

**Arrival Concepts**  
**And**  
**Aspects of Port Evolution In Nigeria**

A thesis submitted to the University of London  
for the degree of Doctor of Philosophy.

By

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## ABSTRACT

The thesis provides a critical analysis of the principles which determine a vessel's arrival at a port.

The introductory Chapters, viz, Chapters 1 and 2 explain the nature of the arrival problem and the basic mechanics of the chartering market. The problematic aspect relates to successive criteria for ascertaining arrival which, to a certain extent have generally proved unsatisfactory. A comparison of their key elements concludes that the root of the problem lies in the adaptation of judicial rules to technological advances, and new trading patterns. This point is highlighted in Chapters 3, 4 and 5 which examine the historical evolution of the dominant theories.

The lack of uniformity in the current application of arrival theories is illustrated in Chapter 6. Additionally, the Chapter considers the parameters of a standard test which can be applied universally, irrespective of ship or port characteristics.

As a corollary of the study, Chapters 7, 8 and 9 assess the extent to which factors such as port creation, port regulation and port procedure may have a bearing on the ascertainment of arrival at Nigerian Ports.

Chapters 10, 11 and 12 focus on the difficulties of interpretation, with respect to the compensatory provisions

which have evolved to counter the perceived limitations of the various arrival theories.

In the light of new developments in maritime transport, the uniform application of standard rules will probably become the norm rather the exception. The thesis accordingly proposes an implementation mechanism for a standard test of arrival.

## ACKNOWLEDGEMENTS

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**Dedicated to My Mother Flora Ngonkwo.**

I am also grateful to Ms. A. Clarke and Ms. L. Toulon, Faculty of Laws, University College, London, for their assistance and advice during the period of my studies. Finally, I would like to thank the staff of all the libraries that I have consulted, particularly the staff at the Institute of Advanced Legal Studies Library, Russell Square, London.



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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Introduction

"If a berth is not available when a ship reaches her destination the ship must wait. Waiting costs money and for a very long time the question who is to pay has been a prolific source of litigation."<sup>1</sup>

### INTRODUCTION

This quotation highlights the perennial nature of the problems associated with the determination of liability for the risk of delay at 1.1 Introduction regard, the starting point is to ascertain whether the vessel has arrived at the destination stipulated 1.2 Methodology party. This may be a specific place within the port where the vessel may lie alongside, e.g. a pier or quay berth, or a specific area such as a dock. It could also be a reference to the port at large. Initially, arrival was a matter of fact, but as ports evolved to take account of improved methods of maritime transportation and new patterns of trade, "arrival of a vessel" has become a term of art. In the context of a voyage charter, which is traditionally a charter of a vessel for a specified voyage,<sup>2</sup>

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<sup>1</sup> Per Lord Reid, *The Johanna Oldendorff* [1974] A.C. 479, 529 (H.L.).

<sup>2</sup> Modern variants of the voyage charter provide for the charter of the vessel for consecutive voyages during a specified period.

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### INTRODUCTION

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This quotation highlights the perennial nature of the problems associated with the determination of liability for the risk of delay at a port. In this regard, the starting point is to ascertain whether the vessel has arrived at the destination stipulated in the charterparty. This may be a specific place within the port where the vessel may lie alongside, e.g. a pier or quay berth, or a specific area such as a dock. It could also be a reference to the port at large. Initially, arrival was a matter of fact, but as ports evolved to take account of improved methods of maritime transportation and new patterns of trade, "arrival of a vessel" has become a term of art. In the context of a voyage charter, which is traditionally a charter of a vessel for a specified voyage,<sup>2</sup>

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it signifies the conclusion of the voyage stage. Thereafter, the loading or discharging stage is deemed to have commenced and the risk of delay can be transferred from the shipowner to the charterer by the device of the laytime and demurrage provision.<sup>3</sup>

As a general rule, once the vessel has arrived and her readiness has been communicated to the charterer, laytime can be computed.<sup>4</sup> By 1802, readiness of the vessel had been identified as a condition precedent to the commencement of the charterer's obligation to load or discharge.<sup>5</sup> There is considerable authority to the effect that there must be complete readiness of the cargo holds.<sup>6</sup> However, the vessel may have ballast on board,<sup>7</sup> and she may load the requisite amount of bunkers for the voyage.<sup>8</sup> It is noted that the test of complete readiness is not required with respect to the

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<sup>3</sup> A more detailed explanation of these terms is given in Chapter 2, pp. 27-28 & 33.

<sup>4</sup> Failure to communicate notice of readiness will postpone the commencement of laytime: Fairbridge v Pace (1844) 1 C. & K. 317; Stanton v Austin (1872) L.R. 7 C.P. 651.

<sup>5</sup> C. Abbott, A Treatise of the Law Relative to Merchant Ships and Seamen (1802) p. 150.

<sup>6</sup> e.g. The Tres Flores [1974] Q.B. 264(C.A); Groves, Maclean & Co v Volkart (1884) C. & E. 309; Crow v Myers 41 F. 806(DC Va, 1890); Rotterdamsche Kolen Centrale v Dover S.S. Co Inc (1958) A.M.C. 1184(N.Y.Arb).

<sup>7</sup> Vaughan v Campbell, Heatley & Co (1885) 2 T.L.R. 33(C.A).

<sup>8</sup> Darling v Raeburn [1907] 1 K.B. 846(C.A); London Traders Shipping Co Ltd v General Mercantile Shipping Co (1914) 30 T.L.R. 493(C.A).

vessel's gear and equipment.<sup>9</sup>

In a recent case, readiness of the vessel and readiness of the cargo were distinguished.<sup>10</sup> It was held that infestation of the cargo which necessitated fumigation affected the readiness of the cargo, and not the readiness of the vessel to discharge. The conception of what fumigation signifies contrasts with the Court of Appeal's approach in The Tres Flores.<sup>11</sup> In that case which also involved the fumigation of the cargo holds prior to loading, Roskill, L.J. distinguished between routine and extraordinary preliminaries.<sup>12</sup> It was held that quite apart from an express condition precedent, the requirement of complete readiness could not be qualified where the act of preparation was an extraordinary preliminary such as fumigation.

In addition, the vessel must attain legal readiness, i.e. compliance with port documentation requirements and Health and Customs regulations. The practice in each port will vary. In

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<sup>9</sup> Armement Adolf Deppe v Robinson [1917] 2 K.B. 204, 208 & 212(C.A); The Demosthenes V (No 1) [1982] 1 Lloyd's Rep. 275, 279-280. A more flexible test of readiness is also evident in cancellation cases such as Noemijulia S.S. Co v Minister of Food [1951] 1 K.B. 223(C.A); Grampian S.S. Co Ltd v Carver & Co (1893) 9 T.L.R. 210; Vaughan v Campbell, Heatley & Co, op cit. See also, Rotterdamsche Kolen Centrale v Dover S.S. Co, op cit. Cf, Sun Shipping & Co v Watson & Youell (1926) 24 Ll.L.Rep. 28.

<sup>10</sup> The Epaphus [1987] 2 Lloyd's Rep. 215(C.A).

<sup>11</sup> [1974] Q.B. 264(C.A).

<sup>12</sup> *ibid*, pp. 274-275. Also, Lord Denning, M.R. at p. 249.

Balley v De Arroyave,<sup>13</sup> it was held that where free pratique (health clearance) is not granted, laytime will commence as soon as the charterer has the liberty to load or unload. It is open to the parties to waive compliance with these regulations by the use of abbreviations such as W.C.C.O.N. (whether Customs clearance or not), or W.I.F.P.O.N. (whether in free pratique or not).<sup>14</sup> It appears that unlike the position with regards to cargo holds, there is no requirement of complete legal readiness, provided that the relevant procedure or formality does not strike at the state of the ship, its crew or passengers, and there is no likelihood of interference with the charterer's use of the vessel or delay to the commencement of laytime.<sup>15</sup>

Laytime can be fixed as a specified number of days.<sup>16</sup> It

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<sup>13</sup> (1838) 7 Ad. & E. 919.

<sup>14</sup> See, Kyra Maritime S.A. v Trans Meridian Inc S.M.A. Award Service Ref. No: 2141, summarized in Fairplay International Shipping Weekly, March 6th, 1986, pp. 46-47.

<sup>15</sup> The Aello [1961] A.C. 135, 179-181(H.L); The Delian Spirit [1972] 1 Q.B. 103(C.A). Cf, The Austin Friars (1894) 10 T.L.R. 633; White v Winchester S.S. Co (1886) 23 Sc.L.Rep. 342; Pan Cargo Shipping Corp v U.S.A. (1965) A.M.C. 2649(SDNY,1964).

<sup>16</sup> In the absence of an express stipulation or custom, "days" or "running days" means consecutive calendar days of 24 hours, without any deductions for Sundays and officially recognized holidays. Cf, Cochran v Retberg (1800) 3 Esp. 121; Commercial S.S. Co v Boulton (1875) L.R. 10 Q.B. 346. "Working days" refer to days on which work is ordinarily carried out in the port: Nielsen v Wait (1885) 16 Q.B.D. 67(C.A); Reardon Smith Line v Ministry of Agriculture [1963] A.C. 691(H.L). Both authorities suggest that a working day is not a reference to the number of working hours in a calendar day. Cf, Mein v Ottmann (1904) 6 Fraser 276; Alvion S.S. Corp Panama v Galban



may also be "unfixed" and calculable by reference to the daily rate at which cargo is loaded or discharged. It is open to the parties to specify additional pre-requisites for the commencement of laytime, e.g. the expiry of a fixed period after the vessel's notice of readiness has been accepted, or entry at the Customs House.<sup>17</sup> Upon the expiration of laytime, demurrage or damages for detention may be payable by the charterer for the additional period of time required for the conclusion of loading or discharge.

By 1900, the law relating to arrival at specific destinations such as berths and docks was well settled. The position was that arrival was not effective until the vessel was in the berth or dock respectively. In the case of orders

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Lobo Trading Co S.A. [1955] 1 Q.B. 430(C.A); The North Princess (1960) A.M.C. 1997(N.Y.Arb). A "weather working day" is a working day during which the weather does not wholly prevent the working of the vessel, whether or not work was intended: Reardon Smith Line v Ministry of Agriculture, op cit; Compania Naviera Azuero S.A. v British Oil & Cake Mills Ltd [1957] 2 Q.B. 293. Also, Destrehan Freighters & Tankers Agency Corp v Continental Grain Co (1968) A.M.C. 442(N.Y.Arb).

<sup>17</sup> Entry at the Customs House, particularly in some Indian ports takes place in two stages, i.e. prior and final entry. In earlier authorities such as The Apollon [1983] 1 Lloyds's Rep. 409, and The Delian Leto [1983] 2 Lloyd's Rep. 496, it was held that "entry" meant "prior entry". However, recent authorities, emphasizing the materiality of the relevant Indian Customs provision have decided that "entry" means "final entry": The Albion [1987] 2 Lloyd's Rep. 365; The Nestor [1987] 2 Lloyd's Rep. 649. It is noted that a recent Indian High Court decision has adopted the former approach which makes "prior entry" effective: Union of India, Food Corp'n of India v The Great Eastern Shipping Co Ltd summarized in Fairplay International Shipping Weekly, February 2nd, 1989, p. 35.

to proceed to a port, attempts to define arrival have been more problematic. Various arrival theories have emerged. Initially, these were beneficial to the charterer, but progressively the shipowner has come to occupy a relatively more favourable position. It is possible to classify these theories. First, the functional theory highlights the specific areas of the port where loading is practicable or possible. Secondly, the formal theory considers that the port is encompassed by its legal limits. The commercial theory determines arrival by reference to the extent of a Port Authority's jurisdiction or the position of usual or customary anchorages. It is suggested that, although the application of some of these theories might have widened the scope of arrival, new developments in maritime technology and port evolution necessitate a reappraisal of existing rules.

Apart from the inquiry into the geographical position of the vessel for arrival purposes, it is also necessary to ascertain whether the vessel can actually receive, and respond to the charterer's berthing instructions. This issue relates to whether the vessel has been placed at the effective disposition of the charterer. Initially, this was not a factor of any significance, but it has achieved prominence with the development of instantaneous communications links between the ship and shore. Current problems relate to whether a vessel can be considered to be at the charterer's disposition in situations where the vessel has been delayed within the port

by events other than congestion, for example, weather and navigational conditions, and the effect of port regulations.

Aspects of port evolution<sup>18</sup> in Nigeria such as port creation, port regulation and port procedures may have a bearing on the determination of arrival. The peculiarities of Nigeria's ports, most of which are fluvial/estuarine ports instead of coastal ports create difficult navigational conditions. In the formative stages of harbour development prior to 1862, the application of a formal or functional theory of arrival would have been problematic. This was due to the fact that port limits had not been delineated. Secondly, lightening of vessels was extensive because vessels were delayed at submarine sandbars which were sometimes located at considerable distances from the usual loading/discharging places.

After 1862, statutory regulation of harbours was introduced but it was not until 1897 that harbour limits were specified, and that was only in respect of Lagos Harbour. Ports were appointed and their limits were defined for the first time in 1917. Although, major port improvements were embarked upon to facilitate the passage of vessels, port administration and regulation was diversified amongst various

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<sup>18</sup> The ports that are of primary concern are dry cargo ports. However, Nigeria's major oil terminals are situated at Antan (offshore); Bonny (onshore & offshore); Brass (offshore); Escravos (onshore); Forcados (offshore); Pennington (offshore); Port Harcourt, i.e. Okrika (onshore); Qua Iboe (onshore).

Government Departments and private organizations. The position changed in 1955 with the establishment of the Nigerian Ports Authority (N.P.A.) which exercises supervisory and regulatory functions in all ports. However, with the current privatization and commercialization programmes of the Federal Government, it is possible to foresee a scenario in which different areas of a port may be subject to the control of diverse entities.<sup>19</sup> An arrival theory contingent upon the extent of a port authority's jurisdiction may be difficult to apply in a situation where there is a lack of coordination amongst the various organizations empowered to direct the movement of vessels within a port.

The concentration of traffic at Lagos, between 1973 and 1977 resulted from rehabilitation and reconstruction programmes that were adopted after the conclusion of the Civil War in 1970. Various traffic control measures were introduced in order to alleviate congestion. In addition, new port documentation requirements have since been formulated for

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<sup>19</sup> ss. 12(2) & 13, Privatization and Commercialization Decree 1988 provide that the N.P.A. shall be commercialized in respect of the fixing of rates, prices and charges for goods and services provided. It is quite possible that a future statutory provision may provide for the privatization of the various duties of the N.P.A., viz, traffic regulation, conservancy and pilotage. It has been mooted that several ports may be run under a mini-Authority, and that shipping companies, business houses and other interested parties may play a more active role in the management of sections of ports, per D.M. Osah, "Future of Maritime Trades in Nigeria" pp. 10-11. Paper delivered at a Conference organized by the Shipping Trade Group and Clearing & Forwarding Trade Group of the Lagos Chamber of Commerce & Industry, October 1988.

economic and fiscal purposes. It appears that they may affect the determination of arrival at Nigerian Ports.

Economic optimization<sup>20</sup> suggests that the ascertainment of arrival should not turn merely on the characteristics or function of a port. It is noted that barge carrying vessels such as LASH and BOB<sup>21</sup> ships usually anchor outside ports, instead of lying alongside "hard" quays within the port. Secondly, some estuarine/fluviat ports may have to develop outer estuaries in order to accommodate larger vessels. It is quite possible that port limits may not be simultaneously extended. In effect, this may result in the creation of moorings and anchorages outside port limits. It is also noted that there is a diversity of arrival theories across the major maritime jurisdictions. Consequently, the outcome of a dispute may vary depending on the forum in which it has been heard. Attempts by the shipping community to bypass judicial interpretations of arrival appear to have had limited success. Compensatory provisions which advance laytime or compensate the shipowner for delay have not been free from difficulties of interpretation. Disputes have arisen with respect to the position which the vessel has to attain before these clauses can take effect. In some cases, there is uncertainty with

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<sup>20</sup> A term used to denote the introduction of larger and faster vessels with vast improvements in cargo handling capacities: S, Mankabady, "The Concept of the Safe Port" (1974) 5 J.M.L.C. 633, 642.

<sup>21</sup> i.e. "Lighters Aboard Ship" and "Barge on Board".

respect to the events which fall within the ambit of a particular compensatory clause.

The object of this thesis is threefold.

First, it will trace the historical evolution of the arrival theories, with particular reference to the impact of technological and economic changes. It will make a comparison of their key elements and thereby attempt to define the parameters of a standard test of arrival.

Secondly, it will highlight the interrelationship between arrival and aspects of port evolution, port regulation and port procedure in Nigeria.

Finally, it will assess the efficacy of compensatory provisions, particularly their usefulness as adequate alternatives to a standard test of arrival.

## **1.2 Methodology**

The thesis has been developed primarily from library research. Parts II and IV, which examine the historical evolution of arrival concepts, and the interpretation of compensatory provisions compares the relevant caselaw from the principal common law maritime jurisdictions, viz, England and the U.S.A. This is a reflection of the fact that, in these jurisdictions, there is no statutory regulation of the fields of laytime and demurrage.

The materials for Part III, which assesses aspects of port evolution in Nigeria were obtained from several sources.

Legislation relating to port and harbour creation were derived from the current Laws of Nigeria, and colonial documents deposited at the British Library, and Public Record Office, Kew. Materials in respect of port regulation and practice were also compiled from current Laws of Nigeria and colonial documents. They have been supplemented by information obtained from interviews conducted amongst shipping personnel in England and Nigeria.



## **CHAPTER TWO**

### **MECHANICS OF THE CHARTERING MARKET**

- 2.1 Definitional Aspects of Demurrage**
  - 2.1.1 Inadequacies of Contractual and Equitable Remedies**
- 2.2 Financial Position of the Parties**
  - 2.2.1 Voyage Calculations**
- 2.3 Standard Forms**
  - 2.3.1 Shipbrokers**

## CHAPTER TWO

### MECHANICS OF THE CHARTERING MARKET

#### 2.1 Definitional Aspects of Demurrage

"There is no magic in a charterparty: it is a contract in which the rights and obligations of the parties to it are found...."<sup>1</sup>

One of the principle functions of any contract is to define the scope of the rights, duties and obligations of the parties subject to it. However, even the most far-reaching and comprehensive contract might not predict in advance and deal conclusively with all the factors that could possibly affect its outcome. This Chapter examines the context within which the ascertainment of arrival is significant. It highlights the functions of the laytime and demurrage provision and it explains how the general procedures that underlie the charterparty fixture may contribute to the terminological difficulties on the subject of arrival.

Demurrage, in the strict sense is a payment stipulated by law or contract. It is payable by the charterer for the use of time beyond that which is conceived to be normally necessary

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<sup>1</sup> Per Singleton, L.J., The Radnor [1956] 1 Q.B. 333, 340(C.A).

for the loading or discharge of a vessel.<sup>2</sup> Nevertheless, it is quite common to employ demurrage in a loose sense, for example, to describe the actual period of delay, or payments made where there is no contractual stipulation for demurrage, although such payments are properly described as "damages for detention". Demurrage is also used in connection with payments in respect of delay which occurs independently of the actual processes of loading or discharge.<sup>3</sup>

The extension of its use can be attributed to several factors. Firstly, the profusion of charterparties catering for specific interests. This might have resulted in demurrage acquiring the meaning the parties deem fit.<sup>4</sup> Also, maritime contracts by their very nature have an international scope. Disputes arising therefrom are adjudicated upon in different jurisdictions and may be governable by legal systems which have various notions of demurrage.<sup>5</sup> It would be desirable that demurrage is employed in its original context but it is

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<sup>2</sup> Inverkip v Bunge [1917] 2 K.B. 193, 200(C.A); Akt. Reidar v Arcos [1927] 1 K.B. 352, 360(C.A). See also, H. Tiberg, The Law of Demurrage (1979) p. 2; Scrutton on Charterparties (1984) p. 305.

<sup>3</sup> See, Clink v Radford [1891] 1 Q.B. 625, 630-631(C.A); Lockhart v Falk (1875) L.R. 10 Ex. 132, 135; Trading Society Kwik-Hoo-Tong of Java v Royal Commission on Sugar Supply (1924) 19 Ll.L.Rep. 90, 92; The Varing [1931] P. 79, 92(C.A); Hellenic Lines v American Tobacco Co (1949) A.M.C. 607(SDNY, 1946); H & N.Y. No 11 (1936) A.M.C. 1711(SDNY, 1936); The Apollon (1824) 22 U.S. (9 Wheat.) 362, 377-378.

<sup>4</sup> e.g. Austral, Cl 2, *infra*, Chapter 12.

<sup>5</sup> H. Tiberg, The Law of Demurrage, pp. 2-3.

doubtful whether commercial practice will change immediately.

### **2.1.1 Inadequacies of Contractual and Equitable Remedies**

If a vessel arrives at a port to either load or unload and then suffers delay as a result of a breach of contract on the part of the charterer, e.g. delay in the provision of cargo, the shipowner may seek to recoup any loss by way of remedies available under general contractual law. There are several possible options. He may bring an action for damages which is the primary remedy, but the shipowner who adopts this option is confronted with the further delay and expense that litigation entails. He is expected to prove his loss by establishing that there has been a breach by the charterer and that he has suffered as a result. He will likely show that he has acted reasonably in the circumstances by mitigating his loss.<sup>6</sup> Although the law does not place on the shipowner the duty to mitigate, he will be debarred from claiming that part of the damages attributable to his neglect to mitigate.<sup>7</sup>

Consequently, one of the advantages of the demurrage provision is that the shipowner is not put to the expense of proving his loss. Furthermore, he need not establish any attempts at mitigation. However, in some American authorities proof of actual damages has been stipulated as a pre-requisite

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<sup>6</sup> See generally, British Westinghouse Electric & Manufacturing Co v Underground Electric Rly Co [1912] A.C. 673, 689(H.L).

<sup>7</sup> The Solholt [1983] 1 Lloyd's Rep. 605, 608(C.A).

to a demurrage claim.<sup>8</sup>

Alternatively, the shipowner can refuse further compliance with the charterparty. An unconditional and immediate right exists if the delay results from a total and final repudiation of the contract by the charterer<sup>9</sup> or from the breach of a duty couched in terms of, and intended by the parties to be a condition.<sup>10</sup> In the absence of these factors, the shipowner's right to repudiate depends on whether the breach substantially deprives him of the benefits of the charterparty.<sup>11</sup> This approach creates problems. In some cases, it may not be clear at the outset of the breach, at what point in time the shipowner's right to repudiate will

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<sup>8</sup> U.S. v Sugarland Industries (1924) 296 F. 913(5 CCA,1924); The S.S. Hartismere (1937) 18 F.Supp. 767(DC Md,1937); Trans-Asiatic Oil Ltd v Apex Oil Co 804 F.2d 773(1st Cir,1986); Steiger v Orth 258 F. 619(2 CCA,1919). Cf, Bailey v Manufacturer's Lumber Co 224 F. 806(SDNY,1915) in which the view was that demurrage was in the nature of liquidated damages. In Continental Coal Co v Bowne 115 F. 945(1CCA,1902), the demurrage provision was regarded as a penalty. See also, New York & N.E. Rly Co v Church 58 F. 600(1 CCA,1893). Other authorities have regarded demurrage as neutral charge or compensation: California & Eastern Rly S.S. Co v 138,000 Feet of Lumber 23 F.2d 95(DC Md,1927); Southern Rly Co v Lewis 51 So. 863(S.C.Ala.,1909). In Leary v Talbot 160 F. 914(2 CCA,1908); Ben Franklin Transp. Co v Fed. Sugar Refining Co 242 F. 43(2 CCA,1917) and The J.E. Owen 54 F. 185(NDNY,1893), demurrage was considered to be in the nature of extended freight.

<sup>9</sup> Heymans v Darwins Ltd [1942] A.C. 356, 397(H.L.).

<sup>10</sup> Photo Productions Ltd v Securicor Trans. Ltd [1980] A.C. 827, 849(H.L.); Bunge Corp. v Tradax Export S.A. [1981] 1 W.L.R. 711, 729(H.L.).

<sup>11</sup> Photo Productions Ltd v Securicor Trans. Ltd, op cit. Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha [1962] 2 Q.B. 26, 72-73(C.A.).

accrue. On the one hand, the charterer requires adequate time for loading or discharging. He will be anxious that the ship is not withdrawn merely on the basis of a minor breach which does not involve the shipowner in any extensive loss. On the other hand, the shipowner may wish to employ the vessel in another venture, although he will be mindful of the risk of wrongfully repudiating the charterparty, thereby exposing himself to claims for damages.

In the light of their discretionary nature, equitable remedies may be of limited use. The Courts may be reluctant to grant possible remedies such as orders for specific performance or injunctions, where damages may be more appropriate or where constant supervision of the order will be required.<sup>12</sup>

The same considerations apply in the discharge situation. However, in those circumstances the shipowner is in a more vulnerable position because he is in possession of the goods and he may be reluctant to threaten to, or actually withdraw the vessel.

Significantly, in the loading situation, the shipowner does not have a right of cancellation directly conferred by the charterparty and which is also complementary to the right to claim damages.<sup>13</sup> This is a right which is exercisable by

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<sup>12</sup> Cf, The Oakworth [1975] 1 Lloyd's Rep. 581, 583(C.A).

<sup>13</sup> Nelson & Sons v Dundee East Coast Shipping (1907) S.C. 927.

the charterer. Its advantage lies in the fact that it is specified by the charterparty and it is exercisable whether or not there has been a breach by the shipowner.<sup>14</sup> Another problem arises if the delay is neither attributable to the act, omission or default of either party. It is this possibility, quite apart from the inadequacies of contractual and equitable remedies which renders necessary a regulation of risks such as that provided by a demurrage provision.

## **2.2 Financial Position of the Parties**

The shipowner who embarks upon any voyage regards it as a commercial venture, and he will endeavour as much as possible to maximise his profits. He will be seeking in the long term and under competitive conditions to obtain as large a surplus of revenue over costs as possible.<sup>15</sup> Once the details of the fixture have been agreed, the shipowner's expectation is that the voyage estimates will be lower than the freight so that he can be assured of a profit. The shipowner's need to keep the vessel continuously employed can be explained on the grounds that, a ship is a wasting asset and will therefore continue to depreciate in value during the course of her lifetime which is on average 23-24 years for dry cargo vessels and small tankers, and 12 years for tankers

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<sup>14</sup> The Democritos [1976] 2 Lloyd's Rep. 149.

<sup>15</sup> B.N. Metaxas, The Economics of Tramp Shipping (1971) p. 137.



exceeding 100,000 gross tonnes.<sup>16</sup> It is estimated that at the expiration of this period, her value as scrap metal will perhaps be about 7% of the original cost.<sup>17</sup> Also, the shipowner might have borrowed capital in order to purchase the vessel. He will be anxious to repay the capital and interest within the shortest possible period. Furthermore, during periods of low freight, the costs of keeping the vessel idle may be higher than the loss incurred if she is kept trading.<sup>18</sup>

Against the shipowner's needs must be balanced those of the charterer who requires sufficient time to load or unload. Therefore, it is usually agreed that a period termed laytime (or laydays) which the charterer shall not pay for will be set aside for the purposes of loading or discharge. The view being that the shipowner will be compensated for its use by the freight.<sup>19</sup>

The ship's time in port consists of waiting time which is time spent waiting for a free berth and service time which represents time actually spent in a berth (including operational and non-operational periods). Ideally, the specified laytime should be of such duration as to cover the

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<sup>16</sup> M. Stopford, Maritime Economics (1988) p. 80.

