SCHRIFTEN DES
DEUTSCHEN VEREINS FÜR INTERNATIONALES SEERECHT
REIHE A: BERICHTE UND VORTRÄGE

HEFT 27

PROFESSOR J. F. WILSON

THE RISK OF TIME LOST WAITING FOR A BERTH UNDER A CHARTERPARTY

THE RISK OF TIME LOST WAITING FOR A BERTH UNDER A CHARTERPARTY

Vortrag

von

Professor J.F. Wilson, M.A.

gehalten vor dem Deutschen Verein für Internationales Seerecht am 25. Mai 1977

Hamburg 1977

THE RISK OF TIME LOST WAITING FOR A BERTH UNDER A CHARTERPARTY

Voyage charters are always exposed to the risk of delay caused by such factors as bad weather or engine trouble during the voyage, or by adverse tides, strikes or the unavailability of a berth on arrival at the port. Some of these risks are covered by exceptions, e.g. perils of the sea, strikes, etc., but many of the standard charter forms do not provide for the most common cause of delay i.e. that arising from the difficulty of obtaining a berth because of congestion in the port. In this paper I intend to concentrate on the general problem of time lost waiting for a berth, irrespective of whether it arises from congestion in the port, strikes, or any other cause. Delay costs money and it is often difficult to decide on whom the loss should fall. First we must consider the position at Common Law, and then where there is an express term in the contract to cover the situation.

1. Common Law position

A voyage charterparty falls into distinct stages and, as a general rule, the risk of loss caused by delay falls on the party responsible for performing the particular stage at the time when the loss occurs. Thus a charter usually involves the following stages:

(a) the loading voyage - the voyage to the place specified as the loading point

(b) the loading operation - covering loading and stowage

(c) the carrying voyage - the voyage to the place specified for delivery of the cargo, and

(d) the discharging operation.

In normal circumstances, stages (a) and (c) are solely the

obligation of the shipowner, whereas (b) and (d) are joint operations, though primarily the responsibility of the charterer. Consequently any loss occurring during stages (a) and (c), which arises from delay in reaching a berth, falls on the shipowner until the vessel becomes an "arrived ship" at the place fixed by the charterparty. At that point lay days begin to run and the cost of any subsequent delay falls on the charterer. It is therefore crucial to establish the precise time at which a vessel becomes an "arrived ship" in order to decide which party has to bear the loss arising from the delay. Up to that time, while exceptions (e.g. perils of the sea) may protect the shipowner from liability for late arrival, time is running at his expense and he cannot recover compensation for it from the charterer.

(a) Test of an "arrived" ship

In seeking to establish when a vessel becomes an "arrived ship" it is important to remember that charterparties are of three types - berth charters, dock charters and port charters. The position with regard to berth and dock charters has been clearly established for some time, the vessel only becoming an "arrived ship" when it reaches and enters the specified berth or dock. (Stag Line Ltd. v. Board of Trade [1950] 2 K.B. 194 (berth charter); Thorman v. Dowgate s.s. Co. [1910] 1 K.B. 410 (dock charter)). In both cases the risk of delay caused by congestion in the port falls on the shipowner. The same rule also applies even in cases where the shipowner, having a right to nominate the berth or dock, nominates a busy one. The courts take the view that there would be no value to the charterer in having such an option if he was obliged to consult the convenience of the shipowner before exercising it. (Reardon Smith Line v. Ministry of Agriculture [1963] A.C. 691).

More difficulties arise in establishing the test for an "arrived ship" in the case of a port charterparty. This is partly due to the larger area involved and partly due to the variety of definitions of a port, dependent on whether it is regarded from a geographical, administrative or commercial standpoint

The first authoritative statement on the subject came in 1908 in the case of Leonis v. Rank (/1908/ 1 K.B. 499) where a vessel had anchored only a few ship's lengths from a pier and at a point where ships usually laid while waiting for a berth at that pier. The Court of Appeal held it to be an "arrived ship" on the ground that it was within the commercial area of the port, i.e. at a point at which the vessel could effectively be put at the disposition of the charterer.

