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## THE SELECTED ASPECTS OF THE CALCULATION OF LAYTIME – “REACHABLE ON ARRIVAL”

### Abstract

The purpose of this analysis is to deal with the first of the conditions for commencement of laytime, i.e. obligation of the vessel to arrive at the agreed destination. The position, *prima facie*, with regard to berth, dock or port is relatively straightforward, it having been established that the vessel only becomes an arrived ship when it enters the specified berth, dock or port, respectively. In all three cases, in principle, the risk of delay in reaching the specified berth, dock or port is borne by the shipowner. In many cases, the shipowners, for obvious reasons are not prepared to bear such a risk for loss and take appropriate action. In particular, they demand the inclusion, in the charterparty, of a specific clause shifting the risk of such loss. We will deal therein below with one of the most commonly used forms of such a clause namely – “Time lost waiting for a berth clause” against broader picture of current English jurisdiction.

**Keywords:** “Time lost waiting for a berth clause”, laytime, arrived ship.

### INTRODUCTION

English law is relatively clear and precise when looked at in general terms regarding the commencement of laytime. It is the application of the general principles to detailed commercial events, circumstances and activities which results in complications and difficulties. In general, there are three requirements which have to be satisfied for laytime to commence under English common law, as follows: (1) the vessel has arrived at the agreed destination – the destination may be

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a port, dock, mooring, berth, etc.; (2) the vessel is ready to load or discharge the cargo; (3) notice of readiness is tendered to the charterers or their agents.

When the three requirements above are satisfied, the vessel is considered an *arrived ship* and, under English law, laytime then commences. In practice, charterparties usually provide that laytime is not to commence until a stipulated time (e.g. 8 a.m. on a next working day), alternatively, after a prescribed time (e.g. 24 hours) after tendering of a notice of readiness and, naturally, such an express provision governs the precise moment that the laytime clock is triggered off. However, there are still some charterparties which do not include such an express provision, in which case the common law position applies so that laytime commences at the very moment that the notice of readiness is tendered to the charterers or their agents.

The words “arrived ship”, emphasized above, are somewhat confusing since they sometimes lead persons to think that they refer to one requirement only, that is, the vessel arriving at the agreed destination. While many people talk about the arrival of vessels, and charterparty clauses often refer to vessels having arrived, the position is that, under English law, the words “arrived ship” only come into effect when all three requirements have been satisfied. The fact that a vessel has arrived at the agreed destination does not determine that the vessel is an “arrived ship” within the context of the commencement of laytime; the other two requirements also have to be satisfied. Despite that, what has just been stated, many persons use the words “arrived ship” when speaking of the first requirement only; it is commonly used in this way by judges and arbitrators so that, when reading judgments and awards, allowance has to be made for the licence displayed therein.

The purpose of this analysis is to deal with the first from the above mentioned conditions for commencement of laytime, i.e. obligation of the vessel to arrive at the agreed destination. The position, *prima facie*, with regard to berth, dock or port, is relatively straightforward, it has been established that the vessel only becomes an arrived ship when it enters the specified berth,<sup>1</sup> dock<sup>2</sup> or port,<sup>3</sup> respectively. In all three cases, in principle, the risk of delay in reaching the specified berth, dock or port is borne by the shipowner.

In many cases, the shipowners, for an obvious reason, are not prepared to bear such a risk for loss and take appropriate actions. In particular, they demand the inclusion, in the charterparty, of a specific clause shifting the risk of such loss. In the international shipping, there are three main types of the clause designated to achieve this objective: (1) clauses requiring charterer to nominate “reachable

<sup>1</sup> *Stag Line v. Board of Trade* [1950] 2 KB 194; *The Isabelle* [1984] 1 Lloyd's Rep. 366; *The Mass Glory* [2002] 2 Lloyd's Rep. 244.

<sup>2</sup> *Thorman v. Dowgate SS Co* [1910] 1KB 410.

<sup>3</sup> *The Johanna Oldendorff* [1973] 2 Lloyd's Rep. 285.

berth”; (2) clauses designated for specific ports; (3) “Time lost waiting for a berth clause”.

The main task of this presentation is to consider, in a more detailed way, the first of the above mentioned types of clauses.

## 1. “REACHABLE ON ARRIVAL” – THE MODERN INTERPRETATION

The potential in a “reachable on arrival” provision in a voyage charterparty has not been fully realised until the 1960s. The modern interpretation of the words by the courts has been very favourable to owners whereby they receive compensation (damages), usually based upon the demurrage rate but not necessarily so, in respect of delays in berthing because of charterers not providing a berth which is reachable at the time of the vessel’s arrival at or off the port.

The first important case before the courts concerned the port congestion. It had started as an arbitration and then, was passed to the High Court as a special case – *The Angelos Lusis*.<sup>4</sup> The charterparty stipulated (*inter alia*) that:

[...] a voyage from Constanza to [...] The vessel shall load and discharge at a place or at a dock or alongside lighters reachable on her arrival which shall be indicated by Charterers [...].

