BUSINESS SESSION 6

TOPIC: WAITING, WAITING, WAITING - AN OVERVIEW OF LAYTIME AND DEMURRAGE

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Waiting, waiting, waiting...An overview of laytime and demurrage

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'If I stay more, I must pay 3l...per diem Demorage, nor can I stay upon Demorage above eight days more.' Daniel Defoe, *Robinson Crusoe* II, p 153 (1719).

1. Introduction

Most disputes about laytime and demurrage arise because of waiting.[1] If a voyage-chartered ship arrives, loads or discharges, and leaves the specified port within the permitted period of laytime, there is, of course, no dispute about demurrage (although there may be one about despatch). If the ship arrives, but loads or discharges so slowly that laytime is exceeded, there may be a dispute about demurrage, but in most cases that dispute should be relatively easy to resolve. Problems usually arise because the chartered ship is forced to wait for one reason or another. Two main causes of waiting give rise to disputes about laytime and demurrage: first, and perhaps most troublesome, there is waiting for a berth; secondly, there is waiting idle at berth because of some interruption to the process of loading or discharging. In this paper, I shall focus on the first of those types of waiting, that of waiting for berth. In particular, I shall concentrate on charterparty clauses that are designed to apply to the situation where the chartered ship loses time waiting for berth. I shall consider the problem of time lost waiting for berth in the wider context of the voyage charterparty as a whole. In so doing, I hope to give a very rough overview of the allocation of responsibility for waiting time lost under a

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1 The word 'demurrage' actually derives from the Old French word for waiting, demourage, which comes from the verb demourer, to wait.

voyage charterparty. This, in turn, should give a very rough overview of the way in which laytime and demurrage disputes arise and are (or should be) resolved.

Prima facie, even problems caused by waiting are relatively simple. In the absence of special provision in the charterparty, the risk of the ship lying idle is allocated according to the stage of the charterparty in which the waiting period occurs. The four stages of a voyage charterparty, with the 'normal' allocation of the risk of waiting are as follows:[2]

1. The loading voyage from the ship's last previous destination to the loading place. In this stage, the ship is on the shipowner's time, and any time spent waiting is for the owner's account.
2. The loading operation at the specified loading place. In this stage, the ship is on the charterer's time, laytime, and any time spent waiting is for the charterer's account.
3. The carrying voyage from the loading place to the discharging place. In this stage, the ship is on the owner's time, and any time spent waiting is for the owner's account.
4. The discharging operation at the specified discharging place. In this stage, the ship is on the charterer's time, laytime, and any time spent waiting is for the charterer's account.

Most modern disputes about laytime and demurrage occur because of special charterparty provisions which attempt to alter this basic, 'normal', allocation of the risk of waiting time. Many of those disputes are about the proper interpretation of clauses that attempt to shift the risk of the first type of waiting described above, that

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2 See EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff) [1974] AC 479 at 556, per Lord Diplock.

of waiting for berth, from the shipowner to the charterer: such clauses include 'Whether in berth or not', 'time lost waiting for berth to count' and 'reachable on arrival' clauses, which are all considered below. Conversely , strike clauses and other clauses purporting to interrupt the running of laytime or demurrage time are an attempt to shift the risk of the second type of waiting, that of waiting during loading or discharging, from the charterer to the shipowner.[3]

In this paper, I shall argue that 'risk-shifting' clauses of this kind must be understood in the context of the basic framework of the voyage charterparty: if they do not clearly re-allocate the risk of waiting time, then the 'normal' allocation of risk should continue to apply. Such an approach is taken in some, but not all, of the laytime and demurrage cases that are considered below.

2. Time lost waiting for berth

If the chartered ship is waiting for berth in the second or fourth of the stages described above (that is, during the loading or discharging operations), then there can be no doubt that the 'normal' allocation of risk applies, and that the ship is waiting on the charterer's time, using up laytime as it does so.[4] Thus, the preliminary question that must be addressed when considering whether a ship waiting for berth is on the charterer's time is whether laytime has commenced. To put it another way, it is necessary to consider whether the waiting ship has completed the first stage, the

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3 These types of 'risk-shifting' clauses are not considered in this paper.

4 Unless, of course, laytime-interrupting provisions shift the risk back to the shipowner. As noted in n. 3 above, such clauses are not considered in this paper.

loading voyage, and has made the transition into the second stage, the loading operation.[5]

The answer to this question depends primarily on whether the waiting ship has arrived at the specified loading place, even though it is not yet in berth.[6] This, in turn, depends on whether the charterparty is a port charterparty, specifying a port as the loading place, or a berth charterparty, specifying a berth within the port as the loading place.[7]

Since the decisions of the House of Lords in The Johanna Oldendorff[8] and The Maratha Envoy,[9] the question of when a ship becomes an 'arrived ship' under a port charterparty is relatively settled. If the ship arrives at the specified port and does not have to wait for a berth, the loading voyage is not over, and laytime does not

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5 For the sake of convenience, from now on the text will refer to loading only, rather than both loading and discharge. The same principles and propositions apply to discharge demurrage, except that there, the voyage is the carrying voyage, not the loading voyage.

6 There are also issues of whether the ship is physically ready to load, and whether a valid notice of readiness has been given. These issues are not considered in this paper. For a general consideration of these issues, see M Davies and A Dickey Shipping Law (Law Book Co, 1990), pp 153-156.

7 For the sake of convenience, the text will not refer to dock charterparties, which specify a particular dock within the port. For the purposes of the issues considered here, dock charterparties are like port charterparties.