The House of Lords, however, took a restrictive view of the definition of "commercial area" in the later case of the Aello (/1960/ 1 Lloyds Rep. 623), basing it purely on the factual situation in Leonis v. Rank where the vessel was anchored a few ship's lengths from the pier. Thus they preferred to regard the commercial area as that part of a port "where a ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available". Consequently in their view the vessel concerned could not possibly be in the "commercial area" of Buenos Aires when delayed at the Intersection in the Roads, some 22 miles from the dock area. The variety of definitions of commercial area which resulted from this decision caused considerable confusion in the commercial world, which was only finally resolved in 1973 in the case of the Johanna Oldendorff (/1973/ 2 Lloyds Rep. 285). Here the charterer, under a port charter, had nominated the port of Liverpool/Birkenhead. At the time the vessel reached the port, no berths were available and it was ordered to anchor at the Mersey Bar, a point some 17 miles from the dock area but within the administrative area of the port. In reviewing the cases, the court criticised the definition of "commercial area" laid down in the Aello on the grounds that it was difficult to define and caused unnecessary uncertainty in the law, with no regard for practical commercial implications.

The Court in Johanna Oldendorff attempted to lay down a more practical test for arrival based on the following propositions. First, the vessel must arrive within the geographical and legal area of the port in the sense commonly understood by its

have "arrived" if the port authorities ordered it to stay outside this area. Secondly, the decisive test is whether the ship at this point is immediately and effectively at the disposal of the charterer, in the sense that it can reach the berth quickly when it is told that one is vacant. In view of improved radio communication and the increased speed of ships, a vessel can satisfy this test even if it is anchored at some distance from a berth, since it is usually given advanced warning when a berth is likely to become available. Thirdly, it is presumed to be effectively at the disposal of a charterer when it is anchored at a place where ships usually lie while waiting for a berth - proof of the contrary resting on the charterer. Even if the vessel is anchored elsewhere (query because of congestion as in the Aello?), the shipowner can prove that it is equally at the effective disposal of the charterer, though in this case the burden of proof rests with him.

These rules established in the Johanna Oldendorff have been followed in recent cases subject to the qualification that it now appears that a vessel may be treated as an "arrived ship" when she reaches the usual waiting place for the port even though it might be a few miles outside the limits of the port itself. This was the view taken by the Court of Appeal in the recent case of Federal Commerce and Navigation Co. Ltd. v. Tradex Export S.A. (reported in the Times Newspaper 30 November 1976). In this case the charterer had nominated one port on the Weser, but the vessel had to wait at the Weser lightship due to congestion up river. Subsequently the charterer nominated the port of Brake, some miles upstream, but there was no available berth at the time. Nevertheless the shipowner persuaded the pilot to take the vessel upstream into the dock area of Brake, from where it had to return immediately on the same tide as there was no vacant berth. The court had no hesitation in holding this journey to be a complete nonsense since in order to qualify as an "arrived ship" the vessel had to end its voyage by anchoring in the dock area while waiting for a berth, and it was not sufficient merely to pass through the dock area on its way back to the Weser light.

On the other hand, as the vessel had given notice of readiness to load, the Court of Appeal saw no reason why it should not then be treated as an "arrived ship" while waiting at the Weser light. As they pointed out, all the ports on the Weser were riverside ports and when they were congested all vessels had to wait far down the estuary since there were no places on the river where they could anchor and wait for a berth. Moreover, the only waiting place for a vessel as large as the Maratha Envoy was at the Weser lightship which was well outside the limits of the port of Brake. If such a vessel could not be treated as an "arrived ship" until she reached a berth in Brake, this would have the ridiculous result of converting what was clearly a port charter into a berth charter. In these circumstances the Court of Appeal saw no reason why a vessel should not be treated as an "arrived ship" even though she was outside the strict port limits, provided that she had reached the usual waiting place for the port and was effectively at the disposition of the charterer. In reaching this conclusion the court expressly followed a New York arbitration award in (Maritime Bulk Carriers v. Garnac Grain Co. [1975] A.M.C. 1826).