The vessel anchored in the roads off the loading port of Constanza on 28 January 1962. She was not permitted, by the port authorities, to enter the port until a berth was available and this occurred on 2 February. Cargo was ready at all times for loading but loading by lighters was impracticable in the surrounding weather conditions. The owners claimed against the charterers for damages in respect of the time that the vessel was delayed in the roads waiting for a berth. They alleged that there was an absolute obligation on the charterers to have a place for loading reachable on the arrival of the vessel at Constanza; further, even though the vessel might not have been an “arrived vessel” for laytime purposes she had arrived within the meaning of the above-mentioned clause.

The charterers contended that the charterparty was a port charter and the risk of any loss of time, before the vessel became an “arrived vessel”, had been on the owners unless either (a) there was a clear provision in the charterparty to the contrary or (b) the vessel’s inability to enter the port and become an “arrived vessel” was caused by the charterers’ breach of contract. “Reachable on arrival” meant arrival in the port and the charterers were not obliged to nominate a loading berth until the vessel entered the commercial area of the port on 2 February.

<sup>4</sup> [1964] 2 Lloyd’s Rep. 29.

In the arbitration, the umpire decided the case in favour of the owners subject to the opinion of the court on a question of law as to whether the charterers were in breach of contract in failing to provide a reachable berth for the vessel when she arrived off Constanza on 28 January. It was held by Mr Justice Megaw that the charterparty provisions referred to above were intended to impose, on the charterers, a contractual obligation of value to the owners; that the charterers' obligation was to nominate a reachable place where she could load (i.e. a berth which the vessel, proceeding normally, would be able to reach and occupy), at the point, whether within or outside the fiscal or commercial limits of the port, where in the absence of such nomination she would be held up; that it was the charterers' responsibility to ensure that there was *at that point of time a berth which the vessel, proceeding normally, would be able to reach and occupy*; that the charterers were in breach of contract in failing to provide a reachable berth for the vessel (occasioned by port congestion) when she required such on her arrival. In deciding as above, the judge emphasised:

- (a) The roads were the normal and proper place for a vessel to lie while awaiting permission to enter the port and that the words in the charterparty "on her arrival" did not have the technical meaning of "arrival" in respect of an "arrived vessel" in a port charterparty. The words denoted the physical arrival of the vessel at a point, wherever it might be, whether within or outside the fiscal or commercial limits of the port, where the indication or nomination of a particular loading place became relevant if the vessel were to be able to proceed without being held up.
- (b) When the vessel had arrived as in (a) above, the charterers had to nominate a reachable place, which meant that it was the charterers' responsibility to ensure that there was, at that point of time, a berth which the vessel, proceeding normally, would be able to reach and occupy (c)
- (c) The time of the vessel's arrival, within the above-mentioned charterparty words, had come when the vessel had gone as far as she could go, whether to the verge of or within the port, in the absence of a nomination by the charterers of a place, which she could not reach without being held up, where she could load.

The decision went in favour of the owners in circumstances of port congestion and the "reachable on arrival" provision of the charterparty. It appeared to be a sensible decision bearing in mind that it was port congestion which prevented the vessel from moving into a berth when she arrived off the port; historically, port congestion had been, in respect of port charterparties, at the risk of charterers.

In many port charterparties, charterers may be able to show that the vessel has not become an "arrived ship" when she arrives off the port so that laytime cannot commence. However, with the inclusion of the important words "reachable on arrival", owners may be compensated on the basis of damages for breach of contract, irrespective of whether the vessel has arrived within the port or not, the word

“arrival” is being given, as it is provided correctly, a broad interpretation. In other words, as long as the vessel has got, as far as she can get, without the nomination of a reachable berth, she satisfies the word “arrival” when lying off the port.

## 2. THE PRESIDENT BRAND

A few years later a further case came before the courts regarding the words “reachable on her arrival”, namely *The President Brand*.<sup>5</sup> The case went straight to the High Court on an agreed statement of facts which stated (*inter alia*) that:

- a) The vessel was voyage chartered to proceed from one safe port Persian Gulf to one or two safe ports in the Mombasa/Capetown range.
- b) Clause 6 of the charterparty stipulates that the vessel shall load and discharge at a place or at a dock or alongside lighters reachable on her arrival which shall be indicated by the charterers.
- c) Under the charterparty the owners guaranteed that the vessel would arrive at Lourenço Marques with a maximum draught of 32’ 5” with no deadweight for the charterers’ account.
- d) After loading cargo of crude oil the vessel was ordered by the charterers to discharge at Lourenço Marques.
- e) At Lourenço Marques there were only two berths suitable for the discharge of oil cargoes from vessels of the size of *The President Brand*; the vessel on her arrival draught of 32’ 3” could have lain safely afloat at all states of the tide at either of these berths but was not able to cross the bar and proceed up the estuary to these berths because of a shortage of water.

