UNIVERSITY OF ESSEX **DISSERTATION**

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LLM/MA IN: International Trade and Maritime Law
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DISSERTATION TITLE ---------- An analysis of the Invalid Notice of Readiness in port charterparties and when laytime will commence ---------- ---------- ----------

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Supervisor: Anna Maria Antoniou

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An analysis of the Invalid Notice of Readiness in port charterparties and when laytime will commence

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1 INTRODUCTION:

The notice of Readiness since a long time ago it has been a necessary tool in the creation of the charterparty therefore disputes have been created since it creates the situation of this document being tendered while the vessel is waiting for anchorage. The main three disputes that have also been recognised are as following. The place of where the notice was tendered, the vessels capability of loading and discharging the cargo, and to extent of the charterers conduct[1]. Furthermore, there are more side effects that can cause problems to this such as congestion, frustration and other factors that may delay the operations of loading or discharging, and to the extent of how effective the notice of readiness was and when laytime could commence.

Subsequently, in most voyage charter parties in order for the ship owner to start the process of laytime it is made conditional by filing a valid Nor in the case of an invalid been filed the shipowner will not be entitled to such commission and the period of lay time will not begin at all, even if it could be argued to be reasonable for the charterer to know that the vessel was ready in all of the aspects. Such a document has created controversies both in English law and the decisions that were given in cases. Things like what if such a document is required and it is not filled. The logical argument would be that the period of lay time would never begin. A peculiar fact is that under common law the Notice of readiness can be given in writing or orally. The controversy that arises from tendering a Notice of readiness orally is that the charterer might argue that the document was never presented to them orally in order to avoid the payment of laytime, it is argued that the arbitrators take a more fair method of determining if whether the commencement of laytime should begin in the point of when the loading or discharging of the cargo started to happen. Irrespectively the owners will need to provide enough evidence that all conditions were met in order for the commencement of lay time to begin. The owner does not have any guarantee to him that this will be awarded.

Some writers have suggested that the law in the current matter is heavily relied upon cases, codes, definitions, clauses, rules and not by authors[2] in matter of fact this is normal since in common law the law is heavily unwritten and decided by cases. Therefore, all the points will be heavily discussed based on what judges have commented about cases, the decisions that were made and what kind of impact they have for the future of laytime and the notice of readiness itself, any secondary sources such as opinions of authors will assist the points that are being set out and .

1.1 General Background

The first important definition that must be given a basic analysis is the C/P there are 2 different C/Ps that can exist it either be a Port or a Berth, to distinguish which is which is easy since it will be recognisable under the agreed destination, if the agreed destination is a Port then the matter at hand will be a port C/P, if the agreed destination is a berth that is inside a Port it will be a Berth C/P, the time of arrival at the agreed destination plays a crucial role, as it will be discussed later for the purpose of lay time since it is one of the requirements in order for a valid Nor to exist, also this the point that the Nor can be tendered, since this research focuses more on port C/Ps more information on them will be discussed. When Port is the question it can be tendered as soon as the vessel arrives on the port premises. Nevertheless, charterers will need to nominate a berth. This is where the controversy begins

[1] Cooke, J., et al. Voyage Charters (Lloyd's of London Press, 1993) 281

[2] Book review - Baughen: Summerskill on Laytime (5th edn) by Paul Todd

since it is not that easy to establish if there is a berth or Port c/p unless the agreement is so clear that leaves nothing to be questioned. From the point of view of the charterer will try to argue that it is a berth agreement because the period of lay time will only begin when the vessel berths and not when the vessel has entered the port premises, so the vessels owner will clearly prefer port c/p[3].

The NOR in the world of maritime means Notice of Readiness. This is a document that its purpose is to be filled in the end of the voyage of a vessel by the captain so the period of lay time and demurrage can start running. When this document is filled the charter is notified that the vessel is ready in every way for the immediate disposal of his and ready to load or unload any goods that the charterer will be able to do so. This document plays an important role in the advancement of laytime and demurrage.

Laytime is the period that is allowed to charterer by the ship owner to load or discharge, it can be expressed as in either of: days, hours, tonnes per day. The period of lay time can be either be counted in running days as working days but days such national holidays and days are excluded, also weather days but when the weather is so bad, and the operation is prevented due to the weather. In the actual contract it can be stated that if the charterer takes less time than the necessary then the shipowner may have in availability in order to claim for Dispatch money, which is a sum of money that is either dispatched by the shipowner or the charterer in a situation where the unloading or loading is completed in less time than the original agreed. In the situation of the loading or discharging taking more time than agreed then the charterer will need to pay a fee (penalty) that is called demurrage.

Demurrage is the result of failure of the charge and discharge of goods within the allocated time limit that was given to the charterer by the shipowner, in that failure a payment must be done towards the party suffering. This kind of penalty is applying irrespective if you have a port charterer or a berth charterer and so on to all vessels. For the delay to happen something needs to go wrong and someone may be deemed responsible it is assessed against the consignee or the consignor.

2.0 Commencing Laytime:

There is one issue that can be identified that is under English law statute lay days are not given a clear definition on how many of them the charterer will have on his disposal in order to work, so it is under the two parties to agree upon this as it has been suggested[4]. It must be noted that lay days and lay time are 2 different terms in their meaning, but they are related to each other.

Laytime as discussed earlier it is the time that is allowed to a charterer to load or discharge the cargo and in a case of this happening in a longer time than the one that was originally agreed then a penalty will be imposed that in practise it is more often seen to be paid by the charterer since he is the one that wants the operations to keep going and in case of the opposite happening meaning that the operations finished earlier than expected the ship owner will might need to pay the charterer.

Lay days have some common characteristics such as it is referred that it is the time that they will be allowed to load and discharge the cargo, and the time that the ship would have to reach the charterer. There are different requirements on calculating the lay day and it is basically based upon the nature of the cargo and the quantity of it, this means that heavy, fragile or dangerous cargo might take longer time to be loaded than other cargo. Therefore, in a situation that the ship becomes available to the charterer outside of the agreed day then a penalty will need to be paid. There 3 different ways to calculate this. It is often calculated by running days, working day and weather working days[5].

[3] Claims Letter – Port C/P or berth C/P

[4] The Commercial and Legal Significance of Laytime & Demurrage in English Law and the New Turkish Commercial Code by Caglan Tanriverdi

[5] What is the Difference between Lay days and Lay time? By Raunek Kantharia

For the lay time to begin in the first place three requirements need to be met. The first requirement is that the ship must become an arrived one which is mentioned in the charter. The second requirement is that the ship will be able to charge or discharge cargo. The third and last requirement is when the Notice of readiness is required the this document will need to be given to the charterer. If all this are satisfied the English Law will recognise that the lay time has already begun. A common notice of readiness that it is used often is the Asbatankvoy charter party form. This form, mentions that lay time will start happening once the Master of the vessel provides the document by either telegraph, wireless or telephone, and lay time will begin in either of 2 occurring situations either 6 hours pass after the notice has been received or the vessel gives berth[6] and this can be found on the 6th clause.

2.1 Port Charter Parties

In the advancement of lay time in port charter parties there is more controversy regarding the topic because of the wording that consists, it mentions that the vessel will need to arrive the premises of the port and it would need to be at the immediate and effective disposal of the charterer, there are 2 parts that need to be discussed. There are some clear definitions given by BIMCO in the Laytime for charterparties Definitions 2013.

The first part is the ships arrival within the port, and according to them it shall mean " any are area that vessels load or discharge cargo and it includes berths, wharves, buoys also places that they are outside of the legal, fiscal or administrative area where vessels are ordered to wait for their turn to no matter the distance from the area." There a clear connection of these rules to the case of Johanna Oldendorff[7], since the decision made wider the scope of whether the stage was in voyage or port. It can be Argued that this come from what Lord Reid established "that a vessel in order to become an arrived one if she is already at the port while waiting to give berth and if this cannot be done immediately the vessel would need to have reached a position which is within the immediate and effective disposition of the charterer with the requirement being in a position which usually such vessels wait, in the case of some extreme situations that the vessel is ordered to wait outside the areas of the port the ship owner would need to provide enough and sufficient evidence that the vessel is to the immediate and effective disposition of the charterer as she would have been in a berthing position which would allow the charterer to load or discharge the cargo[8]". This also important for the notice of readiness.

Another reason that the scope became that much wider was also because of the 4 different criteria that Lord Diplock suggested. The 1st criterion and the 3rd criterion consist information about the voyage and so these requirements are for the charterer. Furthermore, the 1st one is about the loading voyage of the charterer to be at the place and the date that was specified at the loading point that it was agreed and the 3rd requirement has to do about the carrying of the voyage since it has to be specified at the charter party as the place of delivery.