(b) Liability for waiting time

Once it has been established that the vessel is an "arrived ship" laytime begins to run immediately and any subsequent waiting time is at the risk of the charterer. But the charterer is regarded as having "bought" the laytime and so is entitled to all of it. Consequently he can trade off time lost waiting for a berth against time saved in loading. Again he is entitled to take advantage of all the laytime exceptions such as the exception covering strikes, or the provision that Sundays and holidays do not count.

2. Charterparty provisions shifting risk

So far we have been considering the position at Common Law where there are no provisions in the charterparty covering

shipowner is not prepared to bear the loss caused by such delay and acts accordingly. On the one hand he will select the port charterparty rather than the berth or dock charter, since in the former it is easier to become an "arrived ship" even if there is congestion in the port. Alternatively he will demand the inclusion in the charterparty of a specific clause shifting the risk of such loss. There are three main types of such clauses:

(a) Clause to cover obstructions

One type of clause provides that laytime is to run when a vessel reaches a specified point but cannot proceed further because of congestion. Such a clause will be effective even though the vessel does not become an "arrived ship" at that point. Thus in Compagnia Naviera Termar v. Tradex Export (1966) 1 Lloyds Rep. 566) a vessel was chartered to carry a cargo of corn from the United States to Hull. The charter provided that if the vessel was unable to berth because of congestion, "time to count from next working period after vessel's arrival at Spurnhead anchorage, but time for shifting from such anchorage into Hull not to count". In the event the vessel was delayed one day at the Spurnhead anchorage because of congestion in the port and then a further three days because of insufficient water to proceed. On the construction of the clause it was held that the charterer had to pay for the entire four days delay, since it could not be argued that at any time during that period the vessel was "shifting".

(b) Clause requiring charterer to nominate "reachable berth"

Many charterparties include a clause requiring the charterer to nominate a "reachable berth" on the vessel's arrival at her destination. As a matter of construction it was held in the Angelos Lusis (1964) 2 Lloyds Rep. 28) that such a clause transferred the risk of delay to the charterer if he could not nominate a berth because of congestion in the port. The vessel did not need to be an "arrived ship" in the technical sense - all that was required was that it should have reached a point, either inside or outside the port, where it would be held up

in the absence of the nomination of a berth. From that point the charterer would be liable for damages for detention until he could make a nomination.

If, however, the vessel should also be an "arrived ship" at that point, with the result that laytime was running, then the charterer cannot be required to pay twice for the same time. So in the Delian Spirit (/1971/ 1 Lloyds Rep. 506) once laytime began to run, the charterer could trade off time saved on loading against the initial time lost while he was prevented from nominating "a reachable berth".

On the other hand if the vessel is not an "arrived ship" at the point where the charterer is in breach of his obligation to nominate a reachable berth, then the two periods of time run independently. Thus time saved on discharge cannot be credited against time lost while waiting for a reachable berth to be nominated (The President Brand /1967/ 2 Lloyds Rep.338).

(c) Gencon "Time lost waiting for a berth" clause

Perhaps the most common of these clauses shifting the risk of delay is the Gencon clause which provides that "Time lost in waiting for berth to count as loading (or discharging) time". The object of this clause is to shift the risk before the vessel becomes an "arrived ship", i.e. from the time when it could have entered a berth had one been available. Thus, in the case of a berth charter, it will cover the period while the vessel is waiting in port until a berth is available. Alternatively, in the case of a port charterparty, it will apply while the vessel is waiting outside the port, and even while it waits inside the port, in circumstances where it is not immediately at the disposal of the charterer. The crucial question in each case is whether the basic reason for the delay is the unavailability of a berth.