8 EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff) [1974] AC 479.

9 Federal Commerce and Navigation Co Ltd v Tradax Export SA (The Maratha Envoy) [1978] AC 1.

commence, until the ship makes berth. In The Johanna Oldendorff,[10] Lord Diplock said:[11]

> 'If on her arrival within the dock or port there is a berth available at which the charterer is willing and able to load or discharge the cargo, the vessel must proceed straight there and her loading or carrying voyage will not be completed until she reaches it.'

If the ship has come to the specified loading port, but has to wait for a berth, the question of whether the loading voyage is over and laytime has commenced is determined by application of the 'Reid test' from The Johanna Oldendorff. In that case, Lord Reid laid down a clear general test in the following terms:[12]

> '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 waiting 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.'

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10 EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff) [1974] AC 479.

11 At 557-558.

12 [1974] AC 479 at 535-536.

The decision in The Maratha Envoy[13] reinforced the 'Reid test' by confirming that the ship must be waiting within the 'legal, fiscal and administrative limits' of the named port to be an 'arrived ship'. In that case, the House of Lords held that a ship was not an 'arrived ship' at the port of Brake on the River Weser when waiting at the Weser Lightship, although that was the usual waiting place for ports on the River Weser, because 'the Weser Lightship anchorage is outside the legal, fiscal and administrative limits of the port of Brake'.[14]

Thus, to be an 'arrived ship' for the purposes of a port charterparty, a ship that is waiting for berth must be at such a position within the 'legal, fiscal and adminstrative limits' of the port that it is at the 'immediate and effective disposition of the charterer'. In most ports, the question of 'arrival' will be quite clear, although there may still be some difficult cases. One such is the Port of Melbourne, where ships often wait for berth in Port Phillip Bay, which is within the fiscal and administrative, but not the legal limits of the Port of Melbourne.[15] Even in cases such as this, where the relevant limits of the named port are not entirely clear, the 'Reid test' should still provide a tolerably clear answer. For example, in London Arbitration 5/90,[16] the chartered ship was ordered to the port of Haldia in India. Although Haldia is a separate port, it is administered by the Calcutta Port Trust. The vessel gave notice of readiness at the Sandheads anchorage, which is the usual

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13 Federal Commerce and Navigation Co Ltd v Tradax Export SA (The Maratha Envoy) [1978] AC 1.

14 [1978] AC 1 at 13, per Lord Diplock.

15 The Port of Port Phillip Bay is an 'associated port' of the Port of Melbourne for the purposes of Part VA of the Port of Melbourne Authority Act 1958 (Vic), which means that the Port of Melbourne Authority has budgetary and administrative powers and obligations with respect to the Port of Port Phillip Bay. However, the legal limits of the Port of Melbourne extend only a short distance into Port Phillip Bay.

16 LMLN 275, 5.5.90.

waiting place for berths at Haldia. The anchorage is some two hours' sailing time from the port, and it is outside the legal limits of the Port of Calcutta. Applying the 'Reid test', the arbitrator held that the ship was an 'arrived ship' at Haldia while waiting at the Sandheads anchorage, although it was outside the legal limits of the Port of Calcutta, because the Calcutta Port Trust exercised de facto control of the anchorage by giving anchoring orders and arranging for pilotage from the anchorage.

In port charterparties, then, clauses purporting to reallocate the risk of time spent waiting for berth from shipowner to charterer are redundant, as any time spent waiting for berth is for the charterer's account in any event.[17] Such clauses are relevant only in berth charterparties, where the specified loading place is a berth within the port. In a berth charterparty, the loading voyage is not over, and laytime does not commence (that is, the second stage does not begin), until the ship enters the specified berth.

It is primarily for this situation - time spent waiting for berth in a berth charterparty - that the special clauses reallocating the risk of waiting time are devised. It is this situation, and these clauses, that have been the source of most laytime and demurrage disputes since The Johanna Oldendorff[18] and The Maratha Envoy[19] settled most of the questions of time spent waiting for berth in port charterparties. Under the 'normal' allocation of risk, the ship is waiting for berth on the shipowner's time in this situation, in the first stage of the voyage charterparty, the loading voyage. The question, then, is whether the special clauses have the effect of re-allocating the risk of waiting time from shipowner to charterer.

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17 For example, a WIBON clause is redundant in a port charterparty - see Federal Commerce & Navigation Co Ltd v Tradax Export SA (The Maratha Envoy) [1978] AC 1 at 14, per Lord Diplock.

18 EL Oldendorff & Co GmbH v Tradax Export SA [1974] AC 479.

19 Federal Commerce and Navigation Co Ltd v Tradax Export SA [1978] AC 1.

Perhaps the most familiar of these 're-allocation' clauses is the WIBON clause. A WIBON clause provides that laytime is to commence 'whether in berth or not': that is, whether or not the ship has arrived at the place that would otherwise be the end of the loading voyage, the berth. Prima facie, the effect of the clause is to shift the risk of waiting for berth under a berth charterparty from the shipowner to the charterer, as the ship waits on the charterer's time whether or not it is in the specified berth. However, there are two main limitations on the effect of a WIBON clause:

1. The clause has no operation if the chartered ship is forced to wait for a berth while outside the port.
2. The clause only has effect if the specified berth is unavailable when the ship arrives at the loading port; it has no effect if the berth is unreachable for some reason other than congestion.