The 2nd and the 4th requirement have to do about the operations. The 2nd cargo will be delivered at the vessel at the point where the vessel is and its stowage on board, and the 4th is about the discharge operation, it suggest that these operations will be made at the same point as the loading operations were made, this places will be agreed in the charter party. To all of these so called "duties" the shipowner will do some performance and more specifically in the 2nd and 4th it can be said that they are solely performed by him as also lord Diplock has suggested[9].Nevertheless, the shipowner will need to perform some duties throughout all the different stages. Most commonly as it has been argued the stages that have created the most disputes are these for the reason that parties have been given an extensive freedom that can bypass instruments such as conventions and statue law, the parties therefore are free to decide upon the terms and conditions of the contract and mostly the cases that are

[6] Association of Ships Brokers & Agents (U.S.A), Inc, Tanker Voyage Charter Party, October 1977
[7] Oldendorff (EL) & Co GmbH v Tradax Export SA (The Johanna Oldendorff) [1973] 2 Lloyd's Rep 285,
[8] ibid
[9] ibid

brought to both arbitration and commercial courts have to do about whether the shipped was arrived and whether the vessel was within the port limits in port charter parties.[10]

3.0 Notice of Readiness Within the Port.

The port is a particular tricky situation and this is why in the majority brokers that will tend to use the Gencon clauses will have to be more detailed about the Notice of Readiness as not all port have the same limits as they are governed by the national or local law that each port will use and this has been illustrated to by case law throughout the history of maritime law.

One of the first cases that brought such a question was Nicholson v Williams[11] where Lush J recognised that ports are appointed " by the Crown" in order to carry out their business of loading and discharging. In the case of Sailing Ship Garston Co v Hickie[12] Brett MR talked about the port limits and said that the limits can even extend out of the place that the loading and discharge takes place furthermore, Bowen LJ said it would be more logical to look at what the parties really intended. In the later case of Leonis Steamship Co v Rank[13] Kennedy LJ mentioned that in some cases the port due to his nature may not be certain, so deciding upon some specific law to be handling it would be un reasonable whereas, it should be decided in the commercial nature that the contract in question has, it is illustrated that judges prefer to leave the freedom of the contract to the parties and not to interfere with them.

The second requirement is for the vessel to be at the immediate and effective disposition of the charterer this means that not only it has to be at the geographical area of the port but also reachable to the charterer this caused a certain controversy, according to some, in the judicial, furthermore there was a clear need for a reform to the existing law since there was an advancement in means of communication by the introduction of telephones emails and faxes therefore, the requirement of "the immediate and affective disposition of the charterer" became wider sine the time period could vary[14]. Furthermore, in the case of

The Johanna Oldendorff[15], Lord Diplock said that since the vessel was already at the premises of the port but waiting for a spot and at the point of the vessel giving berth properly without major delays it would be under the immediate and effective disposition of the charterer

3.1 Invalid Notice of Readiness

As it has been discussed earlier the NOR in port charter parties can be either valid or invalid. For the NOR to be filled it must satisfy the previous criteria as mentioned. A particular tricky topic is whether the ship is on port or not as it has been stated and it effects the validity of the NOR. The WIPON clause mentions the allowance of the NOR to be filled even if the vessel is outside of the port premises consequently if such clause exists the NOR will be deemed valid, in any case that the charter is a port charter and in any case of nonexistence of WIPON clause the NOR that is being filled while the ship is outside of the port then It will be deemed as invalid in order to be valid it must be within the port limits. An invalid NOR can create a lot of problems and it is close to impossible to become valid. Nevertheless, there are some "loopholes" or 'exceptions", as it will be discussed in more details later on, that an invalid NOR will be taken as valid. It must be also stated that in berth charter parties' things are more straight

[10] 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 Castle" (2017) by Ewa Szteinduchert

[11] Nicholson v Williams (1871) LR 6 QB 632

[12] Sailing Ship Garston Co v Hickie (1885) 15 QBD 580

[13] Leonis Steamship Co Ltd v Joseph Rank (No 1) (1907) 13 CC 136

[14] John Schofield "Laytime and Demurrage" seventh edition

[15] Ibid 6

forward since for the filling of the NOR would need to arrive to the specific berthing position of the discharge/loading.

3.2 Method of communication of the Notice of Readiness.

The way of how the Nor is being communicated to the charterer by the master of the ship can play a significant role of whether it will be considered as valid or invalid, the way of acceptance is oral, written sent via wireless telecommunication or by a fax[16] in more recent years with the advancement of technology and of the internet is vastly used new means of communication has become available to the masters of ships, the new method is the email route and it was questioned in a recent case of whether the communication would be valid or not .As it is illustrated an emailed Nor will not be deemed as valid in a default situation unless it has been stated in the contract as seen in the case of Port Russel[17], in this situation the main tribunal[18] had to consider was whether the email that was received contractually permissible for the NOR to be valid. The tribunal based the decision heavily on the BVPOY03 clauses, which there were originally drafted at 1990 when the usage of email was not that common, and the decision was that the clause was not made just solely to set out a definite list but in order to promote the variety of tendering the Nor in the time of 1990 but also for more modern ways of communicating the document so ways as sending it via an email it would be valid . The tribunal decision can be categorised as reasonable and proportioned for the reason that it cannot be expected some clauses that they were drafter 23 years prior to have the exact same interpretation by a court as they would have then. Nevertheless, the commercial courts[19] followed a different direction when the charterers appealed to the tribunal decision since they upheld it. It was mentioned that the list that was created was to be followed in all of the aspects and therefore the usage of email could not be accepted. If there were any amendments to the clauses, then the email form would have been accepted. In the end of the day if there was any intention for the method to have a validity then it could have been stated in the contract or as the judge mentioned after the extensive list that it was provided by the clauses if the words “or otherwise” were included it would have given the flexibility for the email communication to be seen as valid as it has been suggested[20].

Furthermore, the failure of this case as it has been suggested came from the wording that was chosen as the word “may” can have as an outcome to a clause to fail in factual and commercial context, the reasoning that the judges took such an approach can be explained since it created an uncertainty as to the extent of the validity regarding the Nor because the method used was not prescribed in the clause 19 (c). The absence of a hard copy also, did not clear things up, because it was allowed for a hard copy to be received and signed, by choosing to send It via email this “opportunity” got lost and the only way that this could happen is if the charterers would print the email and then sign it but he was not obliged to do so. Hence, the fact that they did not try to extend the list was crucial since the parties knew that an email could be used[21]. The outcome that can identified from this case is that the courts will explain the wording as it was meant to be unless it contradicts the commercial sense, plus that judges will not rewrite the terms that were decided it is of great importance that both parties use clear terms that they go in depth and the provisions are drafted carefully and the amendments[22].

3.3 The form of the Notice of Readiness

As it has been discussed the purpose of filling such a document it is to inform the charterer that the ship has arrived at the specific place that was agreed, it is also ready for the loading or discharge of the cargo and it is essential for the ship be physically and legally ready in order for the processes to start, it has been pointed out that if the vessel for example has only to clear customs and they can only be

[16] Baatz Y, Maritime Law (Routledge 2018) 177

[17] Trafigura Beheer BV v Ravennavi SpA (The “Port Russel”)

[18] (2013) 872 LMLN 1

[19] [2013] EWHC 490 (Comm)

[20] Charterparty (Voyage) - Demurrage - Notice of readiness - Whether notices of readiness could be served by email - BPVOY3 form by Jack Steer

[21] Notice of Readiness – Permissible Method of Service by Sian Morris

[22] Service of NOR by email not permissible under this voyage charterparty by Jamila Khan Stavroula Mylona

cleared once berth has been given, in WIPON charterparty if the vessel filled the Nor before the berthing took place then it would not affect the readiness[23].

In addition, it is essential that the contents of what was stated in the nor must be indeed true and corresponding. The leading authority that created this rule is the case known as The Mexico I[24] and this case concerned the owners of the vessel that created an agreement with the charterers to use their vessel for the carriage of goods from Argentina to Angola they could also carry another type of cargo which they did by the same charterer, the first part of the cargo contained some corn seeds and the second part of the cargo contained beans, both of the cargos have been stowed on top of each other. When the vessel arrived at the port the master filled the Notice of readiness however, due to the cargo been stowed like this it was inaccessible. The vessel arrived at the 25th of January the maize became available for the discharge on the 6th of February and the beans at the 19th of February. The dispute that arose was that the owners were claiming that laytime should commence at the 6th of February when the cargo as a whole became available to the charterers. From the other hand, the charterers claimed that the commencement of laytime should take place at the 19th of February when the actual discharge took place. The Queen's Bench held that the action of the charterers not asking a valid notice waived their right to insist upon a valid notice being given to then. Furthermore, it could be characterised as invalid and void unless the charterer accepted or acknowledged it as valid, for this reason the arbitrators gave the decision of laytime commencing when the cargo of maize became available to them also they came to the conclusion that the parties did not have any intentions to modify the operation of laytime and demurrage so the award would be upheld, this was also the decision that the Q.B decided.

When the case came to the Court of Appeal a different approach was taken. They decided that the notice was indeed invalid and void with the result regarding the commencement of laytime been ineffective even in the case of the charterers knowing or they should have known. It was noticed that the charterers furthermore were entitled to request a further notice in order for laytime to start running but not in a case of them waiving their right to request one, it was confirmed that the notice was invalid nevertheless, the charterers have accepted the invalid notice through their agents when the discharge started, but as the judged stated the charterers were unaware of the inaccurate contents that the notice had therefore, the notice was not binding to them and they had not obligation of not disagreeing with the notice. Furthermore, there was no provision in the charterparty that provided the contrary and the statements should relate to the time and not to when the notice is given even if the filling is done in the wrong time of the day the notice might be still considered as valid.

3.4 The significance of Johanna Oldendorff:

The importance of this case goes beyond what it was mentioned previously, in almost every case that is going to be mentioned the facts were argued and the authority that was given is still being followed it is considered to be a landmark case since it reached all the way to the House of Lords.

