the exception clauses contained in the contract, it remains unclear where to draw the line. Once all exception clauses go, would the shipowner also be deprived of relying on time limitation clauses and arbitration clauses?<sup>43</sup> It stands to reason that if the insertion of such clauses (limitation and arbitration clauses) is predicated on an agreement between parties to predict how disputes are to be resolved in future, then, it would be illogical if such clauses were to be discarded at exactly the point when the dispute had assumed such epic proportions as to encourage parties to sever their contractual ties.<sup>44</sup> Moreover, Wilberforce LJ's treatment of deviation in the *Photo Production* case as a 'body of authority sui generis, should be treated with caution considering his previous analysis of this issue in the *Suisse Atlantique* case. He had previously opined quite emphatically that the operation of general principles of contract was sufficient to address the problems that may arise from the occurrence of a deviation and the creation of a special rule should be dispensed with.<sup>45</sup> Clearly, this view cannot be reconciled with his latter view that deviation cases should now be treated sui generis. Even the loss of insurance cover cannot sufficiently justify the treatment of deviation cases as sui generis. This importance of loss of insurance cover has lost all or much of its force with the increased use of held covered clauses<sup>46</sup> for charterers and Shipowner's Liability Insurance (SOL)<sup>47</sup> for shipowners as well as the adoption of liberty to deviate devices by the shipowners which provides shipowners with the sufficient latitude to determine the scope of their voyages.<sup>48</sup>

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<sup>42</sup> See *Kenya Railways v Antares Co. Pte Ltd (The Antares) (Nos 1 and 2)* [1987] 1 Lloyd's Rep. 424, 430 [1<sup>st</sup> Col]; *State Trading Corp. of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 288.

<sup>43</sup> Charles Debattista, *Fundamental Breach and Deviation in the Carriage of Goods by Sea* [1989] *Journal of Business Law* 22, 28.

<sup>44</sup> *Ibid* 28.

<sup>45</sup> *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 434, 435.

<sup>46</sup> Sheldon A Vogel, 'The Hull Policy: The Perils and Held Covered Clauses' (1967) 41 *Tulane Law Review* 259, 276; *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 55 Lloyd's Rep. 159, 173 [2<sup>nd</sup> Col].

<sup>47</sup> The American Club, <<http://www.american-club.com/page/shipowners-liability-insurance>> accessed 25/06/18.

<sup>48</sup> *Leduc v Ward* [1888] 20 QBD 475; *Glynn v Margetson & Co* [1893] AC 351. Cf. *Connolly Shaw Ltd v A/S det Norfjeldske D/S* [1934] 49 Lloyd's Rep. 183; *Frenkel v MacAndrews* [1929] AC 545. [HL]

This thesis has also argued that from a commercial standpoint, it is doubtful whether the historical treatment of deviation as a serious matter such that serious consequences attach in the event of a breach. Arguably, the consequences of breach by deviation can range from trivial to serious, therefore, a rule that any deviation makes a contract of affreightment completely unenforceable could lead to disproportionate circumstances. A deviation that had no effect on the cargo and the cargo owner would be treated in the same way as a deviation which resulted in serious damage. In addition, the occurrence of deviation is usually no more serious than other gross fault of the carrier, yet no other breach has such a serious consequence. For instance, in *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd*<sup>49</sup> the Supreme Court refused to attach serious consequences to the occurrence of a breach of the seaworthiness obligation even though the breach of such an obligation could turn up extreme consequences more severe than a deviation. Consequently, it is quite puzzling that a shipowner who tenders an unseaworthy vessel which leads to extreme consequences where crew and cargo are lost still gets the benefit of exclusion clauses<sup>50</sup> but a shipowner who simply deviates is to be denied such benefits.

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<sup>49</sup> [1962] 2 QB 26, 37-38.

<sup>50</sup> James F Whitehead III, 'Deviation: Should the Doctrine apply to On-Deck Carriage?' (1981) 6(1) Maritime Lawyer 37, 49.

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