The owners adopted the same arguments which had been used in *The Angelos Lusia*.<sup>6</sup> According to them, there should be the same result albeit that the *Angelos Lusia* case involved port congestion whereas the circumstances in *The President Brand* concerned a vessel which was prevented from crossing the bar at the entrance to the port of discharge because of lack of water.

In deciding the case in favour of the owners, Mr Justice Roskill agreed with the decision of Mr Justice Megaw regarding the meaning of “arrival”, in the context of “reachable on arrival”; further, on the words “reachable on arrival” he concluded that they applied to the circumstances in question so that, although the berth was not reachable because of a shortage of water at the bar, the charterers were in breach of their obligation to nominate a berth which the vessel could reach on her arrival. He held (*inter alia*):

<sup>5</sup> [1967] 2 Lloyd’s Rep. 338.

<sup>6</sup> [1964] 2 Lloyd’s Rep. 29.

“Reachable” as a matter of grammar means “able to be reached”. There may be many reasons why a particular berth or discharging place cannot be reached. It may be because another ship is occupying it; it may be because there is an obstruction between where the ship is and where she wishes to go; it may be because there is not a sufficiency of water to enable her to get there. The existence of any of those obstacles can prevent a particular berth or dock being reachable and in my judgment a particular berth or dock is just as much not reachable if there is not enough water to enable the vessel to traverse the distance from where she is to that place as if there were a ship occupying that place at the material time. Accordingly, in my judgment, the charterers’ obligation was to nominate a berth which the vessel could reach on arrival and they were in breach of that obligation if they are unable so to do.

The charterers sought to distinguish, in this case, the facts from *The Angelos Lusia* (shortage of water on the bar as opposed to port congestion) so as to assert that there was no causation factor regarding “reachable on arrival” since the vessel would have ground to a halt in any event, not because of the want of a berth but because of insufficiency of water. On this aspect, the judge went on to say that it was true, as a matter of causation, that the reason why the vessel could not cross the bar was a shortage of water but that was not the crucial consideration; the crucial consideration was that, because of a shortage of water, there was not a place or a dock reachable on the vessel’s arrival at Lourenço Marques and therefore the resulting loss of time had to be borne by the charterers.

Some exception was taken to this decision because tides/shortage of water had been, generally speaking, so much at the risk of owners in the past and the fact that, although the charterparty stipulated for one or two ports of discharge from a Mombasa/Capetown range, the discharge port, to which the vessel was eventually ordered, was named in the charterparty (clause 25 – Owners undertake the vessel will arrive at Lourenço Marques with a maximum draught of 32’ 5” with no deadweight for charterers’ account). Therefore, it appeared that the owners took the risk of their vessel, with maximum cargo, being delayed because of known tidal problems. Like *The Angelos Lusia*, *The President Brand* was not concerned with counting of laytime but with damages for breach of contract: however, unlike *The Angelos Lusia* there was emphasis on “reachable” as well as “arrival”, although there appeared to be no departure from the *ratio* of *The Angelos Lusia* regarding the words emphasised earlier: *at that point of time a berth which the vessel, proceeding normally, would be able to reach and occupy*.

The application of the *President Brand* decision is that owners get compensated for loss of time because of a “reachable on arrival” provision in a charterparty in circumstances when otherwise they might not be so fortunate. Further, they can get the benefit of time lost in respect of delay factors which, traditionally, have been at the risk of owners; for example, insufficiency of water. It logically follows

that if a vessel cannot get into a berth because of bad weather (traditionally at the risk of owners) owners get the benefit of the clause since, according to the reasoning of the judge in the *President Brand* case, the crucial consideration would be that, because of the bad weather, there was not a place or a berth reachable on the vessel's arrival.

Although there were no reported English cases regarding the application of the words "reachable on arrival" to a bad weather situation until 1988 there were arbitrations where, it was understood, some arbitrators allowed the words to bite in favour of the owners when bad weather prevented the vessel, after her arrival at the port, from proceeding into a berth. Other arbitrators found it objectionable that owners should get the benefit of time lost waiting to enter a port when a vessel was delayed because of factors which, in the past, had been traditionally at the risk of owners; they thought that the words should only bite in favour of owners in respect of those factors (preventing a vessel reaching a berth) which had been traditionally at the risk of charterers, such as port congestion; delays which, in the past, had been traditionally borne by owners, should not be switched to the risk of charterers simply by way of a "reachable on arrival" clause. While *The Laura Prima* did not resolve the conflict between London maritime arbitrators in respect of the application of *The President Brand* to bad weather circumstances when a vessel arrived at or off a loading/discharging port, it resulted (*inter alia*) in parties and arbitrators focusing upon the application of "reachable on arrival" to bad weather arrival circumstances in the context of clauses 6 and 9, of the then much used Asbatankvoy charterparty; further, the House of Lords decision ultimately led to a resolution of the divergent approach, taken by different arbitrators, to the same facts and problems.

