

## COMMENCEMENT OF LAYTIME: COMMON PITFALLS

**Beth Bradley**

### Introduction

Determining when laytime commences is essential for both owners and charterers. Both need to be aware when laytime starts so that any demurrage claim can be accurately evaluated. It is therefore important that both owners and charterers are able to effectively analyse the terms of the charterparty which deal with the conditions which need to be satisfied before the laytime clock starts running.

In this short presentation, we will review the main conditions that are generally required to be satisfied and look at a couple of recent cases which consider the main conditions.

As a starting point, there can be a number of terms which will deal with laytime and demurrage issues throughout the entirety of the charterparty. The importance of carefully reviewing the charterparty when a laytime and demurrage issue arises cannot be overstated.

In general there are three main conditions which need to be met under most charterparties before laytime can commence. These concern the arrival and readiness of the vessel and the tender of the Notice of Readiness ("NOR"). We will consider these in turn.

### Arrival

Subject to the express terms of the charterparty, once the vessel has arrived at the agreed destination, it will be an arrived ship for the purposes of calculating when the laytime should start to run. The agreed destination will vary depending on whether the charterparty is a port or a berth charterparty and whether there are additional clauses such as the WIPON ("Whether in Port or Not") or WIBON ("Whether in Berth or Not") amendments which alter the physical place that the vessel needs to reach.

Some tanker charterparties, particularly clause 9 of the ASBATANKVOY form of Charter, will contain an additional promise from the Charterers that the place nominated will be "reachable on arrival". While breach of that promise will not alter the commencement of laytime, it may provide Owners with a claim for detention for any delay to the vessel prior to it reaching the arrival destination.

Whether the vessel is an "arrived" ship is not always an easy question to determine.

A good example of some of the difficulties which can arise when considering "arrival" occurred in a recent London arbitration (decision 19/10) in which the Tribunal considered whether the vessel was arrived when she reached Morong Pilot Station.

The vessel was chartered on terms to carry cargo from one safe port/one safe berth Dumai or Lebuk Gaung, Indonesia.

Clause 4 of the Charterparty provided.

*'4. Notice of Readiness and Commencement of Laytime*

- A. *When the vessel has arrived at the port of loading or discharging a Notice of Readiness shall be tendered to the Charterer or his Agent by the Master or Agent by letter, telegraph, wireless or telephone. The vessel shall be deemed ready within the meaning of this clause whether she arrives during or outside of usual business hours whether she is in or out of berth or whether on is ballast water or slops in a tank. Laytime shall commence either at the expiration of six (6) running hours after tender of Notice of Readiness. The vessel in or out of berth.....or immediately upon the vessel's arrival in berth (i.e. finish mooring when at a sea loading or discharging terminal and all fast when loading or discharging alongside a wharf) with or without Notice of Readiness, whichever first occurs.*
- B. *Notwithstanding anything contained in paragraph A of this Clause laytime shall commence when the vessel arrives at the loading or discharging port whether or not berth is available provided that Notice of Readiness shall always be tendered as therein stipulated'*

The vessel loaded at Lubuk Guang. The Owners argued that the vessel was an arrived vessel when she reached Morong Pilot Station. Charterers argued that the pilot station was merely a staging point at which a sea pilot could be taken on board in order to take the vessel up river i.e. it was not the place where vessels have to await instructions as to berthing.

The extracts of the Admiralty Guide to Port Entry listed four harbour pilot areas and four anchorage areas where vessels were recommended to anchor if not taken into berth on arrival at Dumai. Morong Pilot Station was some way beyond all of those locations and was some five to six hours away from Dumai Port and a further two to three hours from Lubuk Gaung.

The Tribunal held that the Pilot Station was merely a staging point. Further on the facts of the Arbitration, a sea pilot boarded the vessel less than two hours after it arrived at Morong Pilot Station and took it up the river to an inner anchorage where it had to wait the attendance of the Port Health Authority the next day and a further day of waiting before the Harbour Pilot boarded to take the vessel to its berth. In the circumstances the Tribunal concluded the vessel was on it's way to Lubuk Gaung when it tendered Notice of Readiness at the Pilot Station. Consequently the Notice of Readiness was premature, invalid and ineffective to trigger the commencement of laytime.

