M.L.A.A.N.Z
5th Annual Meeting

Serial (Maritime)

LAYTIME AND DEMURRAGE

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Laytime and Demurrage.

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1. Introduction

(a) General

A cargo ship is "a money-earning machine," to quote the late Lord Parker in North River Freighters Limited v. President of India in 1955 (reported at (1956) 1 All E.R. 50). In view of the current high costs of operating a ship, it is no less and perhaps even more important than it was in the past for shipowners to ensure that their ships earn a reasonable return on the moneys invested in them, not only whilst running at sea, but, equally as importantly, during the time the vessel spends in port. Likewise from the point of view of charterers, the freight cost is a very significant part of the cost of a particular export transaction and anything which may significantly add to this cost (eg. demurrage payments) needs to be carefully considered when the cost of the export transaction is being assessed.

Therefore, both shipowners and charterers have a common interest in ensuring that time is not wasted or lost in the operations of loading and discharging cargoes which have been carried by sea. Some delays may result from the fault of one of the parties, in which case that party will generally be required to bear the loss. But the carriage of goods by sea is a venture that is always subject to the risk of delays due to a variety of causes beyond the control of either the charterer or the shipowner. In practice the difficult question is who should be responsible for such losses. As the carrying voyage, ie. the voyage of the ship from the port of loading to the port of discharge, is solely within the control of the shipowner, it is invariably the case that he accepts the losses resulting from delays due to unavoidable causes during the voyage. The loading and discharging are joint operations and it is in this area, particularly in relation to delays caused by congestion in ports, that most disputes arise as to which of the parties should bear the risk of losses arising from unavoidable delays. (Lord Diplock described such risks as "misfortune risks" in The Maratha Envoy (1977) 2 Lloyd's Rep. at 304, and contrasted them with "fault risks".) This paper examines briefly the nature of laytime and demurrage, considers the way in which laytime is calculated and examines some important recent cases relating to the "arrived ship" and the "time lost in waiting clause".

In this paper I am concerned with voyage charterparties, namely contracts of affreightment for the employment of the whole or substantially the whole carrying capacity of a ship between ports which are named or to be named and where the freight is calculated by reference to the cargo carried. Where the contract of affreightment is contained only within a Bill of Lading, "liner" terms will usually apply and laytime and demurrage will not normally be applicable. Time charterparties are not relevant because they will normally provide for the freight to be payable during the ship's port time as well as during the voyage itself.

(b) CMI Standard Definitions

I have referred, where appropriate throughout this paper, to the standard definitions of words and phrases commonly used in charterparties which were adopted at the 1977 Conference of the Comité Maritime International held in Rio de Janeiro. These definitions (hereinafter referred to as "CMI definitions") make a useful contribution towards removing some of the areas of uncertainty which still exist in this area of the law.

(c) Freight

Under a voyage charterparty the shipowner undertakes to carry from one place to another a cargo supplied by the charterer for an agreed sum known as freight. The freight is the ship owner's compensation for, first, the use of his vessel by the charterer for the period of the voyage, and, secondly, a reasonable time or, if this be agreed, a fixed time for loading and discharging the cargo.

(d) What is Laytime

Michael Summerskill in his useful work on "Laytime" says that "laytime is the time during which a ship is lying, for the purpose of loading, or discharging, as distinct from moving with the object of carrying her cargo from one place to another": Summerskill on Laytime, Second Edition (1973) p. 1.

The CMI definitions emphasise that "laytime" is paid for by the charterer in the agreed freight.

"Laytime" should be distinguished from "laydays". "Laydays", as I understand the term, is generally now used to refer to the opening and closing dates within which the shipowner is entitled to present the ship for loading or discharging. Sometimes "laytime" and "laydays" are used interchangeably, and this can lead to confusion.

It is the duty of the shipowner to make his ship available to the charterer at the agreed place. It is the duty of the charterer to make the cargo available and bring it to the ship at the agreed place. The time which the charterer is entitled to use for the purpose of loading or discharging his cargo is called laytime and it is in this sense that the expression is used throughout his paper.

Loading is a joint operation. The charterer's duties do not necessarily cease, when the cargo passes across the ships rails. Lord Esher in Harris v. Best Riley & Co. said that loading was "a joint act of the shipper or charterer and of the shipowner; neither of them is to do it alone but it is to be the joint act of both... Each has to do his own part of the work and to do whatever is reasonable to enable the other to do his part".

The period of the laytime which is to be allowed to the charterer may be, and, in practice, usually is agreed between the shipowner and the charterer but it does not necessarily have to be agreed. If it is not agreed then the charterer is entitled to keep the ship for the purposes of loading or discharging for a "reasonable" time. As will be appreciated, differences of opinion can arise as to what is a reasonable time. In practice the shipowner would not normally be happy for the charterer's loading and discharging obligations to be

measured in terms of a reasonable time because, first, it is always open to argument as to what is a "reasonable time in a particular case, and, secondly this would mean that the charterer would not be liable for time lost in loading or discharging through no fault of his own, eg. delays due to strikes, compliance with orders of harbour authorities, and possibly limits imposed by the ship's or the berth's unloading facilities. From the point of view of the shipowner he would much prefer to know that the charterer has an absolute contractual duty to load or discharge the cargo within a fixed period of time.

(e) What is Demurrage

If the charterer fails to load the vessel or discharge the vessel in a reasonable time or within a fixed time (if this is agreed), the charterer will have breached his obligation to load or discharge within the agreed period and the shipowner will be entitled to damages for detention of the vessel. As with all claims for damages, whether the shipowner is able to recover damages will depend on whether he is able to establish that he suffered some pecuniary loss as the result of the charterer's failure to fulfil his contractual duty. It may not always be easy to quantify this loss.