### 3. THE LAURA PRIMA

The words "reachable on arrival" were not considered by the courts between 1967 and late 1979 when *The Laura Prima* was heard in the High Court save for *The Delian Spirit*<sup>7</sup> which case, in any event, was more concerned with the assessment of laytime/damages in the context of a breach, by the charterers, of their obligation. *The Laura Prima* concerned port congestion and important standard clauses in tanker charterparties *vis-a-vis* counting of laytime. The standard clauses 6 and 9 of the Asbatankvoy charterparty were as follows:

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<sup>7</sup> [1971] 1 Lloyd's Rep. 64 and 506.

6. NOTICE OF READINESS. Upon arrival at customary anchorage at each port of loading or discharge the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the Vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the Vessel's arrival in berth (i.e. finished mooring when at a sealoading or discharging terminal and all fast when loading or discharging alongside a wharf), whichever first occurs. However, where delay is caused to Vessel getting into berth after giving notice of readiness for any reason over which Charterer has no control, such delay shall not count as used laytime[...]

9. SAFE BERTHING—SHIFTING. The Vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer [...]

It was decided by the House of Lords that:

- 1) clauses in charterparties as in other contracts had to be construed as a whole and it was impossible to ignore the opening words of clause 9 in construing the penultimate line of clause 6 and the reference in clause 7 to loading and discharging berth meant “designated and procured berth” for it was to that berth the vessel would be moving, the time occupied by such movement being excluded from the laytime calculation;
- 2) “reachable on arrival” was a well-known phrase and meant precisely what it said; if a berth could not be reached on arrival the warranty was broken unless there was some relevant protecting exception and the berth was required to have two characteristics: it had to be safe and it also had to be reachable on arrival;
- 3) although the finding by the umpire that the sole cause of the delay to the vessel getting into berth was the unavailability of a berth due to the presence of other vessels over which the charterers had no control was unequivocal, this fact did not avail the charterers unless the berth which the vessel was prevented from reaching by reasons over which they had no control was one which had already been designated and procured by the charterers in accordance with clause 9;
- 4) clauses 6 and 9 were not in conflict with each other;
- 5) in the circumstances, the owners' claim for demurrage succeeded.

The decision by the House of Lords was welcomed by many in the shipping commercial world, not necessarily because of the reasoning set out in the speech by Lord Roskill *vis-a-vis* “reachable on arrival” (he adopted what he had said in *The President Brand*); but, primarily, because berth congestion had been traditionally at the risk of charterers and there was no case to displace this risk by the words of the second sentence of clause 6 of the charterparty. That is, the words should not bite in favour of the charterers in respect of port congestion but would be free to do so regarding bad



weather or some other cause of delay outside the control of the charterers; this view later on turned out to be wrong.

The application of clauses 6 and 9 of the Asbatankvoy charterparty (similar/identical clauses appear in many other tanker charterparties) to circumstances where wind and/or swell (hereinafter referred to as “bad weather”) prevented a vessel getting into a loading/discharging berth when she arrived off a loading/discharging port, prior to the commencement of laytime, were not considered, by the English courts, until 1988 save that the words “always accessible” (which can be equated with “reachable on arrival”) were the subject of *obiter dicta* by Mr Justice Webster in *The Kyzikos*. The subject was of considerable importance bearing in mind the widespread use of the above clauses in tanker voyage charterparties and the large number of incidents of bad weather which prevent tankers moving into loading/discharging berths at the time they arrive off their destinations. It appeared to many in the shipping world that the last sentence of clause 6 should be a protecting exception for charterers in the circumstances just cited. However, the House of Lords’ decision in *The Laura Prima*<sup>8</sup> threw a considerable doubt on whether or not charterers could take any benefit from the last sentence of clause 6 in such circumstances; many lawyers were of the view that the decision of the House of Lords prevented charterers from taking any intrinsic benefit from the last sentence of clause 6.

In 1985 an arbitration award was published in London which, as it was hoped, would reach the courts so that a binding authority could be obtained regarding circumstances of bad weather preventing a vessel getting into berth when she arrived off the loading/discharging port in the context of clauses 6 and 9 of the Asbatankvoy charterparty. It was a majority award denying the charterers the benefit of the last sentence of clause 6 (in circumstances of bad weather preventing the vessel entering the port on her arrival) on the basis that the *ratio* of *The Laura Prima* prevented the application of the last sentence of clause 6 because of there being no berth reachable on the vessel’s arrival. Unfortunately, leave to appeal the award was refused by Mr Justice Leggatt despite the pleas of all three arbitrators that there be a judicial ruling on the matter; this refusal was appealed unsuccessfully in the Court of Appeal, see *A den Refinery Co. Ltd. v. Uglund Management Co. Ltd.* (C.A.) [1986] 2 Lloyd’s Rep. 336. The result was that there remained no authority on the subject and different arbitrators continued to take a different stance on the topic.