For commercial reasons it is often in owners interests to get the laytime clock started as early as possible after reaching destination. Once laytime is running the charterers are under pressure to get the vessel loaded or discharged within the laytime or face a demurrage claim.

As such there can sometimes be a tendency for the Master to say that the vessel has reached the agreed destination before she in fact has, for example when the vessel is at anchorage but the charter requires the vessel to be on the berth where the cargo operations will take place. As we discuss below, in relation to the NOR, a premature statement concerning arrival can invalidate the NOR and postpone the time at which laytime can commence. It is therefore important for

owners to remind the Master of the terms of the charter. Particularly given that this will be checked closely by charterers when a demurrage claim is presented.

## Readiness

The second requirement for the commencement of laytime is that the vessel must be ready to load or discharge the cargo when the agreed destination is reached and the notice of readiness is given.

Readiness can be defined as the vessel being available for use by the charterers and covers the readiness of the holds, equipment and legal documents.

- (i) *readiness of the holds* – a vessel's holds must be clean and dry and without smell and in every way fitted to carry the cargo loaded. If not, then the vessel will not be ready to receive the cargo and laytime will not commence until such time as it is ready.
- (ii) *readiness of the equipment* – any equipment which is relevant to loading or discharging must be ready e.g. cranes, hatches, pumps etc. Although it is sufficient that the relevant equipment can be ready when actually required.
- (iii) *Documentary readiness* – all necessary papers must be in order so that the vessel can proceed immediately to the loading/discharging place and start work. Before a vessel can start work there are a number of documentary procedures which are owners responsibility including customs clearance, crew clearance and checks on stability. Different ports will often apply different regulations.

As a rule of thumb (and subject to the terms of the particular charterparty) customs clearance and health clearance for the crew will not generally be needed to be granted before this requirement is satisfied, provided that it is a "mere formality" and the Master has no reason to suspect that either will not be given by the port authorities.

A number of standard form tanker charterparties will, however, expressly provide that laytime will not commence unless customs and/or health clearances are obtained within 6 hours of the giving of the NOR. Such a clause will direct that the Master must take an additional step (such as note protest) before laytime can commence. The failure to take additional steps within the 6 hour period was considered in the *Eagle Valencia* [2010] EWCA Civ 713. In that case, the charterparty required that free pratique be obtained within 6 hours of the NOR failing which the NOR would be invalid.

If the Master is unaware of such a requirement and fails to carry out the terms of the charter then there could be a dramatic reduction in any eventual demurrage claim.

## Notice of Readiness

A Notice of Readiness ("NOR") is a statement made by the ship to the charterers or their agents that it has arrived at the agreed destination and is ready to load/discharge the cargo.

Charterparties almost always contain express provisions concerning the NOR, which will in general provide for the NOR to be tendered in writing at each load and discharge port to the charterers or their nominated agents (this is in contrast to the English Common Law position that an NOR is only required at the first loadport).

The requirement to tender a NOR at each load and discharge port has recently been considered in London Arbitration 9/11.

The Tribunal considered whether the vessel was required to give a Notice of Readiness at the second loading port. The vessel was chartered on the Gencon Form for the carriage of 35,000 MT iron or fines in bulk from Haldia and Krishnapatnam in India to China. The Charterparty provided:-

*'L/Port 1/2 SBA (S) to SP Haldia plus Krishnapatnam India.....paragraph NOR to be tendered during office hour 0900-1700 Mon to Fri and 0900-1200 h on Sat, www- at bends.*

*At loading and Disch Port laytime shall commence to count twelve hours after NOR has been tendered unless sooner commenced. If used, actual time used to count as laytime.*

*Shifting between loading/discharging berth to be for Charterers time risk and expense.*

*Shifting from layberth or customary waiting anchorage to first loading. Discharging berth to be for Owners' time risk and expense'.*

The issue was whether the Owners were required to give NOR at Krishnapatnam. The Owners said that they were not - the Charterparty do not provide for a Notice of Readiness to be tendered at the second loading port. Accordingly Owners said that time started to count on the ship's arrival.