For this reason it is common for the shipowner and the charterer to agree that, if the laytime is exceeded, the charterer will pay the shipowner demurrage at an agreed rate in respect of any time used in loading or discharging beyond the laytime. Demurrage is the agreed measure of damages for detention resulting from the failure to load or discharge within the laytime. It is open to the shipowner and charterer to agree on a rate of demurrage even though they have not agreed on a fixed period of laytime. In such a case, demurrage would be payable if the charterer failed to load or discharge the ship within a reasonable time.

The charterer's duty to load or discharge within the laytime is a warranty and not a condition of the charterparty: (see Universal Cargo Carriers v. Citati (1957) 2 Q.B.401; (1957) 2 Lloyd's Reports 311). Therefore, failure to load and discharge within the laytime does not give the shipowner a right to terminate the charterparty. As stated above, the shipowner is entitled to damages for detention of the ship beyond that period. Where the shipowner and charterer have agreed on a rate of demurrage, the rate of so agreed is regarded as the agreed quantification of the damages to which the shipowner is entitled for detention of the ship. Consequently the general rule is that the shipowner is not entitled in respect of the detention of his ship to additional damages over and above the demurrage payments even if he can substantiate that his loss exceeds the demurrage payments; the Suisse Atlantique case (1967) A.C. 361 is an outstanding example of the application of this principle. Conversely, the shipowner does not have to prove that he has in fact suffered loss at least equal to the demurrage payment before he can claim that payment. If the shipowner can establish that the charterer breached the charterparty in some other respect than mere detention, then damages, additional to demurrage, may be recoverable in respect of such breach.

Damages may, of course, be recovered for breaches of the contract other than mere delay and a demurrage provision is irrelevant for the purposes of such other breaches.

The CMI definition of "demurrage" avoids any reference to the concept of a breach of contract and defines "demurrage" in terms of a payment made to the owner for delay beyond the period of laytime.

The period of laytime and rate of demurrage agreed between shipowner and charterer will, in principle, reflect the period which both parties regard as reasonable, if all goes well, for the loading and discharging operations at the ports in question, the cost of operating the ship and the earning capacity of the ship. It will be appreciated that there is no right period of laytime or right rate of demurrage. Both will be estimates made by the shipowner and the charterer, and the figures finally included in the charterparty represent the negotiated figures which both parties have agreed should govern their venture. Events may, of course, turn out quite differently than the parties had expected, but, if the parties have given careful consideration to the terms of the charterparty, any losses will fall on the party which agreed to accept the risk of such losses.

The supply and demand situation at any particular time will in practice significantly affect the freight, laytime and demurrage negotiated because the freight market is highly competitive and sensitive to fluctuations in supply and demand. At times when there is a surplus of shipping, shipowners may well be prepared to include artificially low demurrage rates in their contracts whilst in times when shipping is scarce the converse may well be the case.

(f) Charter is entitled to whole of laytime

It is the charterer's contractual right to use the period of laytime for the purpose of loading and discharging. The charterer has bought his laytime and paid for it in the freight and is entitled to use it for the agreed purpose of loading and discharging. Accordingly the charterer has no legal duty to load or discharge the ship in a shorter time than the laytime. In Margaronis Navigation Agency Ltd. v. Henry W. Peabody & Co (1965) 1 Q.B. 300 Roskill J. said that -

> "It seems to me ... that where a charterparty prescribes that a charterer is to have a fixed time to load ... a charterer is entitled to have that time for loading ... He is under no obligation to accelerate that rate of loading so as to shorten the time to which he is otherwise entitled".

This is so even though by the exercise of reasonable diligence the charterer could have loaded the vessel in a shorter time. Nevertheless once the loading or discharging of the ship has in fact been completed the charterer must release the ship to the shipowner even though the laytime has not expired. In the same case Roskill J. went on to say that -

> "A charterer is entitled to have that time to load, but once he has loaded, he must not use that time for some other purpose".

In practice the charterer may well be happy for the ship to sail as soon as possible because his only real concern is to ensure that his cargo is loaded or discharged in as expeditious a time as possible. But he may not wish to load or discharge the ship at a faster rate than he is obliged to do if this would be more costly than utilizing the whole of the laytime eg. because to do so would incur penalty overtime rates.

(g) Despatch

It is, of course, now not uncommon for the inclusion of a provision for the payment of "despatch" (usually calculated at half the demurrage rate) to be payable to the charterer in respect of any part of the laytime for loading or discharging which he does not actually use in those operations. The provision for despatch acts as an incentive to the charterer to complete the loading and discharge in as short a time as possible.

(i) Frustration

Delay in loading or discharging a ship is unlikely to result in the charterparty being discharged by the operation of the doctrine of frustration and thereby relieving both parties from their liabilities thereunder. Delay of itself is only likely to make the adventure more expensive for one or more of the parties. It is settled law that an increase in cost without more, unless quite extraordinary, cannot produce frustration: see The Angelia (1973) 2 AllER 144, 155. A change in the law which renders the further performance of the loading or discharging obligations unlawful would, of course, frustrate the contract.

(j) Once on demurrage always on demurrage

Demurrage becomes payable when the laytime expires. When laytime has expired, demurrage in the absence of express agreement runs continuously from the end of the laytime until loading or discharging is completed. Once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause is clearly worded so as to have that effect. This rule of construction of charterparties is sometimes referred to by the maxim "once on demurrage always on demurrage". But it must be appreciated that the maxim is a rule of construction only and not an absolute rule of law.