It is perhaps worth mentioning at this point that this is essentially a berth charter clause and many of the problems recounted below have arisen from its incorporation into port charterparties, where there may be an overlap between waiting

time and laytime provisions. Such an overlap could never occur in the case of berth charters.

The important point at issue in the construction of such clauses was the question as to whether the charterer had to pay for all the time spent waiting or whether he could argue that no time had been lost commercially because, even if the vessel had been in berth, no loading could have taken place because of the occurrence of a public holiday, strike or other event which was covered by a laytime exception. In meeting this argument, the courts at an early stage established a strict construction of the Gencon clause and treated it as being completely independent of the laytime provisions. So at various times it has been held that:

1. Waiting time ran even though it was not possible to give notice of readiness to load, which was essential for the commencement of laytime.

   So it was held in the Radnor (/1955/ 2 Lloyds Rep. 73) that time ran under the Gencon clause when the vessel arrived off the Chinese port and no berth was available, even though the crew were held incommunicado by the customs authorities and not permitted to give notice of readiness to load.

2. The charterer can not take advantage of the fact that laytime provisions only apply to "weather working days" and that "Sundays and holidays are excepted", when defending a claim for time lost waiting for a berth.

   So in the Vastric (/1966/ 2 Lloyds Rep. 219) the vessel arrived outside Genoa at 1320 hrs. on Saturday but no berth was available and she could not give an effective notice of readiness to load until 0800 hrs. on the following Monday. Nevertheless it was held that the "time lost" clause ran from the time when she would have been able to enter a berth if one had been available (i.e. 1320 hrs. on Saturday) even though laytime would not have commenced until the following Monday.

3. In a claim under the "time lost" clause, the charterer cannot rely on any of the laytime exceptions. Thus in the Loucas N (1971 1 Lloyds Rep. 215) the vessel was kept waiting for seven weeks outside Houston, Texas, by the combination of a strike and its after effects. Although the charterparty included a Centrocon strike clause, the court held that this only applied after the vessel became an "arrived ship". The charterer was accordingly held liable for the time lost even though the vessel could not have been discharged had it been allowed to berth. In the latter event, however, laytime would not have run because of the strike clause.

The effect of these decisions was summarised by Ackner J. in the Darrah (1974 2 Lloyds Rep. at p. 439) in the following terms.

> "By clause 4 (of the Gencon charter) the parties have made specific provision for one special situation - that is - the loss of time occasioned by the ship awaiting a berth. For that particular event the time so lost is to count as, or to be added to, the discharging time. For this special situation the parties have provided no specially excepted periods and no specially excepted circumstances, e.g. as to where the waiting time takes place. Thus, where time is not lost waiting for a berth, all the time so lost is to count whenever and wherever the waiting takes place and the special exceptions provided in the laytime clauses only operate once a berth is ready."

Such a line of argument is particularly attractive to the shipowner who is able to charge for waiting time irrespective of any laytime exceptions which superficially might appear to cover the situation. It is noticeable that in the Delian Spirit it was the shipowner who, uncharacteristically, was arguing that the vessel was not an "arrived ship" in order to avoid the effect of the laytime exceptions.

3. The Darrah case

From the above account it is clear that the courts, in interpreting the Gencon clause, refused to give literal effect to the provision that time lost waiting for a berth was "to count as loading time". At least it was not to be treated as laytime so far as the laytime exceptions were concerned. Faced with this situation, the charterer in the Darrah ([1974] 2 Lloyds Rep. 435) by some means had the Gencon clause modified to read "Time lost waiting for berth to count as laytime". Subsequently the vessel concerned became an "arrived ship" in Tripoli but was delayed for seven days waiting for a berth. The charterer argued that, as time lost waiting was to count "as laytime", the laytime provisions applied and demurrage should only be assessed for "weather working days", while Fridays and public holidays should be excepted.