Neither of these limitations applies to the 'reachable on arrival' clause, which places on the charterer an obligation to nominate a berth which is 'reachable on arrival'. The second limitation, but possibly not the first, applies to a 'time lost in waiting for berth to count as laytime' clause.[20] This inconsistency between the effect of WIBON, 'reachable on arrival' and 'time lost to count' clauses is undesirable, given that they were designed to have a broadly similar effect.[21] In this paper, I shall argue that both the 'reachable on arrival' and the 'time lost to count' clauses should be subject to the same restrictions as the WIBON clause, and that this outcome can

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20 See, for example, clause 5(c) of the Gencon form. This clause is hereafter referred to as the 'time lost to count' clause for short.

21 See Butcher, 'An inconsistency of approach? The Kyzikos' [1989] LMCLQ 263.

be achieved if those clauses are interpreted in the light of the 'normal' allocation of risk described above.

2.1 The first limitation: arrival within the nominated port of loading

The first of the two limitations on the application of the WIBON clause means that, in effect, the clause turns a berth charterparty into a port charterparty.[22] In order for laytime to commence under a berth charterparty containing a WIBON clause, the chartered ship must be an 'arrived ship' at the port: that is, it must be at the immediate and effective disposition of the charterer, within the legal, fiscal and administrative limits of the port, according to the Reid test from The Johanna Oldendorff. In The Seafort,[23] the ship 'Seafort' was chartered to carry grain from Vancouver to London and Hull, 'Time at [Hull] to count from arrival of vessel at [Hull] whether in berth or not...' At Hull, the ship was required to wait 8 days, 11 hours and 6 minutes for a berth. The waiting time was spent at Spurn Head, which was the usual waiting place for berths at Hull, but which was outside the limits of the port of Hull. The shipowners contended that laytime began to run as soon as the ship arrived at Spurn Head, because of the WIBON clause. McNair J rejected this argument, holding that laytime had not commenced, despite the WIBON clause, because:[24]

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22 Federal Commerce and Navigation Co Ltd v Tradax Export SA [1978] AC 1 at 14, per Lord Diplock; Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd (The Kyzikos) [1987] 2 Lloyd's Rep 122 at 126, 128, 129 (CA) (reversed on other grounds [1989] 1 Lloyd's Rep 1 (HL)).

23 Carga del Sur Compania Naviera SA v Ross T Smyth & Co Ltd (The Seafort) [1962] 2 Lloyd's Rep 147. Although this is the case usually cited as authority for the proposition in the text it is, in fact, a case about a port, rather than a berth, charterparty.

24 [1962] 2 Lloyd's Rep at 154.

> '...it is clear that the vessel, on arrival at Spurn Head, had not even reached the legal, administrative or fiscal limits of the port of Hull, and it is quite impossible to give to the words "whether in berth or not" the effect of extending the words "arrival at [Hull]" to include a place which is not within the limits of the port, whether legal, administrative or fiscal.'

In contrast, in The Angelos Lusis,[25] the court held that under a 'reachable on arrival' clause, the chartered ship waited for berth on the charterer's time, even though it was waiting outside the legal, fiscal and administrative limits of the loading port. When the chartered ship arrived in the roads outside the loadport, Constanza, no berths were available, and the ship waited five days in the roads before being permitted to enter port when a berth became available. The charterers argued that the 'reachable on arrival' clause only came into operation once the ship had arrived in the port, and that they were not required to nominate a berth until the ship entered the commercial area of the port itself. Megaw J rejected this argument, holding that the 'reachable on arrival' clause applied to 'arrival' outside the loadport. Megaw J said:[26]

> 'The parties, in using the words "on her arrival", did not have in mind, or at least did not have solely and exclusively in mind, the technical meaning of "arrival" in respect of an "arrived vessel" in a port charterparty: they had in mind her physical arrival at the point, wherever it might be, whether within or outside the fiscal or commercial limits of the port, where the indication or nomination of a

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25 Sociedad Carga Oceanica SA v Idolinoele Vertriebsgesellschaft mbH (The Angelos Lusis) [1964] 2 Lloyd's Rep 28.

26 [1964] 2 Lloyd's Rep at 33-34.

particular loading place would become relevant if the vessel were to be able to proceed without being held up.'

Roskill J came to a similar conclusion in The President Brand,[27] holding that the chartered ship had 'arrived' for the purposes of the 'reachable on arrival' clause on arrival at the pilot station, which was outside the commercial limits of the loading port, even though it was not then an 'arrived ship' in the strict sense of the term. He said:[28]

'I think as a matter of ordinary common sense if one asked two businessmen if a ship had arrived at Lourenco Marques when she reported at the pilot station...they would answer, "Yes, she has arrived there", notwithstanding that she had not yet got within the commercial limits of the port.'

The Angelos Lusis and The President Brand were both decided before the decision of the House of Lords in The Johanna Oldendorff, and it is arguable that they are inconsistent with that decision. It is difficult to see why the word 'arrival' should be given a fundamentally different interpretation in the 'reachable on arrival' clause than the word 'arrived' is given by the Reid test, so that the 'reachable on arrival' clause comes into operation before the ship has 'arrived' under the Reid test. After The Johanna Oldendorff, one could express this view simply by paraphrasing Roskill J in The President Brand as follows:

'I think as a matter of ordinary common sense if one asked two businessmen if a ship had arrived at Lourenco Marques when she

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27 Inca Compania Naviera SA v Mofinol Inc (The President Brand) [1967] 2 Lloyd's Rep 338.

