

Circular From SKULD**Date: 29 October 2018****A brief history of laytime**

The subject of Commencement of Laytime is extensive. Therefore, this article is intended to be a brief overview of the main conditions that are generally required for laytime (or, if applicable, demurrage) to commence, together with references to the significant supporting case law underpinning the guiding principles.

In general terms, there are three conditions which need to be satisfied under most charterparties before laytime can commence. These are:

1. The vessel must have arrived at the destination specified in the charter;
2. The vessel must be ready in all material respects and in a fit condition to load or discharge the cargo; and
3. Where required, the vessel must tender valid Notice of Readiness (“NOR”) confirming the vessel’s arrival and readiness.

Once these conditions have been met, the vessel is an “arrived ship” for the purposes of the contractual laytime/demurrage regime, and time will begin to run. We will consider each requirement in turn.

Arrival at Destination

The vessel must have arrived at the place within the port where NOR may be validly served as specified in the charterparty. This agreed destination will vary depending on whether the charterparty is a “berth charter” or a “port charter”.

In the case of a “berth charter”, the vessel will not be considered arrived until she reaches the load/discharge berth designated by the charterers within a named port. Until then, the vessel is still at the loading or carrying voyage stage, and no obligation lies upon the charterer to load or receive the cargo (*The Kyzikos* [1987] A.C. 1264). Therefore, under a berth charter, the risk of congestion or other delays in berthing is generally allocated to the shipowner rather than the charterer.

The position is less straightforward for a “port charter” where the vessel, to be an arrived ship, must reach the named port and must have either reached the intended berth or, if the berth is not available, a place within the port where waiting ships usually lies. Once at that position the vessel must be at the “*immediate and effective disposition of the charterer*”. (*The Johanna Oldendorff* [1973] 2 Lloyd’s Rep 285). The charterer will bear the cost of waiting for an available berth. However, the usual waiting place must be within port limits and, unless the charter expressly states otherwise, if the waiting place is outside the limits of the port, then NOR cannot be validly tendered (*The Maratha Envoy* [1977] 2 Lloyd’s Rep 301 and *The Arundel Castle* [2017] 1 Lloyd’s Rep. 370).

WIBON/WIPON: A charter will often contain additional clauses which vary the above position. For example, WIBON (“whether in berth or not”) in a berth charter has the effect of allowing an NOR to be tendered prior to reaching the berth, as contractual destination, if the berth is unavailable due to congestion. This transfers the general risk of congestion from the shipowner to the charterer. This exception only applies to cases where a berth is not available due to congestion and not to cases where a berth is available but is unreachable for other reasons such as bad weather (*The Kyzikos* [1987] 1 Lloyd’s Rep 48). The effect of the phrase is essentially to convert a “berth charter” into a “port charter”.

Similarly, a clause WIPON (“whether in port or not”) addresses the situation where a vessel is an arrived ship but cannot wait within port limits due to port congestion. In those circumstances, a shipowner will be entitled to tender NOR if the vessel has reached the usual waiting area for the port, irrespective if that area is outside port limits (*The Adolf Leonhardt* [1986] 2 Lloyd’s Rep. 395).

Reachable on Arrival/Always Accessible: In addition to the WIBON/WIPON provisions, many charters contain other clauses which allocate the risk of congestion or delay in berthing to charterers. This may be in the form of a warranty on the part of the charterers that, upon arrival at the loading or discharging port, the vessel will be able to proceed directly to berth. This is usually expressed in the terms “reachable on arrival” or “always accessible”. The term “reachable on arrival” in a charter places the obligation on charterers whereby the charterer undertakes that when the ship arrives at the port, there will be a loading/discharging berth available to which the vessel can proceed without delay (*The Laura Prima* [1982] 1 Lloyd’s Rep.1). The cause of any unreachability is immaterial and will include bad weather and other navigational reasons such as shortage of tugs (in addition to port congestion) (*The Fjordaas* [1988] 1 Lloyd’s Rep 336 and *The Sea Queen* [1988] 1 Lloyd’s Rep 500). If a berth cannot be reached on arrival, the warranty is broken and Owners may be able to claim damages for detention or, if the vessel is an arrived ship and laytime has commenced, time will run and charterers can not avail themselves of laytime/demurrage exceptions in the charterparty.

For many years Courts and Tribunals held that the warranty “always accessible” on arrival was effectively synonymous with “reachable on arrival”. However in the recent case of *The Aconcagua Bay* [2018] the Commercial Court confirmed that “accessible” is wider than the term “reachable” and covers both arrival at the berth and departure from the berth. Therefore, a charterer who warrants that a berth is reachable on arrival warrants that the vessel can reach the berth on arrival, whilst a charterer who warrants that a berth is “always accessible” warrants that the vessel can reach the berth on arrival and leave the berth when cargo operations are complete.