In the recent 1978 decision of the House of Lords in The Dias (1978) 1 W.L.R. 261, their Lordships had to consider the clause "at discharging, charterers ... have the option at any time to treat at their expense ship's ... cargo and time so used to not count" (my underlining). The charterers fumigated the cargo after the expiration of the laytime and after demurrage had become payable. Their Lordships unanimously decided that the time spent fumigating the ship (16 days in all) continued to count for the purposes of calculating demurrage because the fumigation clause was, in their view, only applicable when the ship was waiting during the laytime period and not when the ship was on demurrage. Their Lordships agreed with the statement of Mocatta J. in the English High Court that phrases like "to count" or "not to count" were generally used in charterparties in reference to laytime. Their Lordships went on to say that, if the clause were ambiguous (which they did not believe was the case) this would not be enough to save the charterers from their liability to pay demurrage. To stop demurrage from being incurred clear and unambiguous wording is necessary. A usual form of wording to achieve this "time shall not count as used for laytime or for any other purpose whether or not the vessel is then on demurrage".

One rationale of the maxim "once on demurrage always on demurrage" is that if the charterer had performed his contractual obligation, i.e.

to load within the laytime, the ship would have been able to leave the port and thus avoid the delaying circumstances: see Lord Reid on Union of India v. Aeolus (1964) AC 868, 882. The charterer has failed to perform his undertaking to load within the laytime and should therefore bear the whole of the loss arising after the laytime has expired even though circumstances beyond his control intervene. This view is clearly based on the legal analysis of laytime provisions, and on the shipowner's point of view that the charterer, and not he, chose the port and should therefore accept the risk of delays which occur in the port.

Although there is considerable merit in this view a charterer who is in a strong negotiating position may refuse to accept the cost of delays in port due to circumstances beyond his control (ie. "misfortune risks"). He will, of course, be prepared to be responsible for delays due to his own fault, but may for commercial reasons prefer a relatively certain freight cost (which may be "loaded" to cover the risk he has required the shipowner to bear) rather than to run the risk of incurring unquantifiable and possibly substantial demurrage claims. Such a stance by a charterer is likely to make it easier for him to obtain the agreement of his receivers to meeting the freight cost of the shipment of goods.

(k)(j) Completion of Loading or Discharging

Once the loading or discharging is completed the charterer is not liable for any delay to the ship unless it arises from some fault on his part. Thus, if the shipowner fails to secure clearances and the departure of the ship is delayed thereby, or the ship is caught by ice after loading or discharging have been completed, the charterer is not liable.

Time ceases to count against the charterer when the ship is no longer detained by the physical problems involved in loading and discharging and is ready to leave. If the ship is delayed further due to the failure of the charterer to obtain, say, a port clearance which he is required to obtain under the terms of the charterparty, the charterer is nevertheless not liable for demurrage if the shipowner could himself have obtained such clearance. This follows from the principle that the innocent party to a contract has a duty to mitigate his loss. This is the effect of the decision of Willes J. in Moller v. Jecks (1865) 19 C.B. (N.S.) 332. However the innocent party is only required to take reasonable steps to mitigate his loss and one may query whether the decision in Moller v. Jecks would have been the same if the shipowner had been required to pay a substantial fee for the port clearance.

Of course if further work is required (even though this be by the shipowner) in order to make the cargo safe on board the ship (for example by applying proper stowage methods to the cargo), the loading has not been completed and time lost will count against the charterer.

2. Calculation of Laytime

Laytime may be fixed, in which case it is expressly stated as say "6 running days", or calculable, as in "$250 tons per day" or it may be unspecified as in "the cargo to be supplied as fast as steamer can

receive and stow". Where the laytime is fixed it will usually be calculated by reference to "days" or "hours". References to days may be to "days" without any other qualifying word or to "running days" or "working days".

(a) "Days"

"Days" simpliciter in the past was used much more frequently than at present and was taken to refer to all types of days, whether or not work was normally done on them. The most obvious area in which disputes arose was whether "days" by itself included Sundays and holidays. The general view was that it did. It, therefore, became common, where Sundays and holidays were not intended to be counted, to qualify the reference to "days" by the phrase "Sundays and holidays excepted".

Unless the charterparty otherwise provides, the term "days" without any qualifying adjectives means continuous days of 24 hours each, whether or not work is normally done on them. But there may be a custom in a particular port to the effect that work is not performed on a particular day. If the custom is sufficiently well established it will be recognised by the Courts and such days on which work is not performed will be excluded from the laytime. In such a case "days" would mean working days and only "running days" would be truly consecutive. However, for obvious reasons to avoid disputes it is desirable to specify clearly which days (if any) are not to count for this purpose.

"Day" is defined in the CMI definitions as "a continuous period of 24 hours which, unless the context otherwise requires, runs from midnight to midnight".

(b) "Running Days"

The term "running day" is used to distinguish "days" simpliciter from "working days". It is clearer than days and from the point of view of the shipowner it is more advantageous than "working days". Where the word "running" qualifies "days" any exception for Sundays and holidays should, if the parties so intend, be expressly incorporated or justified by a custom. In the absence of an express incorporation or established custom, time runs continuously against the charterer during the loading and discharging of the ship unless the consecutiveness is broken as, for example, by the inability of the ship to accept or deliver her cargo.

(c) "Working Days"

"A "working day" is a period of 24 hours (prima facie starting at one midnight and finishing the next midnight) in the course of which work is usually done at the port in question in the sense that the day is not a day of rest or a holiday": Summerskill on Laytime: Second Edition page 24. The use of the expression "working day" has the effect of making it clear that Sundays and holidays are excluded from the laytime. Other days on which work is not usually done in the port in question, such as Fridays in Islamic countries, are also excluded. As Lord Devlin said in Reardon Smith line v. Ministry of Agriculture (1963) A.C. 691 at 736 "there may, of course, be days in some ports such as the Mahomedan Friday, which are not working days and yet cannot well be described as Sundays or holidays".

The day may, if the charterparty so provides, begin at any time during the 24 hours of the day and in such case each day will be described as an "artifical" or "conventional" day as opposed to a calendar day.