28 At 349.

> reported at the pilot station...they would answer, "No, she has not arrived there", as she had not yet got within the commercial limits of the port.'

Further, it is arguable that the 'reachable on arrival' clause does not clearly achieve its ostensible goal, that of shifting the risk of time spent waiting for berth in a berth charterparty from the shipowner to the charterer. Unlike the WIBON clause, the 'reachable on arrival' clause does not start laytime running; it imposes an obligation on the charterer to nominate a berth that is reachable on arrival, but laytime does not commence until the ship has 'arrived' in the technical sense at the specified loading place. Prima facie, then, the risk of time spent waiting for berth outside the port should fall on the shipowner, not the charterer, as the ship is still in the first stage of the voyage charterparty. If the 'reachable on arrival' clause is to shift the risk of waiting time onto the charterer in these circumstances, despite the fact that the ship is still on the loading voyage, it must do so clearly and unambiguously. Quite simply, the words 'reachable on arrival' are not unambiguous: they may refer to 'arrival' in the general, non-technical sense, or they may refer to 'arrival' in the technical sense set out by Lord Reid in The Johanna Oldendorff. As the clause purports to alter the 'normal' allocation of risk that would otherwise apply, it is arguable that any ambiguity should be resolved by interpreting the clause contra proferentem. If the clause does not clearly and unambiguously allocate to the charterer the risk of time lost waiting for berth outside the port, the word 'arrival' should be given the narrower meaning more favourable to the charterer; namely, the meaning which it has more naturally after the Reid test in any event, that of 'arrival' in the strict, technical sense.

The question of whether the first limitation should apply to the 'time lost to count' clause seems to be simpler, as there is little authority directly on point. Schofield says of the 'time lost to count' clause:[29]

> 'The effect of this clause is that any time spent waiting for a berth counts against laytime. To that extent it is similar to a WIBON provision, but the major difference is that the place where the vessel waits need not necessarily be within the port limits. However, it must be sufficiently close to the port for the vessel to be able to say "we have gone as far as we can" and we are now waiting for a berth.'

In contrast, Summerskill says of the 'time lost to count' clause:[30]

> '[I]n a berth charterparty, where the port is stated but the berth is to be named, the waiting period after arrival <u>at the port</u> is to count. This may be so although the ship is still awaiting her berth and unable to give notice of readiness so that laytime has not begun.'

Thus, Schofield suggests that the first limitation does not apply, and that the clause may come into operation once the ship 'arrives' <u>outside</u> the specified loading port, whereas Summerskill implies the opposite, by stating that the clause only comes into operation 'after arrival <u>at the port</u>'. Neither cites any authority for the proposition in question. This is probably because, as Schofield points out,[31]

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29 Schofield, <u>Laytime and Demurrage</u> (2nd ed 1990), pp 135-6.

30 Summerskill, <u>Laytime</u> (4th ed 1989) p 138. Emphasis added.

31 Op cit at p 137.

> '[T]he major judicial consideration of the clause has not been directed to the geographical point which a vessel must reach before the clause becomes applicable, but to the question as to whether laytime exceptions are applicable to waiting time.'

In the absence of authority directly on this point,[32] the question at what geographical point the 'time lost to count' clause comes into operation must be determined by reference to principle. In principle, in a berth charterparty, the loading voyage is not over, and laytime does not commence, until the ship makes the nominated berth. A clause which provides that 'time lost waiting for berth [is] to count as laytime' obviously comprehends a change-over from the first to the second stage of the charterparty at some point before arrival at the berth, but it does not clearly state where that point is, as the clause does not state where the 'waiting for berth' must occur in order for time to count as laytime. It could, as Schofield suggests, come into operation as soon as the chartered ship is sufficiently close to port that the shipowners can state 'we have gone as far as we can' or it could, as Summerskill implies, only come into operation when the ship becomes an 'arrived ship' at the loading port, even though (unlike the 'reachable on arrival' clause), the clause makes no reference to 'arrival'. As the clause is an attempt to change what would otherwise be the situation under the voyage charterparty, it is arguable that any ambiguity should be interpreted contra proferentem. Again, the proferens is the shipowner, who is arguing that laytime can commence at a point where the ship

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32 Some support for Schofield's proposition may be found in Ionian Navigation Co Inc v Atlantic Shipping Co SA (The Loucas N) [1971] 1 Lloyd's Rep 215, but this decision was overruled by the House of Lords in Aldebaran Compania Maritima SA Panama v Aussenhandel AG Zurich (The Darrah) [1977] AC 157, where the ship was an arrived ship at the port in question. Also, The Loucas N was decided before The Johanna Oldendorff settled the question of when a ship becomes an 'arrived ship' at a port.

would otherwise be on the loading voyage. As the words of the clause do not clearly and unambiguously support Schofield's interpretation, Summerskill's interpretation should be preferred. Such an interpretation would mean that the 'time lost to count' clause would, in effect, turn a berth charterparty into a port charterparty and make the 'time lost to count' clause superfluous in a port charterparty. This is precisely the same effect as was ascribed to the WIBON clause by the House of Lords in The Johanna Oldendorff.[33] Summerskill's interpretation also has the advantage of being consistent with the interpretation placed on the WIBON clause in The Seafort.