The trial judge took the view that he was bound by previous decisions to hold that "time lost" clauses were completely independent of laytime provisions, even in a situation where the vessel in question was an "arrived ship" and consequently laytime had begun to run. He cited with approval the dictum of Donaldson J. in the Loucas N.

"The fact that a vessel is or is not an arrived ship is totally irrelevant to the question of whether time lost waiting for a berth is to count. What matters is whether she is waiting for a berth .... In such a case the laytime provisions can be ignored so long as the ship is waiting for a berth, for the same moment of time cannot count twice." He also noted that a similar point had been made in the 18th edition of Scrutton on Charterparties at p. 147.

It would appear that the trial judge is here taking the principle too far. In none of the previous cases involving construction of the "time lost" clause was the vessel concerned an "arrived ship" and so it is difficult to see how he was bound by previous decisions. Again if laytime is running, why should the laytime exceptions not apply? There seems little point in altering the time lost clause to state that it is to

count "as laytime" if it is treated differently from normal laytime as envisaged in the charter.

The turning point came when the decision in the Darrah was reversed by the Court of Appeal (/1976/ 1 Lloyds Rep. 285). The members of the Court unanimously held that it was difficult to understand how "time lost" could be treated as laytime if bad weather working days, Fridays and holidays were not excluded from the calculation. In the words of Lord Denning M.R. (at p. 288)

> "Once the ship has arrived at the port and is waiting for a berth, the time of waiting is to count as laytime, just as it would have done if she had reached the berth and been waiting for the cargo to be discharged. So Fridays and holidays are excepted. This is commercial good sense."

This certainly appears a more rational attitude to adopt. The Court of Appeal expressed the view that the trial judge had mistakenly relied on the statement in earlier cases that the "time lost" clause was completely independent of the provisions relating to laytime. While the statement was true in certain cases, on this occasion it had been applied out of context since the vessel was already an "arrived ship". In all the earlier cases which had been cited, the vessel had not been an "arrived ship" - in three cases it was still outside the port, and in the fourth case, although the vessel was in port, it was operating under a berth charterparty. Once the vessel has "arrived" and the clause expressly states that "time lost" is to be treated as laytime, then a common sense interpretation must be applied.

Finally the case reached the House of Lords (/1976/ 2 Lloyds Rep. 359) where the decision of the Court of Appeal was upheld. On this occasion, however, their Lordships were not content merely to confirm the judgment of the lower court but took the opportunity to review all the earlier decisions relating to "time lost" clauses. In their view the decisions in the Vastric and Loucas N were wrong and should be overruled, since

cerned with the question as to whether the "time lost" clause would run in the absence of notice of readiness to load being given, and had never addressed their minds to the problem of whether laytime exceptions would apply to the calculation of time lost. There was no validity in the argument that "time lost" clauses and "laytime" clauses in a charterparty constituted two independent and unrelated codes for calculating the amount of permitted laytime that had been used up. Whether the charterparty indicated that time lost was to count as "loading time" or "Laytime", the object was the same - "the vessel is to be treated as if during that period she were in fact in berth and at the disposition of the charterer for carrying out the loading or discharging operation" (per Lord Diplock at p. 364). Consequently "whatever portions of the waiting period would have been taken into account in calculating the permitted laytime used up if the vessel had in fact then been in berth and at the disposition of the charterer (e.g. weather working days) are to be treated as if they had been available for loading or discharging cargo, and whatever portions of the waiting period would not have been taken into account in that calculation (e.g. Sundays or Fridays and legal holidays and days on which working was prevented by inclement weather) are not to be treated as if they had been available for loading or discharging cargo."