A "working day" is a day of 24 hours even though work is not carried on during the whole of the day so long as the day is one on which work is performed in the port. In Reardon Smith Line v. Ministry of Agriculture Lord Devlin said "I can see no justification for the Court, unless there is something which in the charterparty demands it, turning the working day into a number of working hours". Either a day is in total a working day or it is not.

Saturday is a working day even though work may only be carried on during the morning. It does not matter whether the wharf labourers and other workmen required for the operation of loading and discharging are being paid at ordinary rate or overtime rate.

The test of whether a day is a "working day" or not is whether work is usually performed in the port on that day. If work could have been done on that day it is immaterial that the charterer did not avail himself of the opportunity to work.

It should be noted that at one time there was a view that a working day began when work began and ended when work ended with the result that if the port worked 8 hours a day it would be necessary for 3 calendar days to pass before the 24 hours of a "working day" were completed. It is clear that this is not now the law, but, as will be seen below, it is also clear the the expression "a day of 24 working hours" does have this effect.

The CMI definition of "working day" seems to equate "working day" with a "day" simpliciter except that it excludes "holidays" and other days expressly excluded in the charterparty itself. It would seem that this definition involves treating Sundays as "working days" because "holidays" is defined in terms of a day on which work "would normally take place but is suspended" by reason of the local law or practice or terms of employment. Perhaps this is the intention.

(c) "Running Working Day"

The expression "running working days" appears in the Gencon charterparty. To use the two adjectives "running" and "working" together is unsatisfactory because if running days includes all days and working days excludes Sunday and holidays, one is left with the question as to which adjective is to rule, "running" or "working". Summerskill says (I think correctly) that the word "running", when used in conjunction with the expression "working days", does not in any way change the normal meaning of working days. In other words where the expression "running working days" is found, the laytime does not include Sundays or holidays unless they are working days in the port. I would agree with this view. The word "running" is therefore superfluous in that expression. If consecutive unbroken days is intended the expression "running days" should be used. The expression "running working day" could be reworded as "running days ... Sundays and holidays excepted". But this would only be true if Sundays and holidays are not working days in the port. If they are, their exclusion means that they do not count even though work is done on them. The

additional wording "unless worked in which case time actually worked to count" do not impose any obligation on the charterer to use that time and if he does only the time used counts.

Sometimes the word "holidays" in the expression "Sundays and holidays excepted" is qualified by the word "non-working".

Lord Justice Scrutton in Burnett v. Danube Black Sea Shipping Agencies (1933) 2 K.B.438 said that he had some difficulty understanding what a "non-working" holiday was. I think that the expression must mean that a holiday is excepted from the laytime period unless work is customarily performed on that holiday; in other words unless it is a working day.

(e) Laytime calculated by reference to hours

Laytime is sometimes calculated by reference, not to days, but to hours. Examples are a "weather working day of 24 hours" or "24 consecutive hours" or "24 running hours".

A working day of 24 hours is an artificial as opposed to a calendar day and comprises 24 hours in which work actually is carried on in the port in question. The 24 hours need not be consecutive. In other words before a working day of 24 hours can be said to have elapsed, it is necessary for the number of hours worked to aggregate 24, even though these may have been worked on a number of calendar days. It should be noted that this interpretation is much more favourable to the charterer than a reference to "days" simpliciter in that time only counts against the charterer during those hours in which work is normally carried on at the port.

The view which the courts have adopted is neatly summed up by the following quotation from the judgment of Lord Justice Smith in the Court of Appeal in Forest S.S. v Iberian Iron Ore Co. Ltd. (1899) 5 Com. Cas. 83;

> "Why were these words "of 24 hours" inserted? It seems to me for the express purpose of giving the charterers a fixed period of 24 working hours wherein to load or unload each 350 tons of ore no matter what number of hours might constitute a working day in the port of loading or the ports of discharge. What is the sense of inserting "of 24 hours" if not for this?"

The cases certainly provide a warning against using a reference to " a working day of 24 hours" in the laytime clause unless the shipowner is prepared to accept that the only time which counts for laytime is the actual working time in the port.

Following the Forest Case, probably in a desire to overcome the effect of that decision, shipowners sometimes amended the "working days of 24 hours" clause to read a "working day of 24 consecutive or running hours". In the Scottish Court of Session decision in Turnbull Scott & Co. v. Cruickshank & Co. (1904) 7 Fraser (Court of Session) 265 it was held that the expression "working day of 24 consecutive hours (weather permitting), Sundays and holidays excepted" meant a day of 24 consecutive hours irrespective of whether or not work was actually capable of being done during all of those hours.

(f) Laytime calculated by reference to "hatches"

Laytime may also be calculated by reference to the number of hatches or working hatches, eg. "at an average rate of .... tons per working hatch per day". Where the laytime is to be calculated by a reference to a number of "hatches", without the addition of the word "working" the laytime is to be determined having regard to the number of hatches on the ship which are to be loaded or discharged at the port. For instance, if the ship has 5 hatches and the loading and discharge rates are 200 tons per day per hatch, the discharge rate during the whole period of the laytime is 1,000 tons per day.

If the word "hatch" is qualified by the word "working" or the expression "available workable", then the laytime is to be calculated at a progressively reducing actual tonnage rate per day depending on the number of hatches then still working or available for work. Thus, if the loading rate is 200 tons per working hatch per day and there are 5 hatches, the loading rate whilst the 5 hatches are still available for loading is 1000 tons per day; but when there are only 2 working hatches the relevant loading rate will be 200 tons per day. Clearly this wording will be for the benefit of the charterer in that laytime will be longer than it would have been if the word "hatch" had been used in an unqualified way. It will be seen that what the Courts have done is to regard the words "working" or "available workable" as having been inserted by the parties for some special purpose and that this purpose must be distinguished from a laytime period calculated by reference to the hatches which are actually the subject of the loading or the discharging.