2.2 The second limitation: causes of delay

The second of the two limitations on the effect of the WIBON clause derives from the decision of the House of Lords in The Kyzikos.[34] The 'Kyzikos' was chartered to carry steel and/or steel products from Italy to the US Gulf. The charterparty was a berth charterparty because it provided, 'Discharging port or place - 1/2 safe always afloat, always accessible berth(s) each port - 1/2 safe port(s) US Gulf excluding Brownsville and no port North of Baton Rouge'. It also provided, 'Time to count...WIPON/WIBON/WIFPON/WCCON'.[35] The charterers nominated Houston as the port of discharge. The ship arrived within the limits of the port of Houston at 0645 on 17 December 1984, but was unable to proceed immediately to the specified berth because of fog, which resulted in the pilot station being closed. The ship did

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33 See nn 17 and 22 above.

34 Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd (The Kyzikos) [1989] AC 1264; [1989] 1 Lloyd's Rep 1. Note that this decision means that the definition of 'whether in berth or not' in the Charterparty Laytime Definitions 1980 is now incorrect, as it simply states that notice of readiness can be given 'if the berth is not immediately accessible to the ship'.

35 Whether in port or not/whether in berth or not/whether in free pratique or not/whether cleared Customs or not.

not arrive at the designated berth until 1450 on 20 December 1984. At all times while the ship was waiting for berth, the designated berth was free and available, but could not be reached because of the fog.

The shipowners argued that laytime commenced when the ship arrived in the port of Houston and, thus, that the ship had been waiting on the charterer's time because of the WIBON clause. The House of Lords rejected this argument, holding that the WIBON clause applied only where the reason for the ship's inability to reach the specified berth was that that berth was unavailable. Lord Brandon of Oakbrook (with whom the other four Lords agreed) said:[36]

> '[T]he phrase "whether in berth or not" has over a very long period been treated as shorthand for what, if set out in longhand, would be "whether in berth (a berth being available) or not in berth (a berth not being available)".'

In conclusion, Lord Brandon said:[37]

> '[T]he phrase "whether in berth or not" should be interpreted as applying only to cases where a berth is not available and not also to cases where a berth is available but is unreachable by reason of bad weather.'

As the nominated berth was available at all times, the House of Lords held that the WIBON clause had no effect, and so the ship had waited for berth on the shipowner's time.

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36 [1989] AC at 1276; [1989] 1 Lloyd's Rep at 6.

37 [1989] AC at 1279; [1989] 1 Lloyd's Rep at 8.

In contrast, in The Sea Queen[38] and The Fjordaas,[39] it was held that where the nominated berth is available but cannot be reached because of bad weather, the 'reachable on arrival' clause does apply, and the ship waits on the charterer's time.

In The Sea Queen,[40] the chartered ship was chartered for a voyage from one or two safe ports Arabian Gulf, excluding Iran and Iraq, to a range of discharging ports. The charterparty contained a clause requiring the charterer to designate a berth that was 'reachable on arrival'. The vessel was ordered to load at Mina al Ahmadi, and arrived off that port at 0655 on 1 January 1985. From 0655 to 1400 on that day, the ship was unable to make berth because of the unavailability of tugs, which were engaged in berthing other vessels; from 1400 on 1 January to 2215 on 3 January, bad weather prevented berthing. The berth designated by the charterers remained unoccupied throughout the period of delay. The charterers argued that bad weather and non-availability of tugs were traditionally regarded as 'owner's risk', and that they therefore did not put charterers in breach of their obligation to nominate a berth that was 'reachable on arrival'. Although the arbitrators accepted this argument, it was rejected by Saville J in the High Court, who held that the charterers were in breach of their obligation to nominate a berth that was 'reachable on arrival' if the berth were unreachable for any reason. Further, following The Angelos Lusis and The President Brand, Saville J apparently held[41] that it made no difference that the ship had not 'arrived' at Mina al Ahmadi in the strict sense laid

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38 Palm Shipping Inc v Kuwait Petroleum Corp (The Sea Queen) [1988] 1 Lloyd's Rep 500.

39 K/S Arnt J Moreland v Kuwait Petroleum Corporation (The Fjordaas) [1988] 1 Lloyd's Rep 336.

40 Palm Shipping Inc v Kuwait Petroleum Corp (The Sea Queen) [1988] 1 Lloyd's Rep 500.

41 [1988] 1 Lloyd's Rep at 502.

down by the Reid test.[42] Thus, the ship was waiting on the charterer's time for the whole period of the delay.

Similarly, in The Fjordaas,[43] Steyn J held that charterers had breached their obligation to nominate a berth 'reachable on arrival' when the nominated berth could not be reached because of bad weather, unavailability of tugs, and a prohibition by the port authorities on night navigation.

In The Sea Queen and The Fjordaas, the 'reachable on arrival' clause was given a much wider application than was given to the WIBON clause by the House of Lords in The Kyzikos. According to the view expressed in The Sea Queen and The Fjordaas, the charterer is in breach of the 'reachable on arrival' obligation if the chartered ship cannot reach the nominated berth for any reason. At first sight, this conclusion would seem to follow from the plain meaning of the word 'reachable', which was defined tersely by Lord Roskill in The Laura Prima as follows:[44]

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42 'It is not clear whether the 'Sea Queen' had or had not arrived in the strict sense. Saville J refers to the ship arriving 'off' Mina al Ahmadi: see [1988] 1 Lloyd's Rep at 501. The references to The Angelos Lusis and The President Brand would be largely unnecessary if the ship had 'arrived' in the strict sense. It is submitted, though, that as validity of these cases after The Johanna Oldendorff was not considered in detail, The Sea Queen cannot be taken to lend much support to the proposition about 'arrival' in The Angelos Lusis and The President Brand, which is considered above.