<sup>17</sup> C.F.H. Cufley, Ocean Freights and Chartering (1964) 7th Rep. p. 421.

<sup>18</sup> B.N. Metaxas, The Economics of Tramp Shipping, p. 137.

<sup>19</sup> The Delian Spirit [1972] 1 Q.B. 103, 123-124 (C.A.).

expected waiting time and service time having regard to all the relevant information at the disposal of the parties, e.g. the vessel's capacity, the size and nature of the cargo and weather and working conditions at the ports of call. If the charterer fails to load or discharge within the stipulated period, he is in breach of the contract but instead of the shipowner immediately bringing a claim for damages (which he is ordinarily entitled to), the contract may provide that the charterer is liable to pay a fixed sum at a daily rate, i.e. demurrage, for the loading or discharge beyond the stipulated time.<sup>20</sup> If the charterer completes the loading or discharge within the stipulated period, the shipowner may have to pay despatch which is usually half of the demurrage rate. Therefore, in addition to its functions of providing an alternative means of redress and also allocating the risk of delay from independent events, the demurrage provision emphasizes the significance of dispatch to both parties.

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<sup>20</sup> The fact that the specified laytime has been exceeded does not entitle the shipowner to withdraw his vessel. However, such a right exists if there has been inordinate delay that goes to the root of the contract: Universal Cargo Carriers v Citati [1957] 2 Q.B. 401; Inverkip v Bunge [1917] 2 K.B. 193(C.A); Akt. Reidar v Arcos [1927] 1 K.B. 352(C.A). In Unitramp v Garnac Grain Co [1979] 1 Lloyd's Rep. 21(C.A), it was held that as a general rule, the shipowner is not entitled to repudiate the charterparty merely on the grounds of commercially unacceptable delay. It is noted that in Wilson & Coventry Ltd v Otto Thoresen's Line [1910] 2 K.B. 404, it was decided that if laytime is not specified, the vessel is entitled to sail away after a reasonable time. See also, Associated Metals & Mineral Corp v 4,000 Tons of Manganese & Hellenic Lines Ltd (1972) A.M.C. 968(DC Md,1972).

### **2.2.1 Voyage Calculations**

In addition to fixing the freight rate, the shipowner has to consider what his likely disbursements will be. Disbursements fall into three main categories:<sup>21</sup>

(i) Capital Costs: These generally remain constant whatever the duration of the voyage and include capital (either own or borrowed), interest and depreciation on invested capital.

(ii) Operating Costs: e.g. Costs of repairs and maintenance, insurance (on hull & machinery), manning costs.

(iii) Voyage Costs: These are directly influenced by the voyage and include fuel costs, port charges and stevedoring/trimming charges.

The shipowner's ability to control control costs is limited by the fact that capital costs are fixed irrespective of the employment of the vessel. By way of illustration, it is estimated that capital costs constitute 30% of the total voyage estimates of a typical 60,000 dwt modern bulk carrier with a service speed of 16 knots.<sup>22</sup> Nevertheless, there is scope for the control of expenditure if variables particularly (iii) are kept in check. Therefore, it is in the shipowner's interest that the prosecution of the voyage is efficient and "ship time in port" is minimised. Moreso, when average daily

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<sup>21</sup> R. Ihre, L. Gorton & A. Sandevan, Shipbroking & Chartering Practice (1990) p. 87.

<sup>22</sup> Voyage and operating costs represent 52% and 13% respectively: A.E. Branch, Elements of Shipping (1989) p. 250.

ship cost in port indicates an upward trend.<sup>23</sup>

An important constituent of the daily ship cost in port are the port charges. These consist of port charges for services to the vessel and cargo handling charges. The responsibility for the payment of these charges is dependent on the nature of the charterparty. Under a time charter which is basically a charter for a fixed period, the charterer pays both charges. In a simple voyage charter, the port charges for services to the vessel are borne by the shipowner whilst the charterer is responsible for the cargo handling charges.

Apart from port charges, other expenses that might be incurred by the shipowner during any detention of the vessel in a port include manning and fuel costs, and the supplies of provisions. The shipowner's financial position is defined by the fact that the lower the cargo output and the longer the waiting time, the higher the port costs per ton of cargo.<sup>24</sup> There is also the risk that delay to the vessel at a port may lead to the loss of a future charter. In the light of these factors, the demurrage provision is vital because it encourages the charterer to conclude his functions within the stipulated laytime. If for any reason he fails to accomplish this, the demurrage payment represents a mutually agreed remuneration for the shipowner.

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<sup>23</sup> U.N.C.T.A.D., Port Problems. Causes of Increases in Port Costs and their Impact. (1977) TD/B/C.4/167 Supp. 1 p. 40.

<sup>24</sup> *ibid*, p. 41.

### **2.3 Standard Forms**

The shipping sector is characterized by the medium of brokers and the employment of a variety of documents in common use described as standard charterparty forms. Originally, merchants sailed with their vessels conducting sales and purchases at various ports of call. By the 12th century, agreements for the charter of a ship or some of its parts had become widespread.<sup>25</sup> Subsequently, written agreements replaced oral contracts. The introduction of standard forms occurred in the 19th century.<sup>26</sup> At the outset, they were issued by individual contracting parties but later, groups of shipowning and cargo interests formulated standard forms for particular trades.<sup>27</sup> Currently, documentation of standard forms is regulated by international organizations including the United Kingdom Chamber of Shipping, B.I.M.C.O.,<sup>28</sup> Copenhagen, and the Japanese Shipping Exchange, Tokyo. They constitute a forum where shipowners, shipbrokers, chartering agents, P. & I. Clubs<sup>29</sup> and Freight, Demurrage & Defence

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<sup>25</sup> H. Tiberg, The Law of Demurrage, p. 10.

<sup>26</sup> U.N.C.T.A.D., Charterparties (1974) TD/B/C.4/ISL/13 p. 8.

<sup>27</sup> *ibid.*

<sup>28</sup> *i.e.* Baltic and International Maritime Conference.

<sup>29</sup> *i.e.* Protection & Indemnity Clubs. These are groups of shipowners who make contributions in order to provide mutual protection against risks not covered by insurers.

Associations<sup>30</sup> can pool resources, knowledge and experience in the formulation of a wide range of forms for international use.

Forms issued by these international organizations and which have resulted from negotiations between shipowning and cargo interests are usually described as approved or recommended forms. However, there are forms employed in certain trades, for example, liquid bulk cargoes, which emanate from private companies that enjoy a dominant position in those trades. These are described as "private forms".

The objectives of standardization can be summarized as the streamlining of negotiations so as to produce savings in time and expenditure for the contracting parties. Prima facie, familiarity and knowledge of contractual terms should minimise the incidence of disputes. These factors are crucial in a field such as shipping where principals and their intermediaries may be based in different jurisdictions. Nevertheless, the freedom to modify, delete or add clauses to standard forms means that what appears at first to be an unambiguous and explicit document may become liable to different interpretations. Also, improvements in technology or new trading patterns may render certain contractual stipulations obsolete. Therefore, it is important that the

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<sup>30</sup> Unlike P. & I. Clubs, Freight, Demurrage & Defence Associations only provide cover in respect of the pursuit or defence of contractual claims.

Documentary Committees involved with these forms routinely make modifications to reflect new conditions. Failure in this respect encourages the use of riders which seek to clarify the position of the respective parties.<sup>31</sup>

### 2.3.1. Shipbrokers

The function of the broker is to seek cargo for a vessel if he is acting on behalf of the shipowner, or to make inquiries about the employment of a vessel if he is acting on behalf of a charterer. In some cases, a broker may act for shipowners and charterers. However, it is pertinent to point out that there are other categories of brokers who deal with the sale or purchase of vessels or who supervise the loading of vessels at ports.<sup>32</sup>

The centre of international shipping is the Baltic Mercantile & Shipping Exchange (Baltic Exchange), London. Its origins can be traced to the coffee houses that served the City of London in the 17th century.<sup>33</sup> On its "Floor", brokers representing shipowners and charterers confirm and conclude charterparty fixtures, mostly involving bulk cargoes such as

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<sup>31</sup> For a criticism of the employment of riders at the end of printed forms, see, A. Morris, "Non-Charters - The Rider Syndrome". Lecture delivered at the Charterparties Conference organized by Lloyd's of London Press, September 21st-22nd, 1982.

<sup>32</sup> E.R.H. Ivamy, The Growth of the Law Relating to Brokers Unpublished Ph.D. Thesis, University of London 1952 pp. 117-119.

<sup>33</sup> *ibid*, pp. 119-120.

grains, mineral ores and oil.<sup>34</sup> Its dominance is highlighted by the fact that at least 75% of global bulk cargo transportation is handled at some stage by the Exchange.<sup>35</sup>

Charter negotiations at the Exchange mainly involve "tramps" which in contrast to "liners", do not sail in accordance with a fixed schedule. Generally, the negotiations proceed in two stages.<sup>36</sup> During the first stage, the parties through their brokers, are concerned with what has been described as the "main terms" of the prospective charter.<sup>37</sup> The objective is to reach an agreement with respect to matters such as the particulars of the ship and cargo, loading and discharging ports, laytime, demurrage and despatch rates, freight and if applicable, the type of standard form to be adopted. In the second stage, the parties seek to "negotiate details".<sup>38</sup> They can modify, delete or add new terms to the printed standard form. The importance of clarity of terms at this stage has already been referred to in section 2.3. It is the judicial consequences of the parties not themselves defining arrival at the agreed destination or defining it ambiguously that forms the subject-matter of Chapters 3-6.

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<sup>34</sup> A.E. Branch, The Elements of Shipping, pp. 190-191.

<sup>35</sup> H.W. Degenhardt, Maritime Affairs - A World Handbook (1985) p. 59.

<sup>36</sup> L. Gorton, Shipping & Contracting (1983) p. 36.

<sup>37</sup> *ibid*, pp. 36-39.

<sup>38</sup> *ibid*, pp. 39-40.



## **CHAPTER THREE**

### **EVOLUTIONARY CONCEPTS PRIOR TO 1900**

- 3.1 Formative Concepts**
  - 3.1.1 Problematic Aspects**
  - 3.1.2 The Contractual Destination**
  - 3.1.3 Arrival at the Port**
  - 3.1.4 Technological and Economic Factors**
- 3.2 Comparative Developments**
  - 3.2.1 Qualified Orders to Proceed to a Port**
  - 3.2.2 The Dispatch Requirement**
  - 3.2.3 The American Approach**

## CHAPTER THREE

### EVOLUTIONARY CONCEPTS PRIOR TO 1900

#### 3.1 Formative Concepts

The first period in the development of arrival theories promotes a narrow or functional concept of a port whereby the emphasis is placed on those areas where loading or discharging is practicable or possible, instead of the geographical area of the port. Consequently the vessel was not deemed to have arrived, and laytime did not start until the vessel had either begun to load or break bulk, i.e. discharge.<sup>1</sup> The effect of this rule, particularly at a time when ports were made up of quay berths and were not very sophisticated would have meant that arrival, for the purposes of the commencement of laytime coincided with the berthing of the vessel. This Chapter assesses the functional arrival theory particularly in the light of the technological advances that occurred in the 19th century. A refinement of the strict berthing rule is illustrated by the fact that in authorities such as Brereton v Chapman,<sup>2</sup> Brown v Johnson,<sup>3</sup> and Kell v Anderson,<sup>4</sup> the point

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<sup>1</sup> (1875) 2 Maritime Notes & Queries, p. 14. Also, W.K. Niver Coal Co v Cheronea 142 F. 402, 406(1 CCA,1905).

<sup>2</sup> (1831) 7 Bing. 559.

<sup>3</sup> (1842) 10 M. & W. 331.

of arrival was not invariably the quay berth but was fixed as the usual place of discharge.

In Lord Abinger, C.B.'s opinion,

".... the laydays under this charterparty commenced from the time of the vessel's coming into dock; it had then arrived at the usual place of discharge. They certainly did not commence at the period of its entering the port, as that might be very extensive;"<sup>5</sup>

These cases set a pattern whereby what would actually constitute arrival at a port was elaborated upon. The change in emphasis could be attributed to the construction of dock systems which were meant to bypass the high charges that were being levied by the proprietors of wharves, and also the congestion of ships and goods that had resulted from insufficient moorings at quay berths.<sup>6</sup> The dock systems were enclosed areas of water which ships could enter or leave by means of a gate. A vessel had the option of either waiting for lighters within its confines, or alternatively waiting for a vacant berth at the adjoining complex of wharves or quays. The incidence of lighterage meant that in some cases, the usual place for loading or unloading was not the quay itself but the

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<sup>4</sup> (1842) 10 M. & W. 498.

<sup>5</sup> Brown v Johnson, p. 334.

<sup>6</sup> For a description of dock construction at major U.K. ports such as Liverpool (1715, 1753, 1762, 1825); Southampton (1843, 1851, 1890); Bristol/Avonmouth (1713, 1809, 1877); Cardiff (1798, 1839, 1855, 1865, 1874, 1889, 1898): D.J. Owen, The Origin and the Development of the U.K. Ports (1948) pp. 67-69; 83-84; 131-133; 265-267.

area encompassed by the dock.

Secondly, developments in ship mechanization, such as the introduction of steam driven cargo handling gear further improved the system of lighterage.<sup>7</sup> It meant that a ship's turn around was much quicker than if manual labour had been employed. This factor could have induced shipowners and charterers to bypass shore based installations in the loading or discharge of cargo.

### 3.1.1 Problematic Aspects

Although the usual place rule was more flexible than the berthing rule, the former, was considered by shipowning interests to be unsatisfactory. Their contention was that the laytime should commence from the time that the ship was delayed.<sup>8</sup> This argument might not have been given any judicial support for a number of reasons. First, it was considered that, to have reckoned laytime from the date of the ship's arrival at the port entrance would have resulted in large claims for demurrage, particularly where the distance from the quay to the entrance was considerable. In any case, an entirely pragmatic view was taken of the consequences of ordering a vessel to a port. The voyage stage was not deemed to have been concluded until the vessel had reached a place where it was possible or practicable to receive or deliver

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<sup>7</sup> J. Lovell, Stevedores and Dockers (1969) p. 27.

<sup>8</sup> (1875) 2 Maritime Notes & Queries, p. 81.

cargo.

It is noted that several cases had already been decided which, although not directly relevant to the issue of arrival at the agreed destination illustrated the principle that, where laytime is fixed, the charterer is under a duty to load or unload within the stated limits.<sup>9</sup> As a result, loss of time in relation to the loading or discharging process was for the charterer's account unless it was covered by the exceptions clause or was attributable to the shipowner or those for whom the latter was responsible. It may be that as the strict nature of this obligation favoured the shipowner, the Courts were not readily disposed to supporting a rule for the "arrived ship" which also promoted his interests.

Whatever might have been the reasons for the usual place rule, its consequences where a vessel was ordered to a port, without any further qualification, was not always favourable to the shipowner's interests. The claims for demurrage either failed completely or a smaller amount was awarded. A literal interpretation of the terms of each charterparty would suggest that as the agreed destination was a port, it would have been sufficient for the vessel to get to the port limits and not

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<sup>9</sup> Hill v Idle (1815) 4 Camp. 327; Leer v Yates (1811) 3 Taunt. 387; Harman v Gandolph (1815) Holt, 34; Barrett v Dutton (1815) 4 Camp. 333; Randall v Lynch (1810) 2 Camp. 352; This v Byers (1876) 1 Q.B.D. 244; Porteus v Watney (1873) 3 Q.B.D. 534(C.A); Budgett v Binnington [1891] 1 Q.B. 35(C.A). Cf, the requirement of reasonable diligence which applies when laytime is unfixed: Postlewaithe v Freeland (1880) 5 App.Cas. 599(H.L); See also, Hulthen v Stewart [1903] A.C. 389(H.L); Van Liewen v Hollis Bros & Co [1920] A.C. 239(H.L).

necessarily to a smaller area, or a specified place.<sup>10</sup> Moreover, the usual place rule had been applied in a variety of circumstances, for example, where delay had resulted from congestion<sup>11</sup> or the effect of dock regulations<sup>12</sup> or lightning.<sup>13</sup> Where weather or nautical conditions were the cause of delay, these were likely to have been considered as events occurring in the ordinary course of navigation, and as such, the responsibility of the shipowner.<sup>14</sup> In effect, the usual place rule allocated to the shipowner, the risk of most of the independent events that might delay the vessel's entry into a berth. It meant that, orders to proceed to a port were approximated to orders to proceed to a dock or berth. These observations must however be balanced against the fact that subsequent authorities have not overruled these pre-1850 cases. They are probably now regarded as cases decided on the basis that port usage and custom, being consistent with the terms of the charterparty, regulated the performance of the loading or discharge.<sup>15</sup>

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<sup>10</sup> Cf, The Reid test which is explained in The Johanna Oldendorff [1974] A.C. 479(H.L). See further, Chapter 5.

<sup>11</sup> Brown v Johnson (1842) 10 M. & W. 331.

<sup>12</sup> Kell v Anderson (1842) 10 M. & W. 498.

<sup>13</sup> Brereton v Chapman (1831) 7 Bing. 559.

<sup>14</sup> Per Compton, J. in Parker v Winlow (1857) 7 E. & B. 942, 949-950.

<sup>15</sup> See also, Norden v Dempsey (1876) 1 C.P.D. 654.

### 3.1.2 The Contractual Destination

The rule with respect to vessels ordered to a specific berth or dock is that the contractual destination, i.e. the berth or dock, will constitute the point of arrival.<sup>16</sup> In the case of port charters, arrival at the port or within its limits per se, was not considered as sufficient, at least in the pre-1850 authorities. The applicable rules, in both situations were summarized by Brett, L.J. in Nelson v Dahl.<sup>17</sup>

"If the named place describes as before a large space in several parts of which a ship can unload, as a port or dock, the shipowner's right to have the charterer's liability initiate commences as soon as the ship is arrived at the named place, or the place which by custom is intended by the name, and is ready, so far as the ship is concerned, to discharge, though she is not in the particular part of the port or dock in which the particular cargo is to be discharged."<sup>18</sup>

And,

"If the named place describes a more limited space, as a quay, then the right of the shipowner to have the liability of the charterer initiate does not commence until the ship is at the named place, although the ship is in the port, or dock or larger space in which the named place is situated."<sup>19</sup>

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<sup>16</sup> Generally on berth charters, see, Parker v Winlow op cit; Bastifell v Lloyd (1862) 1 H. & C. 388; Strahan v Gabriel (1879) 12 Ch.D. 590; Murphy v Coffin (1883) 12 Q.B.D. 87; Tharsis Sulphur & Copper Co v Morel [1891] 2 Q.B. 647(C.A); Good v Isaacs [1892] 2 Q.B. 555(C.A); Watson v Borner (1900) 5 Com.Cas. 105. Re dock charters: Randall v Lynch (1810) 2 Camp. 352; Tapscott v Balfour (1872) L.R. 8 C.P. 46; Davies v McVeagh (1879) 4 Ex.D. 265.

<sup>17</sup> (1879) 12 Ch.D. 568(C.A).

<sup>18</sup> At p. 583.

<sup>19</sup> At p. 584.

Although, in Nelson v Dahl, the contractual destination was a dock, and the vessel had been waiting outside its confines, the shipowner's claim for demurrage succeeded on the basis that the near clause, i.e. "so near to as she may safely get", was applicable. This clause enables the shipowner to reckon laytime at a different destination from that agreed upon in the charterparty. In earlier authorities, the accepted view was that the clause was inapplicable where the vessel had been waiting outside the ambit of the port, and the delay was of a temporary nature.<sup>20</sup> Apart from its consideration of the scope of the clause, the case is significant because of the general guidelines that were proposed by Brett, L.J. for determining whether a vessel had arrived at her destination. Cotton, L.J. had stated that before laytime could commence, the vessel was required to get to the stipulated place of discharge, which was the dock,<sup>21</sup> whilst James, L.J. took the view that there was a broad distinction between the port of discharge, the usual public place of discharge in the port and the private quay or dock. It was for the shipowner to bear the risk of getting to the public place of discharge and at the private quay or dock, he had to cooperate with the merchant in the

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<sup>20</sup> See, Schilizzi v Derry (1855) 4 E. & B. 873; Metcalf v Britannia Iron Works Co (1877) 2 Q.B.D. 423(C.A). Cf, Dahl v Nelson, Donkin & Co (1881) 6 App.Cas. 38(H.L); Athamas (Owners) v Dig Vijay Cement Co [1963] 1 Lloyd's Rep. 287(C.A).

<sup>21</sup> At p. 596.



delivery of cargo.<sup>22</sup> There was however no discussion about what would happen if the vessel was sent to a port, without further qualification. This was the issue that was taken up by Brett, L.J.

It was considered that laytime could start as soon as the vessel had reached the port and further, that it was not essential for the vessel to be waiting at a place where it was possible to load or discharge. This obiter dictum was not consistent with the earlier authorities which had decided that for the purposes of arrival, traversing the port limits was not enough. The vessel was expected to get to the usual place for loading or discharge. By stating that the point at which the vessel could become an "arrived ship" was dependent on the terms of the charterparty, this approach was more favourable to the shipowner's interests. In the particular context of the port charter, it allowed for a larger area for the purposes of arrival than was possible under the usual place rule.

It is likely that two major factors that influenced the evolution of these guidelines were in the first place, previous authorities on dock charters.<sup>23</sup> By not requiring the vessel to have actually berthed before laytime could commence, they might have induced Brett, L.J. to hold that in the context of a larger area such as a port, it would be sufficient for the purposes of arrival that the vessel had

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<sup>22</sup> At pp. 603-604.

<sup>23</sup> *supra*, fn 16.

reached the port entrance. Secondly, the period in which Nelson v Dahl was decided also coincided with the expansion of the Port of London, which was the destination agreed upon in the charterparty. Although the Port had experienced the construction of its first set of docks between 1802 and 1811,<sup>24</sup> these were becoming by the 1850's incapable of handling the larger ships that were being built, on account of J. the fact that their gates were not big enough.<sup>25</sup> Neither were their waters deep enough. Between 1855 and 1886, larger docks with modern equipment<sup>26</sup> were progressively located downstream in deeper waters.<sup>27</sup> In adjudicating a dispute at that time, it would have seemed appropriate to acknowledge the expansion of port operations over a much wider area. So that if a vessel was ordered to a port, it may be sufficient for the purposes of arrival for her to reach the port entrance.

The less restrictive view of arrival is also evident in Pyman v Dreyfus.<sup>28</sup> It was decided that it was not essential for a vessel delayed by congestion to have reached the inner

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<sup>24</sup> e.g. West India, (1802); East India, (1806); Commercial, (1807); Baltic, (1809).

<sup>25</sup> J. Lovell, Stevedores and Dockers, pp. 11 & 13.

<sup>26</sup> i.e. Victoria, (1855); Millwall, (1868); Albert, (1880); Tilbury, (1886).

<sup>27</sup> I.S. Greaves, London Docks (1800-1980) (1980) pp. 22-23; J. Pudney, London Docks (1975) pp. 144-145.

<sup>28</sup> (1889) 24 Q.B.D. 152. See also, Caffarini v Walker (1876) Ir.R. 10 C.L. 250; McIntosh v Sinclair (1877) Ir.R. 11 C.L. 456. Cf, Nielsen v Wait (1885) 14 Q.B.D. 516.

harbour, or a place of a more limited description such as a quay berth or wharf, before laytime could commence. This case seems to have continued the approach which favoured the shipowner. The crucial factor was not that the vessel could have been loaded in the outer harbour but that when she anchored there, she was deemed to have been placed at the disposition of the charterers and could easily receive and comply with their orders.<sup>29</sup>

### 3.1.3 Arrival at the Port

The division of liability in respect of delay, upon the sole basis of the contractual destination disregards matters such as the position and status of the ship's waiting place. It is useful at this stage to consider the commentary from an earlier treatise on the commencement of laytime. The obligation of the merchant or the charterer as the case might be, was described in the following terms, he

"covenants to load and unload the ship within a limited number of days after she shall be ready to receive the cargo, and after arrival at the defined port,....."<sup>30</sup>

In the absence of explanatory notes, it is not possible to determine whether this extract was also applicable to charters

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<sup>29</sup> The legal history underlying the expression "at the disposition of the charterer" will be discussed in Chapter 5, pp. 106-112.

<sup>30</sup> C. Abbott, A Treatise of the Law Relative to Merchant Ships and Seamen (1802) p. 150.

to proceed to a dock or berth. However, the difficulty involves the interpretation of the words "arrival at the port". Although, the reference to the "defined port" might have emphasized the legal limits and precluded the consideration of other limits, e.g. the pilotage or fiscal limits, the problem as it now appears would probably have been how to construe the word "at" where a vessel was waiting outside the port. There might have been a requirement of proximity to the port limits and the status of the waiting place might have been a relevant consideration. With respect to the former, it is possible to contend that the literal interpretation of the word "at" raises a connotation of proximity,<sup>31</sup> but there is no guidance with respect to the latter. Therefore, it is not clear whether the vessel could have waited anywhere outside the port for the purposes of arrival, or alternatively was required to wait at a recognized place.

#### **3.1.4 Technological and Economic Factors**

The consideration of the contractual destination rule in a case such as Pyman v Dreyfus, extended the point of arrival for a vessel ordered to a port.<sup>32</sup> The shift in approach was possibly a direct consequence of increasing world trade and

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<sup>31</sup> Cf, The views expressed by Staughton, J. in The Adolf Leonhardt [1986] 2 Lloyd's Rep. 395, 402-403.

<sup>32</sup> supra, pp. 50-51.

commerce. The total value of world trade rose from \$1.5 billion in 1800 to \$4 billion in 1850, and by 1900, it was \$24 billion.<sup>33</sup> This was in turn due to the employment of bigger and more reliable vessels which were mainly steamships and not sailing ships. By way of illustration, on the British Register in 1837, there were 19,269 sailing ships (under 100 tons) as against 534 steamships. But by 1897, there were 2,452 sailing ships (over 100 tons) and 6,655 steamships.<sup>34</sup> In response to these changes, some ports would have had to expand their facilities in order to cope with increased traffic. This would have been achieved by either creating more docks or terminal facilities, i.e. berths, or by designating waiting areas, (within or outside the port limits), at which vessels might have to wait for access to such berths or docks. It would have been apposite to consider what was the effect of waiting at these designated areas on the division of financial liability between the parties. It might have also been necessary to consider the position of a vessel waiting at a place which was not within the designated area.

In addition, as the running costs of a steam powered vessel would have been much higher than that of a sailing ship,<sup>35</sup> each day spent waiting for a berth would have

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<sup>33</sup> E. Gold, Maritime Transport (1981) p. 131.

<sup>34</sup> *ibid*, pp. 90-92. L.C. Kendall, The Business of Shipping (1983) p. 20.

<sup>35</sup> L.C. Kendall, The Business of Shipping, p. 19.

resulted in higher overheads for the shipowner. The application of the usual place rule meant that this extra expense could not be transferred to the charterer in most cases. It seems that the financial consequences of the usual place rule, particularly on the shipowner, might have made it imperative to reappraise the law on the "arrived ship".