Before *The Laura Prima* it was thought, by many in the shipping commercial community that, in respect of clause 6, charterers bore the risk of berth/port congestion and owners bore the risk of bad weather which prevented a vessel from

<sup>8</sup> [1982] 1 Lloyd’s Rep. 1.

berthing. For many years, those in the world of tanker operations worked on this basis, even with a clause 9 in the charterparty, so that laytime commenced when a vessel arrived off a port where delay occurred in berthing because of congestion but laytime, although ostensibly commencing, did not start to score when the delay in berthing was caused by bad weather. There appeared to be no problem until *The Laura Prima* – the case which concerned port congestion. In the High Court Mr Justice Mocatta did not consider clause 6 in isolation but read the reachable on arrival provision of clause 9 in conjunction with clause 6 of the charterparty. On a matter of some difficulty he accepted the construction submitted on behalf of the owners in deciding that the last sentence of clause 6 did not bite in favour of the charterers where delay was caused by congestion.

In this event, the reading of clause 9 with clause 6 of the charterparty was adopted by the House of Lords. It is the interrelation of the two clauses by the courts which put a hurdle in the way of charterers regarding circumstances of bad weather that prevented a vessel from berthing after her arrival off a port. In *The Laura Prima* there was only one speech in the House of Lords; it was given by Lord Roskill and contained (*inter alia*) the following important words:

Does “Berth” in the penultimate line of cl. 6 mean a berth which was already designated and procured by the Charterers in accordance with the Charterers’ obligations under cl. 9? [...] It is axiomatic that clauses in Charterparties as in other contracts must be construed as a whole, and I find it impossible to ignore the opening words of cl. 9 in construing the penultimate line of cl. 6; and the construction which I favour is, I think, strongly supported by the last sentence of cl. 7 where the reference to loading or discharging berth must surely mean the designated and procured berth’ for it is that berth to which the ship will then be moving, the time occupied by which movement being excluded from the laytime calculation [...]

“Reachable on arrival” is a well-known phrase and means precisely what it says. If a berth cannot be reached on arrival, the warranty is broken unless there is some relevant protecting exception. The analogy from the requirement of safety does not assist. The berth is required to have two characteristics: it has to be safe and it has also to be reachable on arrival.

*The Laura Prima* concerned port congestion which, as has been already mentioned, was thought traditionally to be at the risk of charterers under clause 6 of the charterparty in question. When the Court of Appeal reversed Mr Justice Mocatta there was considerable pressure from the international shipping community that the matter be reconsidered by the House of Lords. It may be that this pressure resulted in the overlooking of other factors such as bad weather which, if they had been considered fully, might have occasioned a judgment which allowed a clear distinction between bad weather and congestion.

If *The Laura Prima* decision had the effect of denying charterers the benefit of the last sentence of clause 6 in bad weather circumstances, the result would appear very unreasonable to many. Instead of getting widespread protection from an exception where bad weather prevented a vessel getting into a berth, prior to the commencement of laytime, the charterers were left with an exception which was practically worthless. This did not appear to be the intention of those who drafted the clause in that the last sentence should be of such a very limited use.

The divergency between London maritime arbitrators continued throughout 1986 and 1987. In the latter year two arbitration awards were made regarding the effect of *The Laura Prima* decision in circumstances of bad weather, prohibition of night navigation, and the unavailability of tugs when a vessel arrived at or off the loading/discharging ports namely: (*The Sea Queen* and *The Fjordass*).

#### 4. THE SEA QUEEN AND THE KYZIKOS

In *The Sea Queen* the vessel was chartered on the Asbatankvoy form. She arrived off the loading port at 06.55 on 1 January 1985 and tendered notice of readiness. There were two berths capable of accommodating the vessel and both were unoccupied at 06.55 on 1 January when the charterers designated one of those berths for the vessel.

The vessel could not, however, be berthed without the assistance of tugs. Between 06.55 and 14.00 on 1 January, the only two tugs available at the port were occupied in berthing two other ships, and were unavailable to assist the vessel. The tugs in question were owned by companies separate from the charterers and the charterers had no control over them and had no control over the day to day running of the port installation.

From 14.00 on 1 January until 22.15 on 3 January the berthing of the vessel was delayed by bad weather (strong winds and swell). Throughout that period, however, the berth - which had been designated by the charterers for the vessel - remained vacant. The vessel finally berthed at 00.36 on 4 January.

The owners claimed demurrage, contending that laytime commenced at 12.55 on 1 January and continued to run while the vessel was delayed. The charterers argued that the period of delay in berthing should not count as laytime.

In the arbitration it was held (by a majority) that the application of clauses 6 and 9 of the Asbatankvoy charterparty to circumstances where the non-availability of tugs and/or wind/swell (referred to as "bad weather") prevented a vessel from getting into a loading/discharging berth when she arrived off a loading/discharging port, prior to the commencement of laytime, had not been considered by

the courts although the recent case of *The Kyzikos*<sup>9</sup> had something to say about “always accessible”, which words might well be equated with “reachable on arrival”.