43 K/S Arnt J Moreland v Kuwait Petroleum Corporation (The Fjordaas) [1988] 1 Lloyd's Rep 336.

44 Nereide SpA di Navigazione v Bulk Oil International Ltd (The Laura Prima) [1982] 1 Lloyd's Rep 1 at 6. Lord Roskill expressed similar views as Roskill J in Inca Compania Naviera SA v Mofinol Inc (The President Brand) [1967] 2 Lloyd's Rep 338 at 349-350.

> '"Reachable on arrival" is a well-known phrase and means precisely what it says. If a berth cannot be reached on arrival, the warranty is broken unless there is some relevant protecting exception.'

However, at first instance in The Kyzikos,[45] Webster J indicated that a different approach to the interpretation of the 'reachable on arrival' clause was possible. In considering the interpretation of an 'always accessible' clause, Webster J said:[46]

> 'An "access" is a way or means of approach...and the word "accessible" must therefore mean "capable of being approached" in the sense of having an unobstructed way or means of approach. The expression "always accessible" is an adjectival expression, descriptive of the berth. It is not, prima facie, a description of any circumstance affecting the berth, other than that it has an unobstructed way or means of approach; still less is it a description of any vessel approaching the berth. In particular, it does not mean that for the berth to be accessible the vessel must be capable of approaching the berth. It means only that the berth is capable of being approached in the sense in which I have used those words.'

According to this view, because the phrases 'always accessible' or 'reachable on arrival' describe the berth, not the circumstances preventing the vessel from

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45 Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd (The Kyzikos) [1987] 1 Lloyd's Rep. 48. The charterparty in The Kyzikos had both a WIBON clause and an 'always accessible' clause, the latter being equivalent to a 'reachable on arrival' clause. At first instance, Webster J considered both; on appeal, the House of Lords considered only the WIBON clause (see [1989] 1 Lloyd's Rep 1.)

46 [1987] 1 Lloyd's Rep at 58.

approaching the berth, a berth is 'reachable on arrival' if it is free, and if there are no physical obstructions preventing access to it. Other causes preventing the ship from reaching the berth, such as bad weather or unavailability of tugs, affect the navigation of the ship, not the physical nature of the berth, and do not alter the fact that the berth itself is 'reachable on arrival'. Such events cause the risk of waiting time to fall on the shipowner, not the charterer.

Admittedly, Webster J's approach has more than a hint of sophistry about it, but it does have the advantage that it is consistent with the basic division of responsibility under a voyage charterparty; the shipowner is responsible for the ship and navigational matters, and the charterer is responsible for matters relating to the berth. Nevertheless, it was flatly rejected by Saville J in The Sea Queen in the following terms:[47]

> 'It was also argued that "reachable" is an adjectival description of the berth, so that a vacant berth to which the vessel cannot proceed because of bad weather or unavailability of tugs remains reachable in itself, albeit the vessel cannot for the time being approach it. To my mind this argument ignores the fact that in the context of the charter the words "reachable on arrival" must mean reachable by the vessel in question on her arrival...'

Similarly, in The Fiordaas, Steyn J said:[48]

> 'In my judgment the distinction between physical causes of obstruction, and non physical causes rendering a designated place

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47 [1988] 1 Lloyd's Rep at 503.

48 [1988] 1 Lloyd's Rep at 342.

> unreachable is not supported by the language of the contract or common sense; it is in conflict with the reasoning in The Laura Prima; and it is insupportable on the interpretation given to that provision in The President Brand. Quite independently of authority I believe it to be wrong.'

Nevertheless, Webster J's judgment in The Kyzikos shows, at the very least, that the meaning of 'reachable' in the phrase 'reachable on arrival' is ambiguous: it might describe the ship's ability to reach the berth, as suggested by Saville J in The Sea Queen, or it might describe the physical quality of the berth, as suggested by Webster J in The Kyzikos. Again, it seems to me that this ambiguity should be resolved by interpreting the clause contra proferentem. The shipowner, as proferens, is arguing that the clause shifts the allocation of the risk of waiting time that would otherwise apply. If the clause does not clearly provide for a departure from the 'normal' allocation of risk under a voyage charterparty, then no such departure should occur, and the clause should be interpreted in the way most consistent with the 'normal' application.

There seems to be considerably less ambiguity about a 'time lost to count' clause, which simply provides 'time lost waiting for berth to count as loading/discharging time' or 'time lost waiting for berth to count as laytime' or words to that effect. It would seem that, in themselves, these words provide little scope for an argument that the clause should apply only when time is lost because the berth is unavailable because of congestion. In fact, an argument based on ambiguity and a contra proferentem interpretation are unnecessary with respect to a 'time lost to count' clause, as what little authority there is on the interpretation of the clause appears to

support the proposition that it applies only in the event of berth unavailability that is due to congestion or physical obstruction. In The Darrah,[49] Lord Diplock said:[50]

> '"Time lost in waiting for berth" in the context of the adventure contemplated by a voyage charter, as it seems to me, 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 operations, if she has not been prevented by congestion at the port from reaching the berth at which the operation could be carried out.'

This dictum is significant in two respects. First, it suggests an interpretation of the 'time lost to count' clause that is consistent with the interpretation of the WIBON clause later adopted by the House of Lords in The Kyzikos. Secondly, this interpretation is said to arise from a consideration of the clause 'in the context of the adventure contemplated by a voyage charter', by the same judge who gave the definitive description of the four stages of a voyage charterparty adventure in The Johanna Oldendorff. As such, then, it supports both the interpretation argued for in this paper, and the method of arguing for that interpretation.