### **3.2 Comparative Developments**

In the American decisions of this period, broad trends which bear some similarity with some of the English concepts are evident. In Aylward v Smith,<sup>36</sup> the vessel had been ordered to discharge at a port. However, as a result of insufficient water and ice, she was unable to get to the consignee's wharf. It was held that the vessel had not yet arrived, in spite of the fact that she had been waiting about 35 feet (10.67m) from the wharf. It appears that Lowell, D.J. took the view that both parties had contracted upon the basis that "port" meant the consignees' wharf. In the absence of evidence of port practice and custom, or alternatively, a clear stipulation to that effect in the contract of carriage, it is difficult to support this restrictive interpretation. In any case, it was further held that, as the delay had arisen from navigational conditions, the consignee could not be held

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<sup>36</sup> 2 Fed.Cas. No 688, 274(DC Mass,1872). Cf, Choate v Meredith 5 Fed.Cas. No 2,692, 648(CC Mass,1875); Smith v Lee 66 F. 344(1 CCA,1895).

responsible. Maybe this was the overriding factor.<sup>37</sup> Although, the phraseology of the appropriate arrival rule was in terms of the "place of discharge", as opposed to the "usual place of discharge", it is suggested that both expressions have the same meaning. Tiberg, on this same point was of the view that the American rule, possibly referred to a place within the port, where discharge was customarily performed.<sup>38</sup>

### 3.2.1 Qualified Orders to Proceed to a Port

In the next group of cases, viz, Futterer v Abenheim,<sup>39</sup> Williams v Theobald,<sup>40</sup> and Manson v New York, N.H. & H. Rly Co,<sup>41</sup> the vessels were sent to ports, with a further qualification that they were to proceed to either a wharf or dock, as directed by the consignees. It was held that the vessels would be deemed to have arrived, if they were compelled to wait within the port because of the inaccessibility or unavailability of the designated wharf or dock.<sup>42</sup> These authorities do not appear to have complied with

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<sup>37</sup> In this regard, English cases on berth and wharf charters were cited. i.e. Parker v Winlow (1857) 7 E. & B. 942; Bastifell v Lloyd (1862) 1 H. & C. 388.

<sup>38</sup> H. Tiberg, The Law of Demurrage (1979) p. 236.

<sup>39</sup> 9 Fed.Cas. No 5,164, 1017(CC Pa,1874).

<sup>40</sup> 15 F. 465(DC Cal,1883).

<sup>41</sup> 31 F. 297(CC Conn,1887).

<sup>42</sup> Cf, Lindsay, Gracie & Co v Cusimano 12 F. 504(CC La,1882).

the requirements of the place of discharge rule, neither do they indicate any connection with the contractual destination rule. If the latter had been applied, arrival would not have been effective until the vessel had actually got within the wharf or dock. This was the approach that had been adopted in England, where the shipowner was held responsible for any delay to the vessel prior to its arrival at the designated place.<sup>43</sup> As a result, the consignee could nominate a temporarily congested wharf or dock.<sup>44</sup> In America, on the other hand, the consignee's express right to select the loading/discharging place seems to have been regarded as an undertaking to provide an accessible wharf or dock and he was held responsible for any delay consequent upon the exercise of this right. There was however, no discussion in these cases of the position with respect to a vessel ordered to a port without further qualification.

### 3.2.2 The Dispatch Requirement

In Sleeper v Puig,<sup>45</sup> the vessel was ordered to deliver cargo at the port of Havana (Cuba). There were no fixed laydays but it was stipulated in the charter that the vessel was to be discharged with dispatch, and demurrage was to be

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<sup>43</sup> See also, A.J. Bateson, "The Arrived Ship" [1957] J.B.L. 22, 23.

<sup>44</sup> See, Tharsis Sulphur & Copper Co v Morel [1891] 2 Q.B. 647 (C.A.).

<sup>45</sup> 22 Fed.Cas. No 12,941, 321(CC NY,1879).



paid for each day that she was detained. According to the rules and customs of that port, cargo could only be delivered at the "Mole." The vessel anchored at the usual waiting place for the "Mole", and issued the notice of readiness after reporting at the Customs House. However, due to congestion, she was unable to unload immediately. It was held that the customs and rules of the port could not control the time for discharging, and that, the respondents were bound to take the cargo as rapidly as the vessel could deliver it. The decision meant that discharging time started to count from the time that the vessel tendered notice. Prima facie, this case appears to support a more elastic view of arrival at a port, but it was stressed that the material stipulation was the requirement of dispatch on the part of the charterer. That term was construed as meaning "without delay" as opposed to "with diligence". Therefore, it may not be appropriate to regard the decision as establishing a general rule.<sup>46</sup>

### **3.2.3 The American Approach**

In conclusion, the American position prior to 1900 also appears to have been quite unsettled. The choice of arrival rules alternated between a strict requirement of berthing, or an emphasis on the usage and practice of the port.

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<sup>46</sup> Cf, Smith v New York & Maine Granite Paving Block Co 56 F. 527(2 CCA,1893).

## CHAPTER FOUR

### THE COMMERCIAL CONCEPT OF ARRIVAL

- 4.1 Genesis
  - 4.1.1 Marine Insurance Claims
  - 4.1.2 "Final Sailing"
  - 4.1.3 Possible Effects of Technological Advances
- 4.2 A Divergent Approach?
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## CHAPTER FOUR

### THE COMMERCIAL CONCEPT OF ARRIVAL

#### 4.1 Genesis

In the next phase of the development of the legal principles, the emphasis appears to have shifted from the functional elements of the port, i.e. its loading/discharging places or areas, to a wider or more commercial view of the port. This Chapter considers the genesis, and the consequences of the commercial concept of arrival. It appears that although it was recognized as the applicable test in port charter situations, the fidelity to the restrictive, functional concept of arrival was such that in some cases, it was never really accorded the wide interpretation which prima facie, it was capable of supporting.<sup>1</sup> The result of this was that there was a pluralism of applicable tests.

In The Felix,<sup>2</sup> it had been established that if the vessel was waiting within the port, the charterer had an implied right to select a berth. That case had involved a vessel which

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<sup>1</sup> "The Commercial Area of the Port" (1960) 230 L.T. 202, 204; D.G. Powles, "Reversing the Arrived Ship" [1974] J.B.L. 282, 285.

<sup>2</sup> (1868) L.R. 2 A. & E. 273.

had put into a dock which was one of the usual places for the delivery of the vessel's cargo. When the plaintiff, who was the indorsee of the bill of lading for the cargo, subsequently ordered the vessel to another dock, the Master refused to comply until expenses that had been incurred by entering the first dock had been settled. In a suit for the non-delivery of the cargo, it was held that subject to custom, the Master was justified in mooring within the first dock, but having received the charterer's instructions, he was bound to obey them. If there is any delay in the exercise of the right to select a berth, it is reasonable to expect that it should not necessarily be for the shipowner's account.

A more commercial approach would mean that in the case of a vessel ordered to a port, it would suffice for arrival purposes that, the vessel was at the very least waiting within the limits of the port.<sup>3</sup> Such an approach would benefit the shipowner in financial terms, since the laytime would start to count at an earlier time. It would also be in accordance with a literal construction of the charterparty. The order is first to proceed to a port and not to a specific place within it.

This type of approach appears to have been further established in the Court of Appeal decision in Leonis v Rank.<sup>4</sup>

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<sup>3</sup> Contra, Commonwealth decisions such as Midland Navigation Co v Dominion Elevator Co (1904) 34 Can.S.C.R. 578(S.C.) and Waterston v Nat. Mortgage & Agency Co (1901) 4 G.L.R. 129, where it was held that the vessel had to get to the usual loading or discharging place respectively.

<sup>4</sup> [1908] 1 K.B. 499(C.A).

In what is now considered to be the leading judgment,<sup>5</sup> Kennedy, L.J. laid down what were to be the guiding principles in deciding when a vessel could be designated as an "arrived ship". The vessel had been ordered to load a cargo of grain at a port in Argentina. The practice at the specified port was that grain was usually loaded alongside a railway pier which extended into a river. Upon getting to the port, the vessel could not berth immediately as a result of congestion, and had to wait a couple of ship's length off the railway pier. The place at which she waited constituted the usual waiting place for grain vessels.

On the shipowner's subsequent claim for demurrage, Channell, J. ruled that as the charterparty lacked a definite provision upon the point, the precedent laid down in both Nelson v Dahl<sup>6</sup> and Pyman v Dreyfus<sup>7</sup> would be adopted. But the judgment, in apparent contrast to the expansive view that was evident in those authorities was that, the place where the ship waited was merely a possible loading place and not the usual loading place. Therefore the laydays did not commence as soon as the vessel was delayed.<sup>8</sup> The shipowner appealed and the Court of Appeal ruled in their favour. According to

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<sup>5</sup> Per Lord Reid, The Johanna Oldendorff [1974] A.C. 479, 530(H.L).

<sup>6</sup> (1879) 12 Ch.D. 568(C.A).

<sup>7</sup> (1889) 24 Q.B.D. 152.

<sup>8</sup> See, [1907] 1 K.B. 344, 352.

Kennedy, L.J.,

"In the absence of any proof of a custom of this kind..... the commercial area of a port, arrival within which makes the ship an arrived ship, and, as such, entitled to give notice of readiness to load, and at the expiration of the notice to begin to count laydays ought, I think, to be that area of the named port of destination on arrival within which the master can effectively place his ship at the disposal of the charterer, the vessel herself being then, so far as she is concerned, ready to load, and as near as circumstances permit to the actual loading "spot". ..... and in a place where ships waiting for access usually lie, or, if there be more such loading spots than one, as near as circumstances permit to that one of such spots which the charterer prefers."<sup>9</sup>

These guidelines restated the influence of customs.<sup>10</sup> More importantly, the concept of the commercial port was enunciated. The essence of the concept was that the place where ships lie constituted part of the commercial area of the port.<sup>11</sup> So that a vessel waiting at such a place should be regarded as an "arrived ship". In contrast to the usual place rule, the relevant area of the port, for the purposes of the commencement of laytime was not restricted to the actual places where loading or discharge was possible.

#### **4.1.1 Marine Insurance Claims**

A number of marine insurance cases had also adopted descriptions of the port which were not derived from the

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<sup>9</sup> At p. 521.

<sup>10</sup> See further, Chapter 3, p. 46.

<sup>11</sup> Per Kennedy, L.J., pp. 522-523.

functional school. In Cockey v Atkinson,<sup>12</sup> the marine policy for the vessel was for a period of 4 months, at and from a place, to any port or ports whatsoever. Abbott, C.J. held that an open roadstead, if it was the usual loading place was a port within the meaning of the policy.<sup>13</sup> In Whitwell v Harrison,<sup>14</sup> the policy of insurance was to cover the vessel, "at and from Liverpool to Quebec, .... and from thence back to her discharge port in the U.K. and until she had moored at anchor 24 hours in good safety." Upon her return to the port of Liverpool, the vessel grounded after she had discharged a considerable portion of her cargo. It was held that the vessel had arrived at the port although she had not berthed.

In Lindsay v Janson,<sup>15</sup> the dispute involved a policy of insurance on a ship, for a voyage to Mauritius, and for 30 days after arrival. In a suit subsequent to the vessel being lost whilst waiting for freight outside the harbour, it was held that arrival meant the vessel reaching a place where, if she moved afterward, she was only moving from one part of the harbour to another. The significant feature of these cases was that, the arrival of the vessel, or the scope of the port was

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<sup>12</sup> (1819) 2 B. & Ald. 460.

<sup>13</sup> See, Harrower v Hutchinson (1870) L.R. 5 Q.B. 584, where a port was said to be equivalent to any practicable place for loading and unloading, e.g. a roadstead. Also, Sea Insurance of Scotland v Gavin (1829) 4 Bli, N.S. 578.

<sup>14</sup> (1848) 2 Ex. 127.

<sup>15</sup> (1859) 4 H. & N. 699.

not determined by merely considering the functional areas of a port. The usual anchorage or waiting place for a vessel was also deemed to be relevant.

#### 4.1.2 "Final Sailing"

In Sailing Ship Garston Co v Hickie,<sup>16</sup> the charterparty had provided that the freight was to be paid 2/3rds in cash, 10 days after the final sailing from the last port in Great Britain,<sup>17</sup> the remainder in cash on delivery of the cargo. The vessel started on her voyage but soon afterwards was compelled to return to the port for collision repairs. Thereafter, the shipowner claimed part payment of the freight. At first instance, Wills, J. found for the charterer on the grounds that at the time of the collision, the vessel was still within the legal limits of the port, and had not yet finally sailed.<sup>18</sup> In the Court of Appeal, the charterer was also successful, but the basis for that decision was that the ship had not finally sailed beyond the limits of the port in the commercial sense. Whereas in the lower Court, Wills, J. had preferred to consider the legal port as identical to the commercial port, the Court of Appeal, particularly Lord Esher,

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<sup>16</sup> (1885) 15 Q.B.D. 580(C.A).

<sup>17</sup> "Final sailing" means departure from the port limits without any intention of returning: Roelandts v Harrison (1854) 9 Ex. 444; Price v Livingstone (1882) 9 Q.B.D. 679(C.A).

<sup>18</sup> (1885) 15 Q.B.D. 580, 585.



had made a clear distinction between the two entities. It was held that those who are parties to a charterparty did not contract with respect to the legal port, the limits of which might have been fixed by Parliament and which they might not know of.<sup>19</sup> Instead, they contracted with regards to the commercial port.

#### **4.1.3 Possible Effects of Technological Advances**

The gist of the commercial concept of arrival lies in the fact that it highlights the possibility of the vessel having to wait at designated areas before obtaining access to a berth or other loading place. In Leonis v Rank, where the usual waiting area was close to the berth, it was decided that the vessel had anchored within the commercial area and that the laytime could begin to count. It has been contended that the facts of the case and the decision reached suggested that there was a need for proximity between the usual waiting place and the actual loading place.<sup>20</sup> However, it is relevant to consider what would have been the position if the vessel had anchored at a place, (whether the usual waiting place or not), which was some distance away from the berths. The point that was indeed clear from the decision was that if the usual

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<sup>19</sup> ibid, p. 588. See also, Hunter v Northern Insurance Co (1888) 13 App.Cas. 717(H.L).

<sup>20</sup> D. Davies, "The Arrived Ship Concept" (1977) p. 2. Contra, D.G. Powles, "Reversing the Arrived Ship" [1974] J.B.L. 282, 285.

waiting area or some other anchorage was outside the commercial limits of the port, the vessel would not have been regarded as an "arrived ship". The difficulty arises where the legal limits extend beyond the commercial limits, assuming that the latter are capable of being clearly defined. A vessel waiting between both limits would probably not be deemed to have arrived. It is suggested that this scenario illustrates why the issue of the vessel being placed at the charterer's disposition at the usual waiting place should prevail over the issue of port limits of a particular type, or the relative distance between the ship's anchorage and the berths.<sup>21</sup>

This viewpoint can be supported on the grounds that by the time that Leonis v Rank came up, communications had improved. The first transatlantic submarine cable was laid in 1893.<sup>22</sup> This meant that telegraphic instructions by both the shipowner and charterer could be speedily relayed to the vessel. Furthermore the creation of the Universal Postal Union (U.P.U.), in 1874 made international correspondence certain and inexpensive.<sup>23</sup> These innovations were likely to have had a profound effect on the meaning of the expression "placing the vessel at the disposition/disposal of the charterer". If the charterer could pass his instructions to the vessel, and

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<sup>21</sup> For the meaning of the expression "at the disposition of the charterer", see Chapter 5, pp. 106-112, *infra*.

<sup>22</sup> E. Gold, Maritime Transport (1981) p. 95.

<sup>23</sup> *ibid.* Also, C.E. Fayle, A Short History of the World's Shipping Industry (1933) pp. 263-264.

she was able to respond without significant delay as soon as the berth became vacant or weather/nautical conditions permitted, the vessel could be said to be placed at his disposition. Therefore, it would no longer have been strictly necessary for the vessel to be proximate to the loading or discharging place.

#### **4.2 A Divergent Approach?**

It is possible to view Buckley, L.J.'s judgment in Leonis v Rank as consisting of two separate propositions. The first proposition suggests that, in the case of a ship ordered to a port, it would be sufficient if the vessel gets within the port limits.

"The true proposition, I think, is that where the charter is to discharge in a named place which is a larger area in some part or in several parts of which the ship can discharge, the laydays commence as soon as the shipowner has placed the ship at the disposal of the charterer in that named place as a ship ready, so far as she is concerned, to discharge, notwithstanding that the charterer has not named, or has been unable owing to the crowded state of the port to name, a berth at which in fact the discharge can take place."<sup>24</sup>

But in another part of the judgment, there appears to have been a modification of this position. Firstly, the term "berth" was defined as including a "berth, or wharf or a quay, or a place where by the use of lighters or other means a vessel can load or discharge". The words "place of discharge"

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<sup>24</sup> Leonis v Rank [1908] 1 K.B. 499, 512(C.A).

were construed as "a place named in the charterparty of a larger area than a berth within which are a berth or berths". The second proposition was that under a port charter, the laydays did not commence until the vessel had reached the place of discharge, an area more limited than the port in its widest sense, i.e. the dock. The latter was regarded as an area within which the vessel was as closely proximate to a berth as she could possibly be. Consequently, irrespective of whether the order was to proceed to a dock or port, laydays would commence as soon as the vessel was waiting within the dock. In support of the second proposition, Brown v Johnson<sup>25</sup> was cited. In that case, the vessel had been ordered to a port and it was decided that the laydays started from the time that she entered the dock and not from the time that she reached the berth. Another case referred to was Tapscott v Balfour,<sup>26</sup> which came to the same conclusion. As it involved a dock charter, it was probably not directly relevant to the case of a port charter. There was also an allusion to Brereton v Chapman.<sup>27</sup> Buckley, L.J. had taken the view that the usual place of discharge in that case meant an area, although it had been decided that the quay constituted the usual place of discharge.

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<sup>25</sup> (1842) 10 M. & W. 331.

<sup>26</sup> (1872) L.R. 8 C.P. 46.

<sup>27</sup> (1831) 7 Bing. 559.

It was further stated that the words, "the usual place of loading in the port" meant the "commercial ambit of the port as distinguished from the whole port in a geographical or maritime sense".<sup>28</sup> This section of the judgment is very confusing. The reference to the commercial ambit of the port appears to mirror Kennedy, L.J.'s guidelines, but the subsequent description of the "commercial ambit of the port" in terms which make it equivalent to the usual place of loading, suggest that Buckley, L.J.'s concept of the commercial area of the port was narrower in scope than Kennedy, L.J.'s. Although the first proposition could be regarded as being commercial in outlook, the second proposition was clearly functional. The latter differed from the usual place rule in so far as it required that the vessel must be waiting within the dock area. It is noted that in the pre-1850 authorities, the usual place had varied according to the custom or practice of each port. It was not invariably a dock.

#### **4.2.1 Comparison of Judgments in Leonis v Rank**

It is probably fair to state that although the conclusions reached were the same, Buckley, L.J.'s judgment was not as consistent as Kennedy, L.J.'s.<sup>29</sup> Despite the fact

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<sup>28</sup> At p. 513.

<sup>29</sup> N. Hawke, "When Has A Ship Arrived?" (1973) 123 New L.J. 890, 891. Contra, D.G. Powles, "Reversing the Arrived Ship," p. 285.

that there was agreement on the point that in the case of a port charter, the vessel did not have to get into a berth before laytime could count, in his second proposition, Buckley, L.J. had considered that the crucial area of the port for laytime purposes was the dock. This raises the question of how this test would have been applied in a port lacking a dock system. Presumably, the emphasis on the usual loading/discharging place would have meant that the vessel might have been required to reach a berth before the laytime could start. On the other hand, Kennedy, L.J. had not considered it important for the vessel to be waiting within an area where the acts of loading or discharging were possible.

Secondly, Buckley, L.J.'s approach suggested that the vessel had to be waiting in some proximity to the berth. This was not an inference that could necessarily be drawn from Kennedy, L.J.'s test. Finally, whilst the commercial area test envisaged the possibility of the vessel having to wait at the usual place, Buckley, L.J.'s propositions did not elaborate on this point. It is possible that, had the port been extensive and the vessel had waited outside the dock area for a vacant berth, then under Buckley, L.J.'s second proposition, the laydays would not have commenced until the vessel had reached the dock. However, if Kennedy, L.J.'s test was given its ordinary meaning, laydays could commence as soon as the vessel was ready and had been placed at the charterer's disposal. The effect of Buckley, L.J.'s second proposition would have been

that the distinction between dock and port charters would have disappeared.

#### 4.3 Identification of Commercial Limits

One of the issues raised by the commercial test relates to the identification of the commercial area of the port. Although, in Sailing Ship Garston v Hickie,<sup>30</sup> it was stated that it was identifiable by reference to the extent of a Port Authority's jurisdiction over vessels, interestingly, in that case, there had been no definite agreement as to the exact position of the commercial limits of the port. Similarly, in The Aello,<sup>31</sup> their Lordships did not make any common pronouncements on the procedure to be adopted in identifying the commercial area of the port. On the one hand was the view that, since commercial operations were carried out in different parts of a port, and in respect of different cargoes, the commercial area should be regarded as defining a set of circumstances relevant to the voyage and the port, rather than a specific part of the port where a ship can be loaded or discharged.<sup>32</sup> On the other, it was proposed that a test of objectivity which depended upon all the facts of the

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<sup>30</sup> Per Brett, M.R., (1885) 15 Q.B.D. 580, 590(C.A). See also, Hand, Ct.J., Yone Suzuki v Central Argentine Railway 27 F.2d 795, 802(2 CCA,1928).

<sup>31</sup> [1961] A.C. 135(H.L).

<sup>32</sup> Per Lord Radcliffe, p. 166.

case should apply.<sup>33</sup> Alternatively, a functional approach was propounded. The commercial area was deemed to correspond with,

".. the area in which the actual loading spot is to be found and to which vessels seeking to load cargo of the relevant description usually go, and in which the business of loading such cargo is usually carried out."<sup>34</sup>

#### **4.3.1 Absence of Centralized Port Administration**

It may be that the lack of unanimity with respect to the exact method by which the commercial area was to be identified was not a problem for the Courts, particularly in the case of small and medium sized ports under the control of a single Port Authority. Nevertheless, the problem of identification was likely to have been highlighted in those ports which lacked a centralized system of administration. It is pertinent to recall the confusing division of authority between the private Dock Companies which were operating at the Port of London, prior to the creation of the Port of London Authority in 1908.<sup>35</sup> In a port where each Dock Company operated independently, it would probably have been more appropriate to refer to the commercial limits of each respective dock, rather than the commercial limits of the port generally.

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<sup>33</sup> Per Lord Cohen, p. 181.

<sup>34</sup> Per Lord Jenkins, p. 207.

<sup>35</sup> See, J. Pudney, London Docks (1975) pp. 144-145.



#### 4.3.2 Port Complexes/Adjacent Ports

Also, where there are several Port Authorities co-existing side by side, the problem of identifying the commercial limits resurfaces again. Assuming that the administrative powers of each Port Authority overlaps, would a vessel waiting in the vicinity of one port be deemed to have arrived within the commercial limits of any of the other neighbouring ports? In the light of these difficulties, it appears that the sole criterion for the identification of the commercial limits should perhaps not be limited to the extent of a Port Authority's jurisdiction. It will be proposed that a practical test for the identification of the commercial limits may be based on the location of a vessel's usual or customary waiting place.<sup>36</sup>

#### 4.3.3 Ports Lacking Dock Systems

In United States Shipping Board v Frank C. Strick,<sup>37</sup> the point in issue was how to define the commercial area in a port which lacked a dock system. The vessel had been ordered to proceed to a port and there load a cargo of coal, in regular turn as customary, at a stipulated rate. That port did not have docks, and coal could only be loaded at a specific berth. The vessel was not able to berth immediately because of congestion. The shipowner subsequently claimed demurrage, but

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<sup>36</sup> infra, Chapter 6., pp. 126-133.

<sup>37</sup> [1926] A.C. 545(H.L.).

the House of Lords decided by a majority that, the vessel had to get within the loading berth before the charterer's laytime obligation could commence. In effect, the shipowner's claim failed because "in regular turn" was viewed as controlling the time of loading.<sup>38</sup> It was held that in the absence of the "in regular turn" provision, a ship had not arrived in a commercial sense, until she had reached the usual place in the port at which vessels intended to be loaded lie.<sup>39</sup>

The facts of Kokusai Kisen Kabushiki Kaisha v Flack<sup>40</sup> were similar, but the "in regular turn" clause was not included in that charterparty. It was decided by the Court of Appeal that the laytime could not commence until the vessel had reached the place where ships usually lie. It may be possible to contend that in the event of the vessel being delayed before getting to the appointed berth, the voyage should be considered to be at an end, irrespective of wherever the vessel has elected to wait. This might be the rationale underlying the view that the commercial test was restrictively applied in these cases.<sup>41</sup> However, the point that these two

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<sup>38</sup> The practical effect of the "in regular turn" clause is to postpone the commencement of laytime until the vessel gets to the actual loading/discharging place: The Cordelia [1909] P. 27.

<sup>39</sup> Per Lord Atkinson, p. 639.

<sup>40</sup> (1922) 10 Ll.L.Rep. 635(C.A). Cf, Van Nievelt Goudrian & Co Stoomvaart Maatschappij v C.A. Forslind & Sons Ltd (1925) 22 Ll.L.Rep. 49(C.A).

<sup>41</sup> "The Commercial Area of the Port"(1960) 230 L.T. 202, 203.

cases help to illustrate is that in a large port lacking docks, and in addition specified limits, the identification of the limits of the commercial area may not be an easy exercise.

#### **4.4 The Fluctuation of Limits**

Another aspect of the commercial test relates to whether the limits of the commercial area can fluctuate. This scenario is likely to arise where Port Authorities have temporarily extended port limits or appointed new anchorages in order to cope with increased traffic. In The Aello,<sup>42</sup> the vessel was to load the balance of a cargo of grain at a port in Argentina. In order to resolve port congestion, the Port Authority had passed a resolution which was to instruct all grain vessels to wait at an anchorage", 22 miles (35.43km) from the dock area, until a berth was available. The vessel arrived at the anchorage on October 12th, 1954, and remained there until the 29th, when she received permission to proceed to a berth in the inner harbour. The shipowner's claim was for demurrage, calculable on the basis that laytime started to count on October 12th. It was not successful, either before Ashworth J.<sup>43</sup> or the Court of Appeal.<sup>44</sup> Both tribunals decided that at that date, the vessel was not waiting within the commercial area.

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<sup>42</sup> [1961] A.C. 479(H.L).

<sup>43</sup> [1957] 1. W.L.R. 1228.

<sup>44</sup> [1958] 2 Q.B. 385(C.A).

In the Court of Appeal, Parker, L.J. explained the basis of the applicable arrival test in the following terms:<sup>45</sup>

"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"<sup>46</sup>

Although, there may be difficulties in attempting to include all the various aspects of the port into a comprehensive definition,<sup>47</sup> the idea of functionalism conveys a description of the port that relates to the specific acts of the receipt and the removal of cargo from a vessel.<sup>48</sup> In the light of its reference to the area of the port where loading/discharging is possible, it can be said that the above extract, i.e. the Parker test was a functional test.

It has already been proposed that apart from distinguishing between the loading area and the actual loading place, the Kennedy test could be applied where the vessel was waiting at a designated place which was outside the functional areas of the port.<sup>49</sup> The consequences of the Parker test in the latter situation would have been that, even if the vessel

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<sup>45</sup> This test was subsequently overruled in The Johanna Oldendorff [1974] A.C. 479 (H.L).

<sup>46</sup> The Aello [1958] 2 Q.B. 385, 401 (C.A).

<sup>47</sup> See, J. Grosdidier De Matons, "Ports as a Public Service: The Evolution in France and in the United States" (1970-71) 2 J.M.L.C. 571, 571-573.

<sup>48</sup> See also, D. Schwampe, Charterer's Liability Insurance (1988) p. 31.