The CMI definitions define "per workable hatch per day" and "per working hatch per day".

(g) "Weather working day"

A weather working day is any working day in the port during which weather does not wholly prevent working of a ship or would not wholly prevent working if work were intended. If work is or would have been wholly prevented by weather it is not a weather working day. But it does not matter whether or not the parties actually carry out work. The important point is that it is the capability for work to be performed on that day which determines whether or not the day will qualify as "a weather working day".

But what happens if work is carried on part of the day but during the other part of the day cannot be carried on because of bad weather. The original rule was that the Court was not concerned with fractions of a day. Either work could be carried out for the whole of the day or it couldn't. If it couldn't then the day did not count as a weather working day even though work was actually carried out during part of the day.

In Branckelow v. Lamport & Holt (1897) 1 Q.B. 570 it was held that where a substantial amount of work is done on a day (even though less than one half of the working hours are used) and no work is done during the remainder of the day due to bad weather, "the most equitable view is to charge half the day against the charterers", and "to charge a full day against them where substantially a full day's work, though not amounting to 12 hours, is done; no smaller fraction than

half the day should, however, be taken into consideration, and if the time worked is quite insignificant it should not be counted at all"; per Lord Russell of Killowen C.J.

The "half day" rule was soundly critisized in 1955 by Lord Goddard as "a somewhat rough-and-ready rule or a rule-of-thumb"; Alvion v Lobo (1955) 1 Q.B. 430. Many modern charterparties expressly require laytime to be pro rated for fractions of a day, eg. Gencon.

In the House of Lords decision in Reardon Smith Line Limited v. Ministry of Agriculture (1963) A.C. 691 their Lordships said that where the expression "weather working days" is used and weather intermittently stops work during such a day the correct method of working out the laytime is, first, to ask during which hours is work usually performed in that trade in the port at that time, and, secondly, to determine the number of hours during which the weather was good enough to permit work, whether any was done or not. The period actually available for work is then expressed as a proportion of the total normal working hours and then applied to the 24 hours of the "weather working day". The result represents the number of hours which count against the charterer. It follows that if the bad weather occurs outside the period during which work is normally carried on in the port, that bad weather does not affect the inclusion of the whole of that day as a "weather working day". If Saturday is a working day, weather will only be relevant if it occurs during the hours of Saturday on which work is actually carried out. The extent to which laytime will count in the event of weather interrupting work will be calculated in exactly the same way as it is in the case of any other working day.

Whether or not a day is a weather working day is to be determined objectively. It is immaterial whether the charterer intended to avail himself of the period during a weather working day in which work cannot be carried out due to bad weather. If this were not the correct conclusion one would reach the surprising result that a day in which no one intended to do any work is a weather working day even though shockingly bad weather clearly would have made it impossible to work on that day.

3. Arrived Ship

Certain requirements must usually be satisfied before laytime can begin to count. The requirements are:

1. The ship must have reached the agreed destination;
2. The ship must be ready in all respects to load or to discharge; and
3. The ship must give notice of readiness to load or discharge after arrival to the charterer or his agents. The notice must be given at the first loading port. However a notice of readiness is not necessary at the discharging port or ports or at any second or subsequent loading port unless required by the terms of the charterparty.

When these requirements are satisfied the ship is said to be an "arrived ship" and laytime begins to run subject to any provision in the charterparty delaying the commencement of laytime until, say, a certain number of hours has elapsed, eg. Gencon provides that "Time

to commence at 1pm. if Notice of Readiness to load is given before noon...".

(a) "The Agreed Destination"

The ship is continuing on its voyage until it reaches the agreed destination. In general terms it may be said that the charterparty will either be a port charter or a berth charter. In the case of a port charter, the shipowner's duty is to present the ship at the named port or a port as ordered by the charterer. The charterer then has an implied right and corresponding duty to direct the ship to a particular berth and must exercise this right reasonably. He does not have to nominate a berth which is immediately available. The ship has, however, arrived at its destination when it reaches the port and before it reaches the particular berth within the port. If, however, the charterparty specifies expressly that the loading or discharging is to take place at a particular berth in the port, or if the charterparty expressly gives the charterer the right to nominate a berth in that port, then, it is a berth charter and the ship's voyage does not end until the ship actually arrives alongside that berth, unless, of course, the charterparty otherwise provides.

(b) Port Charters

The distinction between a port charter and a berth charter has been recognised since at least the 1840's. Whilst it has been accepted that, in the case of a port charter, the ship need not be alongside the berth to become an "arrived ship", views have differed as to what the ship must do, short of reaching the berth, before she can be said to have "arrived".

The Courts said that the port envisaged by the charterer and the shipowner was not necessarily the geographical, fiscal, legal or administrative port. The limits of a port for these purposes might be very large. The charterer and the shipowner would have viewed the port from a commercial point of view. Brett M.R. in Gartson Sailing Ship Co. v. Hickie & Co. (1885) 15 Q.B.D. 580 said that "shippers of goods; charterers of vessels and shipowners... (understand the word "port")... in its ordinary sense, in its business sense, in its popular sense... It is also the port in its commercial sense". The port, in this sense, was often referred to in the cases as the commercial area of the port, or the commercial port.

The difficulty was to establish where the commercial area of the port was. In Tapscott v. Balfour (1872) L.R.8.C.P., Bovill C.J. said that the commercial area was "not the whole port, but such part of the port as is a proper place for discharging whether the vessel has reached a berth or not". Except where ships discharge into lighters, it is difficult to see how any place other than the berth itself can properly be regarded as "the proper place for discharging". But Bovill C.J. made it clear that he had in mind some place other than the berth because he included the words "whether the vessel has reached a berth or not". Later in his judgment he said "the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port". It should be noted that his Lordship referred to the "usual place of loading in the port" and not to the usual place of waiting for a berth. Thus it would seem that the commercial area of the port would, in his view as expressed in the 1870's, be limited to the immediate vicinity of the docks and

would not extend to the usual waiting place if this was outside the dock area.