Charterers said that the Owners had to give an NOR and that time started to count twelve hours after the vessel tendered NOR. They submitted that Krishnapatnam was very far from Haldia and therefore it was not easy to predict the vessel's ETA at the second loading place. The Charterers contended that the Burnett Steamship case might have been correct in the 1930s when the test of readiness of a vessel looked merely to physical arrival and physical readiness. However that was no longer appropriate. The mere physical arrival of a vessel was far from establishing the status of readiness to load or discharge.

The Tribunal held that the Owners did not have to give NOR at Krishnapatnam. They were bound to follow Burnett Steamship which

remained good law. In that case Branson J said that *'the Charterers should know near enough without a fresh notice of readiness at what time they are to have their cargo ready at the port to which they have ordered the ship to go'*.

If the NOR is tendered but the Vessel is either not arrived or not ready (or in some instances both) then the notice will be invalid. The difficulty here arises because the final trigger for the commencement of laytime in most charterparties is the tender of a valid notice of readiness. Without which, arguably laytime may not commence until the vessel begins to perform cargo operations. This could result in a considerable amount of waiting time being at the owners risk rather than at the charterers.

If there is any doubt about the validity of the first NOR, it is sensible for a Master to serve multiple NOR's without prejudice to the validity of the first NOR.

### Conclusion

It is always of fundamental importance to check the terms of the charterparty.

Terms which relate to the commencement of laytime are often set out in the pre-printed parts of the charterparty, but often rider clauses can adjust the laytime regime. As such the whole charterparty should be checked.

Where there is uncertainty as to whether the NOR has been tendered correctly, the most practical step that a Master can take is to re-tender the NOR without prejudice to the validity of the first one tendered.

## EXERCISE OF LIEN ON CARGO

By Matthew Lam

### Introduction

When there is unpaid hire, freight, demurrage or other sums due under a charterparty, owners may wish to exercise a lien on the cargo. Exercising a lien can sometimes be a useful tool to obtain payment.

Lien may be created by common law or under a contract. Common law liens are usually more restrictive in scope and the liens usually used by owners are the contractual liens. In this short presentation, I am going to discuss some of the issues owners may wish to consider when exercising a contractual lien.

### An example of a lien clause

Clause 8 of GENCON 1994 form provides:-

#### **"Lien Clause**

*The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering same."*

### Right to exercise the lien as against the bill of lading holder

By exercising the lien, owners are refusing delivery of the cargo to the cargo owners. Owners will need to ensure that they not only have the right to exercise the lien as against the charterers under the charterparty but also against the bill of lading holder under the bill of lading. Otherwise, the cargo interests will have an action against owners/ the vessel.

Unless charterers are themselves entitled to delivery of the cargo, owners have no right to refuse delivery unless sufficient lien has been provided under the bill of lading contract.

The bill of lading contract may contain an express lien clause.

It may also provide for the right to lien by incorporating the terms of the charterparty. For example, in CONGENBILL 1994, the terms on its reverse side provide that "all terms and conditions, liberties and exceptions of the Charter Party" are incorporated. If the bill of lading also correctly identifies the relevant charterparty on the front page, depending on the circumstances, it is likely that this will be sufficient for owners to exercise a lien as against the bill of lading holder under English law. However, the local law of the place in which the lien is to be exercised should also be considered.

The exercise of the lien must be consistent with the terms of the bill of lading. For example, for a bill of lading marked "freight prepaid", it will be difficult for owners to exercise a lien for freight. However, it may still be possible for owners to exercise a lien for demurrage in these circumstances.

A court order is usually not required for exercising the lien. However, where there is a risk of wrongful exercise of lien, it may be advisable to consider obtaining a court order to protect the owners' position.

#### Does the lien clause cover the debt in question

It is important to look at the wording of the relevant lien clause carefully to ensure that it covers the debt in question. For example, a charterparty clause providing a lien for unpaid freight only will not entitle owners to exercise a lien for unpaid demurrage. A lien for demurrage will not usually cover damages for detention.