The charterers chartered their vessel "Johanna Oldendorf" for the carriage of grain cargo for U.S.A to any of the following ports: London or Avonmouth or Glasgow or Liverpool or Hull. The port would be chosen by the charterers. In the charterparty it was incorporated clause 3 "whether in berth or not" in order to discharge. When the vessel arrived ath the port of Liverpool/Birkenhead at 2 in the evening, the vessel anchored at Mersey Bar, this was the place that usually ships lied when their cargo was of grain. Although it was outside of the agreed place it was within the legal limits of the port, in more detail 17 miles. Furthermore, the vessel was ordered by the local authorities to stay there after the clearance of customs because at that time there was no available berth. The vessel stayed there and tendered the Notice of Readiness, it remained at that point until the 20th of January. It left that place at the 21st of January, the discharge started taking place at the same day and the operations finished at the 29th of January. A dispute arose due to this action and the charterers argued that the ship was not an arrived one therefore the notice of readiness was tendered prematurely. The case got referred to Arbitration. In arbitration it was decided that laytime begun effectively at 4th of January.

[23] Notice of readiness and the commencement of laytime

[24] Transgrain Shipping B.V. v. Global Transporte Oceanico S.A. (The Mexico 1), 1990 1 LLOYD'S LAW REPORTS 507 COURT OF APPEAL

In the Commercial Court[25] it was decided that, the vessel when reached the anchorage point, the vessel not an "arrived one", the vessel was not on a usual waiting place for ships caring grain that wait for discharge therefore the place where the notice was tendered was not the correct one, laytime would begin to count at the 22nd of January. The judgement was in favour of the charterers, the owners appealed.

The Court of Appeal[26], confirmed that the vessel was not in fact an arrived one, moreover, Lord Justice Buckley made clear why this decision was given with 3 points. The first one was, that the vessel was not in the commercial premises of the port. After that, he specified that the waiting area must be in port. Finally, he stated, that "the commercial area needs to be a part of the port" when discharge or loading operations can take place. Regarding to the argument of "whether in berth or not" it could only be given from a vessel that was already an arrived one, according to their finding the ship was not, if it was an arrived one even though, it would be out of berth, it could tender the notice for advancing the commencement of laytime. For all of the above, the judges decided the appeal to be dismissed but it was left open for the owners to appeal at the House of Lords which they did.

In the House of Lords[27], an even more exhausting analysis of the case facts was given by the Lords. Regarding to what would amount to an arrived ship, it was mentioned that the ship "must" be at the port, to have reached a place where she is at the immediate and effective disposition of the charterers while being in the area that vessels usually lie, if it is impossible for her to enter the berth. In cases that the vessel would not be in that position could also happen, but evidence would need to be provided by the shipowner that the vessel is at the immediate and effective disposal of the charterers as she would have been in the berthing position per Lord Reid. The biggest difference was that they found that the vessel was an arrived one at Mersey Bar anchorage, therefore, laytime would count from the 4th of January. Lord Simon mentioned, the test that was previously used as to what would amount to an arrived ship was described as "inadmissible" "commercially irrelevant" and "inconvenient test". Based on these facts, it would be unreasonable if the House of Lords would follow the same decision as the previous courts followed.

3.4 The place of tendering the Notice of Readiness:

It is possible for a notice to be held as invalid and ineffective if the time that was tendered it was out of the specified place. This usually happens in both berth and port charterparties, but the focus of this research is what happens in port charterparties.

The case of Stag line v Board of Trade[28], the dispute that arose was regarding where the notice could be tendered. The vessel was chartered to load cargo of pit props, the suggested port was Miramichi at Canada by the charterers and the notice was tendered outside this place. The owners claimed that laytime had started since the notice was tendered at Chatham at the anchorage area. The charterers claimed that laytime would commence when the ship arrived at the berth of Millbank-Construction. The Judge pointed out, that parties had the intention for the vessel to either proceed to East Canada or Newfoundland and then the charterer would have the right to nominate the port of his choice. Because this did not happen it was decided that the ship was not an arrived one and the owners claim would fail. The owners appealed.

The Court of Appeal[29] followed the decision of Justice Devlin, it was stated that it would be unnecessary to change the wording of the clauses that was decided in the charterparty, just to give the decision in favour of the owners. The appeal was dismissed with costs. It is understandable that the

[25] [1971] 2 Lloyd's Rep. 96
[26] [1972] 2 Lloyd's Rep. 292
[27] [1973] 2 Lloyd's Rep. 285
[28] (1949) 83 Ll.L.Rep. 356
[29] (1950) 84 Ll.L.Rep. 1

charterers have the right to choose, and it is crucial for the owners to have full awareness of where the notice is tendered in order for laytime to begin effectively.

I n addition, in port charterparties, it is really crucial for the vessel if it cannot arrive in the port and berth that has been nominated in the charterparty, for her to be at the actual waiting place and that would need to be proven by the shipowner. The case which gave the authority of the vessel being in the premises of the port is The Maratha Envoy[30].

3.5.1The Martha Envoy significance

The case was heard originally in the Commercial Court, the facts of this case[31] was, the vessel (Maratha Envoy) was chartered to carry grain from Baltimore to Amsterdam or Rotterdam or Antwerp or Ghent or at a "safe port" at North German Port. The shipment of soya bean meal was loaded and the vessel was order by the charterers to discharge the cargo at Bremen Germany but due to bad weather it was deemed that it would be unsafe for the vessel to go there, in order for this to be avoided the vessel proceeded at Wesser and anchored there, this happened at the 7th of December. At the 8th the vessel sailed for the upriver and ended up to the port of Brake. After the vessel's arrival, there was no available berths for her, additionally the usual waiting area was full and there was no space for anchorage, the vessel also was prohibited from anchoring in the river or the nearest place. It was impossible for the vessel to pass the inspections and the customs, it turned back and when it arrived to Bremerhaven it tendered the notice but it was rejected by the charterers. On the 10th of December it was ordered for the vessel to go back to Brake from the charterers but there was still no available berth for her, but this time it could go through health clearance but not customs. It tendered a second notice, but it was again rejected by the charterers. At the 30th of December the vessel could finally give berth successfully at Brake. Due to all this a dispute arose between this parties. The shipowners claimed that the vessel became ready at the 8th of December, the vessels damages were argued to be recoverable and the charterers had failed to give effective orders at the right time. From the other hand, the charterers contended that the laytime would count from the 30th of December, despite the fact that ordered were not given at the right time it was suggested by them that there were no losses.

Justice Donaldson[32] , considered all of the above, neither of the notices that were given at 8th or the 12th of December were valid, for the reason that the vessel was not actually waiting therefore the voyage did not came to an end, there was no effective arrival of the vessel when it made all the journeys from the commercial aspect. The vessel according to him it sustained no damages in respect of financial terms.

The Court of Appeal[33] took a different approach, more specifically Lord Denning decided that the vessel was effectively ready when it dropped the anchor at Weser and it was possible for her to tender the notice there, it would be held as a valid o notice, but she did not then it would be reasonable for laytime to commence at the 12th of December, furthermore, there was no binding authority in the aspect of a vessel being considered as an arrived one when it enters the port. Lord Stephenson mentioned that due to the implied terms the effective arrival of the ship was when it entered Weser and it would be treated as a part of Brake.

Lord Shaw also found that when the words "whether in berth or not" were incorporated in the contract it gave the ability for the ship to tender the notice as soon as she entered, even outside of the berth and Weser was a part of the Port of Brake, eventually the charterparty was a port and not a berth charterparty, as long as it was at the usual waiting place. Lord Denning decided on the matter that it would not be reasonable for the limits to be decided by them when "no one really know where the limits are". The appeal was allowed with costs and the right to appeal to the house of Lords was not reserved.

[30] Federal Commerce and Navigation Company Ltd v Tradax Export S.A.
[31] ibid
[32] [1975] 2 Lloyd's Rep. 223
[33] [1977] 1 Lloyd's Rep. 217

The House of Lords[34] took a different approach on this matter, Lord Diplock gave a lengthy analysis on his decision on why he would allow the appeal of the charterers. He deemed that the ship had not arrived effectively to the port, the port of Weser was not within the fiscal, legal premises of the port since it was 25 miles away from the port of Brake and none of the authorities of the port exercised any control to ships waiting there, it was generally know that this area was not the usual waiting place for vessels by charterers and shipowners. Furthermore, it was commented regarding to the Johanna Oldendorff, that any arrival in a waiting place does not constitute that the voyage is over. As far as the Reid test application for a vessel to be considered as arrived, in this case, it would have to enter the port, by the virtue of the words "whether in berth or not", that were incorporated to the contract. The implied terms were ineffective and should not have been given as a reason for the judgement, because they would alternate the terms of the contract. All the other Lords agreed with the reasons that were given by Lord Diplock. For all these reasons the appeal that was made by the charters was accepted and the original decision of Justice Donaldson was fully restored.