In 1908 the case of Leonis Steamship Co. v. Rank (1908) 1 K.B. 499 was decided by the Court of Appeal. The case concerned a port charter for the port of Bahia Blanca in South America. When the ship presented, the berth was occupied and she anchored "in the river within the port a few ship's lengths off the pier". Rather surprisingly the charterer claimed that the ship was not an arrived ship until it actually came alongside the berth, and his agrument was successful before Channell J. However the decision was appealed to the Court of Appeal which held that the ship had arrived for the purposes of the charterparty when she anchored off the berth.

The decision in Leonis Line v. Rank was regarded as settling the law on the "arrived ship" for the purposes of port charters. However the two judgments in that case exhibited a difference of view as to the requirements which had to be satisfied before a ship could be said to have "arrived". Buckley L.J. said, in words reminiscent of Bovill C.J. in Tapscott v. Balfour, that the port means "not the whole port, but such part of the port as is a proper place for discharging, whether the vessel has reached a berth or not". His Lordship went on to say that it is enough if the ship is "closely proximate" to the berth. This language certainly suggested that a ship could not be regarded as having "arrived" until she came to rest in close physical proximity to the berth. But what if the usual waiting place for ships waiting to load or discharge is not in the dock area itself?

Kennedy L.J. adopted a broader view than Buckley L.J. He regarded a ship as being within the commercial area of the port when the ship is in an area where she is effectively at the disposal of the charterer, in a position as near as circumstances permit to the actual laoding spot in a place where ships waiting for access to that spot usually lie.

His Lordship explained the references in earlier cases to the commercial area as being "the usual place at which loading ships lie" (Brett L.J.) and "the dock or roadstead where loading usually takes place" (Bovill C.J.) on the basis that they were meant to refer to that area "in the port within which vessels whose obligation and purpose is to receive a cargo lie". This seems to suggest, as Lord Morris pointed out in the Johanna Oldendorff case in 1973, that he had in mind the usual waiting places as well as the usual loading places This view is much more flexible and realistic than that of Buckley L.J. Not only does the ship not have to be in the dock area of the port, but she does not have to be in close physical proximity to the berth.

The next major decision was The Aello, a decision of the House of Lords in 1960: (1960) 2 All E.R. 578. That case concerned a port charter for Buenos Aires. Owing to congestion in the port, the authorities ordered the Aello to wait in the roads at a point called the Intersection some 22 miles from the dock area. The Intersection was within the geographical administrative, legal and fiscal limits of the port of Beunos Aires but was not the usual waiting place for ships of the kind in question. Due to the failure of the charterers to provide a cargo, the Aello waited at the Intersection for a period of 17 days. The House of Lords, by a majority of 3 to 2, held that

the Aello was not an arrived ship when she anchored at the Intersection.

The majority of the House of Lords adopted what is sometimes called the Parker test of when a ship is "arrived". Parker L.J. said in the Court of Appeal in the Aello case that "what Kennedy L.J. was, I think, contrasting throughout his judgment (in Leonis v. Rank) was an area where loading takes place, as opposed to the actual loading spot. The commercial area was intended to be that part of the port where a ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available". The Aello, whilst at the Intersection, was not in that part of the port of Beunos Aires where loading took place and had not therefore arrived for the purposes of laytime. It is worth noting in passing that in the later House of Lord's decision in "The Johanna Oldendorff" Lord Reid said that the Parker test "would lead to the absurd conclusion that the decision of a case would be different if on the one hand the usual waiting area is just inside that part of the port where a ship can be loaded or on the other hand just outside that part of the port, although this slight difference of location would make no practical difference in any commercial sense to any one": (1973) 3 All E.R. at 154.

Incidentally although the shipowner lost the arrived ship issue, he was successful in obtaining damages from the charterer for detention of the vessel resulting from the charterers failure to provide a cargo in accordance with his obligations under the charterparty.

The next case in this saga is The Delian Spirit (1971) 2 All E.R. 1060 where the Court of Appeal decided that a ship had "arrived" at the Black Sea port of Tuapse when she anchored in the outerharbour, which was separated from the dock area by a breakwater. It is difficult to see how the outerharbour could, consistently with the reasoning of the majority of the House of Lords in the Aello, be regarded as within that part of the port "where a ship can be loaded when a berth is available".

In 1967 the Johanna Oldendorff was chartered to load a bulk cargo of grain in the U.S. and "therewith proceed to London or Avonmouth or Glascow or Belfast or Liverpool/Birkenhead (counting as one port) or Hull". The charterers ordered the ship to Liverpool/Birkenhead to discharge. The ship was required to wait at Liverpool/Birkenhead at the Bar anchorage, which is within the geographical, fiscal, legal and administrative area of that port. The charterer, in reliance on the Aello, argued that the ship was not an arrived ship at the Bar anchorage because it is 17 miles from the dock or commercial area of the port. The owners argued that the ship was arrived because she was within the geographical, fiscal, legal and administrative limits of the port, was at the usual waiting place for vessels of her kind and had been ordered to wait there by the port authorities. The five members of the House of Lords unanimously held that the ship was an arrived ship at the Bar anchorage. Their Lordships re-examined Leonis v. Rank in the light of the Aello case, and decided that the Parker test, which was adopted in the Aello, was not an accurate summation of the views of Kennedy L.J., whose views their Lordships preferred to those of Buckley L.J. Their Lordships decided to exercise their power, which they have had since 1966, to overrule their own previous decision in the Aello. They held that the Johanna Oldendorff had "arrived" when she anchored at the Intersection in the Port of Liverpool/Birkenhead. Lord Reid reformulated the law as follows:

> "Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the charterer... If the ship is waiting at some other place in the port then it will be for the owner to prove that she is as fully at the disposition of the charterer as she would have been if in the vicinity of the berth for loading or discharge."