Readiness of the Vessel

The second requirement for the commencement of laytime is that the vessel must be ready in all respects to load or discharge the cargo. This means that the vessel must be both

1. physically ready, in that the holds must be clean and dry and in every way fitted to carry the cargo loaded, and that any equipment which is relevant to loading or discharging must be ready e.g. cranes, hatches, pumps etc; and

2. legally ready in that all necessary documentation must be in order so that the vessel can proceed immediately to commence cargo operations.

The vessel must be ready in a business and mercantile sense. Therefore, readiness does not involve completion of minor or routine formalities (*The Tres Flores* [1974] QB 264). For example, routine preliminary matters such as the removal of hatch covers will not generally prevent a valid NOR being tendered. Similarly, customs clearance and health clearance for the crew is often only obtainable on berthing, and are considered to be usual formalities that will not generally affect a vessel's legal readiness.

It is also possible to accelerate the tender of a valid NOR by the inclusion of a term such as “*whether customs cleared or not*” (“WCCON”) or “*whether in free pratique or not*” (“WIFPON”).

Notice of Readiness

A Notice of Readiness (“NOR”) is the effective “trigger” for the commencement of the running of laytime. Whilst the tendering of an NOR would appear to be a relatively straightforward task, the validity of an NOR frequently gives rise to disputes, and there are several pitfalls to be aware of.

Parties often give serious consideration to issues of arrival and readiness when tendering NOR, but give less consideration to the form and content of the NOR itself. The form and content of an NOR will depend on the terms of the charterparty. It is important that these requirements are followed strictly because if an NOR is invalid on tendering, it cannot subsequently become valid. Therefore the consequence of tendering an invalid NOR can be significant.

Form: The charterparty will often specify the means (i.e. notice to be in writing) and method of service of an NOR. Many commonly used charterparty forms pre-date the use of e-mail. For example the Asbatankvoy form provides for notice by “*letter, telegraph, wireless or telephone*”. In *The Port Russel* [2013] EWHC 490 the Court held that this charter provision did not include service by e-mail. Therefore, when the NOR was tendered by e-mail the Court held this to be un-contractual service, and the NOR was deemed to be invalid.

Content: The contents of the NOR must be statements of existing facts. If the NOR states that the vessel is an arrived ship and/or is materially ready, but the vessel is either not arrived or not ready (or in some instances both) then the notice will be invalid. Anticipatory arrival is not arrival and anticipatory readiness is not readiness. In *The Mexico I* [1990] 1 Lloyd's Rep. 191 the Court of Appeal held that an NOR which was tendered invalidly (i.e. the vessel was not in a state of readiness) could not become valid when the requirements for readiness were subsequently satisfied. The readiness must exist at the time notice is given.

Similarly, in *The Agamemnon* [1998] CLC Rep 106 an NOR which was served prematurely, i.e. before the vessel had actually arrived at the port, was invalid and would not become valid once the vessel arrived at the designated area, notwithstanding that the vessel was otherwise ready and in all other ways fit to load/discharge cargo. NOR was therefore invalid and could not serve to trigger the commencement of laytime.

However, in *The Petr Schmidt* [1998] 2 Lloyd's Rep. 1 the Court of Appeal confirmed that a vessel that had arrived at its designated area and was in a state of readiness, but tendered NOR non-contractually (i.e. out of office hours) then the NOR was valid and became effective the next day, on the basis that the NOR contained accurate statements of existing fact, which remained accurate at the time the NOR was received by charterers. Therefore the NOR was tendered in a non-contractual manner but was not invalid.

Given that an invalid NOR will not trigger the commencement of laytime, the consequences of invalidity can be serious. However, a charterer may be found to have accepted an otherwise invalid notice on the basis of the legal doctrines of waiver and estoppel. In *The Happy Day* [2002] EWCA 1068 the Court of Appeal held that laytime commenced notwithstanding tendering of an invalid (premature) NOR when cargo operations commenced because charterers' knowledge that the vessel was ready and their assent to commence discharging operations was sufficient to give rise to a waiver of the requirement to give valid NOR. In *The Shackleford* [1978] 1 Lloyd's Rep 191 an invalid NOR was deemed accepted by charterers when charterers endorsed it with the word "accepted" having full knowledge of the defect. In those circumstances charterers were estopped from relying on the invalidity of the NOR.

Given the above complexities, if there is any doubt about the validity of the first NOR, a shipowner would be well advised to serve multiple further NOR's without prejudice to the validity of the first NOR.

As mentioned at the outset, the law relating to the commencement of laytime is expansive and not straightforward. Disputes relating to issues of commencement of laytime are common. The above points represent only a short summary of the primary principles and case law. When considering issues relating to the commencement of laytime, it is of fundamental importance that the terms of the charter are carefully checked and, where appropriate, advice sought from your P&I Club.

Source of Information: Skuld P&I Club