3.5.2 The aftermath of this decision

This decision can certainly be described as bitter by the point of view of shipowners as it was not welcomed, it has been suggested[35] this did not receive any approval since it limits the flexibility that was adopted previously, because the test that was adopted was for previously shipowner to provide enough evidence that risk of losing time while waiting for a spot passed from the shipowner to the charterer, plus it was at the effective and immediate disposal of the charterer, this has diminished the strength of Johanna Oldendorff and it would be easier for the test that was adopted from this case to be treated as an arrived ship when it comes to closest point of the agreed port and cannot proceed closer due to congestion, this would amount for the shipowner's obligation to be fulfilled, this also suggests that the port limits would not need to be specified to the exact point but rather as the usual waiting place as it was suggested[36]

3.6 The invalidity of the Notice of Readiness regarding time place and physical readiness:

This case is seen as a landmark because it gave the deciding authority about the contents of the notice. This case also played a big role in the case of The Agamemnon[37] in this case it was made a contract for the carriage of some steel pipes from Mississippi Baton Rouge to Brisbane and in the charterparty it was agreed that the vessel was "ready to proceed to loading port weather permitting" at the South West Pass which was 170 miles far away from Baton Rouge and by no means formed a place of the port and the notice of readiness was tendered. The vessel entered the port 2 days after the tendering of the notice in the 7th of October 1995 without tendering a newer notice of readiness, the berth that was suppose the vessel to anchor was occupied and only became available at the 9th of October. The dispute that arose from this matter was when the commencement of laytime can actually start counting. The arbitrators, decided that because the ship master having tendered the notice at South West Pass had fulfilled the obligation of notifying the charterers in respect of the ships readiness to load the cargo that they wanted, this was accepted by them on the arrival of Baton Rouge and the effective laytime would run from the 7th of October. The charterers disagreed and they argued that laytime would run from the 9th of October for the reasons that the notice was given prematurely outside the borders of the port and no further notice was given when the ship went in the actual port. The judge were in favour of them by applying the case of Mexico I, in order for the laytime to begin the notice would need to be accurate and clear a delayed one or inchoate one would not satisfy the criterion of validity, applying the facts of this case with the previous, it is comprehensive why the judges were in favour of the charterers, because it was indicated from the notice that the vessel was at Baton Rouge whereas It was not, therefore laytime could not trigger.

3.6.1 An exemption to this:

[34] [1977] 2 Lloyd's Rep. 301

[35] Voyage Charter Arrived Ship

[36] ibid

[37] TA Shipping Ltd v Comet Shipping Ltd (The "Agamemnon") Lloyd's Law Reports , [1998] 1 Lloyd's Rep. 675

As it was previously discussed from this case it is of utter importance that when the notice of readiness is being tendered the contents of the notice needs to be accurate, the time and the physical readiness must also comply to the notice, if all these go wrong it is most probable that the notice will be invalid. Although an important distinction was made in the following.

The "PETR SCHMIDT"[38], the owners had led their vessel to the Galaxy Energy as charterers for the carriage of gasoil from Tuapse to other Mediterranean ports. The charterer party provided that the notice had to be tendered to the charterer's agent between 6 in the morning until 17:00 in the evening for both ports, in order for the laytime to start running and the operations of loading and discharging the cargo. When the vessel arrived at Tuapse the vessel tendered the notice at 12:01 in the midnight and the loading started 02:00 in the morning. Upon arrival at Trieste the vessel filled the notice at 18:00 in the evening and she was in fact ready for the discharge. When it arrived the second port at Venice the notice was tendered at 18:00 in the evening but effectively the discharge of the cargo happened the next day at 17:40. The following where question as to whether or not the notice should be tendered to the charterer, strictly to those hours that were agreed, in the clauses 6 and 30 of the Asbatankvoy, despite the fact that the ship could have been fully ready to load and unload the cargo. It was argued that the notice was invalid and void a new notice had to be tendered inside the agreed hours or as to what extent the notices that were tendered took an effect, at the time of when the operations took place. The arbitrators decided that the notices of readiness where effective and available to load at the same day at 06:00 even though they were not given at the according hours and laytime commenced. The charterers appealed on that decision on the basis that, because the notices were given outside of the agreed hours they were void and invalid and this constituted that the hours that were agreed was a condition and such a breach would terminate the validity of the notices. The shipowners instead argued that the notices were valid and took effect at 06:00 in the morning. The charters putted forward the argument of Mexico I that in order for the notice to be considered as valid the statement of facts that is found in the notice must be true and corresponding and that was indeed confirmed by the judges but they made an important distinction. In the current case there a was a major difference was that the vessel was in the correct place that it was supposed furthermore it was ready to load and discharge goods. The only thing that was not on point was that the notices were given outside of the agreed time and their office time. They added also that the notices were tendered to the charterers first thing in the morning office hours and this is the compliance that was needed to be shown by the owners. In addition the courts discussed in the situation where the notices are received or given after the agreed time, in a case of everything corresponding to the content it would not amount it to be wrong, nevertheless it would be non-contractual, and as to the extent of the defect to be "cured" would be depend to the facts of each case individually. A conclusion that we can get from this case it is that the notice even if wrong can be accepted also at the same time it can be denied such thing will be decided by the course of action of the charterer.

As to the position of this case it has been argued that it gives no guidance to the aspect of the readiness when the vessel has tendered the nor outside of the office hours and the following working day something happens to the vessel and it needs some repairs[39]

3.6.2 The Acceptance of the notice being denied.

The case of "The Happy Day" made clear as to what would happen in a case of where no valid notice of readiness is tendered whether it was prematurely or not and to what extent laytime commenced when it did or it did not commence at all. It has been mentioned that this controversy arose from the case of Mexico I not covering fully all the potential controversies[40].

[38] Galaxy Energy International Ltd v Novorossiysk Shipping Co (The "Petr Schmidt") [1998] 2 Lloyd's Rep. 1

[39] Early NORs and the Petr Schmidt revisited by Phil Stalley

[40] Shipping – Berth charterparty – Premature invalid notice of readiness given by master – Vessel subsequently berthed with no further notice of readiness being given – Delays in unloading – Laytime – Claim for demurrage – Date at which liability for demurrage commenced – Whether laytime could commence without valid notice of readiness – Waiver of notice requirement by Lloyd's Shipping and Trade Law

The facts of the following case[41] are the shipowners went into an agreement to lend their ship "Happy day" to the charterers for the carriage of wheat from Odessa to Cochin. The cargo was effectively loaded at the vessel at September and it arrived at the end of September but when it tried to enter the premises of the port failed since the missed the tide, nevertheless the master of the ship tendered the notice at the same day of the arrival. The effective entry of the vessel happened the day after, but no further notice got tendered to the charterers. The owners argued that according to clause 30 they were given the ability to commence the laytime for the reasons that the port of Cochin gave them the ability to file the notice while was outside of berthing position because it was a port charterer, the charterers were since the port had restrictions on entering with the tide, the charterers could not deny the notice because they acted as if it was valid. Finally, they suggested that even in the case of laytime did not commence at the time of the notice being tender it commenced when the actual operations for the discharge begun. From the other hand, the charters claimed that there was no valid notice with the result of laytime never commencing and for that reason they claimed for despatch.

When it went to arbitration it was decided that it was a berth charterparty instead of port charterparty as it was argued by the shipowners and rejected all of their requests but the laytime would conclude three day after the vessel berthed at the 29 of September. The charters did not particularly like this decision so they appealed at the High Court and Justice Langley[42] brought a heavy verdict against the shipowners, he deemed that a valid notice was never tendered to the charterers, the invalid notice was never accepted and no reliance was placed with the result of laytime not commencing not even when the operations for handling the cargo begun. The owners were unable to claim for demurrage and the charterers could be awarded the despatch money. This decision has been criticised to be controversial and problematic because it could create an unfair effect for shipowners because it would give the authority to charterers, to act knowingly that there is an invalid notice of readiness and carry on with the loading or discharging but in the end they would not pay the laytime or demurrage plus they would be awarded the despatch, but thankfully this decision did not steak around for long time[43]. Others have supported that even with that judgement laytime would be able to commence if the owners will create a clause that will trigger the laytime even in the case of an invalid notice at the latest point which is when the vessel is loading or discharging[44]. It has been suggested by the same authors[45] that if there is any ambiguity as to if the master has served a valid or invalid notice it should be re-tendered in order to avoid any confusions.

The court of appeal[46] when the shipowner appealed on the decision of Justice Langley took a different approach on their judgement. The judges gave some situations of where laytime could commence even without a valid notice. This circumstances are the following, in the situation where the notice has been filled before the arrival of the vessel in the port, the charterers have knowledge of the vessels arrival or they expect it to arrive, the charters or their agents act in a way that would act as if the notice had nothing problematic, they do not make known to the shipowners for the reissue of another notice. If any of these circumstances appear to have happened, then the charterers have waived of their right to reject the notice and laytime will commence when operations start. As it has been suggested the findings of this case were not really corresponding to the facts and to cases that could have similar facts a similar approach would be followed[47]. Furthermore, it has been characterised as a welcomed decision that was fair commercially, but in no way, it should mean that any invalidity would be able to be made good and the facts of each case would play a role. Everything would need to be done in a way to fulfil the provisions[48].

3.6.3 Owners accepting an invalid Notice of Readiness because of their conduct.

[41] Glencore Grain Ltd v Flacker Shipping Ltd, The Happy Day
[42] [2001] EWHC 503 (Comm)
[43] Notice of readiness and a happy day for owners
[44] (Un)Happy Day for Owners by Chris Hobbs and Robert Driver.
[45] ibid
[46] [2002] EWCA Civ 1068
[47] Voyage Charter - Notice of Readiness
[48] Ibid

It has been accepted by the courts that the charterers can accept an invalid notice of readiness and for the first time this was confirmed in 1978 with the case of "Shackleford".