They decided in favour of the charterers, their views being (LMLN 197—21 May 1987):

(a) The rules of construction set out in *Scrutton on Charterparties*, in particular, Article 7:

“Charters are to be construed in the light of the nature and details of the adventure contemplated by the parties to them”, amplified by the footnote 54 which cites (*inter alia*) the words of Lord Wilberforce from *The Diana Prosperity*<sup>10</sup>: “What the Court must do is place itself in thought in the same factual matrix as that in which the parties were.”

(b) The desirability of giving a commercial construction to words in commercial contracts by construing them in the broad sense in which a business man would use them; see Mr Justice Goddard in *K.K.K. v. Bantham Steamship Company*<sup>11 12</sup> and cited in *Luigi Montana v. Cechofracht*,<sup>13</sup>

(c) The words of Lord Reid in *Schuler v. Wickman*<sup>14</sup> in particular at page 57:

No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the whole of the contract [...].

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the *more necessary it is that they shall make that intention abundantly clear.* (Emphasis added.)

(d) A part of Lord Roskill’s speech could support a possible different interpretation to that submitted by those who contend that the *ratio* from this speech automatically precludes charterers from benefiting from the last sentence of clause 6 in circumstances of bad weather at the time of the vessel’s arrival. There is some difficulty in establishing exactly what Lord Roskill had in mind in respect of part of his speech and there is some doubt as to whether his speech was intended to be a bar to invoking of bad weather circumstances, by charterers, at the time of a vessel’s arrival.

(e) “Reachable on arrival” provisions in a charterparty should be applied restrictively, particularly in weather and other circumstances which have been

<sup>9</sup> [1987] 1 Lloyd’s Rep. 48.

<sup>10</sup> [1976] 2 Lloyd’s Rep. 621.

<sup>11</sup> [1976] 2 Lloyd’s Rep. 621.

<sup>12</sup> Approved by the Court of Appeal 63 L.L.Rep. 155

<sup>13</sup> [1956] 2 Lloyd’s Rep. 97.

<sup>14</sup> [1973] 2 Lloyd’s Rep. 53.

traditionally at the risk of owners. It may be that this can be achieved by using that part of *The Angelos Lusia*<sup>16</sup> ratio which speaks about the relevant time and proceeding normally.

If the vessel cannot proceed normally into port because of factors relating to wind and/or sea and/or swell (traditionally at the risk of the vessel and/or owners) then the relevant time, for the charterers' obligation to bite, should be when the weather conditions have abated so that the vessel can proceed normally.

The majority also drew support from certain *obiter dicta* of Mr Justice Webster in the *Kyzikos*<sup>15</sup> case in respect of the charterers' absolute obligation to nominate a berth which was "always accessible", which words should be treated as synonymous with "reachable on arrival". In the circumstances of fog being the effective cause of the vessel's inability to proceed he was against the owners in that there was no breach of the charterers' obligation to nominate a berth which was accessible. He distinguished *The Angelos Lusia*,<sup>16</sup> *The President Brand*<sup>17</sup> and *The Laura Prima*<sup>18</sup> from the fact that those cases dealt with port congestion or a physical obstruction preventing access to the berth. In the absence of authority other than to the effect that a berth is not accessible, if there is something which physically obstructs access to it, he considered the word accessible as meaning "capable of being approached" in the sense of having an unobstructed way or means of approach. The expression "always accessible" was an adjectival description, descriptive of the berth and was not, *prima facie*, a description of any circumstance affecting the berth other than that it was an obstructive way or means of approach – it was still less a description of any vessel approaching the berth. In particular, it did not mean that for the berth to be accessible the vessel must be capable of approaching the berth. The fact that the vessel could not safely approach the berth because of fog or other weather conditions did not mean that the berth was not accessible provided that those conditions did not have the effect of obstructing (e.g. lack of water) the berth or the approach to it. The majority of the arbitrators thought the *obiter* was obviously relevant to the bad weather circumstances but they also thought it was even more compelling in circumstances where no tugs were available to berth a vessel and the responsibility for obtaining tugs was on the owners of the vessel as in their case. They went on to say:

In no way can we see why the Charterers should be in breach of an obligation to provide a berth "reachable on arrival" simply because of the non-availability of tugs the provision of which was the responsibility of the Owners. It seems to us that it would

<sup>15</sup> [1987] 1 Lloyd's Rep. 48.

<sup>16</sup> [1964] 2 Lloyd's Rep. 29.

<sup>17</sup> [1982] 2 Lloyd's Rep 338.

<sup>18</sup> [1982] 1 Lloyd's Rep. 1.

stand the Charterparty on its head to put the Charterers in breach of contract simply because a vessel could not berth because of the lack of a facility the provision of which was fairly and squarely on the Owners. While we recognise the argument in relation to bad weather and a berth not being “reachable on arrival” to put a charterer in breach of contract (although we prefer the alternative argument) we see no cogency in the argument as related to the non-availability of tugs.