<sup>49</sup> *supra*, pp. 70-71.

was still anchored within the legal limits of the port, it would not have been considered as an "arrived ship". Its strictness in this respect did not prevent their Lordships<sup>50</sup> from affirming the Court of Appeal decision. On the question of whether by the Port Authority's resolution, the limits of the commercial area could fluctuate, there were divergences of opinion. Lord Radcliffe and Lord Cohen decided that it was not the port conditions at the charterparty date that governed the conception of arrival, but the port conditions as the vessel found them when she reached the port.<sup>51</sup> But the majority view was that there could be no fluctuation of the commercial limits, and that upon her arrival, the vessel was merely awaiting access to the commercial area.<sup>52</sup> As a result of the difference in opinion, Lord Radcliffe and Lord Cohen regarded the issue of propinquity between the ship's anchorage and the actual loading place to be irrelevant,<sup>53</sup> whilst the majority, adopted a different position.<sup>54</sup>

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<sup>50</sup> i.e. Lord Jenkins, Lord Keith and Lord Morris of Borth-y-Gest. (Lord Radcliffe and Lord Cohen dissenting).

<sup>51</sup> At pp. 172 & 182.

<sup>52</sup> e.g. Lord Jenkins and Lord Morris, pp. 208 & 215.

<sup>53</sup> At pp. 172-173 & 181-182.

<sup>54</sup> e.g. Lord Jenkins, p. 206.

#### 4.4.1 Effect of Functional Rules

The emphasis on the functional aspects of the port meant that the only position in which the vessel could be regarded as being at the charterer's disposal, and also as near to the actual loading/discharging place as circumstances permitted, was the loading/discharging area, which in most ports would correspond with the dock or wharf area.<sup>55</sup> If it was generally agreed that the ship did not have to get to a berth, the requirement that the vessel should have to wait within the working area of the port, i.e. a place where loading/discharging is possible or practicable appears to have been restrictive. There is also another reason why the functional requirement should probably not have been applied. This relates to contemporaneity in the shipowner's laytime obligations. The obligation to provide a ship that is ready to load or discharge, and the notification of that fact to the charterer does not arise until the vessel has reached the appointed destination.<sup>56</sup> It could perhaps be argued that, in the interests of uniformity in the application of all the shipowner's laytime obligations, the relevant date for evaluating the scope of the commercial area should have been

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<sup>55</sup> Although certain cargoes, e.g. oil and dangerous goods may have loading/discharging areas distinct from the general dock or wharf area of the port. See for example, reg. 64, Nigerian Ports Authority (Port) Regulations (1955).

<sup>56</sup> See, Christensen v Hindustan Steel Ltd [1971] 1 Lloyd's Rep. 395; The Tres Flores [1974] Q.B. 264(C.A). Also, P. Manca, International Maritime Law (1970) vol. 2, p. 322.

the date that the vessel was deemed to have arrived at the port, instead of an earlier date, e.g. the date of the charterparty.

It is suggested that the commercial test was elastic enough to deal with the circumstances that prevailed in The Aello, and that the relevant date for the purposes of ascertaining the commercial limits is the date that the vessel gets to the port. Consequently, the commercial area can fluctuate depending on the circumstances present at the named port.

#### 4.4.2 The Overruling of The Aello

Contemporary opinion about the final decision in The Aello has been divided. Whilst it is contended that the House of Lord's application of the commercial area test was restrictive,<sup>57</sup> Davies suggests that its effect was to specify a much wider area than had been thought possible, particularly in the case of large ports.<sup>58</sup> The decision was subsequently overruled in The Johanna Oldendorff on the basis that the application of the Parker test would have made a decision turn on whether the vessel was waiting within, or just outside the loading/discharging place, although the issue of location

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<sup>57</sup> e.g. A. Waring, The Law of Charterparties: A Comparative Study of South African, English and American Law (1983) p. 161. Also, D.G. Powles, "Reversing the Arrived Ship" [1974] J.B.L. 282, 286.

<sup>58</sup> D. Davies, The Commencement of Laytime (1986) p. 6, para. 5.

would not have been commercially significant.

#### **4.5 Comparative Notes**

Although in England, the applicable arrival rule had in effect become more functional,<sup>59</sup> the situation in America during the period under review was less predictable. Some cases reflected the commercial approach, whilst others were in the functional mode. The disparity may be attributed to the conflicting dicta that were to be found in those cases that had seemingly applied the same arrival rule.

##### **4.5.1 Commercial Considerations**

A more flexible approach was evident in Roney v Chase, Talbot & Co.<sup>60</sup> The vessel had been required under the contract of affreightment to deliver cargo at the port of New York. Upon arrival within the port, she suffered a delay of 10 days as a result of a stevedores strike and, also public works being carried out by the Port Authority. It was held that as the contract only required the vessel to deliver at the port, without further qualification, the delay would be at the risk of the charterer. Whereas, Kennedy, L.J.'s guidelines had emphasized factors such as the vessel being placed at the disposition of the charterer, and the status of the waiting

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<sup>59</sup> See also, McAloney v Mersey Paper Co (1933) 2 D.L.R. 261(N.S.S.C).

<sup>60</sup> 161 F. 309(2 CCA,1908).



place, Roney v Chase, Talbot & Co appears to have been decided on the basis that the charterer had a duty to order the vessel to a wharf which she could reach.

In W.K. Niver Coal Co v Cheronea,<sup>61</sup> Putnam, Ct.J. had stated, obiter, that the effect of ordering a vessel to a port, and to a berth or dock, as ordered by the charterers was that arrival did not become effective until the vessel was waiting at the berth or dock respectively. These views affirmed the contractual destination rule, and taken to their logical conclusion would have suggested that arrival within the port, would be sufficient for commencement of laytime purposes under a port charter. However, there was no express pronouncement on this point. The case itself was disposed of on the basis that the parties had specifically provided that the laytime could count prior to the vessel's arrival in the designated wharf.

In The Edward T. Stotesbury,<sup>62</sup> a vessel that had grounded within New York Harbour before reaching her berth was regarded as an "arrived ship" from the moment that she was delayed. However, Ward, Ct.J.'s obiter dictum<sup>63</sup> on the consequences of the "as ordered" clause in a port charter, differed from the views expressed in earlier authorities such

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<sup>61</sup> 142 F. 402(1 CCA,1905). See also, Anderson v J.J. Moore 179 F. 68(9 CCA,1910).

<sup>62</sup> 187 F. 111(2 CCA,1911).

<sup>63</sup> At pp. 112-113.

as W.K. Niver Coal v Cheronea<sup>64</sup> and Anderson v J.J. Moore.<sup>65</sup> It had been decided in those authorities that the vessel did not arrive at her destination until she had actually reached the dock or berth to which she had been subsequently assigned by the charterer or consignee. Ward, Ct.J. had qualified this rule by making the charterer responsible for any delay resulting from congestion, where he was entitled under the charterparty to nominate a berth or dock.<sup>66</sup>

The commercial approach was also applied in The Bellota,<sup>67</sup> where the vessel had been delayed by congestion. It was held that as the vessel was not responsible for the delay, and in the absence of custom, or a stipulation that there could be no arrival until the vessel had reached the berth, the delay was for the charterer's account. Readiness to receive or discharge cargo was construed as readiness to load at the port of arrival, and not upon reaching the berth of loading.<sup>68</sup>

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<sup>64</sup> 142 F. 402(1 CCA,1905).

<sup>65</sup> 179 F. 68(9 CCA,1910).

<sup>66</sup> Hand, Ct.J., Yone Suzuki v Central Argentine Railway 27 F. 2d 795, 803(2 CCA, 1928), appears to have supported the qualifications devised by Ward, Ct.J. Cf, Tweedie v Barry 205 F. 721(2 CCA,1913); The Levi Ostrander 271 F. 406(9 CCA,1920).

<sup>67</sup> 57 F.2d 264(SDNY,1928). See also, The Lake Yelverton 300 F. 47(4 CCA,1927); Royster Guano Co v U.S. 18 F.2d 469(4 CCA,1927).

<sup>68</sup> See also, Dean H. Windsor Navigation Co v Athans & Co (1953) A.M.C. 593(N.Y.Arb).

~~form~~In Cureton Lumber Co v Hammond Lumber Co,<sup>69</sup> the charterparty stipulated for the carriage of a cargo of lumber to Miami, and for its discharge at such safe dock or place, as designated by the charterers or their agents. The vessel arrived at the usual waiting place, which was 6 miles from the docks, however she was prevented from proceeding to her berth as a result of insufficient water and the blocking of the harbour channel by another vessel. The shipowner claimed demurrage in respect of the delay. It was decided that the vessel would have arrived for the purposes of laytime when she reached the anchorage, but as the ship was further required to proceed to a place to be designated by the charterer, and, as the charterparty had mutually excepted hindrances beyond the control of either party, the shipowner's claim could not succeed. Nevertheless, Foster, Ct.J. held that if the consignees had been in default, presumably, if the cause of the delay had been port congestion, the laydays would have started after the vessel's arrival at the anchorage. This aspect of the judgment contrasts with the approach favoured in authorities such as Anderson v J.J Moore.

The facts of Thomas Bell & Co v Stewart<sup>70</sup> were similar, but it was provided by the charterparty that laydays for discharging were to commence from the time the vessel had been reported as ready to discharge, having fulfilled Customs House

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<sup>69</sup> 29 F.2d 973(5 CCA,1929).

<sup>70</sup> 31 F.2d 44(5 CCA,1929).

formalities, whether berth or cargo available or not. It was held that when the vessel arrived at the place that had been designated as the anchorage for the Port, she had then arrived for the purposes of giving notice of readiness to discharge. The exceptions clause in the charterparty which had excepted "stranding and other accidents of navigation", was regarded as inapplicable on the grounds that the delay resulted from the consignee's failure to procure a berth with reasonable dispatch, and not from the grounding of another vessel in the harbour channel.

#### 4.5.2 Limiting Terms

Nevertheless, it is possible that the scope of the commercial test may be limited by the express terms of the contract. In Puerto Madrin S.A. v Esso Standard Oil Co.,<sup>71</sup> the charterparty had provided that laytime was to commence 6 hours after the tender of notice of readiness, provided that the vessel was herself ready to load or discharge after arrival at the port. Herlands, D.J. ruled that on the authority of Yone Suzuki v Central Argentine Railway, and particularly in the absence of express stipulations by the parties, the words "at the port" had to be construed in a commercial sense. The vessel had tendered notice 75 miles (120.8km) from the port of discharge. However, it was held that the notice was ineffective because the vessel was not "at" the port.

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<sup>71</sup> (1962) A.M.C. 147(SDNY,1961).

Furthermore, she was not ready because at the material time, the condition of her boilers would have made discharge impossible.<sup>72</sup>

#### **4.5.3 Functional Considerations**

The functional rule appears to have been the yardstick adopted in U.S.A. v Atlantic Refining Co(The Baldhill).<sup>73</sup> As a result of an obstruction caused by a ship that had grounded, the vessel was delayed for 21 days prior to berthing. Despite the explicit laytime provision which provided that laytime was to commence as soon as the vessel was ready to receive cargo, Manton, Ct.J. held that the notice that was issued whilst the vessel waited 36 miles (58km) from the agreed destination was ineffective for the purposes of starting laytime.<sup>74</sup>

#### **4.5.4 American Judicial Structures**

It is suggested that the nature of American judicial structures influenced the development, and the application of the various arrival theories. Laytime and demurrage disputes fall within the admiralty jurisdiction of the Federal Courts,

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<sup>72</sup> See also, The Ioannis K 222 F.Supp. 299(DC Or,1963), and Venore Transp. Co v President of India (1973) A.M.C. 301(SDNY,1972). Both would appear to have been decided upon the basis that the commencement of laytime at the vessel's waiting place was precluded by the express terms of the charterparty.

<sup>73</sup> (1930) A.M.C. 1041(2 CCA,1930).

<sup>74</sup> At p. 1047.

as opposed to the State Courts.<sup>75</sup> Originally, at the trial level there were District Courts, and next in the hierarchy were Circuit Courts that had been empowered to review the decisions of the lower Courts.<sup>76</sup> Further appeals lay to the Supreme Court. However, in 1891, the Circuit Courts of Appeals were established,<sup>77</sup> and although the old Circuit Courts continued in existence until 1911, they no longer had appellate powers in respect of the decisions of the District Courts. In view of the fact that the Supreme Court's review powers had also become discretionary, the decisions of the Circuit Courts of Appeal were usually regarded as final in most admiralty suits.<sup>78</sup> Supreme Court judgments may have binding authority on the lower Courts, but the decisions within a particular Circuit appear to have persuasive authority outside that Circuit. Against the background of the size of the U.S.A, and the concepts of "independence" and "localism" that are encouraged by its federal structure,<sup>79</sup> this might have made it possible to get more divergences in

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<sup>75</sup> See, art. 3, ss. 1 & 2, United States Constitution. Also, G. Gilmore & C.L. Black, The Law of Admiralty (1975) pp. 1-2 & 18-19.

<sup>76</sup> At first, there were 13 District Courts and 3 Circuit Courts.

<sup>77</sup> Under the Judicial Code 1948, these were renamed the United States Courts of Appeals.

<sup>78</sup> The U.S.A. currently has 12 Courts of Appeals and there is at least one District Court in each state.

<sup>79</sup> See, H.M. Hart & H. Wechsler, The Federal Courts and The Federal System (1973) p. 59.

the approach to legal problems. This point is reinforced by the description of the American judicial system as an aggregation of independent tribunals, tied together only by the authority of the superior Courts to review the judgments of the inferior Courts.<sup>80</sup>

This probably explains the inconsistencies in the American caselaw on port charters, particularly those that contained the "as ordered" clause. In some decisions, the dock or the berth ultimately selected by the charterer was regarded as the final destination. In other cases, it was the usual waiting place, within the larger area of the port that was considered to be relevant. Although the contractual destination rule was recognized and applied in varying degrees in both England and America, the real problem was how to refine it in such a way that the incidence of waiting by vessels, whether at the usual places or not, could be accommodated in the course of its application. One possible solution which evolved was the purely commercial test with its expansive connotations. However, the functional test which stressed the loading or discharging places at the port did not completely disappear.

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<sup>80</sup>     ibid.

## **CHAPTER FIVE**

### **THE FORMAL CONCEPT OF ARRIVAL**

- 5.1 The Composite Test
  - 5.1.1 Economic Background
  - 5.1.2 Technological Background
  - 5.1.3 Legal Background
- 5.2 Relevant Limits
  - 5.2.1 Legal, Administrative & Fiscal Limits
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## CHAPTER FIVE

### THE FORMAL CONCEPT OF ARRIVAL

#### 5.1 The Composite Test

As a general rule, in the absence of special provisions, arrival cannot be effected outside the limits of a port.<sup>1</sup> The point of arrival within the port itself had been determined by considering either its functional or commercial characteristics. The conclusion in previous Chapters was that the functional and the commercial tests had not satisfactorily dealt with the arrival problem. The factors that might have contributed to the formulation of an arrival test that relates to the formally defined limits of a port constitutes the subject-matter of this Chapter.

In The Johanna Oldendorff,<sup>2</sup> the vessel had been ordered to load a cargo of bulk grain in the United States and then to proceed to Liverpool/Birkenhead. She arrived at the usual

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<sup>1</sup> This is the position in the English authorities, e.g. Nelson v Dahl (1879) 12 Ch.D. 568, 585 & 590-591(C.A); The Seafort [1962] 2 Lloyd's Rep. 147, 154. Also, The Werrastein [1957] 1 Q.B. 109, 119-121, although Sellers, J. ruled that by virtue of a proviso in the charterparty, laytime could be counted prior to the arrival of the vessel within the legal limits of the port.

<sup>2</sup> [1974] A.C. 479(H.L.).

waiting place which was 17 miles from the dock area, on January 2nd, 1968, and on the following day she proceeded further into the port in order to complete Customs formalities. The vessel was subsequently ordered by the Port Authority to return to the usual waiting place because there were no vacant berths. The House of Lords unanimously decided that the vessel was an "arrived ship" whilst she waited at the usual waiting place.<sup>3</sup> It was found that the anchorage was within the legal, administrative and fiscal limits of the Port, and was the usual waiting place for grain vessels. Lord Reid's explanation of the applicable test suggests that, the more important of the two points was that the vessel was waiting within the legal limits. Provided that requirement had been satisfied, whether or not the vessel was waiting at the usual place was not considered to be significant, if it could be established that she was at the charterer's disposition.<sup>4</sup> The applicable test, which is composite in nature, provides 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 lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie on the charterer. ... If the ship is waiting at some other place in the port

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<sup>3</sup> Also, Lord Denning M.R., *ibid*, pp. 489-492. *Contra*, Buckley and Roskill L.J.J., pp. 500-501 & 511. Also, Donaldson, J., [1971] 2 Lloyd's Rep. 96, 104.

<sup>4</sup> See further, The Maratha Envoy [1978] A.C. 1(H.L).

then it will be for the owner to prove that she is fully at the disposition of the charterer as she would have been if in the vicinity of the berth for loading or discharge"<sup>5</sup>

The integral elements of this test will be separately evaluated in Sections 5.2 & 5.3.

#### **5.1.1 Economic Background**

The factors underlying the formal test can be considered from three major viewpoints, viz, economic, technological and legal. In order to have general application, an arrival rule should be flexible enough to accommodate the consequences of economic growth. The continued increase in world seaborne trade, (dry cargo and oil), that occurred between 1950 and 1974 would probably have made waiting at a designated place, a real possibility under certain charters. During that period, total world seaborne trade increased sixfold, rising from 525 million tons to 3,190 million tons. Seaborne trade growth during the 1950's was at an average annual rate of 7.5%, accelerating to about 9%, per annum during the 1960's. The year to year growth in seaborne cargo tonnage in the early seventies was uneven. In 1971, it was 4%, in 1972, 6% and in 1973, 11%<sup>6</sup> Between 1970 and 1974, world seaborne trade increased from 2,545 million tons to 3,250 million tons.<sup>7</sup>

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<sup>5</sup> Per Lord Reid, The Johanna Oldendorff, pp. 535-536.

<sup>6</sup> U.N.C.T.A.D., Technological Progress in Shipping and its Effect on Ports (1975) TD/B/C.4/129 p. 1.

<sup>7</sup> O.E.C.D., Maritime Transport 1986 (1987) p. 170.

Tables 1, 2 & 3 illustrate the commodity growth rate comparisons and share of world seaborne trade between 1962 and 1974.

**Table 1: Growth in World Seaborne Trade (1962-1974)**

(1962 = 1.0)	Cargo Tons
Oil (Crude & Products)	3.1
Three main dry bulk commodities, (Iron Ore, Coal, Grain)	2.6
Other Cargo	2.1
	<hr/>
All Cargo	2.6

Source: U.N.C.T.A.D.<sup>8</sup>

**Table 2: Share of World Seaborne Trade By Commodity Category (%)**

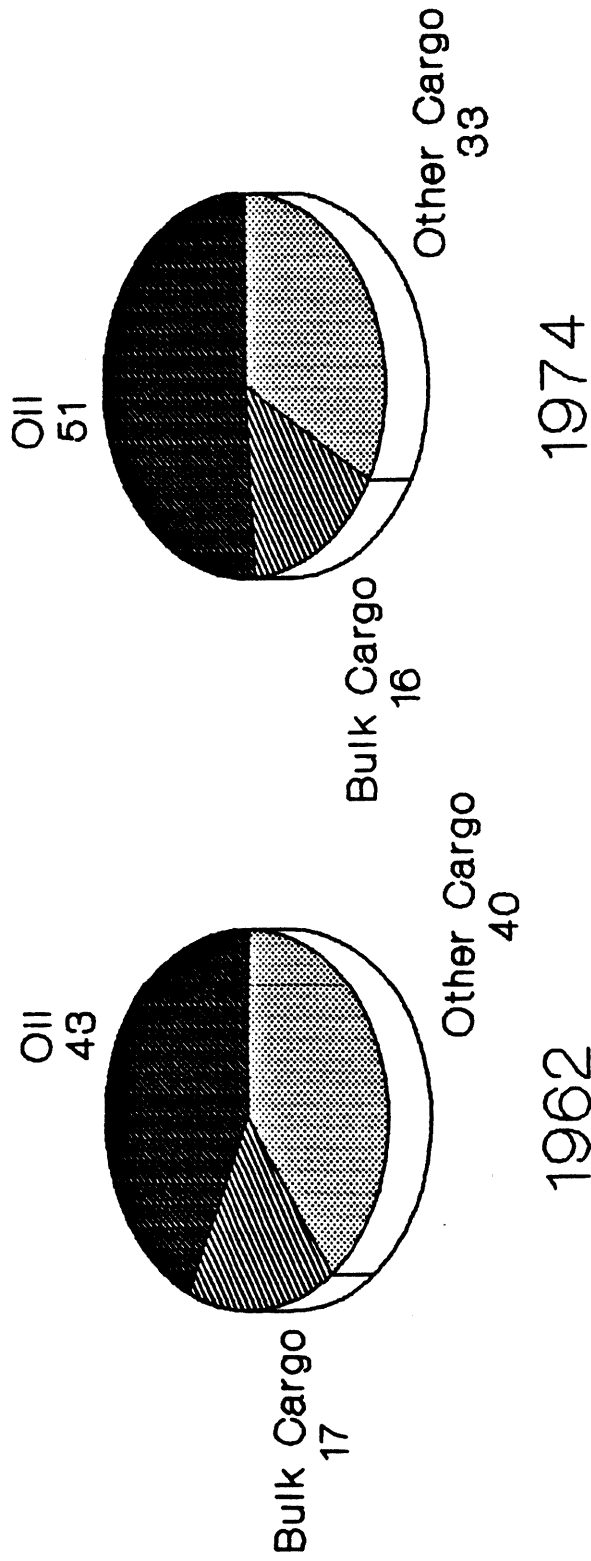
	Cargo Tons	
	1962	1974
Oil	43	51
Three Main Dry Bulk Commodities, (as above)	17	16
Other Cargo	40	33
	<hr/>	
	100	100

Source: U.N.C.T.A.D.<sup>9</sup>

<sup>8</sup> U.N.C.T.A.D., Technological Progress in Shipping and its Effect on Ports, p. 2.

<sup>9</sup> ibid.

# Share of World Seaborne Trade by Commodity Category



Source U.N.C.T.A.D

This data underlines the huge growth in the oil trade<sup>10</sup> and its increased share of total shipments since the early 1960s. This may suggest that congestion was more likely to have occurred at oil terminals, followed by those ports handling bulk commodities. The problem with a functional rule is that it emphasizes the proximity of the vessel's waiting place to the working areas of the port. Therefore, it may not be easily adaptable to a situation where, as a result of increasing trade, the limits of the port have been extended, and the waiting places have been located further away from the loading/discharging areas.<sup>11</sup> So that if a ship is waiting at the usual waiting place, which is situated beyond the loading/discharging area and is completely ready in every respect, the financial burden for the delay still falls on the shipowner. On the other hand, both the commercial and the formal tests, by their very nature, would be easily adaptable to changes in the port limits necessitated by economic considerations. If either test had been applied in The Aello,<sup>12</sup> the vessel would have been regarded as an "arrived ship" as soon as she started to wait at the usual waiting place.

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<sup>10</sup> See further, R.W. Smith, "Oceanborne Shipment of Petroleum" (1973) 1 Marit. Stud. Mgmt. 119-121.

<sup>11</sup> See also, F.J.J. Cadwallar, "Ships Arriving and Arrived" (1977) 4 Marit. Pol. Mgmt. 253.

<sup>12</sup> [1961] A.C. 135(H.L).

The increasingly large sums of money that might turn on a Court's definition of the point of arrival was possibly one of the factors underlying the reappraisal of the applicable rules. Tables 4 & 5 indicate the scale of the increase in the average daily ship cost for different vessels between 1970 and 1976.

**Table 4: Evolution of Average Daily Ship Cost in Port (\$)**

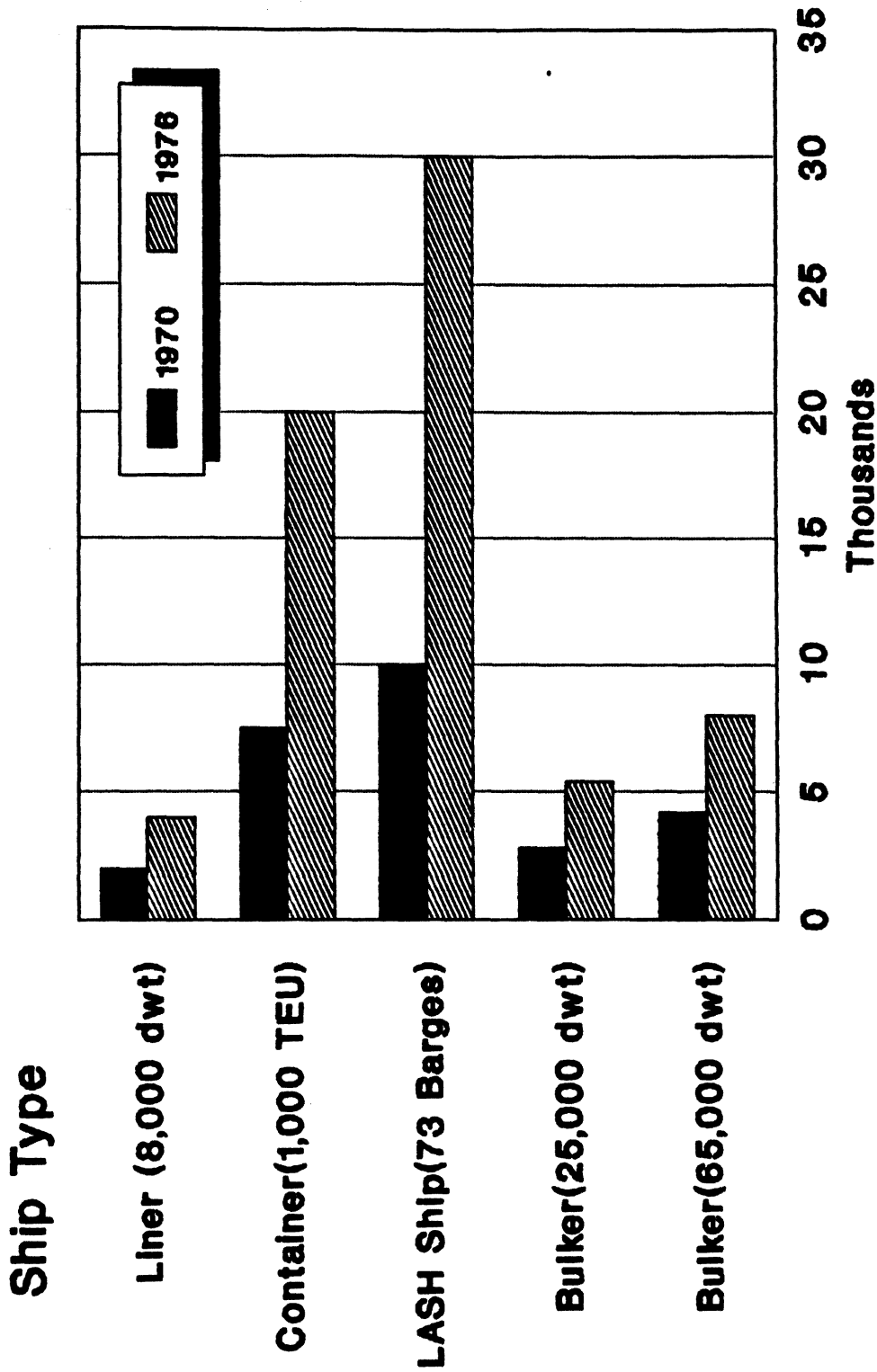
Ship Type and Size	1970	1976	Percentage Difference
Conventional Liner Vessel, (8,000 d.w.t.)	2,000	4,000	+100
Cellular Container Ship, (1,000 TEU)	7,500	20,000	+170
LASH Barge-Carrying Ship, (73 barges)	10,000	30,000	+200
Bulk Carrier, (25,000 d.w.t.)	2,800	5,400	+93
Bulk Carrier, (65,000 d.w.t.)	4,200	8,000	+90

Source: U.N.C.T.A.D.<sup>13</sup>

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<sup>13</sup> U.N.C.T.A.D., Port Problems. Causes of Increases in Port Costs and their Impact (1977) TD/B/C.4/167 suppl. 1, p. 40.