A lien is usually confined to the shipment to which it relates. Sometimes, a charter may provide for consecutive voyages. The cargo carried on one voyage cannot be liened in respect of sums due under other voyages, unless the wording of the lien clause is wide enough to cover this situation.

Generally, a lien may be exercised only in respect of amounts which are due at the time of its exercise. It does not cover sums which are not presently due and payable.

If the charterparty provides that freight and demurrage are payable after discharge, it may be difficult to exercise a lien in these circumstances. By the time the freight and demurrage are due, owners may have already lost possession of the cargo.

#### Exercise of lien

There are two basic requirements for the exercise of lien: (1) a demand for the amount for which the lien is due and (2) retention of continuous possession of the cargo.

Lien should be properly exercised and notified before possession is retained. Lien notice should be sent and a proper demand should be made. It is advisable to send the notice/ demand to both charterers and cargo owners.

It is also essential that owners retain possession of the cargo.

#### Where to exercise the lien

Owners cannot stop the vessel in the middle of the voyage to exercise the lien.

It should probably be sufficient for the vessel to anchor off the discharge port. It is generally not necessary for the vessel to proceed to the berth since this may cause unnecessary expense or congestion to the port. If the vessel enters into the port, the receivers may also be able to obtain an order to force owners to discharge the cargoes in some jurisdictions.

Under some circumstances, it may also be possible for the vessel to sail to another convenient port to discharge.

### Exercise of lien after discharge

As mentioned previously, owners must retain possession of the cargo. At some ports, owners may be able to retain possession of the cargo after discharge.

If the owners are to lien the cargo after discharge, it is essential to ensure that possession of the cargo does not pass to the receivers of the cargo or their agents. Owners will also have to arrange warehousing of the cargo and bear the risks and expenses.

Owners should consider the costs and risks of exercising the lien onshore (e.g. warehouse charges, the risk that cargo interests may apply for local court order in respect of the cargo) and the potential benefit which can be achieved (e.g. the vessel will be free to sail).

### Sale of the cargo

In the absence of a specific right of sale in the bill of lading or under the local law, there is generally no right for owners to sell the cargo.

### Local law and practice

It is essential to consider the local law of the place where the lien is to be exercised, i.e. usually the discharge port.

It should be checked whether the local law recognises the right to lien and whether there are any specific requirements for the exercise of the lien.

As mentioned above, the bill of lading may simply provide that it incorporates the terms of the charterparty without expressly providing for a lien. While this may be sufficient under English law, the local law may not recognise there is a valid lien in these circumstances.

Local law advice should be sought to minimise the risk of claims/ actions by the cargo interests.

### Conclusion

Lien on cargo can be a useful tool for owners to obtain payment. However, if the lien is not exercised properly, there will be risks of claims/ actions by charterers and cargo interests. Careful consideration should be given before exercising the lien.

There are also other tools, e.g. lien on sub-freight, obtaining bill of lading freight, etc. We can assist you on all these, when required.



# LIQUIFACTION OF CARGOS: DIVISION OF RESPONSIBILITIES BETWEEN OWNERS AND CHARTERERS

By Tom Kelly

Much has been written on the topic of liquefaction, by P&I Clubs in particular, with respect to its scientific causes and obligations to test cargos for susceptibility. By contrast, this talk is intended to examine the division of legal responsibility between Owners and Charterers with respect to cargos prone to liquefaction.

## **WHAT IS LIQUIFACTION?**

"Liquefaction" is the expression used to refer to cargos which have changed from a solid to a viscous state. In this condition, the cargo acts like a fluid, and for example may flow from one side of the ship to the other with a roll, and not completely return with a roll in the other direction. This may progressively lead to a dangerous list and potentially the sudden capsizing of the vessel and associated loss of cargo, hull, and most importantly, life. This is not a new problem, but has become more prevalent with the carriage of bulk cargos from new origins where conditions make the cargo particularly susceptible. At the end of 2010 alone there were 3 vessel sinkings with the loss of 44 seafarers, allegedly attributable to liquefaction of nickel ore.