This case[49] concerned the shipowners had agreed to carry grain for the shipowners to Constanza, and it consisted a special clause 13 that can be considered that it governed the time of when laytime could commence, and it stated that the notice would need to be communicated to either them or their agents by 4 in the evening of that day and laytime would commence the next business day, first thing in the morning at 8, the clause did not put any restrictions as to where it would commence it could be either at the port or at the berth. The vessel arrived at 15th of October around 8 in the morning and tendered immediately the notice at the same day while they were waiting at the usual place that vessels anchorage, therefore, the vessel was at the immediate disposition of the charterers but it could not approach due to congestion. The notice was received by the agents of the charterers and they stated to the master of the ship that laytime should count since arrival, berthing was not specified. The discharge was problematic, the ship took approximately more than a month to give berth next to another ship and then it was moved again to another berthing point. The effective discharge operations took place at the 2nd of December.

In the first instance, the case went to an arbitration court and the questions that were asked was as to when effectively laytime could start counting and if there were any interruptions to laytime since it changed berths and they had no provisions for such thing happening.

It was held that both master and shipowners on the acceptance that was performed by the agents of the charterers, they attempted to berth earlier and so on the could clear the customs earlier so clause 13 would be satisfied in order to tender the notice earlier so laytime could start counting. The charterers "demanded" that they would be given back the award.

In the Commercial Court[50], it had to be decided whereas the notice had any validity or not. Donaldson J made 2 observations regarding the notice. The 1st one was that the vessel was truly ready to discharge at the port and if accurate laytime would begin the earliest. The 2nd one was regarding as the customs have been cleared effectively in order for the notice to be given, if satisfied the acceptance would not be of such importance.

Regarding to if the charterparty was a port or a berthing charterparty it allowed to be a port charterparty but the port of Constanza. Then the questioned to be answered was whether the vessel had arrived, and it was indeed ready for the discharge. The judge said that it was ready for discharge, but the notice was tendered prematurely since the customs were not cleared fully. The allegation that the charters made, as to whereas time that was lost during the change of births was not borne out by the fact that the delay was not caused by the owners, it had to be ruled out. Due to their own conduct, the charterers were not able to deny the notice and it was ordered by the court to the arbitrators to start counting the time of demurrage. The Judgement was on favour of the shipowners, but nevertheless the judgement was appealed, it ended to the Court of Appeal.

In the Court of Appeal[51], the judges decided that the notice was supposed to take place after clearing customs and the fact that it got accepted without being fully "valid" commenced laytime the next working day at 8 in the morning, .Furthermore, a new argument was presented, namely, the fact that there was no authority the receivers it was quickly disposed, for the reasons, that the charterers should have provided enough information to the agents even in the case that they have ought to know about the peculiarity of Constanza, therefore, they could not rely upon that ignorance, furthermore they found that the receivers was acting in accordance with the authority of the charterers because commercially they had to take some decisions for them since they were appointed, and the prematurely given notice took an effect. The Court of Appeal also confirmed the view of the Commercial Court about the moving of the ship from one berth to another, for the reason that this was done in order to be more convenient for the charterers and it was reasonable to do so, laytime would count and not because the notice was given earlier but because it was accepted. The judges all agreed that the appeal would

[49] Surrey Shipping Co. Ltd v Compagnie Continentale (France) S.A. (The "Shackleford")
[50] [1978] 1 Lloyd's Rep. 191
[51] [1978] 2 Lloyd's Rep. 154

be dismissed the charterers would have to bear the costs and no further appeal could be made to the House of Lords.

3.6.4 Losing the right to refuse the invalid notice

It has been suggested that the charterers can lose this right by the conduct of their agents, since they are, considered to be, acting on their behalf. It has been supported by case law.

In the case of Helle skou[52], the vessel was chartered to carry, under GenCon clauses, the cargo of skim milked in bags that was going to be loaded at the port of Antwerp, the charterparty had incorporated clause 22 of GenCon that required the ship had to be free from smells, clean and dry, the master of the ship was also informed about that. The Notice was given when the vessel arrived, was accepted, and the loading of the cargo started the next day. As operations where taking place, it was discovered after the operations started that the vessel was not properly cleaned from the previous cargo that was holding, which was fishmeal, no inspections were made before the loading, the operations were stopped and the vessel went for further cleaning.

The owners argued that the notice was valid even though it was given earlier than it should have been, the charterers did not have the right to reject the notice because they started loading the cargo. From the other hand, the charterers argued that their right was not lost and in fact they did reject it when they stopped the operations and started taking the cargo off the ship, and that laytime should count later than the owners were claiming. Owners claimed that it should start at the 23rd of January until the 8th of February and the charterers claimed that it should commence only at the 29th of January.

In the Commercial Court[53] it was held that indeed the charterers had lost their right to treat the notice as invalid, because they started their operations and it was to be taken as valid.

A more recent case[54] about accepting an invalid notice concerned the vessel Northgate that was chartered for the carriage of iron from Brazil to China and the peculiarity that it has it that none of the 2 concerning parties signed a charterparty. The dispute that arose came from the port of Sepatiba at Brazil because it has 2 anchorage area and the master filled the notice at the outer space, because of congestion the vessel entered the port 10 days after tendering the notice. The owners argued that the Nor could be either be “tendered at the berth or port, if the vessel has not passed the customs, whether free pratique or not” so the point of the outer anchorage was correct and that the charterers had lost their right to deny the notice. The charterers claim the otherwise so the notice would be invalid and laytime would commence, when the vessel entered berthed successfully and the operations started, furthermore, they claimed that the acceptance was not from them but from any terminal of the port. It must be noted that there was a common ground between them that the notice could be tendered at the inner part and not the outer unless it was instructed to do so. On that basis the Commercial Court[55] decided that the notice was given from the wrong place so it would be invalid and ineffective, but the defect was set aside for the reason, there was an acceptance by the terminal and that was a body of the charterers, the award would be subsequently be given to the owners.

4.0 Extensive delays causing problems to laytime and to the Nor.

There are several factors that can cause a delay to the ship, not only during the voyage, also at the time when the ship has to enter the port and subsequently cannot approach the berth in order to start the operations of loading or discharging the, this can cause problems at laytime, naturally, the shipowner will that the delay had nothing to do with the delay and laytime should commence as soon as possible and the charterer will claim that the due to the delay laytime could not commence because the vessel was not at the immediate disposition, the clauses of the agreement will play a role also. It has been argued that three things must be proven when the charterers claim that the fault was the

[52] Sofial S.A. v Ove Skou Rederi (The “Helle Skou”)
[53] [1976] 2 Lloyd’s Rep 205
[54] Ocean Pride Maritime Ltd Partnership v Qingdao Ocean Shipping Co (The “Northgate”)
[55] [2007] ewhc 2796 (comm)

shipowners , the first one is, that the charterer will have to prove that the situation that occurred was the fault of the shipowners, secondly, clauses that excuse general will not be applicable to laytime and demurrage only if the clause is specific and it has been provided in the contract, lastly, the fault that caused the delay in laytime by the owner will not be able to be actionable[56]. The most notable situations that can cause delays are congestion, a strike happening in port and due to bad weather. Theoretically a vessel might be held back due to problems in the port, but still tender the notice of readiness, and might be valid or invalid, it would be reasonable for when a port charterparty exists for the master of the vessel to tender the notice while waiting outside of the port.

4.1 Congestion in Port causing delays and confusion to the NOR.

An arbitration case[57] was brought recently that had similar facts. Moreover, the vessel was chartered under Gencon 94 as amended to carry a bulk of corn from upriver of Riven Plate Argentina to Yemen, in the process the port that it had to discharge the goods changed to another port, the original port was Hodeidah and the later was Saleef port. The vessel tendered 4 different notices. The first one was while it was still on the voyage to Yemen, subsequently it was invalid and could not trigger laytime, also due to the difficulty of the area being in a civil dispute the vessel was informed that it had to through some checkpoints and military approval. The vessel went ahead to tender the second and the third notice at the outer anchorage both of them were held to be invalid because it was considered by the tribunal to be out of the premises of the port. The shipowners claimed that they could only tender the notice at the outer part since the port was congested and when the vessel was able to reach the inner part of the port it filled the fourth and last notice. The good were effectively discharged after 2 months almost of the arrival. The validity of all of them was questioned and the tribunal held that the WIPON provision, allowed the master of the vessel to tender the notice when it reached the place that vessels usually lie and that could even mean even if the place is outside of the limits of the port. The notice that it was held to be valid and effective was the third one so laytime could start counting after that point. It can only be speculated that the second notice was not decided to be valid because it was filled during the night and it meant outside of business hours.

Nevertheless, this does not provide the owners with unlimited flexibility, since on another arbitration case[58], which was also presented as argument from the case above[59] that the fact that it was a port charterparty did not really matter, a different approach was taken in the present case the vessel was waiting 400 miles outside of the port while it filled the notice and it was decided that it was ineffective because it was not the place that vessels usually would wait, plus it was waiting to join a convoy. It is understandable that each case will be decided by the facts.