2.3 Conclusion about the limitations on the effect of the 'risk-shifting' clauses

Admittedly, the arguments based upon a contra proferentem interpretation of the 'reachable on arrival' and 'time lost to count' clauses rely heavily on the notion that the 'normal' allocation of risk under a voyage charterparty is fixed as described in the introduction to this paper unless the charterparty clearly and unambiguously

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49 Aldebaran Compania Maritima SA Panama v Aussenhandel AG Zurich [1977] AC 157; [1976] 2 Lloyd's Rep 359.

50 [1977] AC at 165; [1976] 2 Lloyd's Rep at 364. Emphasis added.

provides otherwise.[51] Similar arguments were given by the arbitrators in The Sea Queen as a reason for finding for the charterers, but they left Saville J singularly unimpressed. He said:[52]

> 'In the first place, what may or may not be regarded as the "traditional position", or as being reasonable or unreasonable, cannot be the starting point for construing a contract of this kind. The starting point must be the words and phrases the parties have chosen to use. It is not a permissible method of construction to propound a general or generally accepted principle for sharing the risk of delay between the owners and the charterers or seeking in the abstract to determine a reasonable allocation of risk of delay and then...to seek to force the provisions of the charter into the straitjacket of that principle or into that concept of reasonableness. To do so is to rewrite the bargain that the parties must be taken to have made by the words that they have chosen to use.'

With respect, it is not accurate to describe the four stages of a voyage charterparty as 'a general or generally accepted principle for sharing the risk of delay between the owners and the charterers'. It is much more than that, which is why I have referred throughout this paper to the 'normal' allocation of risk, rather than to the 'traditional' allocation of risk. The four-stage division of obligation under a voyage charterparty

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51 Note, though, that 'risk-shifting' clauses that relate to the second type of waiting considered in the introduction (that is, clauses interrupting laytime or demurrage) are construed contra proferentem, the proferens in this situation being the charterer: see, for example, Sametiet M/T Johs Stove v Istanbul Petrol Rafinerisi A/S (The Johs Stove) [1984] 1 Lloyd's Rep 38.

52 [1988] 1 Lloyd's Rep at 502. Similar observations about the merit of the 'traditional' view were expressed by Steyn J in The Fiordaas [1988] 1 Lloyd's Rep at 341.

is not simply a 'generally accepted principle' about who bears the risk of delay in what circumstances; it is, fundamentally, what the parties have agreed. In a voyage charterparty for carriage of goods from A to B, the shipowner promises that its ship will go to port A, and will carry the charterer's cargo from port A to port B; the charterer promises to load at port A and to discharge at port B within the agreed period of laytime. The charterer's primary responsibility (other than the provision of the cargo itself) is the provision of loading and discharging berths, which is why the charterer bears the risk of port congestion.[53] The notion that the charterer's responsibilities arise only within the permitted laytime periods for loading and discharging is fundamental to what the parties have promised one another under a voyage charterparty.

To repeat Saville J's own words: 'The starting point [of interpretation] must be the words and phrases the parties have chosen to use'. All of the words and phrases in a voyage charterparty except the 'risk-shifting' clauses shape, and are consistent with, the 'normal' allocation of responsibility that simply is what a voyage charterparty is. In effect, a 'risk-shifting' clause is an attempt to change the fundamental obligations of the parties, and if it is to achieve that effect, it must do so clearly and unambiguously. To take this approach is not 'to seek to force the provisions of the charter into the straitjacket of [generally accepted] principle': it is to apply the fundamental[54] rule of construction that the terms of any contract must be interpreted in the context of the contract as a whole.

It may also be said that the supposed ambiguities in the 'reachable on arrival' and 'time lost to count' clauses are illusory and that, as Lord Roskill said in The Laura Prima, the clauses 'mean precisely what [they] say'. Yet, it is undeniably true that

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53 See Schofield, Laytime and Demurrage (2nd ed 1990), p 245.

54 And, thus, surely 'permissible', to use Saville J's words again.

the reallocation of the risk of waiting time could be shifted from shipowner to charterer much more clearly and unequivocally than under any of the existing 'risk-shifting' clauses. For example, a clause in the following terms would clearly reallocate the risk of time spent waiting for berth completely from shipowner to charterer:[55]

> 'All time spent waiting for berth to count as laytime, whatever the reason for delay and whether or not the waiting time was spent within the nominated port of loading/discharge.'

Such a clause would not be subject to the ambiguities described above. It would go beyond the decision in The Johanna Oldendorff, by providing unequivocally that laytime could commence before the ship arrived at the loading port, even though the shipowner had not then completely performed its promise to go to the designated loading place.

The presence of such a clearly pro-shipowner clause in a voyage charterparty might be expected to have some effect on the freight rate that could be charged. In The Fjordaas, Steyn J expressed his indifference to the fact that his interpretation of the 'reachable on arrival' clause might not match 'traditional' expectations of fairness and allocation of risk, by saying:[56]

> '[I]t is unrealistic to argue that it is a fair or unfair allocation of risk; that is a matter which in the market place will be reflected in freight rates.'

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55 Another example of a clause that clearly allocates the risk of waiting time to the charterer is that considered in London Arbitration 1/91, LMLN 20.4.91.

56 [1988] 1 Lloyd's Rep at 342.