Looked at from a purely commercial standpoint, the Court felt that this was the only rational solution to the problem. The "time lost" clauses originated from the basic conflict of interest between charterer and shipowner. Whereas the primary concern of the shipowner in a voyage charter is to make profitable use of his vessel, and the location of the ports is only a secondary consideration, such selection of ports is a matter of vital importance to the charterer. Consequently if the latter wishes to select ports where there is a risk of delay owing to congestion, it is only fair that he should agree to compensate the shipowner for any additional time lost from this cause. This object is achieved by the introduction of a "time lost" clause under which time lost waiting for a berth is to count

as loading time or laytime, i.e. as though there had been no delay and laytime had begun to run. Such clauses originated in berth charters where the voyage did not end until the vessel was actually in berth, but they were later extended to port charters in cases where the vessel was still not an "arrived" ship, e.g. where it was waiting outside the port. But such clauses were not needed in a port charter once the vessel became an "arrived" ship, since laytime began to run at that point and the risk of loss caused by delay was transferred to the charterer. The relevance of such clauses to port charters had been much reduced following the decision in the Johanna Oldendorff, which had considerably extended the concept of an "arrived ship".

If waiting time in these circumstances is to be treated as "loading time" or "laytime", then presumably the object must be to put the shipowner in the same position financially as if the vessel had been able to proceed directly to a berth. In the words of Lord Diplock, "In a berth charter the effect of the clauses is to put the shipowner in the same position financially as he would have been if, instead of being compelled to wait, his vessel had been able to go straight to her berth and the obligations of the charterer to carry out the loading or discharging operation had started then. In a port charter the clauses are superfluous so far as concerns time spent in waiting in turn within the limits of the port. This counts as laytime anyway; it is laytime." (p. 364).

If this construction is correct then, in the calculation of "time lost", only those days will count which are eligible to be treated as laytime i.e. Sundays and holidays will be excluded and the laytime exceptions will apply. Since the charterer has paid for laytime in the freight, there is no reason why the shipowner should receive a bonus because his vessel is lucky enough to be kept waiting for a berth during a period which would not have counted for laytime had the vessel been in berth. Such a result does not make commercial sense and there seems no evidence to suggest that such an eventual-

demurrage rates.

4. Conclusion

What then is the combined effect of the decisions in the Johanna Oldendorff and the Darrah as regards the incidence of the risk of time lost waiting for a berth in a voyage charter-party? In the absence of any express provision in the contract it would appear that the cost of such delay must be borne by the shipowner until the vessel becomes an "arrived" ship, at which point laytime begins to run and the risk is transferred to the charterer. The point at which a vessel will become an "arrived" ship will vary depending on the type of charter involved. In the case of a berth or dock charter this stage will not be reached until the vessel enters the specified berth or dock respectively. As regards the port charter, the area in which a vessel may be considered an arrived ship has been greatly extended by the decisions in the Johanna Oldendorff and Maratha Envoy. It would now appear that the crucial test is whether the vessel is in a position at which it is effectively at the disposition of the charterer, and it is presumed to be in such a position if it is at a point, either inside or outside the port, where vessels normally lie while waiting for a berth.

In many cases, however, the shipowner is not content to bear the risk of delay until the vessel becomes an "arrived" ship and inserts a "time lost" clause providing that all time lost waiting for a berth shall count as either loading time or laytime. In these circumstances the risk is transferred to the charterer as soon as the vessel reaches a point, either inside or outside the port, where the main reason for its detention is the unavailability of a berth. All such time lost is then to be treated as laytime, in the same way as if the vessel had become an "arrived" ship. There is no rule of law that "time lost" clauses and "laytime" clauses constitute two independent and unrelated codes for computing the amount of permitted laytime that has been used up. In the words of Lord Diplock, "the vessel is to be treated as if during that period she were in

ing out the loading or discharging operation ... and ... in the computation of time lost in waiting for a berth there are to be excluded all periods which would have been left out in the computation of permitted laytime used up if the vessel had actually been in berth". Consequently, whether the "time lost" or "laytime" clauses operate, Sundays and public holidays will not count and the laytime exceptions will apply. Such a rationalisation of the law makes good commercial sense, since there seems no reason why a shipowner should gain greater advantage from his ship being kept waiting for a berth than he would get from her being kept at her berth.