The dissenting arbitrator shared the majority’s views as to what the commercial, sensible and reasonable outcome of the case should be, but felt constrained not to reach the result the majority had reached mainly because of the decision in *The Laura Prima*. He felt that there was an urgent need for a review of the relevant line of authorities in order to clarify the position so that answers to this type of case, which maritime arbitrators encountered very frequently, were finally made clear.

In the High Court Mr Justice Saville had a few doubts whatsoever in reversing the majority arbitrators in *The Sea Queen*.<sup>19</sup> He held that it was clear from *The Laura Prima*<sup>20</sup> that clauses 6 and 9 of the charter had to be read together, and that the word “berth” in the last sentence of clause 6 meant a berth for the vessel reachable on her arrival designated or procured by the charterers in accordance with clause 9.

The majority of the arbitrators in the present case had taken the view that a distinction should be drawn between reasons for delay in berthing traditionally regarded as being at owners’ risk, such as non-availability of tugs or bad weather, and “charterers’ risk” factors, such as congestion. They had expressed the view that if every reason for delay were to be at charterers’ risk, the result would be “very unreasonable”. They accordingly concluded that the charterers were protected by the last sentence of clause 6.

The approach adopted by the majority of the arbitrators could not be sustained. First, what might or might not be regarded as “the traditional position”, or as being reasonable or unreasonable, could not be the starting point for construing a contract of the present kind. The starting point had to be the phrases the parties had chosen to use. It was not a permissible method of construction to propound a generally accepted principle for sharing the risk of delay between owners and charterers or seeking in the abstract to determine a reasonable allocation of risk of delay and then to seek to force the provisions of the charter into the “schedule” of that principle or into that concept of reasonableness. To do so, it would be necessary to rewrite the bargain that the parties must be taken to have made by the words that they had chosen to use.

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<sup>19</sup> [1988] 1 Lloyd’s Rep 500.

Secondly, there were in any event great difficulties in trying to propound some general principle which divided delaying events into owners' risk and charterers' risk factors. The arbitrators regarded bad weather as a case in the former category but, for example, how would the principle operate on congestion caused by bad weather?

Thirdly, there was nothing in the cases which qualified the ambit of the obligation imposed upon the charterers to designate and procure a berth which the vessel was able to reach upon her arrival. Clearly, if there had been some relevant protecting exemption the charterers could have taken advantage of it. Equally, if the reason for the berth could not be reached was some breach of charter by the owners, then the charterers would also be protected – either on the basis that their obligation extended only to finding a berth for a vessel conforming to the charter, or on the basis that any claim by the owners with regard to the delay would be defeated by a cross-claim based on the owners' breach. Short of such cases, however, or where the contract could be said to be frustrated, the charterers had warranted in clear and simple words that there would be a berth which the vessel would be able to reach on her arrival.

It was clear that the arbitrators did not regard with satisfaction the fact that the House of Lords had held that the word "berth" in clause 6 meant a berth duly nominated in accordance with clause 9. However, *The Laura Prima* decision was binding on the court and there were no grounds for distinguishing between the various causes which might make a berth unreachable for the vessel, unless the particular cause was specifically exempted elsewhere in the charter or was a consequence of the owners' breach of the charter or was such as to frustrate the adventure as a whole. Accordingly, the appeal would be allowed. The charterers were not protected by clause 6.

At about the same time *The Fjordass* arbitration reached the High Court.<sup>20</sup> The same charter terms were applicable (Asbatankvoy clauses 6 and 9) in circumstances where at the discharge port, Mohammedia, the vessel's size made it impossible for her to berth and discharge anywhere but at Sealine No. 3. The vessel tendered notice of readiness at 00.45 on 8 April 1985 but was unable to proceed immediately to her designated berth due to a combination of a prohibition of night navigation coupled with a requirement of compulsory pilotage. Pilotage was not available until 9 a.m.

At 10.55 on 8 April a pilot came on board. Until 14.02 attempts were made to bring the vessel to the discharging line but eventually the attempts were abandoned due to bad weather. Until 16 April bad weather continued to prevent the

<sup>20</sup> [1988] 1 Lloyd's Rep. 336.

vessel from berthing. Thereafter, on 16 and 17 April a strike by tug officers operated which prevented berthing. At 14.45 on 18 April the vessel eventually berthed.

The principal issue before the arbitrators related to the “reachable on arrival” clause (clause 9) of the charterparty. The majority of the arbitrators held that the decision in *The Laura Prima* only applied in cases where the berth was congested. The present case was distinguishable because the primary cause of delay had been the combination of the prohibition of night navigation coupled with compulsory pilotage. Both those restrictions had been imposed by the local port authority. The berth designated by the receiving installation had been available on the vessel’s arrival at the discharging port. Accordingly, the charterers were entitled to take advantage of the exception in the last part of clause 6. The owners appealed. It was held, by Mr Justice Steyn, that the approach of the majority was wrong. They had failed to give the words “reachable on arrival” their ordinary meaning. Instead, they had started from the premise that in relation to voyage charterparties responsibility for navigational matters rested on the shoulders of owners and not charterers. That was referred to as the owners’ traditional responsibility.