4.1.2 Congestion shifting the nature of the charterparty.

A peculiar thing that can happen is that in some cases, theoretically it would be possible for a berth charterparty to change to a port charterparty when congestion plays a big role. This was argued in the case of Kyzikos.

This case[60] concerned the vessel Kyzikos, that was chartered to carry a cargo of steel from Italy to Houston U.S.A , when the vessel arrived at 17 of December it filled the notice but it was not able to proceed to a berthing point 3 days after the original arrival. The vessel finished the operations at the 11 of January, consequently, the shipowners claimed that laytime started as soon as the arrival of the vessel and that it went on demurrage. The charterers, from the other hand, denied any liability and question if that notice that was given to them had any effectiveness and validity.

In the arbitration[61] it had to be decided that if the notice could be given outside of the berth, even though it was a berthing charterparty, while being vacant but could not approach during the fog.

[56] Risk Of Delay in Charterparties: Like a Ping-Pong game by Javier Andrés Franco Zárate
[57] London Arbitration 16/18 [(2018) 1007 LMLN 3
[58] London Arbitration 5/85 ((1985) 143 LMLN
[59] Ibid 36
[60] Seacrystal Shipping Limited v Bulk Transport Group Shipping Co. Ltd (The "Kyzikos")
[61] (1987) 198 LMLN 1

The arbitrator decided that due to incorporated, clause 5 of Gencon, in the charterparty agreement, it could be effectively be changed to a port charterparty, the owners claim was successful. The charterers appealed.

In the Commercial Court[62] it was decided that the arbitrators were wrong for concluding that laytime would commence when the vessel arrived, whereas, it should commence when the vessel gave berth, because the charterers had no liability towards the shipowners. Moreover, even if the wibon clause could be converted to a wipon and become a port charterparty, the vessel was not at the immediate and effective disposition of the charterers, the owners could not prove that the charterers were in breach since they could not nominate a berth which is " always accessible", the award that was given in favour of the owners would be set aside. The right to appeal was left open and Justice Weber mentioned that it would be also appropriate for the Court of Appeal to hear both sides.

In the Court of Appeal[63], the judges clarified that the clause of "whether in berth or not" was given generally, it did not include any restriction as to where it could be given, theoretically, the notice could be given even if the vessel was outside of the port, in the first place this clause was incorporated for any case that there was congestion to the port and unable to berth. If the charterers wished to be specific, they could specify it in the charterparty. The clause allowed the master to file the notice even in a place that was outside the berthing position even though the problem was the weather and not congestion. The whole purpose of the clause was to change the berth charterparty to a port charterparty so the commencement of laytime to be smoother, the owners could do such thing because the vessel was ready to discharge the cargo and at the immediate and effective disposition of the charterers. The Reid test was applied for the practicality that offered. The arbitrators award was upheld, and the appeal was allowed, the charterers appealed at the House of Lords.

In the House of Lords[64], it was pointed out the clause of "whether in berth or not" did not have any authority to be applied for situations that a berth is vacant but the vessel cannot proceed to it due to the weather, It was intended to have authorities for situations that there is no available berth for the vessel, the clause would only take effect in case that there was no available berth and the charterparty could only be changed to a port when a berth is not available for the vessel. The Judgement was given in favour of the charterers, laytime would not commence at the time when the owners claimed, demurrage would not be payed to the owners.

Lord Brandon of Oakbrook[65] was the one that gave the Judgement that that clause would not apply to situations where the berth is unreachable due to bad weather, congestion as an argument it could definitely be accepted as a reason for changing the charterparty, all the other Lords agreed with him.

With all these said the argument of a wibon clause changing to wipon by the nature of circumstances, such as congestion, can happen, as seen, but there would be a careful examination of facts in each case. If proven otherwise, the shipowners would lose their right to claim the laytime and demurrage. This was also has been supported by several authors[66] and it have been broken down to 2 different stages the clause will start getting triggered, when the vessel is at the loading or discharging port and when "there is not an available birth" the vessel would need to be at the port limits this can be misleading as they suggest but it usually means that the vessel will wait at the usual customary area anchored even if it the distance that the port with vessel has is greater, when there is not an immediate birth. The second stage would be no availability to any berthing point, congestion will suffice but not weather, the arrival and the unavailability of the berth would need to happen at the same time, therefore,

[62] [1987] 1 Lloyd's Rep. 48

[63] [1987] 2 Lloyd's Rep. 122

[64] [1989] 1 Lloyd's Rep. 1

[65] Ibid

[66] Voyage Charterers by Julian Cooke, John D Kimbal, Timothy Young, David Martokowski, Michael Aschcroft, Leroy Lambert, Andrew Taylor, Michael Sturley 4th edition published 2014

the clause would be triggered the charterparty would change from berth to port and the notice of readiness would be given at that point and consequently it would be valid and effective[67].

4.1.3 What it means for the Notice of Readiness and laytime when strikes cause congestion.

Strikes mean that the workers stop any operations to the port because they demand something such as better wage, conditions, by a death of co-worker etc[68]. The main issue that is created is who will bear that fault, the shipowners will support that is not their fault, so they will tender the notice in order for the laytime to commence, from the other hand the charterers will support that the strike was not caused by their actions, they will question the validity of this notice and to when laytime commenced. In practise charterers often include clauses that excludes the liability of time being lost while a strike happened[69].

A case, that have considered about who would bear the risk in a situation where a strike caused congestion concerned 4 different vessels, these vessels were The Co-op Phoenix, The Alpha Glory TheC Young and The Royal Breeze. The facts of this case[70] consisted the following. They were supposed to carry coal from Indonesia to the port of "Puerto de Ferrol" Spain. They arrived at July to the port of discharge, but not all at the same time, and each one tendered the notice of readiness, the strike ended officially before any of the vessels could enter the berthing places. The owners claimed that due to the nature of the clauses that existed[71] the charterers were supposed to bare the risk, when combined therefore the laytime should not be deducted. In the other hand, the charterers claimed that the nature of clause 9[72] provided an exclusion in delays when the cause was a strike. It also needs to be noted that the shipowners argued that clause 9 was not to be taken into consideration since the delay that was caused happened only after the arrival of the vessels in question. The arbitrators were in favour of the shipowners and clause 9 was not clear enough, also they decided to take the same as approach as it was taken by a previous case where it was decided in the house of Lords[73] that the clause could not apply to a vessel when it is delayed from berthing even when there is a strike happening, the charterers appealed.

The Commercial Court[74] took a different approach, the appeal was allowed and the award that was given was set aside. They mentioned that clause 9 had full effect regarding the protection that gave to the charterer in a case were there was a delay to the discharge was due to congestion caused by a strike that ended before the vessels arrival, since it could be controlled by the charterers. The shipowners appealed.

The Court of Appeal[75] had decided to dismiss the appeal, because if the parties had the intention of limiting the freedom of the charterer a stricter language could be used, the effect of this clause was to protect the charterer irrespective. In Respect to what kind of degree could the decision from the previous case could be applied to this, it was mentioned that there was in a way similar but there was no authority from stopping this court to give the meaning that it was intended to have which was to protect the charterer even after a strike had ended. Therefore, the notice that was given in that situation was indeed invalid.

It is of great importance to discuss why such a different decision was taken by both of the courts from the arbitrator's original decision. The arbitrators did a good job at taking into account the similar facts of these 2 cases, that being the clauses that were incorporated to the charterparties, but they did not distinguish to the extent that they should have been in order to be given a more appropriate decision. This is supported by Field J. when he said that in the prior case there was congestion due to a strike

[67] ibid
[68] Laytime and Demurrage by John Schofield 7th edition 2016
[69] Strike clause by Master
[70] Carboex SA v Louis Dreyfus Commodities Suisse SA
[71] Clause 9 and 40 of AmWelsh form as amended (COA)
[72] ibid
[73] Central Argentine Railway, Ltd v Marwood (the "Goathland") [1915] A.C. 981
[74] [2011] EWHC 1165 (Comm)
[75] [2012] EWCA Civ 838

but this was caused from the charterers, since the vessel was held back due to other vessels, chartered by the same charterer, discharging their cargo, in a way the charterer in that situation had a fault from the other commitments that he had. In the later case it was out of the control of the charterers[76]. Some authors have also suggested that not enough effort was made to explore this particular area of congestion, also the AmWelsh has not attracted any "judicial scrutiny" to itself. Furthermore, even in the situation that laytime has already have started counting, it will not be prevented the strike clause from getting triggered[77]. Also, the facts of this case were closer to Leonis[78] and even more similar to London[79], as suggested by the courts.

4.1.4The similarity of these cases and they impact on the decision

In the case of Leonis[80] the vessel was chartered to carry wheat from a south American port, at the loading port the vessel could not enter the berth because there was congestion due to a strike that happened. A port charterparty was in question. Furthermore, there was clause that consisted of the exclusion of liability from the charterer in a case of a strike happening and that they would not bear any kind of risk. The owners made a claim for demurrage, the charterers relied on the clause 39, because when the vessel reached the port the strike was over. Bingham J[81] decided to be in favour of the charterers for two reasons. Clause 39 provided enough coverage of situations in order for the charterers to rely upon it since the congestion "was an indirect cause of events", the second reason was based on the word "obstruction" that existed and this meant congestion as well. The Court of appeal[82] dismissed the appeal of the shipowners and confirmed both views of Bingham J but there was a favouritism over the first reason.