# Evolution of Average Daily Ship Cost in Port (\$)



Source U.N.C.T.A.D.



Although, the higher daily ship costs were probably reflected in the demurrage that was payable, it is suggested that the way in which the functional and commercial rules had been applied prior to 1973 meant that the shipowner's ability to recoup the costs of any delay by claiming demurrage, depended upon the waiting place being located within the working area of the port. This requirement would probably have been very difficult to comply with within some large ports.

### **5.1.2 Technological Background**

By the beginning of the 1970s, petroleum products were already well established as the fuel of choice for over 90% of the world's fleet. Coal, on the other hand, had a share of about 4.9%.<sup>14</sup> Furthermore, since the Second World War, the trend in ship propulsion had shifted in favour of the diesel engine instead of the steam turbine because of the former's economy in the consumption of fuel oil.<sup>15</sup> However, the power limitations of the diesel engine had restricted its use in large vessels such as tankers.<sup>16</sup> These improvements in propulsion methods, coupled with the reduction in the size of bunkers of ships that burnt oil resulted in faster vessels.<sup>17</sup>

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<sup>14</sup> C.F.H. Cufley, Ocean Freights and Chartering (1964) 7th Rep. p. 248.

<sup>15</sup> U.N.C.T.A.D., Technological Progress in Shipping and its Effect on Ports, p. 7.

<sup>16</sup> *ibid.*

<sup>17</sup> E. Gold, Maritime Transport (1981) p. 182.

Further developments in the field of long distance communications, for example, the first commercial transmission in 1965, of radio signals via satellite<sup>18</sup> were likely to have made proximity between the waiting area and the berth a less significant consideration. It would have meant that the vessel could receive, and respond to the charterer's berthing instructions almost instantaneously irrespective of where she was waiting.

In this light, the formulation of a rule with criteria reflecting modern conditions would have seemed particularly appropriate. Although, the elastic nature of the commercial test would have made it adaptable to changes brought about by new technology, a functional rule would not have given any recognition to the advent of faster vessels and improved ship to shore communications. A vessel waiting at the usual place, whether within or outside the port, but which may not be near to the actual loading/discharging area would probably not qualify as an "arrived ship" on account of her position, although she may have been at the charterer's disposition. This was in fact the fate that befell the Johanna Oldendorff prior to the House of Lords' decision.

### **5.1.3 Legal Background**

It appears that at the very least, the functional arrival rule results in the conversion of port charters into dock

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<sup>18</sup> Encyclopaedia Britannica (1973) vol. 21, p. 785.

charters, and in fact this was the result in The Aello. It is perhaps not equitable that the shipowner should bear to the greater extent, the risk of delay where the charterparty has stipulated a larger area such as a port, instead of a dock as the destination. In The Felix,<sup>19</sup> it was established that, the charterer has an implied right to nominate the final loading/discharging place. If that nomination is not timeous, it is reasonable that the charterer should bear a proportion of the waiting risk. In the sense of referring to the loading/discharging area, the Parker test<sup>20</sup> is similar to the "usual place" rule which was developed in the pre-1850 cases.<sup>21</sup> Since both tests involve an inquiry into the loading/discharging area of the port or the usual place of loading/discharging, they probably will not be satisfactory to the shipowner's interests because they may lead to the approximation of the port charter to a dock, or alternatively, a berth charter. In other words, the application of a functional rule attaches a restrictive meaning to "port".

The commercial test, with its emphasis on the waiting place appears to have avoided this shortcoming, but the expansionist scope of the test has been minimised because of judicial opinion to the effect that proximity between the

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<sup>19</sup> (1868) L.R. 2 A. & E. 273.

<sup>20</sup> The test was overruled in The Johanna Oldendorff [1974] A.C. 479 (H.L.).

<sup>21</sup> See, Chapter 3, pp. 42-46.

waiting place and the loading/discharging areas was a material point.<sup>22</sup> Also, the practice of disallowing arrival outside the legal limits of the port may have curtailed the scope of the commercial test in those cases where the waiting places were located outside the legal limits.

Prima facie, the formal test ascribes an ordinary meaning to the word "port" and should therefore benefit the shipowner. But it may be restrictive with respect to ports that have waiting places outside their limits. Nevertheless, when this point arose in The Maratha Envoy, the House of Lords retained the formal interpretation of "port" instead of opting for an expanded definition. It also appears that the formal test may be incapable of being applied in ports that do not have expressly defined limits.<sup>23</sup> In spite of these shortcomings, the formal test can be considered to be an improvement on the functional test because it widened the scope of arrival within a port.

It could be further argued that, as the parties are free to formulate provisions to suit their peculiar requirements, they need not resort to the Courts for the clarification of difficult points. If recent evidence is anything to go by, some of the special clauses that have been devised to tackle the perceived shortcomings of the various arrival rules are

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<sup>22</sup> e.g. Lord Jenkins, The Aello [1961] A.C. 135, 206(H.L).

<sup>23</sup> See, p. 106, *infra*.

not entirely free from difficulties of interpretation.<sup>24</sup> It is ironic that some of the problems relate to the position that the vessel should attain before the special clauses can take effect.<sup>25</sup> It is suggested that their further proliferation may create uncertainty, and ultimately a proliferation of litigation or arbitration. Such a state of affairs would not assist legal advisers who are expected to give prompt and clear advice during the negotiations that may precede the conclusion of a charterparty.

Another factor of legal import might have been the decision in The Delian Spirit.<sup>26</sup> The case had involved an oil tanker that had been ordered to a small port on the Black Sea. When she arrived there, the port was congested so she had to wait for her turn at the usual waiting place for tankers. Notice of readiness was issued on February 19th, 1964, but the vessel did not actually berth until February 24th. Loading was completed on the following day. The shipowner's original claim

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<sup>24</sup> See further, The Darrah [1977] A.C. 157(H.L), (the "time lost" clause); The Kyzikos [1988] 3 W.L.R. 858(H.L), (the whether in berth or not clause, W.I.B.O.N.); The Adolf Leonhardt [1986] 2 Lloyd's Rep. 395, (the whether in port or not clause, W.I.P.O.N.); The Laura Prima [1981] 3 All.E.R. 737(H.L); The Notos [1987] 1 Lloyd's Rep. 503(H.L); The Sea Queen [1988] 1 Lloyd's Rep. 500; The Fioordas [1988] 2 All.E.R. 714, (the reachable on arrival clause).

<sup>25</sup> e.g. In The Maratha Envoy [1978] A.C. 1, 14-15(H.L), Lord Diplock held that the W.I.B.O.N. clause was not applicable to vessels waiting outside the port under port charters. Contra, Lord Denning, M.R., [1977] Q.B. 324, 339-340(C.A). Cf, Lloyd, L.J. in The Kyzikos [1987] 1 W.L.R. 1565, 1570-1572(C.A).

<sup>26</sup> [1972] 1 Q.B. 103(C.A).

for demurrage was subsequently altered to damages for breach of the reachable on arrival clause. The scope of that clause was considered and the claim for damages was struck down on the grounds that once laytime had been bought and paid for in freight, the charterer could not be deprived of the right to use it to wipe out or lessen any delay for which he would otherwise be responsible.<sup>27</sup> The Court of Appeal unanimously decided that the vessel was an "arrived ship" whilst she waited for a vacant berth because the usual waiting place was located within the legal and administrative limits of the port.<sup>28</sup>

In contrast to the facts of The Aello, the area subject to the Court's scrutiny was quite small. The port was made up of a breakwater or mole, within which was a jetty with berths for four tankers, and the distance between the anchorage and the jetties was only 1.25 miles (2.01km). Also, there had been no change in the location of the usual waiting place. If a functional test had been applied, the area within the breakwater would have formed the loading/discharging area. By not insisting on the requirement to wait within a limited area, the effect of the decision in The Delian Spirit might have suggested that the decisions in The Aello and Leonis v Rank were applicable to different sets of facts, and that for

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<sup>27</sup> Per Lord Denning M.R., pp. 123-124; Fenton Atkinson, L.J., pp. 124-125; Sir Gordon Willmer, pp. 126-127. Contra, Donaldson, J., *ibid*, pp. 112-113.

<sup>28</sup> Also, Donaldson, J., p. 114.

the purposes of the commencement of laytime, a distinction might have to be drawn between small and large ports. The difficulty with such a small/large port theory, (assuming that it was intended), is that it is not clear whether factors such as the topographical features of the port, the existence of legal or administrative limits, or the distance between the waiting places and the loading/discharging areas are material in defining the size of the port. Should consideration be given to matters such as a port's cargo handling capacity and annual revenue receipts? It is possible to foresee a subjective process whereby the classification of a particular port varies from Judge to Judge, and from one country to another. If the ideal arrival rule is a single test for all ports, irrespective of their size, the formulation of the formalistic test might have been a response to the possible interpretations that could have been ascribed to the decision in The Delian Spirit.

## **5.2 Relevant Limits**

The limits of the port that came up for consideration in The Johanna Oldendorff were described as the fiscal, administrative and legal limits. It may be that in some ports, these limits coincide, so that the application of the Reid test would be quite straightforward. Where the various limits are separate, the question is which one of them does the vessel need to get within before she can become an "arrived

ship"? In other words, is it possible to regard the different types of port limits as constituting alternative tests?

### **5.2.1 Legal, Administrative and Fiscal Limits**

There is authority to the effect that within the context of commercial documents such as charterparties, the fiscal limits have no relevance because they may extend far beyond what may popularly or in a business sense be regarded as the port.<sup>29</sup> Its irrelevance is borne out by the fact that there was no direct reference to the fiscal limits by any of their Lordships. Lord Reid had referred to the limits within which a Port Authority exercises its powers to regulate the movements and conduct of vessels, and also the limits defined by law.<sup>30</sup> It is suggested that his Lordship was referring to the administrative and legal limits respectively. It may be that the context within which Lord Reid's statements were made, suggests that the legal and administrative limits are equivalent.<sup>31</sup> Nevertheless, Berlingieri contends that where the waiting area of a port is situated outside its legal limits, the administrative limits should be regarded as extending beyond the legal limits because the allocation of a place at the waiting area usually falls within the scope of a

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<sup>29</sup> e.g. Brett, M.R., Sailing Ship Garston v Hickie (1885) 15 Q.B.D. 580, 587(C.A). Also, Baggallay, L.J., p. 594.

<sup>30</sup> The Johanna Oldendorff [1974] A.C. 479, 535(H.L).

<sup>31</sup> See further, Lord Diplock, p. 561.



Port Authority's powers to control traffic at the port.<sup>32</sup> Consequently, the usual waiting place for a port irrespective of its location, should be considered as an area within the administrative limits. This contention does not appear to have influenced the final decision in The Maratha Envoy. In that case, the view was that the administrative limits of a port did not extend beyond the legal limits. This approach has been criticized on the grounds that, it will make the allocation of the risk of delay dependent on circumstances that have no connection whatsoever with the commercial venture or the common intent of the parties.<sup>33</sup>

#### **5.2.2 Private Jetties and Docks**

It is also possible that any inquiry into the regulation of the movement and conduct of vessels at a port may produce more uncertainty for it is conceivable that there may be several bodies instead of a single entity, which may have been empowered to issue directives about a vessel's movements, and that such powers are exercisable over different areas of the port. This point will be particularly relevant within the context of ports with privately run jetties or dock systems.

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<sup>32</sup> F. Berlingieri, "The Allocation of Risk of Delay in Voyage Charter Parties" (1977) 8 J.M.L.C. 497, 499-500.

<sup>33</sup> *ibid*, p. 500.

### **5.2.3 Ports Lacking Legal Limits**

Another difficulty relates to those ports that have no legal limits.<sup>34</sup> Although Lord Reid had stated that most ports would have express legal limits, the evidence from recent arbitrations contradicts this viewpoint.<sup>35</sup> Arbitrators appear to have resolved the problem by regarding the vessel as an "arrived ship" as soon as she starts to wait at the usual place, provided that the Port Authority exercises some control over that particular area.<sup>36</sup> But there is still an outstanding problem with respect to ports such as Jorf Lasfar, (Morocco), where in addition to a lack of legal limits, there are no specially designated waiting places. In such a situation, the "within the port" requirement and the practice of fixing arrival from the time that the vessel waits at the usual place will be redundant. The inadequacies of the formal test under those conditions may suggest that the ideal arrival rule should perhaps not refer to the limits of the port.

### **5.3 Vessel at Charterer's Disposition**

The expression, "at the immediate and effective disposition of the charterer" could mean that the vessel, for the purposes of laytime must be in the possession of, and at

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<sup>34</sup> e.g. The ports of Jorf Lasfar, (Morocco) and Bangkok, (Thailand): Guide to Port Entry (1987/88) vol. 2. pp. 1050-1051 & 1472-1474.

<sup>35</sup> D. Davies, Commencement of Laytime (1987) pp. 9 & 12-17.

<sup>36</sup> *ibid.*

the control of the charterer. In view of the fact that there is settled authority to the effect that charters other than demise charters are not contracts of hire,<sup>37</sup> the sense in which this expression is used in voyage charters is likely to be different. The first half of this section traces the historical evolution of the expression, whilst the second half considers its application in circumstances where the vessel has been delayed by events other than congestion.

### **5.3.1 Pre-1900 Cases**

The early cases, such as Brereton v Chapman,<sup>38</sup> Kell v Anderson,<sup>39</sup> and Brown v Johnson<sup>40</sup> did not make use of the term, probably because there was no need to. The consequence of the usual place rule which was applied in those cases made proximity of the vessel to the berthing area a prerequisite for the commencement of laytime. The Courts adopted the view that to have decided otherwise would have meant extensive claims for demurrage. As a result, a vessel that was waiting at the entrance to the port was not considered to be an "arrived ship".

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<sup>37</sup> See, Cockburn, C.J., Sandeman v Scurr (1866) L.R. 2 Q.B. 86, 96. Cf, Lord Herschell, L.C., Baumwoll Manufactur Von Carl Scheibler v Furness [1893] A.C. 8, 14-15(H.L).

<sup>38</sup> (1831) 7 Bing. 559.

<sup>39</sup> (1842) 10 M. & W. 498.

<sup>40</sup> (1842) 10 M. & W. 331.

It appears that the first direct reference to the expression was made by Brett, L.J. in Nelson v Dahl.<sup>41</sup> In Pyman v Dreyfus,<sup>42</sup> Matthew, J. stated that a vessel would be at the disposition of the charterers if,

"If they only had to indicate the place to which she was to go for her cargo, and she would have been there immediately".<sup>43</sup>

It is significant that both cases did not specifically link the vessel being at the disposition of the charterer with her proximity to the berth. It was merely sufficient that the vessel had arrived within the named port or dock. She was not required to be in a place where loading or discharging was possible, and if she could respond without significant delay to the charterer's orders, she was considered to be at his disposal. The novel point was the vessel's ability to respond to the charterer's orders not just her proximity to the berthing area or her arrival within the named place.

### 5.3.2 1900 - 1973

There was further innovation with the case of Leonis v Rank. Kennedy, L.J.'s commercial test required that the vessel be placed effectively at the disposal of the charterer, and

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<sup>41</sup> (1879) 12 Ch.D. 568, 581 & 590(C.A).

<sup>42</sup> (1889) 24 Q.B.D. 152.

<sup>43</sup> *ibid*, p. 157.

also be in a place where waiting ships usually lie.<sup>44</sup> Although Kennedy, L.J. had used the expression "at the disposal of" instead of "at the disposition of", this modification should not be regarded as significant since both expressions ordinarily share the same meaning.

The new factor that was introduced by the commercial test was the connection between the vessel waiting at the usual place and her being placed at the effective disposition of the charterer. Some of the pre-1850 cases had not been receptive to this contention, particularly if the vessel had been waiting outside the usual place for loading or discharge. It was now possible that under the commercial test, a vessel waiting outside the usual place for loading or discharge could be considered to be at the effective disposition of the charterer, and therefore be described as an "arrived ship". This particular point did not come up for determination in Leonis v Rank. However, it was the question to be decided in The Aello.<sup>45</sup>

Their Lordships applied the Parker test, which was meant to have been an interpretation of the commercial test, and concluded that a vessel waiting 22 miles (35.43km) from the berthing area was not an "arrived ship". According to a majority of the Court, at the material time, the vessel could not be said to have been at the effective disposition of the

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<sup>44</sup> [1908] 1 K.B. 499, 521(C.A).

<sup>45</sup> [1961] A.C. 135(H.L).

charterer. In view of the fact that the application of the Parker test may result in the conversion of port charters into dock, or even berth charters, it seems that the decision re-emphasized the connection between proximity of the vessel to the berthing area and her being at the effective disposition of the charterer.

### **5.3.3 1973 - to the Present**

The Parker test was subsequently replaced by the Reid test which requires, inter alia, that the vessel must be at the immediate and effective disposition of the charterer. Lord Reid explained that the vessel would be at the disposition of the charterer if she was waiting at the usual place within the port.<sup>46</sup> It was also possible for the vessel to be at the charterer's disposition, although she was waiting at some other place within the port. The essential point was that the waiting occurred within the limits of the port. Lord Diplock on the other hand, expressed in greater detail what the expression could mean. His Lordship considered that a vessel would be fully at the disposition of the charterer if three conditions were satisfied, viz, she was so positioned that, (i) she would count for turn, (ii) easily receive information from the charterers about available berths, and, (iii) proceed

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<sup>46</sup> It is open to the charterers to rebut this presumption: The Johanna Oldendorff [1974] A.C. 479, 535(H.L).

without any significant delay to the appointed berth.<sup>47</sup> The Johanna Oldendorff was held to have met all three requirements, although she had been waiting 17 miles (27.4km) from the nearest discharging berth. This interpretation of the expression is analogous to those that were given by Brett, L.J. and Matthew, J. in Nelson v Dahl and Pyman v Dreyfus. As long the vessel waits within the the port limits, and all the above mentioned conditions are satisfied, her distance from the berthing area and the status of the waiting place are irrelevant.

The issue of turn is of practical significance because if a vessel waits at a place where she does not count for turn, she may likely suffer more delay if she subsequently has to wait for her turn at the recognized place. However, it is suggested that the more important criteria relate to,

(i) The vessel's ability to receive information about vacant berths, and,

(ii) The length of time that elapses between the receipt of the charterer's orders and the vessel's arrival in the appointed berth.

The first point probably has to be construed as an allusion to the facility with which the charterer's instructions can be communicated to the vessel. In an era of radio communications, this will probably be almost instantaneous. With respect to the second, the crucial point is that the relevant time period

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<sup>47</sup> ibid, p. 560.

is not unreasonable, having regard to other factors such as the duration of the voyage itself, and the normal shifting times at that particular port for ships of a similar size and type.

#### **5.3.4 Events Other Than Congestion**

Until very recently, the meaning of "at the immediate and effective disposition of the charterer", particularly within the context of delay brought about by events other than congestion had received very little judicial consideration. The historical development of the expression seems to suggest that it relates to the charterer's ability to pass on berthing instructions to the vessel, and also the latter's ability to respond without significant delay. If that is indeed the case, it would mean that short of a complete breakdown of communications links with the vessel, and/or a persistent bout of severe weather or congestion, a vessel waiting under normal conditions at a port will always be at the disposition of the charterer.

One of the questions that was raised in The Kyzikos,<sup>48</sup> was whether a vessel that had been delayed by fog, in circumstances where a berth had always been available could be regarded as being at the effective disposition of the charterer. The House of Lords, did not deal specifically with this point. Their Lordships, overruling the Court of Appeal

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<sup>48</sup> [1988] 3 W.L.R. 858 (H.L).



and affirming the decision at first instance, disposed of the case on the grounds that as a matter of tradition, and having regard to the format of the charterparty, the W.I.B.O.N. clause which the shipowner had sought to rely upon in order to initiate the laytime, was only applicable where delay had been caused by port congestion.<sup>49</sup> However, in the Court of Appeal, Lloyd, L.J. had ruled that, in considering the ambit of the expression, it would be impractical to also, determine the cause of the delay to the vessel.<sup>50</sup> It was held that the terms of the Reid test were explicit and that if a vessel had satisfied its geographical requirement and was herself ready, laytime would count regardless of the nature of the delay. In the lower Court, Webster, J. in his brief consideration of the point had concluded that, although the vessel was not being used for the shipowner's purposes during the period of delay, she could not be regarded as being at the charterer's disposition.<sup>51</sup> The Court of Appeal's decision has been criticized on the grounds that it disregards the longstanding tradition of allocating weather and nautical risks to the shipowner.<sup>52</sup> Furthermore, it is contended that it

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<sup>49</sup> *ibid*, pp. 863-864. Cf, C. Butcher, "An Inconsistency of Approach" [1989] L.M.C.L.Q. 263, 265-266.

<sup>50</sup> [1987] 1 W.L.R. 1565, 1574-1575. (C.A). Also, Glidewell, L.J. and Sir John Megaw, p. 1577.

<sup>51</sup> [1987] 1 Lloyd's Rep. 48, 57. See further, J. Schofield, Laytime and Demurrage (1986) p. 250.

<sup>52</sup> D. Davies, The Commencement of Laytime (1987) p. 23.

over-emphasizes the inconvenience that may ensue in attempting to ascertain the cause of delay.<sup>53</sup> Although the historical evolution of the expression possibly supports the Court of Appeal's approach, the strong emphasis that was placed by their Lordships on the tradition relating to the allocation of weather and nautical risks suggests that if the point was to come up at a later date, it may be decided that, a vessel that had been delayed by weather or nautical conditions whilst waiting within the port was not at the charterer's disposition.

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<sup>53</sup> *ibid.*

## **CHAPTER SIX**

### **THE STANDARD TEST**

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## CHAPTER SIX

### THE STANDARD TEST

#### 6.1 Voyages of Convenience

The main proposition of the last Chapter is that although the formal test<sup>1</sup> might have expanded the area within which a vessel is deemed to have arrived at a port, it is restrictive, or even incapable of being applied in certain situations.<sup>2</sup> Another area of difficulty which relates to voyages of convenience will now be examined.

The wording of the Reid test raises the possibility that a vessel waiting outside the port, could qualify as an "arrived ship" by steaming into any area within the port, pausing there briefly and then returning to the waiting place outside the port limits. This point arose in The Maratha Envoy.<sup>3</sup> The case had involved a ship that had been directed to discharge her cargo of grain at Brake, one of the Weser

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<sup>1</sup> See, The Johanna Oldendorff [1974] A.C. 479, 535-536(H.L). This test was also applied in The Prometheus [1974] 1 Lloyd's Rep. 350.

<sup>2</sup> *supra*, Chapter 5, p. 106.

<sup>3</sup> [1978] A.C. 1(H.L); [1977] Q.B. 324(C.A); [1975] 2 Lloyd's Rep. 223.

Ports. She arrived at the Weser Lightship on December 7th, 1970, and waited there until December 29th for a free berth. The Weser Lightship constituted the usual waiting place for vessels and was located outside the legal, administrative and fiscal limits of the port. On the 8th and 12th of December, the vessel made two trips upriver to Brake and back in which she neither anchored nor stopped in the river because this was prohibited by the port regulations. Although, the notice of readiness that was issued on the first trip was ineffective, because health and customs formalities had not been complied with, the notice that was given on the second trip was properly issued. The shipowner initially claimed demurrage on the grounds that, by one or other of the voyages on the 8th or 12th, the ship qualified as an "arrived ship".

Perhaps, if the Reid test had emphasized the finality of the type of waiting that was required in the following terms, viz, "... that before a ship can be treated as an arrived ship she must be specifically waiting within the port for the charterer's berthing instructions, and at the immediate and effective disposition of the charterer...", then it could be argued that the temporary presence of a vessel within the port would not suffice.

As the test stands, it is possible to give to it the interpretation which the shipowner had sought to advance. In any event, these voyages of convenience were dismissed by the

Courts.<sup>4</sup>

#### 6.1.1 The American Response

In contrast, the majority decision of American arbitrators in A/S Mosvold Maritime Co v Bunge Corp<sup>5</sup> would seem to suggest that voyages of convenience are effective, provided that the vessel is herself ready and has also complied with other conditions precedent to the commencement of laytime, e.g. entry at the Customs House. That award, which had also involved a vessel that had been sent to the Weser estuary, proceeded upon the basis that,

(i) When the vessel arrived at the Weser Lightship, she had for all practical purposes fulfilled its obligations to the charterers,<sup>6</sup> and,

(ii) If the vessel proceeded further into the Weser estuary because the charterer had delayed in nominating a particular port, notice could be issued since shipowners had not bargained to have their vessel lying as a storage facility at the waiting place.

This award illustrates the less formalistic concept of arrival that has been developed in the American authorities.

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<sup>4</sup> Per Stephenson and Shaw L.J.J., [1977] Q.B. 324, 348 & 353, see also, Lord Diplock, [1978] A.C. 1, 15. For an earlier case on the subject of voyages of convenience, see, The Werrastein [1957] 1 Q.B. 109, 120.

<sup>5</sup> (1974) A.M.C. 2372(N.Y. Arb).

<sup>6</sup> See further, the American cases and awards cited on pp. 129-130, *infra*.

It will be proposed that it is appropriate, in the light of these differences in approach, to develop a uniform arrival test.<sup>7</sup> This would ensure that the outcome of a dispute does not depend upon where it is heard. However, the formulation of a standard test is one thing, its application is quite another. Those methods by which universal application may be attained will be assessed in Section 6.4.

## **6.2 Retention of the Formal Test**

Although, the shipowners in The Maratha Envoy had failed in their attempt to claim demurrage on the basis of the voyages of convenience, they subsequently argued on appeal that the vessel had arrived on the 7th of December, 1970. That contention succeeded in the Court of Appeal on the grounds that, the vessel was waiting at the usual place, and was also at the effective disposition of the charterers. But the House of Lords unanimously ruled that, in the light of the requirements of the Reid test, the vessel was not an "arrived ship" whilst she waited at the Weser Lightship on that date.<sup>8</sup> The object of this Section will be to assess the possible

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<sup>7</sup> It is noted that art. 8, U.N. Resolution 2205(XXI) provides for the establishment of the United Nations Commission on International Trade Law, (UNCITRAL), for the purposes of furthering the progressive harmonisation and unification of the law of international trade.

<sup>8</sup> Also, Donaldson, J., [1975] 2 Lloyd's Rep. 223, 233 & 235. See further, The Timna [1970] 2 Lloyd's Rep. 409, 411. Contra, A/S Mosvold Maritime Co v Bunge Corpn (1974) A.M.C. 2372 (N.Y.Arb).

reasons underlying the House of Lords decision.

### 6.2.1 Voyage Stages

The final decision in The Maratha Envoy reinforced the practice whereby a distinction was made between a port which had its usual waiting place within its limits, and one which did not.<sup>9</sup> The origins of this rule can be traced to the pragmatism that was a feature of the earliest laytime cases.<sup>10</sup> In the era of sailing ships, the problems associated with the weather and poor communications would have meant that for a vessel to be truly at the disposition of the charterer, she would have had to proceed further into the area of the port. However, the practice may also be explained by reference to the analysis of the voyage in terms of four successive stages,<sup>11</sup> namely,

(i) The loading voyage, i.e. the voyage of the chartered vessel from wherever she is at the date of the charterparty to the specified place of loading.