The arbitrators had no doubts in mind in relation to the observations by Lord Diplock in *The Johanna Oldendorjf*,<sup>21</sup> where he referred to the importance of the four stages into which the adventure was divided. However, Lord Diplock’s general observations have never intended to lay down a special rule of construction, or to require that one should approach a special clause such as a “reachable on arrival” provision with a predisposition in favour of the “traditional” allocation of risk. On the contrary, Lord Roskill made it clear, in his opening observations, in *The Laura Prima* that such an approach would be wrong.

Adopting the reasoning of the dissenting arbitrator, most charterparty disputes and particularly laytime/demurrage disputes did not involve fault in a moral sense. One was merely considering the allocation of risk provided for in the charterparty. In the present case, the events at Mohammedia could in no way be described as being the fault of the owners or the charterers. However, the terms of the charterparty specified that the charterers should bear the risk of the delays that actually occurred.

The charterers had argued that *The Laura Prima* decision covered only *physical* causes of obstruction which rendered the place in question not reachable, and therefore did not apply in the present case. However, it would be wrong to approach the “reachable on arrival” clause with a predisposition in favour of a restrictive interpretation. The charterers’ argument involved interpreting the relevant words as “reachable on arrival without delay *due to physical causes*”. That ignored the fact that Mr Justice Mocatta and the House of Lords contemplated

<sup>21</sup> [1973] 2 Lloyd’s Rep. 285.



that a non-physical cause such as an embargo, could put charterers in breach of a “reachable on arrival”, clause. In any event, the distinction sought to be drawn by the charterers, was in conflict with the interpretation of the “reachable on arrival” clause in *The President Brand*. The distinction between physical causes of obstruction and non-physical causes rendering a designated place unreachable was not supported by the language of the contract or by common sense. It was in conflict with the reasoning in *The Laura Prima* and was unsupportable on the interpretation given to that provision in *The President Brand*. Quite independently of authority, the court believed it to be wrong. The interpretation which found favour with the dissenting arbitrator had, moreover, the merit of avoiding disputes as to different causes of delay in reaching a designated berth.

The appeal would be allowed. The charterers had not designated a berth which was reachable on arrival and therefore could not take advantage of the clause 6 exception.

Although Mr Justice Steyn and Mr Justice Saville differed in their reasoning regarding “proceeding normally” the end results were the same. The charterers in the *Sea Queen* and the *Fjordass* cases were the same entity and did not appeal the High Court decisions. Therefore, the High Court decisions are binding precedents *vis-a-vis* arbitrators in respect of the various circumstances (e.g. weather, tug/pilot strikes) which may be in existence and prevent berthing when a vessel arrives at or off the loading/discharging port in the context of clauses 6 and 9 of the Asbatankvoy charterparty and no berth being reachable at that time. At least, there is now certainty regarding the application of clauses 6 and 9 of the Asbatankvoy charterparty in respect of “reachable on arrival”; the differing approach by different maritime arbitrators is at an end, since they are bound to apply the *Sea Queen* and *Fjordass* decisions.

#### WYBRANE ZAGADNIENIA DOTYCZĄCE LICZENIA OKRESU ŁADOWANIA

**Słowa kluczowe:** klauzula utraty czasu w oczekiwaniu na nabrzeże”, okres ładowania, „statek przybyły”

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## Abstrakt

Celem niniejszego opracowania jest analiza pierwszego warunku koniecznego do rozpoczęcia liczenia okresu ładowania statku, to jest obowiązku dopłynięcia statku do uzgodnionego miejsca przeznaczenia.

*Prima facie*, stanowisko prawne z punktu widzenia nabrzeża miejsca załadunkowego (doku) czy portu jest stosunkowo jednoznaczne. Przyjętym jest bowiem, iż statek może zostać uznany za statek, który przybył do miejsca załadowania (*arrived ship*), kiedy dopłynie do określonego nabrzeża, doku czy odpowiednio portu. We wszystkich wyżej wymienionych wypadkach, ryzyko zwłoki w dopłynięciu do tak wyznaczonego miejsca ponosi armator.

W wielu przypadkach armator, z oczywistych powodów, nie jest gotowy ponieść takiego ryzyka oraz wynikającej z tego szkody i w związku z tym podejmuje stosowne działania. W szczególności, domaga się on wprowadzenia do umowy czarteru, stosownych specyficznych postanowień przenoszących rozważane tu ryzyko na czarterujących.

W niniejszym opracowaniu przedstawiono jedną z najbardziej rozpowszechnionych form takiego postanowienia umownego, a mianowicie „*Time lost waiting for a berth clause*” („klauzula utraty czasu w oczekiwaniu na nabrzeże”). Analiza ta dokonana została w oparciu i na tle szerszego spektrum aktualnego orzecznictwa angielskiego.