Unfortunately this last sentence of Lord Reid's text sounds somewhat similar to the judgment of Buckley L.J. in Leonis v. Rank. It may give rise to problems where a ship is waiting, not at the usual waiting place, but in some other part of the port where she has been ordered to wait in the particular case by the port authorities. Lord Reid also said that "the essential factor is that before a ship can be treated as an arrived ship she must be within the port and at the immediate and effective disposition of the charterer and that her geographical position is of secondary importance".

Whilst the Johanna Oldendorff brought greater commercial realism to the law relating to the "arrived ship", it raised a point of difficulty in the case of ports where the usual waiting place is outside the geographical area of the port itself eg. Glascow and Hull in the U.K., Rotterdam in Holland and Emdem in Germany. Lord Reid in that case said "We cannot say that whenever a vessel anchors in the usual waiting area for a port she becomes an arrived ship because there are a great many ports where that area is well outside the port area... All are agreed that to be an arrived ship, the vessel must have come to rest within the port". Viscount Dilhorne in the same case said that "if it is refused permission and ordered to wait outside the port by the port authority it is not an "arrived" ship". Similar statements were made by Lords Morris and Diplock. (See also The Darrah (1976) 3 WLR 320 at 363).

Well, notwithstanding these clear statements by Lord Reid and Viscount Dilhorne, the Court of Appeal in The Maratha Envoy (1977) 1 Lloyd's Rep. 217 in 1977 held that a ship had "arrived" at the Port of Brake on the River Weser in Germany even though she was at anchor outside the port at the Weser Lightship and at a distance of 40 miles from Brake. The effective ground for the Court of Appeal's decision was summed up by the Lord Denning in the following words: "In modern conditions, so described, it is absurd to make everything depend on such a narrow point as this: Is the usual waiting place within the port or not". The "modern conditions" referred to by Lord Denning are the advancements in wireless and speed of ships which result in a ship being effectively and immediately at the disposal of the charterer even though she is waiting many miles from the dock area. Lord Denning did not regard the decision of the House of Lords in the Johanna Oldendorff as binding on him because the remarks of their Lordships about the necessity for the usual waiting place to be within the port were not necessary for the purposes of that case as the Johanna Oldendorff was actually waiting within the port.

Lord Denning has always been known to be a bold judge who prefers to reach what he regards as the fair and just decision even if this involves refusing to follow an apparently binding previous decisions. On the facts of the Maratha Envoy, one can have some sympathy with

Lord Denning's view. The ship had done all that she could to reach a berth, but due to congestion in the port of Brake could not obtain one. She was unable to wait in the dock area or within the port at Brake because, although the port Browning described the river as "deep and wide"; there was no waiting place in the river for a ship of her size. She demonstrated that she was effectively and immediately at the disposition of the charterers by sailing on two occasions from the waiting area at the Weser Lightship to the dock area of Brake in just over four hours. Incidentally the ship made these, as it turned out, futile voyages up the Weser, in the hope that, by giving notice of readiness as she turned at Brake (a manoeuvre which took about 10 minutes) for the purpose of returning immediately to the Weser Lightship anchorage, she would become an arrived ship. Obviously the owners were aware of the problems they faced in making her an "arrived ship", particularly since the voyage took place in 1970, ie. before the House of Lord's decision in the Johanna Oldendorff.

Maratha Envoy

The charterers appealed to the House of Lords which reversed the decision of the Court of Appeal: (1977) 2 Lloyd's Rep. 301. The only detailed judgment was given by Lord Diplock, with whom the other four Lawlords agreed. Lord Diplock stressed the need for legal certainty in business matters. He considered that the Johanna Oldendorff had given certainty in this area of the law and had not been shown to be a decision which was difficult to apply in practice. His Lordship regarded it as quite clear that all the members of the House of Lords in the Johanna Oldendorff case considered arrival within the port as essential before a ship could qualify as an "arrived ship". Although he saw the merit in the views expressed by the Court of Appeal, their decision could not be justified in the light of the previous authorities. His Lordship was concerned to point out that where the usual waiting place for a port is outside the limits of the port, the parties can always expressly provide in the charterparty that the ship becomes an arrived ship on arrival at that waiting place.

I understand Lord Diplock's concern for legal certainty. I also appreciate the apparent illogicality of regarding (as the Court of Appeal, in effect, did) the ship as having arrived at the port when it is in fact waiting outside the port, perhaps in the open sea. But the House of Lord's reversal of the Court of Appeal's decision in the Maratha Envoy means that whether a ship which is waiting for a berth will be treated as having arrived will depend upon whether or not that waiting place is within or outside the port.

It will be necessary to work out with precision the limits of the port for the purposes of the Reid test. Lord Diplock, in the Maratha Envoy, said that -

> "I am not aware that in practice the Reid test has proved difficult of application because of any doubt as to whether the usual place where vessels wait their turn for a berth at a particular port lies within the limits of that port or not".

If that question did arise it might be necessary to determine whether one should have regard to the geographical, the legal, the fiscal or the administrative limits of the port. Of course, if the usual waiting place is outside all of these limits, the ship would not have arrived when it waits in that place. It is not easy to say which test the House of Lords would adopt. The resolution of this question might still yet need to be settled in the Courts, but hopefully there are few if any ports where this question will be decisive.