(ii) The loading operation, i.e. the delivery of the cargo to the vessel at the place of loading and its stowage on board.

(iii) The carrying voyage, i.e. the voyage of the vessel to the place specified in the charterparty as the place of

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<sup>9</sup> See also, The Darrah [1977] A.C. 157, 164-165(H.L).

<sup>10</sup> These are discussed in Chapter 3, supra.

<sup>11</sup> Per Lord Diplock, The Johanna Oldendorff [1974] A.C. 497, 556(H.L); Also, Donaldson, J., [1971] 2 Lloyd's Rep. 96, 98.



delivery.

(iv) The discharging operation, i.e. the delivery of the cargo from the vessel at the place specified in the charterparty as the place of discharge and its receipt there by the charterer or other consignees.

Since each stage cannot commence until the preceding one has ended, the charterer is not obliged to furnish orders regarding the berth to which the vessel should proceed until she has reached the agreed destination.<sup>12</sup> Inherent in this view is the treatment of the port as a well defined entity. Therefore, if the vessel is ordered to a port and she cannot proceed immediately to a berth, she must at least get to the port limits, and not merely be waiting beyond them before the voyage stage can be deemed to have ended. Lord Diplock, who had delivered the leading judgment in The Maratha Envoy concluded that, in practice the "within the port" requirement had not proved difficult of application because of doubts as to the location of the usual waiting place.<sup>13</sup>

But this literal view of what a port encompasses was not one to which the Court of Appeal had subscribed. In what may be described as a "fusion" of the requirements of the Reid test, it was held that a vessel waiting at the usual place, whether outside the port or not, would be regarded to have

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<sup>12</sup> Lord Diplock, The Johanna Oldendorff, p. 557.

<sup>13</sup> [1978] A.C. 1, 9(H.L.).

been placed at the disposition of the charterer.<sup>14</sup> It could be said that the rationale for its decision was based upon the view that the vessel was effectively at the disposition of the charterer at the waiting place, as she would have been in the vicinity of the berth. In view of the fact that the evolution of the expression "at the immediate and effective disposition of the charterer" appears to have taken into account developments such as faster vessels and improved communications links,<sup>15</sup> it is suggested that the usefulness of the "within the port" requirement now needs to be reassessed. It may have been sufficient when advances had not yet been made in maritime transport to stipulate that in order to facilitate the receipt of the charterer's berthing instructions, the vessel should be waiting within the port and as close to the berth as was possible. Under modern conditions, the paramount consideration should be that the vessel is placed at the charterer's effective disposition at the usual or customary waiting place.<sup>16</sup>

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<sup>14</sup> Lord Denning, M.R., The Maratha Envoy [1977] Q.B. 324, 339; Stephenson and Shaw L.J.J., pp. 346 & 351-352. See further, Glara S.S. Corp v Sun Oil Co (1975) A.M.C. 2643, 2646(N.Y. Arb).

<sup>15</sup> *supra*, Chapter 5, pp. 106-112.

<sup>16</sup> See, Benedict on Admiralty (1989) vol. 2b pp. 2-12-2-13. Also Section 6.3, *infra*.

### 6.2.2 Special Clauses

Another factor that might explain the retention of the Reid test lies in the contention that shipowners can employ special clauses to bypass any hardship that its application might otherwise have caused. The difficulties that may result from the increased use of special clauses have already been alluded to in the previous Chapter.<sup>17</sup> Moreover, the divergent views about the ambit of the W.I.B.O.N.<sup>18</sup> clause during the passage of The Maratha Envoy through the Courts further highlights this point. On the one hand, there was the view that the clause could take effect, even if the vessel was waiting outside the port under a port charter,<sup>19</sup> and on the other, there was support for the rule that the clause was only applicable to vessels waiting within the port under a berth charter.<sup>20</sup>

### 6.2.3 Legal Certainty

It is ironic that a possible consequence of the Reid test is that charters to ports with waiting places outside their limits will be converted into berth charters. This had been one of the shortcomings of the functional arrival rules such

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<sup>17</sup> supra, pp. 100-101.

<sup>18</sup> i.e. "whether in berth or not", see further, Chapter 10.

<sup>19</sup> [1977] Q.B. 324, 339-340, 347 & 353 (C.A.).

<sup>20</sup> Per Lord Diplock, [1978] A.C. 1, 14-15 (H.L.).

as the usual place rule and the Parker test.<sup>21</sup> Nevertheless, this point did not influence their Lordships in The Maratha Envoy. Although, it was accepted that a vessel could be at the disposition of the charterer although she was waiting outside the port limits,<sup>22</sup> the decision to observe precedent can be explained by the fact that the appeal had come up only 4 years after The Johanna Oldendorff.<sup>23</sup>

#### **6.2.4 Freight Rates And Market Factors**

Another explanation for the retention of the Reid test relates to the inter-relationship between the freight payable by the charterer, and the allocation of the risk of delay from events which fall beyond the control of both parties. Lord Diplock was of the view that where the shipowner assumes this risk, the freight will be sufficiently high, but if it is assumed by the charterer, a lower freight rate will be charged.<sup>24</sup> This explanation suggests that the mechanics of the chartering market have a direct regulatory effect on the financial position of the parties.<sup>25</sup> The question is whether

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<sup>21</sup> These rules were analysed in Chapters 3 & 4.

<sup>22</sup> The Maratha Envoy [1978] A.C. 1, 13(H.L).

<sup>23</sup> *ibid*, pp. 9-10 & 14.

<sup>24</sup> *ibid*, p. 8.

<sup>25</sup> See also, H. Tiberg, "The Arrived Ship and Demurrage: An English and a Swedish Approach" (1976) 20 Scand. Stud. in Law 257, 259. Contra, D. Davies, "The Arrived Ship Concept" (1977) p. 8, para. 17.

the interdependence between the freight calculations on the one hand, and the length of the laytime and the amount of demurrage on the other, is the only criterion to be considered by the parties?

It is generally accepted that the freight market for voyage charters is cyclical and is influenced principally by the interplay of the forces of supply and demand. Market expansion in a particular trade may lead to an increased demand for vessels, and if the expansionary trend continues, freights will also increase. During short periods of prosperity, the shipowner seeks to employ his vessel in such a way that it can earn sufficient, not only to offset the losses of the lean years, but also to provide during her lifetime, economic benefits comparable with other forms of investment.<sup>26</sup> The increase in freights may become more pronounced if the expansion in a particular trade results in a shortage of vessels in other sectors. Higher freight levels will generally persist until demand begins to level off, or when the deliveries of new vessels increase.

Therefore, the primary consideration in freight calculations appears to be the prevailing market conditions in a particular trade. The freight itself is calculated in terms of cargo tonnage, whilst laytime and demurrage are computed according to the characteristics of the ship, her cargo, and

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<sup>26</sup> C.F.H. Cufley, Ocean Freights and Chartering (1964) 7th Rep. p. 410.

also the perceived local conditions at the ship's destination. Furthermore, demurrage is usually payable per diem. It appears that, the lowest possible freight level will be dictated by market factors rather than the bargaining process between the parties. However, the extent to which the shipowner may be prepared to fix the freight above the lowest level may be open to negotiation.

### **6.3 Alternative Concepts. Test 1: Completion of the Voyage/Vessel at Charterer's Disposition**

In the light of the criticisms that have been directed against the formal test,<sup>27</sup> this Section will evaluate the possible criteria for a replacement test. The first test requires that the vessel must have completed the voyage and further, is at the immediate and effective disposition of the charterer.<sup>28</sup> The predominant judicial view has been that, in the absence of special provisions, the completion of the voyage occurs only after the vessel has arrived within the legal limits of the port.<sup>29</sup> But the limitations of such a rule, particularly within the context of ports which have the

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<sup>27</sup> "The Arrived Ship" (1978) 94 L.Q.R. 1, 3; D.G. Powles, "An Anchorage for the Arrived Ship" (1979) J.B.L. 115, 122-123.

<sup>28</sup> For a discussion of the historical development and the meaning of the expression "at the immediate and effective disposition of the charterer": Chapter 5, pp. 106-112.

<sup>29</sup> Lord Diplock, The Maratha Envoy [1978] A.C. 1, 14(H.L). Also, the cases referred to in Chapter 5, fn 1.

usual or customary anchorages<sup>30</sup> for vessels situated beyond their specified limits or ports which lack expressly defined limits, have already been discussed.<sup>31</sup> Instead of emphasizing the limits of the port, the completion of the voyage should turn on whether the vessel has reached the usual or customary waiting place. However, in those ports which do not have recognized waiting places, the completion of the voyage may have to be ascertained by considering whether the vessel is waiting at a place where she may be subject to the general powers of a Port Authority.

The advantages of this new test can be summarized under three headings, viz,

**(i) Flexibility**

Although it may be true that the ascertainment of port limits in some countries may not be too difficult, in the case of those countries where the port limits have not been delineated, or alternatively, where the port limits have been defined but the documents indicating the extent of the port are not readily available to the general public, a less rigid

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<sup>30</sup> It is suggested that the usual or customary anchorage refers to a waiting place specially designated for that purpose by the Port Authority, or a place where vessels are obliged to wait but not under the direction of the Port Authority. Both types of waiting places have been incorporated within the definition of "port" which is included in the Charterparty Laytime Definitions 1980. See further, pp. 141-142, *infra*.

<sup>31</sup> Chapter 5, pp. 103-106.

test such as that which is proposed would obviate the need to make lengthy, and possibly expensive investigations about the existence (or otherwise) of port limits.

Where usual waiting places are located outside the legal limits, the new test will enable the shipowner to count laytime as soon as the vessel is ready and is clearly at the charterer's disposition. This would eliminate the illogicality of having an arrival rule that produces different sets of results with respect to ports of a similar size merely on the basis of the location of their usual or customary waiting places.<sup>32</sup>

It is also possible for the port limits to be temporarily extended in order to cope with increased traffic. What is not immediately clear from the wording of the Reid test is whether under those circumstances, the relevant limits should be the permanent limits, or the prevailing limits at the time that the vessel gets to the port. As the proposed test does not ascribe any importance to the port limits, it should be more adaptable to temporary changes of this nature.

#### **(ii) Uniformity of the Law**

Another reason for suggesting a replacement for the formal test relates to the interests of achieving uniformity of the law in the most commercially significant jurisdictions. At the moment, the outcome of a dispute may depend upon where

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<sup>32</sup> D. Davis, The Commencement of Laytime (1987) p. 10.



its settlement is sought.

In contrast to the position in England, the law in America has progressively moved towards a more expansive definition of arrival.<sup>33</sup> In Maritime Bulk Carriers v Garnac Grain Co(The Polyfreedom),<sup>34</sup> a majority of the arbitrators ruled that a vessel that had been compelled by congestion to wait at the usual place outside the port of Rotterdam was an "arrived ship". Some of the crucial points in the shipowner's favour were the vessel's position at the usual anchorage, and at a place where she was subject to some control by the Port Authority. Also, the panel was of the opinion that the W.I.B.O.N. provision would have been rendered ineffective if it had decided that the notice of readiness could not be issued until just before the vessel berthed. Although, Lord Denning, M.R. had supported his judgment in The Maratha Envoy on the basis of The Polyfreedom award, Lord Diplock ruled that as the English rules on the subjects of arrival and the scope of W.I.B.O.N. were very explicit, there was no need to look to a foreign system.<sup>35</sup>

In U.S.A. v Overseas Oil Carriers Inc.,<sup>36</sup> the Court

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<sup>33</sup> See, Benedict on Admiralty, p. 2-14. For an account of the early stages of its development, see, Chapter 3, pp. 54-57; Chapter 4, pp. 80-87, supra.

<sup>34</sup> (1975) A.M.C. 1826(N.Y.Arb).

<sup>35</sup> The Maratha Envoy [1978] A.C. 1, 15(H.L). See further, The Kyzikos [1988] 3 W.L.R. 858(H.L).

<sup>36</sup> (1981) A.M.C. 971, 975-976(SDNY,1980).

similarly adopted a less rigid view of arrival. It was held that to require a vessel with excessive draft, in order to "arrive", to enter a harbour without first lightening its cargo would be highly unrealistic. Arrival would be effective from the time that the vessel started to wait for a lighter. In Caribbean Maritime Co, Ltd v Directorate General of Commerce, Saigon,<sup>37</sup> the arbitrators unanimously decided that a vessel that was waiting 75 miles (121 km) away from the berthing area of Saigon Port was an "arrived ship". This was in spite of the fact that, contrary to the terms of the charterparty, the vessel had not obtained Customs entry. In Trans-American Steamship Corpn v Riviana Int. Inc.,<sup>38</sup> the ship was delayed in berthing because the consignee had not provided the necessary port documentation. The Court also held that the vessel had arrived from the time that she started to wait 6 miles (9.7 km) off the port of Bandar Abbas (Iran).

The position is not different in some of the decisions and awards that have emanated from the civil law systems. In a French award, M.S. Chryssoula II,<sup>39</sup> it was held that a vessel would be deemed to have arrived from the time she starts to wait "within the port there, where waiting ships habitually and normally wait for a berth to be made

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<sup>37</sup> (1970) A.M.C. 945(N.Y.Arb). Contra, Venore Transp. Co. v President of India (1973) A.M.C. 1301(SDNY,1972).

<sup>38</sup> (1983) A.M.C. 196(SDNY,1982).

<sup>39</sup> Reported in (1978) E.T.L. 358.

available." Although, this test appears to be analogous to the Reid test, the fact that the English theory of arrival was specifically rejected may suggest that this approach seeks to only emphasize the status of the waiting place.

In the Scandinavian countries, i.e. Sweden, Norway, Denmark and Finland, arrival is also viewed as an elastic concept.<sup>40</sup> If the vessel cannot immediately proceed to a berth, the shipowner may give notice and the laytime can start to count from the time that the vessel is within the locality of the port. However, the locality of the port is not evaluated by reference to the port limits.<sup>41</sup> If the voyage is considered to be substantially performed, the question that has to be decided is whether the cause of delay arose within the charterer's or shipowner's sphere of duties.<sup>42</sup> As a general rule, port or berth congestion is deemed to be a risk that falls within the charterer's sector, whilst navigational risks remain the shipowner's responsibility.

It is pertinent to consider the ideal objective of achieving harmony between the common and civil law systems.<sup>43</sup> It is likely that if businessmen think that their interests

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<sup>40</sup> H. Tiberg, The Law of Demurrage (1979) p. 231.

<sup>41</sup> See, H. Tiberg, "The Arrived Ship and Demurrage: An English and a Swedish Approach", pp. 262-263.

<sup>42</sup> *ibid.*

<sup>43</sup> Re uniformity in the common law systems: Lord Roskill, "Half a Century of Commercial Law 1930-1980" Holdsworth Lecture 1980, p. 6. Also, Holmes, J. in Eliza Lines 199 U.S. 119, 128(1 CCA, 1895).

are better served in certain jurisdictions as opposed to others, they may seek the resolution of their disputes in "more favourable" jurisdictions.<sup>44</sup> This may result in some jurisdictions experiencing congestion in the disposal of actions, and consequently, increases in the costs of litigation or arbitration.

**(iii) The Effect on Special Clauses**

Quite apart from its pragmatic consequences, it appears that from a legal point of view, the replacement of the Reid test will have a considerable impact on the interpretation of those special clauses such as W.I.B.O.N. and W.I.P.O.N.<sup>45</sup> that are meant to advance the commencement of laytime. The general rule has been that the W.I.B.O.N. clause is only applicable to vessels waiting within the port under a berth charter,<sup>46</sup> whilst W.I.P.O.N. is available to vessels waiting outside the port under a port charter.<sup>47</sup> But under the proposed test, whether the vessel lies inside or outside the port will no longer be a material point and it is likely that the distinction between these provisions will disappear. Such

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<sup>44</sup> See, M. Summerskill, "Sea Links - Maritime Lawyers and the Market Place" [1986] L.M.C.L.Q. 205, 209.

<sup>45</sup> i.e. "whether in port or not". These clauses are evaluated in Chapter 10, *infra*.

<sup>46</sup> Lord Diplock in The Maratha Envoy [1978] A.C. 1, 14(H.L).

<sup>47</sup> Per Staughton, J., The Adolf Leonhardt [1986] 2 Lloyd's Rep. 395, 402.

a result has already become evident in some of the Italian and French arbitral awards.<sup>48</sup> It is perhaps the case that, an expansive concept of arrival will make it superfluous to include in charterparties special clauses that advance the commencement of laytime.

Finally, even in those circumstances where a vessel has to wait for a berth a long way off the port, it is suggested that the guiding principle should still be whether such a place constitutes the usual or customary waiting place for the port, or whether it falls within the Port Authority's general jurisdiction. If one or the other is applicable, the vessel should be regarded as an "arrived ship". If not, the waiting should be at the shipowner's expense.

#### **6.3.1 Test 2: Readiness of the Vessel**

Another possible test may require that the vessel must be ready herself, and must have completed all the necessary port procedures and formalities. Such a test confuses the issues because it makes arrival in terms of the completion of the loading or carrying voyage dependent on the vessel's legal and physical readiness. Legal readiness refers to compliance with port formalities and documentation requirements, whilst physical readiness describes the state of readiness of the

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<sup>48</sup> H. Tiberg, The Law of Demurrage, pp. 233-234.

ship's holds and the loading/discharging gear.<sup>49</sup> Although, a consequence of the early rules of arrival might have been that independent consideration was not always given to the vessel's state of readiness,<sup>50</sup> by the early part of the 19th century, a clear separation between the concepts of arrival and readiness was already evident.<sup>51</sup> Therefore, it is possible for a vessel to have arrived in the legal sense, irrespective of her state of readiness.

Secondly, the "de minimis rule" discussed in cases such as Armement Adolf Deppe v Robinson,<sup>52</sup> The Delian Spirit,<sup>53</sup> and The Tres Flores,<sup>54</sup> provides that minimal unreadiness either with respect to the vessel's loading/discharging gear, or the compliance with port documentation requirements will not bar the vessel from issuing the notice of readiness,

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<sup>49</sup> Both concepts are explained in cases such as Groves, Maclean v Volkart (1884) C. & E. 309; The Austin Friars (1894) 10 T.L.R. 633; Noemijulia S.S. Co v Minister of Food [1951] 1 K.B. 223(C.A); The Tres Flores [1974] Q.B. 264(C.A); The Mexico 1 [1990] 1 Lloyd's Rep. 507(C.A); The Virginia M [1989] 1 Lloyd's Rep. 603.

<sup>50</sup> These rules are discussed in Chapter 3, supra. They had the effect in most cases of making the commencement of laytime and berthing almost simultaneous. As a result, very little attention would probably have been paid to the vessel's state of readiness until she was at least very close to the berth.

<sup>51</sup> There are separate references in early treatises such as C. Abbott, A Treatise of the Law Relative to Merchant Ships and Seamen (1802) p. 150. Also, Scrutton on Charterparties (1886) p. 77.

<sup>52</sup> [1917] 2 K.B. 204(C.A).

<sup>53</sup> [1972] 1 Q.B. 103(C.A).

<sup>54</sup> [1974] Q.B. 264(C.A).

provided complete readiness can be attained without any significant delay, or alternatively, if the port procedures are mere formalities. In the light of such a rule, it would be unduly restrictive to propose that a vessel should not be considered to be an "arrived ship" until the minimal unreadiness has been rectified. If, for example, free pratique, i.e. health clearance, amounts to a mere formality in a particular port and is usually not granted until the vessel gets into a berth, a consequence of this test would be to convert a dock or port charter into a berth charter.

### **6.3.2 Test 3: "As Far as the Vessel Can Proceed"**

Alternatively, there could be a test which stipulates that the vessel must have gone as far as she can before she can be regarded as an "arrived ship".<sup>55</sup> It is suggested that such a test may be too widely drawn to have any practical application because,

(i) It is not clear whether laytime will start to count whatever the obstructions that have caused delay to the vessel. As it stands, the test may allow the shipowner to stop anywhere at sea so as to transfer navigational risks, for which he is normally responsible to the charterer. It is noted

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<sup>55</sup> Benedict on Admiralty, p. 2-12. Cf, The effect of the near clause, i.e. "so near thereto as she may safely get," see, Dahl v Nelson, Donkin & Ors (1881) 6 App. Cas. 38(H.L); Athamas (The Owners) v Dig Vijay Cement Co Ltd [1963] 1 Lloyd's Rep. 287(C.A). Cf, Schilizzi v Derry (1885) 4 E. & B. 873.

that in C.A.O. Navigation S.A. v Junta Nacional de Granos,<sup>56</sup> an American arbitral panel unanimously decided that a vessel waiting 583 km from the loading port because of navigational obstructions was not an "arrived ship". Even in the absence of ordinary navigational difficulties, the shipowner may rely on the test where the vessel has had to wait a long way from the port, for example, in order to join a convoy.

(ii) Also, the proposed test does not expressly indicate whether the shipowner can immediately count notice time,<sup>57</sup> (where applicable) and laytime, as soon as the ship is delayed or whether he would have to wait until it is clear that the obstruction cannot be overcome by reasonable means within a reasonable period of time.<sup>58</sup>

#### **6.3.3 Test 4: Abolition of the Concept of Arrival**

The abandonment of the concept of arrival, and the distinction between the various types of charters forms the basis of the fourth possible test.<sup>59</sup> It is proposed that the

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<sup>56</sup> S.M.A. Award Service Ref. No: 2379, summarized in Fairplay International Shipping Weekly, November 12th, 1987 p. 40.

<sup>57</sup> In some charterparties, eg, Synacomex, Cl 6; Baltimore Form C Grain Charter, Cl 14; Cemenco, Cl 5; Gencon, Cl 6(c), laytime does not run as soon as the notice has been accepted by the charterer, but is postponed until after the expiration of a specified period, i.e. the notice time.

<sup>58</sup> Cf, The views of Brett, L.J. in Nelson v Dahl (1879) 12 Ch.D. 568, 593(C.A).

<sup>59</sup> See, F. Berlingieri, "The Allocation of Risk of Delay in Voyage Charter Parties" (1977) 8 J.M.L.C. 497, 503.



"time lost" clause<sup>60</sup> should be included in all charters. The final destination in all charters will be the berth, but if a vessel is delayed off the port by events such as congestion, the waiting time counts as laytime. Navigational risks will remain the shipowner's responsibility.

This test produces difficulties of interpretation with respect to certain issues.

(i) If all the laytime has been exhausted either before or after arrival at the anchorage, the question is whether the shipowner is still expected to give a notice of readiness when the vessel berths, and should the notice time, (where applicable), still run? It could be argued that if the charterparty contains a notice provision, the shipowner is still bound, as a matter of contract to issue the notice of readiness as soon as the vessel berths.<sup>61</sup> However, there is authority to the effect that if the charterer already has knowledge of the vessel's state of readiness, it may not be necessary to tender notice.<sup>62</sup> The real issue must be whether any useful commercial purpose is served by giving notice when the laytime has already been exhausted.

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<sup>60</sup> i.e. Time lost waiting for a berth to count as laytime or loading/discharging time. See, Gencon, Cl 6 and The Darrah [1977] A.C. 157(H.L).

<sup>61</sup> See, The Mexico 1 [1990] 1 Lloyd's Rep. 507(C.A).

<sup>62</sup> Franco-British S.S. Co v Watson & Youell Shipping Agency (1921) 9 Ll.L. Rep. 282. As a general rule, notice is usually not required when the vessel arrives at the discharging port.

With respect to the notice time, recent decisions which have reinforced the maxim, "once on demurrage, always on demurrage" suggest that the charterer would not be able to insist on using the notice time without a clearly worded stipulation to that effect,<sup>63</sup> but it has been contended that this approach may be tantamount to depriving the charterer of a contractual benefit.<sup>64</sup>

In order to minimise the incidence of disputes, the parties should formulate specific provisions to deal with these issues. It is noted that, under the definition of the "time lost" clause that is included in the Charterparty Laytime Definitions 1980,<sup>65</sup> it is explicitly stated that notice will not be necessary, and the notice time will not count, once the vessel is on demurrage. However, these Definitions are only applicable to charterparties by the express agreement of the parties.

(ii) Another problem in attempting to imply the "time lost" clause in all charters relates to the fact that the interpretation of certain aspects of the clause has not

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<sup>63</sup> See, The Dias [1978] 1 Lloyd's Rep. 325 (H.L.); The Tsukuba Maru [1979] 1 Lloyd's Rep. 459; The Delian Leto [1983] 2 Lloyd's Rep. 496; Marc Rich & Co v Tourloti Compania Naviera S.A. [1988] 2 Lloyd's Rep. 101 (C.A). Also, American decisions such as Continental Grain Co v Armour Fertilizer Works (1938) A.M.C. 414 (SDNY, 1938) and U.S.A. v Atlantic Refining Co (1953) A.M.C. 554 (DCNJ, 1951). Cf, Steamship Co of 1949 v Montmorency Shipping Ltd (1954) A.M.C. 519 (Mont.Arb).

<sup>64</sup> J. Trappe, "Laytime Problems and Comparison of Law" [1986] L.M.C.L.Q. 251, 257.

<sup>65</sup> See, appendix i.

been uniform. Under English law, the waiting time is not considered to be an independent time code. Therefore it is subject to the laytime exceptions.<sup>66</sup> On the other hand, some Continental tribunals appear to view this period of time as running without any interruptions.<sup>67</sup> This means that in the latter jurisdictions, the shipowner may benefit financially if the vessel happens to be waiting for a berth during the period of a holiday or weekend. Whereas, if the vessel had proceeded straight to her berth, such periods would not have counted by virtue of the laytime exceptions.

(iii) The case of LASH and BOB vessels, i.e. "Lighters Aboard Ship" and "Barges on Board". These were first introduced in 1969, and they now operate mainly between the U.S. Gulf ports and Europe. The system requires the "parent ship" to carry on board a complement of fully loaded lighters or barges. Upon arrival outside the port, the lighters or barges are off-loaded by means of ship mounted gantry cranes or elevators, and if they are not self-propelled, they are towed ashore. The converse procedure then takes place with a new set of fully loaded lighters or barges. This process eliminates the need to employ shore-based facilities for the loading or

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<sup>66</sup> The Darrah [1977] A.C. 157(H.L). Also, The Radauti [1988] 2 Lloyd's Rep. 416(C.A).

<sup>67</sup> e.g. The M.S. Chryssoula II (1978) E.T.L. 358. See further J. Trappe, "Laytime Problems and Comparison of Law", p. 256.

discharge of cargo.<sup>68</sup>

In circumstances where the parent ship will invariably be waiting beyond the berths, it is not clear whether the laytime should count only from the time that the lighters berth, or whether it should be run down by the parent ship's waiting time? The first option would, if adopted clearly undermine the operational flexibility that is the most significant feature of the LASH and BOB concepts. It would mean that, although the parent ship was ready offshore, and had off loaded the lighters or barges without any significant delays, the commencement of laytime would be determined by the conditions that prevail at the berths which may be some distance away from where the parent ship has anchored.

In view of the fact that it is widely accepted that, the waiting time under the "time lost" clause counts although the vessel is not completely ready, and has not yet issued the notice of readiness,<sup>69</sup> the effect of the second option might be that the shipowner would not be obliged to fulfil other conditions precedent to the commencement of laytime. In a situation where the vessel subsequently proceeds to her appointed berth, the charterer's expectation would be that the

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<sup>68</sup> See further, L.G. Taylor, Seaports (1974) pp. 60-61. Also, U.N.C.T.A.D., Technological Progress in Shipping and its Effect on Ports (1975) TD/B/C.4/129 pp. 6-7 & 14-15.