Cargos prone to liquefaction include mineral cargos of predominately fine particles mined and stored in conditions which allow large absorption of moisture, with minimal drainage and evaporation. Some examples would include iron ore fines, nickel ore, millscale, and fluorspar originating from open air stockpiles in the tropical regions. These cargos do not necessarily look wet at loading, but during the course of carriage the weight of the cargo, coupled with the movement of the vessel, compresses the moisture within the cargo, causing it to flow freely on top of, or within, the particles constituting the cargo.

## **WHAT ARE OWNERS AND CHARTERERS OBLIGED TO DO?**

In simple terms, the common law provides that owners are obliged to ensure the vessel is seaworthy at the time of sailing, and to stow a cargo, and charterers are obliged to supply a cargo, and if the cargo is dangerous, to warn the owner so that suitable precautions may be taken. The definition of "dangerous" in this context relevantly embraces cargos which are physically dangerous, such as cargos which may liquefy. The division of the respective parties' obligations may be modified by international conventions and the charterparty. Insurance may also have a practical bearing on an owner's position.

### **1. Charterparties**

#### **(a) *Example: NYPE form 1946***

The NYPE charterparty 1946 in standard form (that is, where not amended by riders or recaps) is a common charterparty for bulk carriers. This form provides that it is Charterer's obligation to load, stow and trim the cargo at their expense "*under supervision of the Master*". This has been interpreted to mean that the Master's obligation to supervise is consistent with his obligation to ensure the vessel is seaworthy, but this shall in no case relieve the Charterers if their primary duty to stow safely, thereby modifying the usual common law division of responsibility. Where a vessel has been rendered unseaworthy solely through improper stowage by the charterer, the Charterer will be liable. The Charterer's obligation to ensure the cargo is safe for carriage is therefore onerous, and the Master's responsibility to intervene in relation to stowage is very

limited, even where his positive action could have alleviated the problem (See *ER Hamburg* [2006]).

Where Charterers are confident they have complied with their legal obligations in relation to the cargo, including providing a cargo within the TML, and accurate information about the cargo prior to loading, they could consider placing the onus of responsibility on the Master for loading, stowing and trimming by inclusion of the words "*and responsibility*" after "*under supervision*" in charterparties under NYPE 1946 form (again, see *ER Hamburg* [2006]). The efficacy of such an inclusion will be subject to the additional comments below.

**(b) Exceptions under the NYPE form – obligation for stowage rests with the Owner**

Even without the inclusion of "*and responsibility*", there are other exceptions (albeit limited) where the obligation for stowage under a charterparty may shift to Owners. These are: (a) where the Master has actively "intervened" in stowage and this intervention leads to a loss which would not have otherwise occurred absent such involvement; and (b) where there are matters which are uniquely within the vessel's knowledge. Vessel stability would be an example of this. It is possible Charterers could use such matters as a defence where there was a loss involving a cargo that would otherwise be safe for ordinary carriage due to: (a) the overriding impact of a Master's intervention on decisions as how to stow the cargo; or (b) stowage plan chosen on a vessel with particular stability characteristics which made it unusually susceptible to capsizing (which were unknown to the charterer) (see *The "Socol 3"* [2010]). This is probably an issue of Owner's negligence and also of seaworthiness, discussed further below.

**(c) Clause paramount – The Rules**

The charterparty may include a clause paramount, which if appropriately drafted will incorporate the bill of lading terms, including the Hague or Hague Visby rules (the "Rules"), or COGSA (US) (as applicable), into the charterparty. This is a feature of the standard NYPE 1946 form.

The Rules include Article IV Rule 6, which relevantly provides that:

*"Goods of a... dangerous nature to the shipment whereof the carrier, master... has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment".*

And Article IV Rule 2(a) provides that Owners will have no liability for any:

*"act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship"*

However, Owners will only be entitled to rely on such an indemnity against Charterers if the vessel is seaworthy. Article III of the Rules relevantly has the significantly lessening the absolute obligation imposed on Owners by the common law to provide a seaworthy vessel at sailing, to the obligation of "due diligence" to ensure seaworthiness before and at the beginning of the voyage. Therefore, the Owner's obligations to ensure the vessel will not become unstable, for example through the handling of cargo before sailing on a particular stage of the voyage, may be significantly softened.