Incidentally the CMI definition of "Port" is "an area within which ships are loaded with and/or discharged of cargo and includes the usual places where ships wait for their turn or are ordered or obliged to wait for their turn even if such waiting places are outside that area, no matter the distance from that area."

We have been dealing with port charters where the ship has been unable to obtain a berth immediately she reaches the port. If the ship is able to proceed immediately to her berth, she will become an arrived ship on her arrival at the berth. Thus the ship must travel right to the berth before she can be said to have arrived. But we have seen that, if a berth is not immediately available, she is regarded as having arrived when she is effectively and immediately at the disposition of the charterer in the usual waiting place within the port. Does the time taken for such a ship to move from the usual waiting place to the berth count for the purposes of laytime. The answer would clearly seem to be that it does on the ground that once laytime commences time continues to count unless it is interrupted in accordance with express provisions in the charterparty or some established custom in the port or because the time is used by the shipowner for his own purposes. The Court of Appeal decision in the Shackleford handed down on 12th May, 1978 confirms this view. Therefore if shifting time is not to count, express provision to this effect should be included in the charterparty.

The CMI definition of "laytime" deals specifically with this point.

In passing it is worth noting that the Shacklesford decision emphasises the need for charterparties to be drafted with care having regard to the conditions which apply in particular ports. In that case the charterparty was quite explicit that time would count "whether in berth or not, whether in port or not whether in free practique or not". But it also said that the notice of readiness could only be given after the ship had been entered at the customs house. The ship did not in fact obtain customs clearance until she berthed after having waited about 40 days for a berth. The Court of Appeal held that customs clearance was a condition precedent to laytime commencing to run, but that, as the charterer's agents had accepted the notice of readiness on no less than three occasions, the charterer had waived his right to dispute that the notice was invalid in view of the failure to obtain customs clearance. I find this latter aspect of the decision unconvincing. It appears to be an attempt to reach what seemed to the Court of Appeal to be a fair result in the face of the clear legal principles to the contrary. In this regard it is worth recalling Lord Diplock's remarks in the Maratha Envoy that "when occasion arises for a Court to enforce the contract or to award damages for its breach, the fact that the members of the Court themselves may think that one of the parties was unwise in agreeing to assume a particular... risk (the occurrence of which is beyond the control of either party) or unlucky in its proving more expensive to him than he expected, has nothing to do with the merits of the case or with enabling justice to be done. The only merits of the case are that parties who have bargained on equal terms in a free market should stick to their agreements". Although these remarks may seem hard and inflexible, it is as well to appreciate that the basic approach of Courts to the interpretation of all contracts is that the parties are bound by the agreement they have made as recorded in their contract.

4. "Time Lost Waiting" Clause

I would like to refer briefly to the "time lost waiting for berth" clause as it applies in respect of port and berth charterparties following the House of Lords decisions in The Darrah (1976) 2 All ER 963 and The Maratha Envoy. The clause has particular reference to a berth charter because the ship does not become an "arrived ship" until it reaches the designated berth. The shipowner therefore carries the risk of waiting time lost as a result of a berth not being immediately available due to congestion in the port. Shipowners not surprisingly took the view that the charterer should assume the financial cost of a berth not being immediately available irrespective of whether it was a berth charter or a port charter. The inclusion in the Gencon charterparty of the "time lost in waiting" clause follows from this view.

In the case of port charters, the effect of the Johanna Oldendorff and the Maratha Envoy is to reduce the apparent operation of the time waiting clause to those cases where the ship is kept waiting outside the port. But even where the ship is waiting within the port, the decisions in The Radnor (1956) 1 All ER 50, The Vastric (1966) 1 Lloyd's Rep. 219, and The Loucas N. (1970) 2 Lloyd's Rep. 482 need to be considered.

The effect of those three decisions was that the time waiting clause was independent of the laytime clause, that the exceptions in the laytime provisions did not apply to that clause (eg. "Sundays and holidays excepted") and that the time spent waiting was to count as it occurred as used laytime (without any account being taken of the excepted periods) so that the ship came onto demurrage earlier if she was waiting for a berth than if she was actually at the berth.

The House of Lords in The Darrah reviewed the three cases cited above and concluded that the propositions of law derived from them were incorrect. Lord Diplock said that the reference in the Gencon charterparty to "time lost in waiting for berth"

> "in the context of the adventure contemplated by a voyage charter .... must mean the period during which the vessel would have been in berth and at the disposition of the charterer for carrying out the loading or discharging operation, if she had not been prevented by congestion at the port from reaching a berth at which the operation could be carried out. The clauses go on to say that that period is to count as loading time or as discharging time, as the case may be. That means that for the purposes of those provisions of the charterparty which deal with the time allowed to load or to discharge the vessel and how it is to be paid for (ie. laytime and demurrage), 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".

Thus The Darrah establishes that periods excepted from laytime proper (eg. Sundays, holidays and non-weather working days) are not to count for the purposes of the time lost in waiting clause.

The commercial good sense and fairness of this decision cannot be doubted. The previous interpretations, whilst supportable in terms of the strict wording of the time lost in waiting clause itself, made little sense in the context of the charterparties as a whole and led

to shipowners being unfairly enriched if by chance, say, in a berth charter their ship reached the port on a Saturday and could not obtain a berth until Monday. In such a case time on Sunday would under the older authorities count as time used even though Sundays were not to count for laytime purposes.

The CMI definition of "time lost waiting for berth to count as loading/discharging time" is consistent with the conclusion of the Hours of Lords in The Darrah.

5. Conclusion

I hope that this paper will serve to stimulate discussion and will make a contribution to the development in Australia of greater awareness of the law relating to charterparties. There is a real need for Australian lawyers and businessmen to develop greater expertise than at present exists in this important area of the law especially having regard to Australia's dependence on shipping for her vital export and import markets.