<sup>69</sup> See, The Massalia [1962] 2 Q.B. 416; The Loucas N [1970] 2 Lloyd's Rep. 482. Cf, The Agios Stylianos [1975] 1 Lloyd's Rep. 426. However, there are a number of American awards that have adopted a different approach, see further, Chapter 11, *infra*.

unused laytime would count from the time that the shipowner issues the notice of readiness, and after the expiration of the notice time, (if any). But where a vessel, by its very nature has to wait permanently beyond the port area, and in view of the special nature of the waiting time, the shipowner may contend that he cannot be compelled to comply with the conditions precedent to the commencement of laytime.

Therefore, the implication of a special provision such as the "time lost" clause may create further problems with respect to matters such as the notice of readiness, notice time and the effect of exceptions clauses on the waiting time. Furthermore, such a test may not be easily adaptable to the requirements of some specialized ships.

#### **6.4 Implementation of the Standard Test**

The problem appears not to have been an arrival concept that is based upon the vessel's destination. What seems to be required, particularly in the domain of port charters where most of the difficulties have arisen, is a test that is (i) flexible enough to adapt to economic and technological changes, (ii) that promotes certainty of the law and uniformity in its application, and (iii) reduces the need to employ special provisions. In the recent Charterparty Laytime Definitions 1980,<sup>70</sup> although a definition of "arrival" is not

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<sup>70</sup> These were issued jointly by the Baltic & International Maritime Conference, (BIMCO); Comite Maritime International, (CMI); Federation of National Associations of Shipbrokers and

provided, "port" is defined as,

"PORT"- means 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 no matter the distance from that area.

If the word "PORT" is not used, but the port is (or is to be) identified by its name, this definition shall still apply"

This definition suggests that, the usual or customary<sup>71</sup> waiting place, irrespective of its distance from the berthing area falls within the port. So that if a vessel waits there for a berth, she is considered to be waiting within the area of the port and should therefore be regarded as an "arrived ship".

In the light of the respective limitations of the functional and formal tests, the formulation of a standard, open-textured test that as much as possible anticipates, and seeks to deal with all the possible conditions that a vessel may encounter at a port is appropriate. From the preceding analysis of the possible tests, Test 1, which can also be regarded as the commercial approach in its widest sense, appears to be the most practical. Consequently, a standard test of arrival should be based on the expansive, commercial approach.

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Agents, (FONASBA); General Council of British Shipping, (GCBS). They comprise 31 definitions of the most commonly used words and phrases in the fields of laytime, see appendix i.

<sup>71</sup> The meaning of usual or customary anchorage is discussed in fn 30.

#### **6.4.1 Judicial Action**

The question which then arises is how to achieve universal application of an expansive, commercial test. There are four possible alternatives. Firstly, by the judicial process itself. However, it is clear that in those jurisdictions where certainty of the law is preferred to commercial expediency, a change to a more flexible approach may not be immediately forthcoming.

#### **6.4.2 National Legislation**

Another option is to institute change through national legislation. In the light of the fact that most common law countries regard contractual terms as a matter best dealt with by the parties themselves, it is unlikely that national legislation on the subject of the "arrived ship" will be promoted. Even in the civil law countries where there are statutory Codes governing the issues of laytime and demurrage, the relevant stipulations are not automatically applicable. They are usually applied in the absence of provisions by the parties themselves, or relevant customs.

#### **6.4.3 International Legislation**

A third possibility is to adopt an international Convention. Although Conventions have been formulated in other

sectors of the carriage of goods by sea,<sup>72</sup> practical difficulties may arise. Initially, matters of procedure such as the selection of the members of the drafting committee, and at a later stage, the monitoring of compliance with the Convention are all possible areas of conflict. Furthermore, experience has shown that the whole ratification process and the assimilation of a Convention into a country's municipal laws may be very protracted.<sup>73</sup>

#### 6.4.4 Contractual Stipulation

The most feasible option is the inclusion of a standard definition, in the nature of those that constitute the Charterparty Laytime Definitions 1980, in the charterparty. Although there is evidence to suggest that the 1980 definitions themselves have not been widely adopted,<sup>74</sup> greater publicity of their efficacy should improve this state of affairs. Chartering brokers could play a useful role in this regard, by advising their clients as to the advantages of including a modern and commercially attuned definition of arrival in their charterparties.

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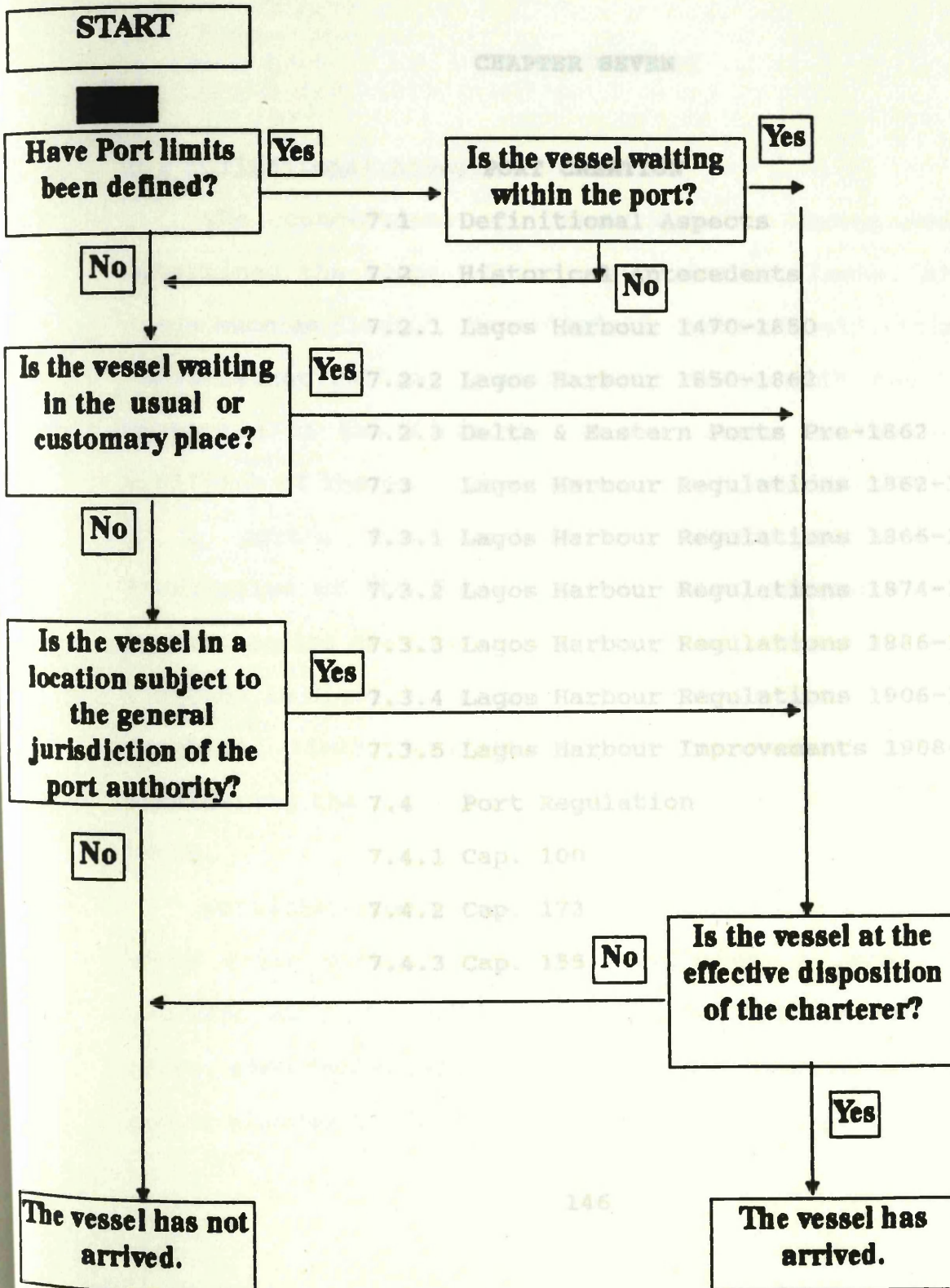
<sup>72</sup> e.g. The Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924, (amended 1968); The United Nations Convention on the Carriage of Goods by Sea, 1978.

<sup>73</sup> F. Berlingieri, "Uniformity in Maritime Law. Implementation of International Conventions" (1987) 18 J.M.L.C. 317.

<sup>74</sup> See, comments by A.E. Morris, Charterparty International No 1 (1984) vol. 1, p. 8.



# STANDARD TEST OF ARRIVAL



## **CHAPTER SEVEN**

### **PORT CREATION**

- 7.1 Definitional Aspects
- 7.2 Historical Antecedents
  - 7.2.1 Lagos Harbour 1470-1850
  - 7.2.2 Lagos Harbour 1850-1862
  - 7.2.3 Delta & Eastern Ports Pre-1862
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  - 7.3.1 Lagos Harbour Regulations 1866-1874
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## CHAPTER SEVEN

### PORT CREATION

#### 7.1 Definitional Aspects

The conceptions of what a port encompasses have determined the scope of successive arrival tests. Although, words such as "legal", "functional", "commercial", "fiscal" or "administrative" may precede port, these with the possible exception of the first two merely relate to the secondary qualities of the port. The primary qualities define the nature of a port's creation, whilst secondary qualities are descriptive of the functions that have been assigned to the port after its creation. This Chapter examines aspects of port creation in Nigeria. The primary objective is to establish the practical limitations of some of the arrival concepts by considering the different phases of the evolution of Nigerian Ports.

Notwithstanding issues of definition, the creation of ports falls within two basic categories. A legal port has specific authority stipulating its appointment, and in some cases, also declaring its limits. Hale's classic definition of a port alludes to the formalistic elements of port creation in

the following terms:

"A port is a haven and somewhat more.

1. It is a place for arriving and unloading of ships or vessels.

2. It hath a superinduction of a civil signature upon it, somewhat of a franchise and privilege,.....

3. It hath a ville or city or borough, that is the capus portus, for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships.

So that a port is quid aggregatum, consisting of somewhat that is natural, viz. an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lye, and a good shore where they may well unlade; something that is artificial, as keys and wharfs, and cranes and warehouses and houses of common receipt; and something that is civil, viz. privileges and franchises, viz jus applicandi, jus mercati and divers other additaments given to it by civil authority."<sup>1</sup>

A more recent definition enumerates the various features of a port in these terms:

"Port. A place for the loading and unloading of cargoes of vessels and the collection of duties or customs upon imports and exports. A place on the seacoast or on a river, where ships stop for the purpose of loading and unloading cargo, or for the purpose of taking on or letting off passengers, from whence they depart, and where they finish their voyage. A port is a place intended for unloading or unloading goods; hence includes the natural shelter surrounding water, as also sheltered water produced by artificial jetties, etc."<sup>2</sup>

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<sup>1</sup> "De Portibus Maris", Chapter 2, in Hargreaves Law Tracts (1787) vol. 1, pp. 46-47. See further, Nigerian Ports Authority v Panalpina (Nig) Ltd & Ors [1972] N.C.L.R. 144, 162(H.C. Lagos).

<sup>2</sup> Black's Law Dictionary (1979) p. 1045.

The use of the conjunctive "and" in the first line of Hale's definition and also of the term "quid aggregatum" suggest that the three stated features of a port must be read together. It may be that the second definition consists of three separate definitions. However, the fact that the three sentences are prefaced by the word "port" may imply that they are meant to jointly constitute the features of a port. Whereas Hale's definition highlights the feature of civil authority, the second definition does not give prominence to this point.

In contrast, the functional port is descriptive of a place where the topography, natural or artificial, makes the loading and discharge of vessels possible.<sup>3</sup> Nigeria's experience prior to 1917 was limited to functional ports, but since that date, legal ports have been successively created.<sup>4</sup>

The nature of legal and functional ports was also considered in Sailing Ship Garston v Hickie.<sup>5</sup> As to the question whether a ship had finally sailed from a port, the Court at first instance and the Court of Appeal applied different criteria. Although both tribunals concluded that the vessel had not finally sailed from the port, the basis for

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<sup>3</sup> Sailing Ship Garston v Hickie (1885) 15 Q.B.D. 580, 587-590(C.A).

<sup>4</sup> See, s. 3, Ports Ordinance, Cap. 100 (1923); s. 3(a), Ports Ordinance, Cap. 173 (1948); s. 6, Ports Act, Cap 155 (1958). Also, L.N. 1917 No. 137; L.N. 1939 No. 17; Declaration of Port Limits Order 1959; Declaration of Port Limits Order 1965; Ports (Declaration of Port Limits) Order 1975.

<sup>5</sup> (1885) 15 Q.B.D. 580(C.A).

Wills, J.'s approach was formalistic in character because it was decided that a port, properly so called meant,

"a place of call for ships, where defined limits have been established by competent authority."<sup>6</sup>

In the Court of Appeal, Brett, M.R. had emphasized the functional elements of port creation. In the description of the commercial area of the port, three features were held to be significant, viz,

(i) A configuration of the land with the sea in such a way that a ship which gets within certain limits is in a place of safety.

(ii) The ability of vessels to load or unload within those limits, and,

(iii) The submission to the authority of the governing body of the port by vessels within the limits so described.<sup>7</sup>

What is clear from Brett, M.R.'s judgment (and also Bowen, L.J.'s),<sup>8</sup> is that a port may be constituted by the mere fact of the possibility of safely loading and discharging cargo in a particular area. In contrast, the existence of a specific authority, e.g. a statute which prescribes the appointment of the port or the delineation of its limits

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<sup>6</sup> *ibid*, p. 583.

<sup>7</sup> *ibid*, p. 588.

<sup>8</sup> Bowen, L.J. had adopted the three characteristics of a port, whilst Bagallay, L.J. emphasized the submission of the vessel to port jurisdiction.

constitutes the essence of Wills, J.'s approach. Consequently, in the study of any Port, it is necessary not only to discuss the functional aspects of its evolution, but also to isolate the genesis of statutory, or other authority relating to the appointment and the definition of its limits.

## **7.2 Historical Antecedents**

Port evolution in Nigeria can be classified into two distinct phases. In the historical phase which predates 1862, there was no statutory regulation of harbours or ports. However, from 1862, statutory regulation of harbours was embarked upon, although this was only in respect of Lagos Harbour. It was not until 1917 that there was statutory regulation of all port activities. By this stage, Lagos had emerged as the primary port for foreign trade. It is for this reason that this Chapter highlights the position of Lagos.

### **7.2.1 Lagos Harbour 1470-1850**

It has been stated that Lagos Port was discovered by the Portuguese in 1471.<sup>9</sup> An alternative view is that the relevant date is 1472.<sup>10</sup> Whatever might be the correct date, it seems

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<sup>9</sup> Nigerian Ports Authority, "Port Congestion in Nigeria and How It Was Tackled by the Nigerian Ports Authority," A paper delivered to the 4th Conference of the Port Management Association of West and Central Africa, August 2nd-6th, 1976, p. 7.

<sup>10</sup> J.W. Blake, European Beginnings in West Africa 1454-1578 (1937) pp. 4-5; The Nigerian Handbook (1953) p. 24; A. Obayemi, "The Yoruba and Edo Speaking Peoples and their

to be generally agreed that foreign contact was not established until the latter part of the 15th century. In the light of Hale's definition, there might have also been an adjoining settlement, but it is claimed that the earliest specific reference to a settlement appears to have been made in 1659 by the Dutch cartographer, Blaeu.<sup>11</sup> If port is simply employed in the functional sense,<sup>12</sup> the reference to "port" should not necessarily raise the connotation of an adjoining settlement. The N.P.A.<sup>13</sup> report<sup>14</sup> refers in the alternative to the Rio de Laguo.<sup>15</sup> This may support the view that, what had been discovered in 1471/72, was the entrance to the sheltered area of water which formed the natural harbour.

Further support for this viewpoint may lie in the written accounts of this era in which there is hardly any mention of trade with Lagos. Although the Portuguese navigator, Pacheco Pereira had described the main trade in the area directly

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Neighbours Before 1600" in J.F.A. Ajayi and M. Crowder, A History of West Africa (1985) vol. 1, p. 258; W.T.W. Morgan, Nigeria (1983) p. 42.

<sup>11</sup> A. Mabogunje, "Lagos - A Study in Urban Geography" Unpublished Ph.D thesis, University of London (1962) pp. 26-27.

<sup>12</sup> i.e. a place where vessels can be safely loaded or unloaded.

<sup>13</sup> i.e. Nigerian Ports Authority.

<sup>14</sup> supra, fn 9.

<sup>15</sup> i.e. the channel connecting the Lagos Lagoon to the sea, see, map of Lagos Harbour and Port, appendix ii.



north of Lagos as slavery, he had not described trade in the area around Lagos which he probably would have passed through.<sup>16</sup>

Voyages performed by English as opposed to Portuguese seamen in the 16th century do not appear to provide any evidence to the contrary. The majority of these voyages were concluded at places further west along the coast, i.e. Upper Guinea (now Sierra Leone), and Mina (The Gold Coast, now Ghana), so that the only voyages that are perhaps relevant for present purposes are those conducted by Thomas Wyndham to Benin in 1553 and William Towerson to Guinea in 1577.<sup>17</sup>

The summary of Wyndham's voyage did not mention any contact with Lagos.<sup>18</sup> It merely stated that he had sailed from Mina, eastwards to Benin. In contrast, the account of Towerson's final voyage to Guinea and Mina referred to Laguna, the Portuguese word for lagoon, from which Lagos is derived. Towerson had sailed from Plymouth (England) in convoy on January 30th, 1577. By March 10th, he had reached the West African coast. Although a small group went ashore at Laguna, no description was given of any settlement neither was there any

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<sup>16</sup> D. Pacheco Pereira, Esmeraldo de Situ Orbis (1505-1508), G.H.T. Kimble (trans.), (1937) p. 124.

<sup>17</sup> Other major voyages to the West African coast were William Hawkins' three voyages to Guinea between 1530-32; John Lok's to Mina in 1554 and the first two voyages to Mina by William Towerson in 1555 and 1556.

<sup>18</sup> R. Hakluyt, The Principal Navigations, Voyages and Traffiques of the English Nation (1903-1905) vol. 6, pp. 239-240 & 248.

reference to trade.<sup>19</sup>

The lack of references to the settlement of Lagos might have been due to the fact that vessels did not sail there. Alternatively, trading activities on that part of the coast might have been simply omitted from contemporary accounts of these voyages. With respect to the second argument, it has been said that the account of Wyndham's voyage was incomplete in certain respects, e.g. trading places visited on the Gold Coast were omitted.<sup>20</sup> So that it may be that brief stops at Lagos were not recorded. But it is pointed out by the same writer that the omissions were only of minor value and that the account was accurate with respect to important particulars.

In the light of the navigational difficulties that were encountered by vessels trading along the West African coast, the first argument seems to be the more plausible. Vessels might have decided to avoid Lagos on account of the sandbars which impeded access to the natural harbour. Its notoriety lay in the fact that it was unstable and shifted constantly so that it was not safe to rely entirely on maps and charts.<sup>21</sup> It seems that although there was some knowledge about the existence of the sheltered harbour, the "Bar" deterred foreign

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<sup>19</sup> *ibid.*

<sup>20</sup> J.W. Blake (ed.), Europeans in West Africa 1450-1560 (1942) vol. 2, pp. 254-259.

<sup>21</sup> R.S. Smith, The Lagos Consulate 1851-1861 (1978) p. 98. See further, C. Buckle, Landforms in Africa (1978) p. 201.

sailors and merchants from making inquiries about trading prospects in the interior.

### **7.2.2 Lagos Harbour 1850-1862**

The emergence of Lagos as a trading centre of importance has been attributed to the impact of the anti-slavery measures, such as the institution of patrols by British naval squadrons. These had adversely affected trade in the major slaving centres near Lagos such as Whydah and Porto-Novo.<sup>22</sup> The location of Lagos in a network of creeks and lagoons created a haven for slave traders attempting to evade the patrols. Moreover, they were protected by the then King of Lagos, Oba Kosoko.

This state of affairs persisted until December 1851, when the settlement was bombarded by the British. On January 1st, 1852, Oba Kosoko's successor, Oba Akitoye finally signed a treaty abolishing slavery. This period of its history pinpoints the first time that the settlement and its surrounding waters were used for the purposes of large scale commercial enterprise involving sea-going vessels. The demise of the slave trade did not affect its growing influence because Lagos rapidly became a centre for the palm oil and

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<sup>22</sup> Both towns are now located in the Republic of Benin, (formerly Dahomey).

ivory trades.<sup>23</sup> The inability to obtain information about vessels conducting foreign trade in the area around Lagos was attributed to the fact that there were no parties on the spot who could collect the necessary information. It was proposed that in future, the appropriate forms were to be left with resident-agents.<sup>24</sup>

In spite of the bombardment of 1851, sovereign rights over Lagos still vested in the Oba. This situation changed on August 6th, 1861, when Oba Docemo signed the Treaty of Cession. The scope of the Treaty was decided in Attorney-General v John Holt & Ors,<sup>25</sup> where it was held that the words used were explicit and unambiguous. Its effect was to cede to the British, the sovereignty as well as the territory of the Port and Island of Lagos. However, it was held that there was an obligation on the Colonial Government to respect existing rights of private ownership.

Although, in art. 6, Treaty of Abolition of Slavery 1852, there was a reference to the "... ports.... within the

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<sup>23</sup> On the commercial position of Lagos in the 19th century: J.H. Reading, Voyage Along the Western Coast of Newest Africa (1901) p. 96; R. Burton, "How Lagos Became a Colony" in F. Lumley, Nigeria. The Land, its Art and its Peoples; An Anthology (1974) pp. 48-51.

<sup>24</sup> Letter by J. Beecroft to the British Foreign & Colonial Office, F.O. 2/7, p. 11.

<sup>25</sup> 2 N.L.R. 1(P.C). See further, Oduntan Onisiwo v Attorney-General 2 N.L.R. 79, 88 & 98(S.C); Amodu Tijani v Sec. Southern Nigeria [1921] 2 A.C. 399, 407(P.C); Oshodi v Dakolo & Ors 9 N.L.R. 13, 25-27(P.C); Idewu Inasa v Oshodi [1934] A.C. 99, 101(P.C); Oyekan & Ors v Adele (1952) Selected Judgments of W.A.C.A. 87, 90-91.

territories of the King and Chiefs of Lagos,.....," the import of the 1861 Treaty lies in the fact that arts. 1 & 3 contain the first, direct references to the Port of Lagos in any legal document.<sup>26</sup> In both treaties, "port" was probably not employed in the formalistic sense because prior to both dates, there does not appear to have been any compelling evidence that the Obas of Lagos had in any way demarcated specific areas within their domain solely for the purposes of loading or unloading vessels.

It is possible to support this proposition on the basis of some of the facts that came to light in Attorney-General v John Holt & Ors. The Colonial Government had sought a declaration that by virtue of the Treaty of Cession, it was seised of and entitled to the foreshore and the bed of the Lagos Lagoon and surrounding creeks. Although, the meaning of "port" was not a matter that was raised in argument or dealt with in the various judgments, the case is still significant because of the evidence that was given about the customary law relating to the foreshore and the bed of the lagoon. That evidence can be classified into three categories:

(i) That customary law knew of no rights below high water mark.

(ii) That the foreshore (Etisha), belonged to the owner of the land who had a right to forbid others from using it.

(iii) That whoever owned the land by the water, owned the

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<sup>26</sup> See, appendix iii.

waterside and his land extended to where the water covered his head.

Osborne, C.J. ruled that although the evidence on the issue of customary law was scant, he would attach the greatest importance to the second class of evidence. His conclusion was that under customary law, the owner of the land by the water, also owned the foreshore. Any grantee of such land was only entitled to use it for access to the water, for landing and embarking, and for mooring and hauling up his canoes.<sup>27</sup> The evidence did not elaborate on the nature of rights beyond the foreshore. However, the public right of fishery in the waters of the Lagoon was acknowledged.<sup>28</sup>

It is necessary at this juncture to highlight a feature of customary land tenure. Prior to the influx of ideas from abroad, the right of alienation was unknown. Land either belonged to the community as a whole, or to a particular family. Therefore, any grantee of such land could not dispose of it as he wished.<sup>29</sup> By the mid 19th century, the practice of alienation had become widespread and the Oba had begun to dispose of property by issuing written grants. Those that were executed by Oba Docemo, in relation to riparian properties

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<sup>27</sup> Attorney-General v John Holt & Ors 2 N.L.R. 1, 8.

<sup>28</sup> The public right of fishery and navigation in tidal waters was also recognized in Olaye v Nigerian Agip Oil Co Ltd (1973) 2 R.S.L.R. 96, 97(H.C. Port Harcourt).

<sup>29</sup> G.B.A. Coker, Family Property Among the Yorubas (1966) pp. 209-210 & 215-216.

prior to 1861, appear to have been only limited to dry land since they did not expressly allude to the foreshore.<sup>30</sup> Therefore, it seems that for any boat or canoe seeking to use any of the moorings along the shore, permission would first have to be obtained from the head of a family in the case of family land, or the Oba, in the case of those properties disposed of under a written grant and in which the foreshore was excluded, or a specific individual where the written grant of the property also included the foreshore.

It is also known that by an agreement concluded with foreign merchants on February 28th, 1852, the Oba was receiving import and export duties on goods passing through his domain.<sup>31</sup> However, there is no mention of anchorage dues being imposed by either the Oba or any of his subjects. The significance of anchorage dues lies in the fact that its imposition is regarded as an incident of the proprietorship of a port. In Foreman v Free Fishers of Whitstable,<sup>32</sup> the dispute turned on whether Whitstable was a port. The plaintiff's claim for anchorage dues did not proceed on the basis that it was a customary payment for the use of the soil. Instead, they alleged that from a period beyond memory, they had taken this payment from every vessel anchoring within the

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<sup>30</sup> Per Osbourne, C.J., Attorney-General v John Holt & Ors, p. 7.

<sup>31</sup> R.S. Smith, The Lagos Consulate 1851-1861, p. 36.

<sup>32</sup> (1869) L.R. 4. H.L. 266, 280 & 285-287 (H.L.).

limits of the anchorage. Their Lordships held that anchorage dues could be claimed if it could be proved that the vessel had anchored within the precincts of a port or harbour or, alternatively, if a specific service or aid to navigation had been rendered. The plaintiff's claim succeeded because it was held that the defendant's vessel had been waiting within a port.

In the light of the foregoing, the few known facts about Lagos, circa 1860 can now be briefly summarized.

(i) The location of Lagos provided a natural shelter for vessels.

(ii) Export and import duties were paid to the Oba.

(iii) Permission to land or use moorings had to be obtained from the Oba, or some of his subjects.

(iv) Anchorage dues were probably not received from those who used the waters surrounding the settlement.

Although, some of these facts may establish the existence of a functional port, they cannot without more, support the existence of a legal port. What is required is evidence that the Oba, being the sovereign over the territory of Lagos, expressly demarcated the limits of an area, within which the loading and unloading of vessels was to be carried out.

Consequently, the procedure at Lagos would probably have been very straightforward. Vessels arriving at the "Bar", if they were small enough to negotiate it, would proceed further into the inland waters where they would be met by boats and



canoes into which their cargoes would be transhipped. If they could not proceed further inland, the transshipment would occur where the various ships had dropped anchor beyond the "Bar". If the condition at the "Bar" was too rough, cargoes were sometimes transhipped to Forcados, 241 km to the east, from where they would be forwarded to Lagos.<sup>33</sup> The converse procedure would apply in the case of export cargoes.