In London[83] it concerned a vessel (The Holgate) which was to carry a cargo of coal to the port of Villa Constitution in Argentina, and something similar to clause 9 of the previous case[84] was incorporated, the clause was based on the Welsh coal form which introduced exceptions to laytime. The vessel arrived at the destination and gave the notice of readiness at the 2nd of January and only 4 days after a strike happened which lasted until the 15th of February until the 27th of January all ships were prevented from to discharge any cargo, the vessel effectively reached the berth on the 9th of February and the cargo was discharged on the 2nd of March. The owners claimed that laytime had begun effectively with the notice of readiness being valid thus triggering demurrage for 42,5 days and the charterers payed 28 days. It was decided by Scrutton J[85] that the clause was fully protecting the charterers throughout the whole period of the strike, the amount that would be awarded to the shipowners were only equivalent for six days since the rate of the discharge operations were also affected by the strike that took place.

By these 2 mentioned cases it can be clearly seen as to why it is considered by the courts that when, there is a strike clause incorporated it will protect the charterer where it is unreasonable to argue that there was a fault of his. If the shipowner wants to be stricter as to this right the clause can be modified. It has been suggested[86] that the courts will provide a commercially sensible interpretation, carboex provided an exception and it is a reminder for everyone that the owners need to negotiate the terms of the charterparties and cannot rely upon assumptions because exceptions can happen and the consequences would be grave to them.

4.1.5 A modern approach

[76] Ibid 72
[77] English shipping law by Stephen Girvin
[78] Ibid 13
[79] London and Northern Steamship Co Ltd v Central Argentine Railway Ltd
[80] Leonis Steamship Company Limited v Joseph Rank Limited
[81] (No 2) (1908) 13 Com Cas 295
[82] ibid
[83] Ibid 79
[84] Ibid 68
[85] (1913) 108 LT 527
[86] A waiting game by Mike Burns

In a London Arbitration[87] concerned a vessel that was chartered of sawn timber in bundies. The ship arrived at the port at the 14th of January at 7:30 in the morning and tendered the notice of readiness at that time but the vessel did not berth until the 31st of January at 20:00 in the night because the port was congested due to port workers being on a strike plus priority was given to other ships. The effective discharge of the cargo finished on the 2nd of February at 2:51 in the morning. The owners contested that there was a failure from the charterers because they did not provide an always accessible berths, the charterers denied that there was not an agreement of laytime regarding the discharge port. Regarding the notice of readiness, the COP was argued that covered the entire time of the discharge in the port. The argument of the berth being accessible when the notice of readiness was tendered then it should have been mentioned in the charterparty. The ship was not given a better priority because the shipowners did not pursue pre-slung cargo according to the charterers, also the owners should have let them know that there was a strike happening at the port. The tribunals decision was that the charterers could not rely on the COP for the period that delayed the ship only for the loading period, if someone was to inform the other party for the strike it was the charterers informing the owners, after all they were the ones that nominated the port and it can be argued that they have an obligation to know what is going on in the port, the demurrage rate existed and it would be awarded to the shipowners. Owners argument that the charterers should have provided an "always accessible berth" succeeded" the requirement was that as soon as the vessel would arrive there would be an available berth for her. The tribunal decided that the damages would be awarded to the owners and the demurrage rate would be calculated.

Another recent arbitration[88] case that had considered the same thing. The vessel was chartered under the amended Gencon 94 form for the carriage of salt from India to Bangladesh. The vessel arrived at the destination on the 18th of April and commence discharge, but a strike took place from the 21st until the 27th of April, the 27th of May the discharge operations were finished. The main issue that arose was due to Gencon strike clause that existed and it reads as neither the shipowner or the charterer will be responsible when any of their obligations are not fulfilled due to a strike happening. Nevertheless, the owners claimed demurrage. It was held that the owners were right to claim, although they did not gave a notice to the charterers that a strike was happening it was proven that the charterers knew about the strike that was taking place, the fact that the vessel had arrived to the port before the strike begun and the charterers kept the ship at the port it meant that laytime would run in full amount and demurrage in half.

From these 2 cases we can conclude that strike clauses will be taken into consideration not only in their nature but also at the facts that each individual case had, as to when laytime can start running as it has been suggested[89] will be decided by the words that were laid out in the charterparty.

5.0 Bad weather causing extensive delays in laytime.

Bad weather as it will be discussed can cause delays to the ship from discharging the goods that was chartered for and so when the effective triggering of laytime start to run can be. Adverse weather is usually excluded from the calculation of laytime, but it does not mean in all situation laytime will not count because of the weather[90].

Another issue that can be identified is that it can be often misused, as it was proven in an arbitration case. In a London Arbitration[91] a vessel was chartered to carry sugar cargo under the Sugar Charterparty form 1969, due to the extreme heat and the sugar bees were attracted to sight and they

[87] London Arbitration 3/17 (2017) 969 LMLN 2
[88] London Arbitration 9/17 (2017) 972 LMLN 2
[89] Strikes, Congestion and Delay - Recent Decisions, by Danielle Southey
[90] Ibid 68
[91] London Arbitration 5/94 (1994) 386 LMLN 2(2)

started attacking stevedores and other port workers with the result of the discharge operations being delayed a dispute arose to the calculation of discharge port laytime. The charterers relied upon clause 28 of the charterparty and the event that took place was force majeure so laytime could be interrupted. Furthermore, they relied upon clause 14 that the stevedores were under the control of the master and subsequently the shipowners control therefore their action were not to be their error. Finally, they argued that the weather was the whole cause of this situation, so they could rely upon the weather clause and interrupt the laytime. The tribunal decided that clause 28 did not apply therefore, the counting of laytime were not affected. Clause 14 in order to have an effect it was need to be proven by the charterers that there was a breach, it was said that the stevedores were acting in a reasonable way by refusing to work while the bees were swarming, so there was no error by the workers and the owners. Finally, it was said that the bees were not the "weather", in order to do so it would need to be established a "causal link" between the bees and the weather by showing consistency and inevitability, this could not be proven by the charterers. For all these reasons the owners succeeded. An argument that can be made is to what extent situations like that can affect other ships. It has been suggested that if a vessel experiences bad weather it does not mean that another vessel will have the same problems as the other one, it can be expected that rain can affect cargo that is prone to be damaged by it such as sugar but not in a case of cargo where it has no effect such as crude oil. It can be even different, in a cargo where it is the same, but it has different clauses such as a ship which have a port charter but laytime is counted in weather days and the other ship is a port charter but laytime is counted in working days but a clause exists that excludes laytime due to adverse weather. The first ship will be excluded from laytime due to rain, but the second ship would not be excluded from laytime[92].

5.1 Limitations to weather.

One can identify that it is possible for the charterers to "exploit" this clause and stop the run of laytime, especially in the winter because it is the season that things like winds, or rain, or snow or hail and thunderstorms occur. The best case that shows a limitation exists is an arbitration case.

This case[93] concerned a vessel which was chartered to carry green bananas to St Petersburg Russia under amended Gencon, laytime was to be counted in weather working days and a provision existed that said normal winter conditions will not stop laytime, the discharge was supposed to take place at the end of January beginning of February, the discharging operations started on the 30th of January and finished on the 10th of February. A dispute arose as to how much time was used for the discharge operations. The owners claimed that it lasted 8 days and 2 days of demurrage, from the other hand the charterers argued that it lasted 5 days, because operations indeed stopped because of the weather "snow" and "rain". The issue that the tribunal had to consider was to what extent the provision had effect. The owners argued that in Russia it was common for such weather to appear. The charterers added a surveyors opinion that the temperature in that place could go down to minus 30 degrees Celsius, thus the bananas would be damaged and they would be unacceptable, in order for this not to happen discharge could only happen when the hatches would remain closed in order to bring the temperature up so the bananas would not be damaged and discharge would continue, an important point is that there were no actual evidence that the temperature was so low, according to them this weather would be adverse and there would an exclusion. The tribunal rejected the argument of the owners that this was a normal weather, also they rejected the argument of the charterers based on the definition of a weather working day. They went forward with the surveyor's opinion so the owners would be amounted laytime and 1 day of demurrage. The application in this situation is smooth because both parties tried to "exploit" the clause and the provision but not succeeded, plus the commencement of laytime was protected in situations like that.

5.2 Extreme weather cases like Ice/frost

When there is ice, problematic situations can occur which prevents the vessel to enter the port and berth or to exit, stop the operation of machines that are needed for the effective discharge or load of the cargo and affect for how long hatches can be opened. Ice clauses exist and when incorporated

[92] Ibid 68

[93] London arbitration 23/04 (2004) 650 LMLN 1

to the charterparty they allow the shipowner to claim the money in demurrage[94] but not in all situations especially where a clause exists.

The Matheos[95] was chartered to go the ports of Danube- Braila and Sulina to carry a cargo of wheat from Danube to a port on the Continent. The vessel arrived at the port of Braila on the 7th of December on the 10th it received order to load the cargo after it berthed it could not move to the next destination until April because the port was frozen, it left the port on the 5th of April and continued for the Sulina port. The dispute that arose was who was liable to pay in situations like this. The arbitrator decided that laytime would count from the 7th of December, the demurrage would count for 10 days and detention of the ship was payable from the charterers to the owners, the charterers appealed .The King's Bench Division[96] supported the arbitrator's view and Justice Rowlatt mentioned that he cannot let the appeal, although he did not support the view of the arbitrator that if the vessel was loaded at the right, the vessel would have left before the ice settled in. The charterers appealed again.