To put this in context, it has been stated that the presence of undeclared dangerous cargo in a container is not necessarily something that could be detected by the exercise of due diligence (see *The Kapitan Sakharov* [2000]). However, the practical use of a "due diligence" defence (as oppose to absolute obligation of seaworthiness) by Owners may be limited given that a Master should have sufficient warning of the potential risks associated with a cargo by: (a) the

prewarning mechanisms the shipper is obliged to comply with under SOLAS and the IMSBC Code, coupled with media coverage and P&I club warnings; (b) the Master can take the initiative by the simple "can" test (see the Code, Section 8 Page 33); not to mention previous experience of handling bulk cargoes from a loadport with similar conditions.

## **2. Case study**

In *Micada v Texim* (1968) 2LLR 57 the vessel loaded a cargo of iron ore concentrates. It turned out that some of the concentrates had a moisture content over 7%, in which case they could not safely be carried without the vessel being fitted with shifting boards. Some of the concentrate turned out to have a moisture content over 11% in which case they could not be safely carried at all (with or without shifting boards).

At the loading port the Master did query the moisture content. He even went so far as to complain about the cargo being wet. He asked the Shippers about the moisture content. He asked the Shippers for a certificate as to the moisture content. The Shippers assured him his fears were unfounded, that the moisture content did not exceed 4.5% and that a certificate had been or would be sent to the Charterers.

In the event the Master sailed for destination but the cargo shifted and the Master had to put into Piraeus where the cargo was discharged, shifting boards were put in place, the cargo was reloaded and then the vessel resumed voyage to destination.

Arbitrators found for Owners, holding Charterers responsible for the entire costs of liquefaction. However, it is important to note that the Arbitrator had specifically decided that "The Master was not aware and could not reasonably have been aware of the dangerous nature of the cargo at the time of loading".

On Appeal, this finding of fact could not therefore be considered by the High Court, who dismissed Charterer's appeal, and could not seriously consider the issue of whether the Master should have intervened to stop loading to preserve seaworthiness.

In other cases however, such as the *Imvros* (1999) 1LLR 848, the Courts have held that where Charterers are responsible for loading and stowage, they will be liable for poor stowage even where that poor stowage endangers the vessel, i.e renders it unseaworthy.

## **3. International conventions**

International maritime conventions may be applicable to a ship: (a) where the flag state of that ship is a "contracting state", being a state which has bound itself to enforce a particular convention; and (b) via port state control, whereby a contracting state has obliged itself to enforce a convention with respect to a ship passing through its territorial waters.

Chapter VII of SOLAS 1974 (the safety of life at sea convention) incorporates the mandatory International Maritime Solid Bulk Cargoes Code 2009 (the "Code"). The Code governs the safe loading, stowage and carriage of solid bulk cargoes. Chapter VI of SOLAS provides that; *"Concentrates or other cargoes which may liquefy shall only be accepted [by the Master] for loading when the actual moisture content of the cargo is less than its TML"*. Cargoes prone to liquefaction are identified as "Group A" cargoes. The Code obliges the shipper to provide certain information about the cargo before loading, including whether it could be classified as a Group A cargo, and the transportable moisture limit ("TML"). A cargo is not safe to carry if it exceeds the Flow Moisture Point ("FMP") against which the TML is calculated.

## **CONCLUSION**

The general position is that Owners are only obliged to carry dangerous cargo where notice required has been given and consent provided. The precise nature of the Owners' and Charterers' rights and obligations with respect to carrying a dangerous cargo will be stipulated by the charterparty and by international conventions. Time and cost relating to a carriage of a Group A cargo will tend to be for Charterers' account. Charterers will face a heavy burden to escape liability, and proof of unseaworthiness will probably be required. Where a vessel has sunk and witnesses unavailable, this will potentially result in long and costly court or arbitration actions. As always, when seeking to protect themselves, Charterers should be careful to ensure charterparties and sales contracts contain back-to-back liability provisions down the contractual chain.