Although much is made of the sensitivity of market freight rates, I must confess to some degree of scepticism that market sensitivity is so exquisitely delicate that it can reflect subtle shades of difference between a WIBON clause and a 'reachable on arrival' clause. Of course, I stand to be corrected by those with better knowledge of the market than I, but even if it is true that the market can adequately reflect the difference between the two types of clause, surely it is commercially more desirable that all 'risk-allocation' clauses with similar intentions produce similar effects.

The inconsistency in the effect of the 'risk-shifting' clauses is undesirable, regardless of what is or is not possible by tinkering with freight rates.[57] That inconsistency should be resolved not by expanding the effect of the WIBON clause so that it operates outside port and whatever the cause of delay, but by restricting the operation of 'reachable on arrival' and 'time lost to count' clauses so that they only come into operation when the ship is an 'arrived ship' at the port of loading according to the Reid test, and so that they allocate the risk of delay by congestion or obstruction of the berth to the charterer, but all other risks remain with the shipowner.

3. Conclusion

I am conscious of the fact that in this paper, I have argued that not one, but at least four, decisions are incorrect - namely, The Angelos Lusis, The President Brand, The Fjordaas and The Sea Queen. However, I am comforted by the fact that 'there have

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57 See Butcher, 'An inconsistency of approach? The Kyzikos' [1989] LMCLQ 263.

been opposing views between the legal and mercantile communities'[58] on the issues raised in those cases. Only one of those four decisions (The Angelos Lusis) upheld the award of the arbitrator. Two of them (The Fiordaas and The Sea Queen) allowed appeals from the arbitrators' decision, and the last (The President Brand) did not go to arbitration at all.[59] It seems that the commercial community takes the view that the 'risk-shifting' clauses considered in this paper do not (or should not) shift the risk of those kinds of delay that are 'traditionally' regarded as shipowners' risks.[60] My own view may be slightly different, as it is based on the 'normal' allocation of risk under the four stages of a voyage charterparty, rather than any 'traditional' view of whether one kind of risk or another is properly an owner's risk or a charterer's risk. The 'normal' allocation of risk emphasises the stage of the voyage charterparty at which the delay occurred, rather than the nature of the delaying cause, and it may well be that the 'traditional' allocation of risks to charterer or owner will not always match the 'normal' allocation of risks according to the stage of the voyage charterparty on which the delay occurred.[61] Nevertheless,

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58 Schofield, Laytime and Demurrage (2nd ed 1990), p 245. At n 22 on that page, Schofield notes that these communities are 'sometimes euphemistically referred to as the inhabitants of the Temple and of the parish of St Mary Axe'.

59 At [1967] 2 Lloyd's Rep at 342, Roskill J remarked, somewhat patronisingly, 'The parties here have (if I may say so) wisely waived the arbitration clause for the purpose of avoiding the expense of a special case since the clause provided for lay arbitrators only.'

60 Ibid.

61 For example, in The Fiordaas [1988] 1 Lloyd's Rep at 341, Steyn J points out that 'political risks are traditionally classified as charterers' risks', and that this would not necessarily support the proposition that 'reachable on arrival' means 'reachable on arrival without delay due to physical causes'. Steyn J refers to Schofield, Laytime and Demurrage (1986), p 252 as authority for the proposition that political risks are charterer's risks; the proposition is at p 248 in the 2nd ed, 1990.

it seems to me that the view expressed in this paper is much closer to the 'traditional', commercial view than that expressed in the four cases in question.

The law often finds itself out of step with commercial expectations, particularly in maritime matters. Some of the papers at recent conferences of this Association have commented on similar gaps between the legal and commercial understanding of the effect of what the parties have agreed.[62] Usually, commerce is forced to reorganise its affairs to get back into step with the law. Lord Chorley described that process, and the reason for it, as follows:[63]

> 'It is, of course, an axiom to lawyers that the law must be regular, dependable, certain. To preserve these essentials and at the same time to give the law that elasticity which will meet the fluctuating demands of business is in the view of many lawyers to ask the impossible, and they regard it as mere truckling to the unduly enhanced prestige of commerce to make the attempt - let the merchants cut their coats according to the yard of excellent broadcloth allowed by the law.'

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62 See, for example, Hetherington, 'Fixing or unfixing a charterparty' (1989) MLAANZ Conference papers, Adelaide. This was a commentary on the decision in Star Steamship Society v Beogradska Plovidba (The Junior K) [1988] 2 Lloyd's Rep 583, and had as its epigraph a mournful comment of Ian Timmins: 'Commercial justice and sterile legal application - "the twain shall never meet"'.

63 RST Chorley, 'The Conflict of Law and Commerce' (1932) 48 LQR at 51.

Occasionally, though, the law does shift to reflect commercial understanding.[64] In Hillas (WN) & Co Ltd v Arcos Ltd, Lord Tomlin said:[65]

> 'The governing principles of construction recognised by the law are applicable to every document, and yet none would gainsay that the effect of their application is to some extent governed by the nature of the document...[T]he problem for a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men may as far as possible be effective, and that the law may not incur the reproach of being the destroyer of bargains.'

In this article, I have attempted to show how the commercial understanding of the 'risk-shifting' clauses can be given legal effect 'without violation of essential principle', by applying 'the governing principle of construction' that the application of the clauses 'is...governed by the nature of the document'. Whether by this process of reasoning or some other, there is still some hope, at least, that the law may yet reflect commercial expectations in this area.

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64 Some examples of this are given in RST Chorley, 'The Conflict of Law and Commerce' (1932) 48 LQR 51.

65 (1932) 38 Com Cas 23 at 29.