The Court of Appeal[97] decided to allow the appeal, and to give the judgement in favour of the charterers because they were protected by clause 11 which mentioned that when there is detention by either frost or ice in either of the port lay-days will not count. Furthermore, it was physically possible for the vessel to be loaded under these situations but commercially impossible. The owners appealed.

The House of Lords[98] decided rejected the appeal of the owners for three reasons. The first one was that the clause referred to lay-days, therefore there could be no question about it. The second reason was based on the argument of the shipowners, which was that the vessel was physically possible for the cargo to be loaded, It was agreed that this could happen but it would be commercially impossible for the reasons, that it would come to a great financial cost and by storing the cargo for such a long time the chances of the cargo being damaged would be higher. The third reason was to reject the argument that was made in King's Bench division that in order for the clause to be used the charterers would have to prove that none of the forms of loading could happen. The award of detention would be set aside but the shipowners were entitled to some payment.

5.3 The effect that bore tide has on laytime and to what extent can be counted as a weather condition.

Bore tides can be extremely dangerous since the height of the waive is unusually high because 2 tides collided with each other, also in period of equinoxes it is really dangerous[99] but the question that needs to be answered is if whether or not they can be considered as weather, an answer for this comes from a case.

The Maria G[100] was a vessel that was chartered for the carriage of skullscarp cargo from Calcutta to Kobe. The vessel arrived at the destination and the operation of loading commenced but it was ordered by the harbourmaster to be moved to another port because a bore tide was coming and the vessel could sustain damages and also cause damages, the ship was moved to buoys and it came back to the loading port after six days laytime included. The charterers argued that in fact it was reasonable for the vessel to be moved to a buoy because there was an expectation of damage, but the six days that were lost could not be counted as "weather working days" therefore time should not be counted while the vessel was at the buoys. The shipowners from the other hand argued that they were forced to leave from the weather thus not making it their own fault and laytime was prevented to run, that it was right to do so, since the bore tide happened.

[94] Ibid 92
[95] Michalinos & Co v. Louis Dreyfus & Co
[96] (1923) 17 Ll.L.Rep. 111
[97] (1924) 18 Ll.L.Rep. 251
[98] (1925) 21 Ll.L.Rep. 233
[99] Ibid 92
[100] Compania crystal de Vapores v. Herman & Mohatta (india), ltd.

The Queen's Bench Division[101] mentioned that there was nothing in the charterparty that gave an effect to the charterers to make an exception to laytime, if they really wanted to make an exception then they should provide enough evidence that the shipowners were at fault at the loading stage which stopped within the laytime. This was not proven since the shipowners had little to no control over the situation. Devlin J posed two questions to himself as to what extent a bore tide was "weather" and as to what extent this bore tide prevented the vessel from loading the cargo. The answer to the first question was that bore tide could be counted as weather within the clause that was provided. The second answer was that the bore tide itself could not prevent the vessel from loading the cargo within the laytime, but it created a situation which putted the vessel in a danger therefore it would be reasonable for her to leave the berth.

It is argued by John Schofield that bore tide cannot be classified as weather when examined oceanographical and meteorological because it cannot be related to the atmosphere but it is a side effect of everything that happens in the sea, moreover there can be an explanation as to why it could count as weather by taking into account that it got influenced by an actual "weather"[102].

6.0 Frustration

Frustration in contracts usually means that something happened either by the action of a person or by actions that no one could possibly foresee, therefore the person could not have any control over the situation. The question that arises from these facts is if there is a frustrated charterparty does it mean laytime is frustrated and so on the notice of readiness being frustrated and invalid, this will be answered by case law that exists.

6.1 Frustration of Laytime and what happens to the notice of readiness

It is possible that a contract can be frustrated during the loading or the discharge operation, but when it happened does it mean laytime stop counting.

In an arbitration case[103] a vessel was chartered to carry crude oil from West Africa in either Nigeria or Gabon port. The vessel arrived at nominated port on the 25th of January and laytime did not commence until the 29th of January. On the 28th of January the company that was supposed to supply the oil informed the charterers that they would not receive any oil because a pipeline was broken so the supply to loading port was impossible. On the 29th of January after the receival of these new the charterers informed the owners that the contract had become frustrated, and that was beyond their control. The owners did not accept the frustration and argued that cargo should be loaded as it was laid out in the charterparty and they claimed that the charterparty was wrongfully rejected. On the 5th of February operations for the replacement of the pipeline started and were finished mid-February. The tribunal decided that the charterers acted too hastily, calling the charterparty frustrated they did not wait even until the end of laytime, the fact that was proven by the charterers, that operations could not take place was irrelevant since they did not try to load the cargo in another port within the agreed area. The claim of the shipowners was successful, and an award was given to them.

The Elevit was a vessel that was chartered under, Gencon form, for the carriage of sugar cargo from a safe berth from Philippines to a safe berth in Ethiopia. The notice of readiness for the loading of the cargo happened on the 22nd of September, but because the cargo was not available the vessel remained at anchorage until the 15th of October when it was made available to her, the owners despatched the vessel to another destination for another voyage. The charterers argued that because they were communication between them and the owners it was made clear even though the cargo was delayed it would be loaded, the vessel could not be despatched since there was not enough frustration and no indication was given to them that the owners would not fulfil their obligations. The despatch of the shipping happened after the end of the allowed laytime, laytime was running for 23 days. The

[101] [1958] 1 Lloyd's Rep. 616

[102] Ibid

[103] London Arbitration 2/84, (1984) LMN 113, 1

tribunal decided that the owners decision was justified since the charterers failed to hand in the cargo for loading and the award was given to the shipowners.

A vessel name Massalia[104] was chartered for the carriage of iron ore from Masulipatnam to Genoa. The vessel arrived at the loading port of loading on the 9th of November and it tendered the notice of readiness at the same day, previously on the 2nd of November the Canal of Suez became unavailable. Loading took place at the 18th of November and the vessel sailed at the 19th of November and on the 20th of November the charterers said that the charterparty was frustrated. It was suggested that by tendering the notice of readiness the shipowners made a clear indication that they fully committed to charterparty. The commercial court[105] pointed out that when the notice of readiness got tendered the claimants knew that the Canal of Suez was not anymore available, so they had to take another route via the Cape of Good Hope. A really difficult thing to decide upon the validity of the charterparty came from the notice of readiness since it was tendered by the shipowners and accepted by the charterers, it is even possible to mean that a new charterparty was created but this could only be done if it was instructed by the shipowners. It was decided that the respondents would need to pay the claimants.

In this the case the notice of readiness played a role in the decision since the validity could not be questioned. Overall the charterparty will the laytime and the remuneration and it would be really odd if the courts decided that laytime did not occur due to frustration the same can be said in the notice of readiness. In the meantime, it can be possible in the future for such thing to happen if the facts of a case suggesting that.

7.0 Conclusion.

In conclusion, this research focused heavily on what happens in cases of the notice of readiness when it is invalid. In order to avoid such a thing from happening the shipowners and the master of the ship would need to pay close attention to the circumstance and the wording that decided to incorporate in the charterparty. It is really crucial for the clauses to unambiguous and leave nothing to question so disputes could be resolved in a really early stage. There three important stage for a notice of readiness to be considered valid that is the form, the content stating the readiness of the vessel and the way of communication a fault in these stages can “destroy” the validity of the notice of readiness.

An invalid notice would dictate that laytime never commenced, the consequence of this for the shipowner would be devastating as he would not be entitled to any remuneration. One can identify that these two stages go hand to hand because if the shipowner wants to trigger laytime he would need to prove that the vessel arrived at the correct destination it is fully ready and capable of loading and discharging cargo and finally a valid notice of readiness was tendered.

An invalid notice of readiness would never become valid unless the charterers act in such a way that would indicate the otherwise. This prevents an exploitation of the shipowners rights, because in a scenario where an invalid notice of readiness is tendered and the charterers receive this document they notice that the document is not valid and they continue their operations, thinking that when the time comes for them to pay the remuneration they would claim that laytime never commenced it would create such a big financial deficit to the shipowner that could go out of business. Furthermore, shipowners would fear to enter in a charterparty for this reason and the maritime role in the world of trade would be diminished.

The problem with the law regarding the commencement of laytime is not fully straightforward as it has been argued[106], disputes regarding to the commencement of laytime happen on a constant basis. According to others English law is moving to a practical solution[107], it has been suggested if the

[104] Societe Franco-Tunisienne D'Armement v. Sidermar S.P.A.
[105] [1960] 1 Lloyd's Rep. 594
[106] A brief history of laytime by Nikolai Ivanov
[107] Notice of readiness and the commencement of laytime Review and Update by Stuart Kempson and Kelly Wagland

are any doubts in order for laytime to start as early as possible, the master should issue another notice of readiness[108]. In order to stop disputed from happening the terms of the charterparty should be checked in every aspect[109].Furthermore congestion can cause delays and create disputes that are not wanted, strikes, weather and finally frustration can also contribute to all these.

[108] Ibid
[109] Ibid 105

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