At this stage, the problems of delay arising from navigational conditions as opposed to port congestion would have been prevalent. It was explained in Chapter 3 that in the early 19th century, the Courts had applied the berthing or the usual place rule to legal problems relating to the arrival of vessels. It appears that the application of either rule to the conditions at Lagos would have created real difficulties. Since the facilities for the loading and unloading of vessels would have been very simple, orders to proceed to Lagos would not have been too specific. Vessels would have been required to proceed to Lagos simpliciter and not to a particular berth or pier. It is suggested that any vessel which was able to get beyond the "Bar" and then anchor within the inland waters would probably have been considered to be an "arrived ship" because she was waiting within an area where ships were usually loaded or unloaded. The status of a vessel waiting

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<sup>33</sup> N.P.A., Bilingual Magazine, 2nd edn. p. 29. Also. H.P. White, "The Morphological Development of West African Seaports" in B.S. Hoyle and D. Hilling, Seaport Development in Tropical Africa (1970) pp. 21-22.

offshore would not have been so clearcut. It is possible that the shipowner could have been held responsible for the delay on the grounds that, the vessel was waiting outside the natural boundaries of the harbour and the cause of delay arose from navigational difficulties, the risk of which were normally borne by the shipowner.

Such an approach would have been unfavourable to shipowners because in order to bypass it, they would have had to resort to smaller vessels. A possible consequence would have been the reduction of freights since they would have been obliged to carry smaller cargoes. What seems to have happened was that sailing ships were accompanied by much smaller vessels, variously described as pinnaces, barks or caravels, which were generally under 50 tons. Whilst the main vessels anchored off the coast, the smaller craft were sent ashore. This practice might have improved the shipowner's position since the smaller vessels would have carried the cargo further inland and should have been regarded as "arrived ships" as soon as they were at any of the usual mooring places.

Even if in the alternative, a vessel waiting offshore was considered to have been waiting within the harbour, the shipowner's position might not have been appreciably better. There was the issue of proximity to the usual loading/discharging places. In the pre-1850 cases, it was emphasized that, the vessel would not be deemed to have arrived unless she was proximate to the usual loading or

unloading places. The underlying policy being the reduction of demurrage claims.

### 7.2.3 Delta and Eastern Ports<sup>34</sup> Pre-1862

Lagos Harbour achieved prominence on account of the anti-slavery measures instituted at the beginning of the 19th century. However, prior to 1800, foreign traders had actively participated in the palm oil and slave trades at ports<sup>35</sup> such as Gwato, Brass, Akassa, Forcados, Bonny and Calabar. Access to these ports was also impeded by submarine sandbars, but unlike the position at the Lagos Bar, the water depths across these sandbars exceeded 10 feet (3.05m).<sup>36</sup> In the case of the Bonny Bar, water depths of 20 feet (6.10m) were possible.<sup>37</sup> This probably explains the concentration of shipping activities in the Delta and Eastern Ports between 1500 and 1800.

The emergence of Lagos as a major trading centre coupled with the progressive shoaling up of access channels, resulted in the decline of some of the Delta and Eastern Ports, for

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<sup>34</sup> For the positions of the major Delta and Eastern Ports, see, map of Nigerian Ports, appendix iv.

<sup>35</sup> The term "port" is employed in the functional sense.

<sup>36</sup> B. Ogundana, "The Location Factor in Changing Seaport Significance in Nigeria" (1971) 14 Nig.Geo.J. 71, 73-75.

<sup>37</sup> *ibid.*

example Gwato, Brass and Akassa.<sup>38</sup> Nonetheless, Calabar enjoyed a brief period of prosperity between 1670 and 1750, although it was later overshadowed by Bonny which had a better seaward approach.<sup>39</sup>

As in the case of Lagos, the Delta and Eastern Ports are estuarine/fluviial ports located at variable distances from the sea. Consequently, the preceding discussion about the ascertainment of arrival due to delays at sandbars would also apply.

### 7.3 Lagos Harbour Regulations 1862-1866

The importance of maritime trade to the settlement of Lagos is apparent from the fact that its earliest legislation dealt with issues relating to the collection of import/export duties, and the regulation and safety of vessels. The stated purpose of Ord. No. 1 1862, was to secure revenue for the Government by the levying of import and export duties at all Ports within the territory. One of the Ports referred to was that of Lagos. Although, ss. 1 & 2 stipulated the rate of duty that would be payable, viz, 2% ad valorem on all imports and exports, (with a few exceptions), the extent of the fiscal

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<sup>38</sup> *ibid*, pp. 71-73. Also, H.P. White, "The Morphological Development of West African Seaports" in B.S. Hoyle and D. Hilling (eds.), Seaport Development in Tropical Africa (1970) p. 23.

<sup>39</sup> B. Ogundana, "Patterns and Problems of Seaport Evolution in Nigeria" in Seaport Development in Tropical Africa, *op cit*, 171-173.

port, i.e. the limits within which the duty was to be collected were not specified. Neither was there in the alternative, an Interpretation Section. In common with the legislation of this period, Ord. No 1 was very short, consisting of just seven Sections.

The next Ordinance, No. 2 1862, was described as,

"An Ordinance for the regulation of the Port and Harbour of Lagos and the safety of vessels entering and leaving the same."

In its operative parts, with the exception of s. 5, all the references were in respect of the Harbour of Lagos. However, s. 5, the long title and the preamble referred to the Port of Lagos. As in the case of Ord. No. 1, the extent of the port limits was not defined in the statute. Consequently, the reference to "port" appears to have been superfluous since it would have had the same meaning as harbour, i.e. a natural shelter where ships can be safely loaded or unloaded.

Ord. No 3. 1862, which consisted of four Sections did not contain any reference to the Port of Lagos. It was described as,

"An Ordinance to provide sanitary regulations for vessels coming into the Harbour of Lagos."

Its usefulness lies in the fact that it may throw some light on what was meant by the Harbour of Lagos in the pre-1900 statutes. Whereas its long title referred to the Harbour of Lagos, the preamble referred to the Lagos Lagoon. It may be

that the Harbour area coincided with that of the Lagoon. However, the available evidence suggests that most of the mooring places were not situated along the shores of the Lagoon itself but were located alongside the eastern bank of the channel connecting the lagoon to the sea.<sup>40</sup> It was probably this channel that constituted the harbour area.

Another relevant statute in this period was Ord. No. 6 1863 which was of a similar length to Ord. No. 2 1862. Its long title and preamble, in addition to s. 5, contained references to the Port of Lagos. It differed from the latter in that it contained more detailed provisions relating to pilotage, for example,

(i) s. 1, Ord. No. 2 1862, provided in absolute terms that no vessel was to be taken into or out of the Harbour without a pilot, but s. 1, Ord. No. 6 1863, distinguished between entry into the Harbour and departure from it. In the former situation, only vessels not belonging to Lagos were under the the necessity of taking on a pilot, and then only if one should have provided his services. The statute itself did not define the meaning of "vessels belonging to Lagos." It could have meant vessels belonging to,

- (a) The Government of the Settlement of Lagos, or,
- (b) Persons resident in, or carrying on some business in Lagos, or,

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<sup>40</sup> R.S. Smith, The Lagos Consulate 1851-1861, p. 99; Also, W.T.W Morgan, Nigeria, p. 151.

(c) Both (a) and (b).

It is doubtful whether it referred to vessels registered or licensed within the Settlement. Firstly, none of the previous legislation had designated Lagos as a Port of Registry. Secondly, the first statute relating to the licensing of any vessels was not enacted until 1866.<sup>41</sup> It applied only to boats, i.e. undecked or partly decked vessels as opposed to ships. In the case of vessels leaving the Harbour, Ord. No. 6 1863 stipulated that, without any exceptions, they were obliged to take on a pilot.

(ii) Another aspect of Ord. No. 6 was that, s. 7 provided for the first time that vessels discharging dangerous cargoes such as gunpowder, should be handled in a special area of the harbour.<sup>42</sup>

#### 7.3.1 Lagos Harbour Regulations 1866-1874

The only relevant legislation of this period was Ord. No. 3 1868. It repealed Ord. Nos. 2 & 3 1862 and Ord. Nos. 6 & 16 1863. In addition, it provided inter alia, more detailed regulations for the safety of vessels entering, remaining and leaving the Harbour of Lagos. However, there was still no stipulation regarding the boundaries of the Harbour.

In contrast to s. 1, Ord. No. 6 1863, s. 2, Ord. No. 3

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<sup>41</sup> i.e. Ord. No. 3 1866.

<sup>42</sup> Ord. No. 16 1863 was intended as an amendment of Ord. No. 6 1863. It was subsequently repealed by Ord. No. 3 1868.

1868, did not refer to vessels belonging to Lagos. Instead, it provided that all vessels exceeding 20 tons had to employ a licensed Lagos pilot, either upon entering or leaving the Harbour.<sup>43</sup> The most significant features of the 1868 Ordinance were its penalties and enforcement provisions. S. 4 provided that if a vessel entered the Harbour without a licensed pilot, the vessel and its Master would be liable for the pilotage dues as well as a monetary penalty. In the case of a vessel leaving the Harbour, the persons liable were the Owner or Agent in Lagos, if any, or the Master. With respect to the recovery of pilotage dues, it was provided that in the former situation, it was recoverable by the pilot who first offered to take charge of the vessel, whilst in the latter, it was the pilot whose duty it would have been to take charge of the vessel.

Ss. 10-12 were entirely new provisions dealing with the licensing of Lagos pilots, the revocation of pilotage licenses and the method of enforcing the payment of penalties prescribed in other Sections.

### 7.3.2 Lagos Harbour Regulations 1874-1886

The only relevant statute passed in this period was the Lagos Pilotage and Harbour Ordinance 1878.<sup>44</sup> S. 2, the

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<sup>43</sup> s. 13 excluded from the operation of the Ordinance, vessels belonging to the Navy, the Governments of other foreign states or any other British or foreign settlement.

<sup>44</sup> It repealed Ord. No. 3 1868.



Interpretation Section was a feature that had been absent in previous Ordinances. It provided that,

"Harbour" means,  
the Harbour of Lagos, and includes the foreshore thereof;"

S. 3 stipulated that,

"The Governor in Council may from time to time define and declare or vary the extent and boundaries of the Harbour of Lagos: The extent and the boundaries existing at the commencement of this Ordinance shall continue until otherwise so declared or varied."

The 1878 Ordinance clearly indicated that its subject matter was the regulation of the Harbour. Although, s. 2 defined what was meant by harbour, it did not elaborate upon what were its seaward limits. S. 3 stipulated for the first time, a legal basis for the declaration and definition of the Harbour limits. However, the question is what were the boundaries existing at the commencement of the Ordinance?

In the pre-1878 statutes, although the limits of the Harbour had not been expressly defined, "harbour" had been preceded by words such as "entering" or "leaving" or "into" or "out of." This suggests that the Harbour had ascertainable seaward limits. Those limits probably corresponded with the natural configuration of the land with the sea. So that the limits of the Harbour were located just inside the "Bar", at the point of entry of the navigable channel with the sea.

The next relevant Ordinance, the Lagos Pilotage and

Harbour Ordinance 1882, was incorporated into s. 38 of the principal Ordinance.<sup>45</sup> It contained further provisions for the regulation of vessels carrying dangerous cargo.

### **7.3.3 Lagos Harbour Regulations 1886-1906**

The maritime statutes passed during this period were incorporated within the principal Ordinance. They did not directly relate to the issue of port and harbour limits, consequently they will not be discussed extensively. It will suffice to briefly state that by virtue of the Lagos Pilotage and Harbour (Amendment) Ordinance 1897, new provisions were made for matters such as the removal of wrecks and obstructions. In the Lagos Pilotage and Harbour (Amendment) Ordinance 1898, further provisions for the removal of wrecks were formulated.

### **7.3.4 Lagos Harbour Regulations 1906-1916**

The Colony of Lagos became the Colony of Southern Nigeria by Letters Patent dated February 28th, 1906. This was followed on January 1st, 1914, by the amalgamation of the Colony and the Protectorate of Southern Nigeria with the Protectorate of Northern Nigeria, thereby establishing the state of Nigeria.

The Lagos Pilotage and Harbour (Amendment) Ordinance 1906 was very similar to the Lagos Pilotage and Harbour Ordinance 1878, although the arrangement of Sections was different. Its

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<sup>45</sup> i.e. Lagos Pilotage and Harbour Ordinance 1878.

Second Schedule specified details of the Harbour limits which had been published on October 11th, 1897.<sup>46</sup> The relevant limits for present purposes are the seaward limits. The western section of those limits appears to have closely followed the foreshore. On the other hand, the eastern limits extended from the Signal Station first in a southerly direction for 1.5 miles (2.41km), and then in a westerly direction to the original starting point.

In the Harbour Regulation Ordinance 1908, it was provided by s. 2(1) that,

"The Governor in Council may by order declare that the provisions of this Ordinance shall from a date therein mentioned apply to any harbour in the Colony or Protectorate"

S. 2(2) stated that,

"Any such order may define and declare the extent and boundaries of the harbour to which it relates.

According to s. 2(3),

"Unless and until the extent and boundaries of any harbour be defined and declared as aforesaid they shall be deemed to be identical to the port limits as from time to time declared under the provisions of the Customs Ordinance, 1908, or of any Ordinance amending or substituted for the same"

It is doubtful whether the provisions of s. 2 of the 1908 Ordinance would have been applicable to Lagos Harbour. The Section appears to have been intended for those harbours whose

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<sup>46</sup> See, appendix v.

limits had not yet been expressly defined. Even if the Section had been applied to Lagos, it would not have made any difference because the limits of the port for fiscal purposes specified in Schedule B, part II, Customs Ordinance 1908 were the same as the Harbour limits described in Schedule 2 Lagos Pilotage and Harbour (Amendment) Act 1906.

The Lagos Pilotage and Harbour (Amendment) Ordinance 1909, was concerned with administrative issues. The Lagos Pilotage and Harbour (Amendment) Ordinance 1911, is also not directly pertinent. S. 2(a)-(i), provided for several modifications to be made to the principal Ordinance and regulated inter alia, steering by pilots in the channel marked out by the Harbour-Master,<sup>47</sup> and also the issue of passing vessels.<sup>48</sup> By virtue of s. 3, the Lagos Pilotage and Harbour (Amendment) Ordinance 1909 was repealed.

The last legislation on harbours passed during this period was the Harbours Regulation (Amendment) Ordinance 1912, which merely augmented the Harbours Regulation Ordinance 1908 by prescribing a penalty for the use of steam whistles.

It is clear that in contrast to the pre-colonial era, when there was no centralized authority responsible for the direction, regulation and control of vessels entering, remaining in or leaving the Harbour, the period prior between 1862 and 1912 witnessed the appointment of the Harbour-Master,

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<sup>47</sup> s. 2(f).

<sup>48</sup> s. 2(i).

as the person who was authorized to carry out regulatory functions within an area that did not extend beyond the "Bar". Pilots were also introduced in order to ensure the safe passage of vessels into and out of the Harbour. Despite the definition of Harbour limits in 1897, arrival in the legal sense would not have been possible for most ocean-going vessels. The navigational difficulties created by the "Bar" meant that they were compelled to wait beyond the Harbour limits.

#### 7.3.5 Lagos Harbour Improvements 1908-1916

By 1900, it was clear that the navigational difficulties resulting from the "Bar" had to be dealt with. Although, the length of the voyage to Lagos from Western Europe was about 2-3 months for sailing vessels or just over two weeks in the case of steamships,<sup>49</sup> the delay at the "Bar", which could last for several weeks meant that for the latter, the advantage of a shorter voyage could be wiped out. It is possible that freights on imports to the Colony might have been much higher than they should normally have been. Furthermore, the process of transshipment, with manual labour increased the incidence of loss or damage to cargoes. The scale of the loss was approximately 30% of all imports.<sup>50</sup>

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<sup>49</sup> J.H. Reading, Voyage Along The Western Coast of Newest Africa, p. 108.

<sup>50</sup> R.S. Smith, The Lagos Consulate 1851-1861, p. 99.

This was likely to have been another factor taken into account by importers when fixing the prices for various goods and might have been reflected in higher prices for the consumer. Also, exports might not have been promptly shipped from the Colony in order to satisfy external demand, thereby contributing to a loss of revenue.

On the advice of its Consulting Engineer, Sir John Coode, the Colonial Government embarked upon the construction of Moles (breakwaters) at the entrance to the Harbour so as to provide a permanent, navigable channel for all types of shipping.<sup>51</sup> The depth of the channel was to be maintained by constant dredging. Initially, the project could not be implemented due to the lack of revenue, and also of local materials required for the construction of the Moles. This difficulty was overcome when in 1896, the plan to link Lagos with the north of the country by rail, was approved by the Colonial Government. This meant that adequate supplies of building materials such as granite rocks and timber could be guaranteed. It was also considered that the rail link would generate business for the Harbour and raise revenue.

The construction of the East Mole began in 1907, whilst work did not start on the West Mole until 1910. By 1914, these harbour installations had been completed and the depth of the channel that ensued was over 8 metres. It is currently

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<sup>51</sup> See further, Colonial Office Papers, CO 147/78, pp. 53-56; 64-66 & 95-103.

possible for vessels drawing between 9-10.7 metres to enter and leave Lagos Port.

#### **7.4 Port Regulation**

Prior to 1915, provisions relating to pilotage and harbour regulations had been included in the same statutes. However, in that year, Ord. No. 9, dealing only with pilotage was enacted. This was followed in 1917 by Ord. No. 64, the Ports Ordinance. The latter was the first Ordinance to be described solely with reference to ports. It was referred to as Cap. 100 whilst the Pilotage Ordinance was Cap. 102.<sup>52</sup> The important factor was that Cap. 100 was the first enactment to refer to other ports apart from Lagos.

##### **7.4.1 Cap. 100**

Under s. 3, it is provided that,

"The Governor may by notice in the Gazette-  
(i) Appoint ports for the purposes of this Ordinance and declare the limits of such port."

In contrast to previous statutes dealing with Lagos Harbour, s. 3 specifically deals with the issue of "appointment." It is for this reason that it is proposed that even when harbour limits were specified in 1897, Lagos Harbour could still not

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<sup>52</sup> D. Kingdon, Laws of Nigeria (1923) vol. 2, pp. 1008-1014.

be regarded as a port in the legal sense.<sup>53</sup>

Another feature of s. 3, was that it clearly stated that the appointment and declaration of limits was to be carried out by means of a notice. In the Lagos Pilotage and Harbour Ordinance 1878 and the Lagos Pilotage and Harbour (Amendment) Ordinance 1906, the mode of defining and declaring the harbour limits had not been stipulated. S. 2(1), Harbour Regulation Ordinance 1908 provided that the Governor could define and declare harbour limits by means of an order. It has been already been suggested that the Ordinance might not have been applicable to Lagos Harbour.<sup>54</sup>

Although, the limits of Lagos Harbour were specified after it had been in use for such purposes, in all cases, the appointment of ports and definition of limits occurred simultaneously by virtue of L.N. 1917 No 137<sup>55</sup> The new definition for Lagos Port extended the western limits of the Port to 3 miles (4.83km) instead of 1.25 miles (2.01km). Also, the eastern limits were extended to 4 miles (6.44km) instead of 1.5 miles (2.41km) before proceeding back to the original starting point. This point is also reinforced by the

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<sup>53</sup> See further, Halsbury's Laws, 4th edn., vol. 36, p. 231 (para. 402) & p. 236 (para. 406). The dual features of appointment and delimitation are also characteristics of ports legislation in other Anglophone West African countries, e.g. s. 2, Port & Inland Waters Act, Cap. 138, (Sierra Leone); ss. 2 & 3, The Port of Freetown Act, Cap. 140, (Sierra Leone); s. 1(1), Ports Act 1962 (Ghana).

<sup>54</sup> *supra*, pp. 171-172.

<sup>55</sup> See, appendix vi.



fact that in The Lagos Harbour Dues Ordinance<sup>56</sup> which had a commencement date of January 1st, 1918, s. 2, the Interpretation Section provided that,

"Harbour" means and includes all the Port of Lagos as defined under the Ports Ordinance, save and except that part lying outside a line connecting the extremities of the moles."

This definition is further proof that the Port limits extended beyond the breakwaters, i.e. the harbour.

#### 7.4.2 Cap. 173<sup>57</sup>

S. 3(a) of Cap. 173 is similar to the equivalent Section in Cap. 100. In L.N. 1939 No. 17,<sup>58</sup> with respect to the port limits specified for Lagos, these varied slightly from those contained in L.N. 1917 No. 137. For example, the western limits commenced from a point 3 miles (4.83km) south of the Light House, instead of south-west. Whereas the 1917 limits just stated that the eastern limits proceeded 4 miles (6.44km) south from the Signal Station, the 1939 Notice specified that the limits extended southwards for 3.85 miles (6.20km).

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<sup>56</sup> i.e. Cap. 101 (1923).

<sup>57</sup> N.J. Brooke, The Laws of Nigeria (1948) vol. 5, pp. 282-287.

<sup>58</sup> See, appendix vii.

7.4.3 Cap. 155<sup>59</sup>

S. 2, Ports Act provides that,

"port" means a port declared under section 6 of this Act to be a port;"

S. 6 states that,

"(1) The Minister may, by order-

(a) declare any place in Nigeria and any navigable channel to be a port within the meaning of this Ordinance;

(b) declare the limits of any port appointed in accordance with paragraph (a) of this subsection;

(c) declare any navigable channel leading to any port to be an approach to such port within the meaning of this Ordinance.<sup>60</sup>

(2). The places specified in the First Schedule shall be deemed to ports, and the limits of any such port shall, until other provision is made in accordance with paragraph (b) of subsection (1), be the limits declared under the Ports Ordinance and in force immediately before the commencement of this Part"

The commencement date for this Section was September 23rd, 1954. In the previous Ordinances, it had been simply provided that the Governor could appoint ports. However, s. 6 empowers the Minister of Transport to declare a place and the navigable channel leading to it to be a port. This provision takes into account the fact that, major Nigerian Ports are fluvial ports located further inland along the estuaries of rivers instead

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<sup>59</sup> See, Laws of Nigeria (1958) vol. 5.

<sup>60</sup> s. 5, Ports Act 1963 stipulates that with reference to s. 6(1), any area outside the Federal Territory which is for the time being declared or deemed to be a port is a Federal Port.

of coastal ports.<sup>61</sup>

New limits for Lagos, Port Harcourt, Calabar and Sapele were specified in the Declaration of Port Limits Order 1965,<sup>62</sup> which had a commencement date of December 23rd, 1965. In the case of Lagos, the seaward limits differed from the 1939 limits on account of the fact that, the eastern limits extended southwards for 3.68 miles (5.92km) instead of 3.85 miles (6.20km). Current port limits are specified in the Ports (Declaration of Port Limits) Order 1975.<sup>63</sup> The significant feature of these port limits is that, they refer solely to coordinates of longitude and latitude. In the case of Lagos, the limits which do not refer to the foreshore are more extensive than its antecedents.

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<sup>61</sup> See further, Declaration of Port Approaches Order 1956, which defines navigable channels as approaches to ports such as Koko; Sapele; Warri; Forcados; Burutu; Akassa; Degema; Bonny; Port Harcourt.

<sup>62</sup> See, appendix viii. The limits of Bonny were redefined by the Declaration of Port Limits Order 1959.

<sup>63</sup> See, appendix ix.

## **CHAPTER EIGHT**

### **PORT REGULATION**

- 8.1 Relevant Legislation**
  - 8.1.1 Organizational Structure**
- 8.2 Mechanics of Regulation**
  - 8.2.1 The Harbour-Master**
  - 8.2.2 Port Regulations**
  - 8.2.3 Imposition of Dues & Charges**

## CHAPTER EIGHT

### PORT REGULATION

#### **8.1 Relevant Legislation**

A significant aspect of Nigerian Ports and Harbour legislation is that it falls into two distinct phases. Statutory enactments between 1862 and 1917 concentrated on the regulation of Lagos Harbour, whilst after 1917, legislation dealt with all ports including Lagos.

Another distinctive feature is that there was no unified structure of port regulation until April 1st, 1955. Prior to that date, several organizations were involved with the regulation of port activities. The Marine Department provided navigational aids within ports and their approaches. It also maintained Government-owned port structures, licensed vessels and enforced safety standards. At Lagos Port, there were three organizations entrusted with the regulation of wharves. The Customs Department was responsible for Customs Quays on Lagos Island. On the other hand, Apapa and Ijora Wharves, on the mainland were regulated by the Railways Department. Oil Wharf, which was also on the mainland was subject to the control of a separate Wharf Authority. In the case of Port Harcourt, the Railways Department regulated wharf activities. At minor Ports such as Burutu, Sapele, Warri and Calabar, the regulation of

example, United Africa Co Ltd (Burutu), African Timber & Plywood Co Ltd (Sapele) and John Holt Co Ltd (Warri).

This was the background against which the Ports Act<sup>1</sup> was enacted. S. 7(1) provides for the establishment of a public authority to be known as the Nigerian Ports Authority (N.P.A). The Authority is a body corporate with perpetual succession and a common seal.<sup>2</sup> It has the power to sue and it can be sued in its corporate name.<sup>3</sup> However, despite the fact that the N.P.A. commenced operations in April 1955, full control of ports such as Calabar, Warri and Burutu was not transferred until 1969 and 1970 respectively.<sup>4</sup> This Chapter considers aspects of port regulation which relate to the movement of vessels into and out of a port and its approaches.

#### **8.1.1 Organizational Structure**

At the apex of the organizational structure is the Federal Minister responsible for maritime shipping and navigation,<sup>5</sup> i.e. the Federal Minister of Transport. He exercises considerable powers with respect to the constitution of the N.P.A. The Authority is constituted by 20 members

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<sup>1</sup> Cap. 155.

<sup>2</sup> s. 7(2).

<sup>3</sup> *ibid.*

<sup>4</sup> See, Ports (Amendment) Decree 1969; Port of Burutu (Appointed Day) Notice 1970.

<sup>5</sup> s. 2, Ports Act.

appointed by the Minister.<sup>6</sup> It includes a Chairman,<sup>7</sup> 12 persons appointed in order to reflect national character,<sup>8</sup> one person having experience of, and ability in the organization of workers,<sup>9</sup> two persons representing the interests of persons who pay ship's dues on the one hand and harbour dues on the other,<sup>10</sup> and one person representing the interests of the Nigerian Railways Corporation.<sup>11</sup> The Authority's quorum is four.<sup>12</sup>

Apart from the power of appointment of members, the Minister is also empowered to remove from office, any member of the Authority if it is deemed necessary in the public interest.<sup>13</sup> This power is exercisable irrespective of any provisions in the Fourth Sched., Ports Act relating to the tenure of Office of any member.<sup>14</sup>

The need for consultation between the Authority, and those persons who use the facilities which it provides has also been recognized. The Minister may make regulations for

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<sup>6</sup> s. 1(2), Ports Act 1963.

<sup>7</sup> s. 1(2)(a).

<sup>8</sup> s. 1(2)(b).

<sup>9</sup> s. 1(2)(c).

<sup>10</sup> s. 1(2)(d).

<sup>11</sup> s. 1(2)(e).

<sup>12</sup> *ibid.*

<sup>13</sup> s. 1(4).

<sup>14</sup> *ibid.*

the establishment of a body, which represents the interests of persons using facilities under the control of the Authority.<sup>15</sup> The regulations shall provide for the holding of consultations between the body and the Authority. Also, it shall enable the body to make representations to either the Authority or to any particular member or officer of the Authority, with a view to safeguarding its interests.<sup>16</sup>

The Authority is subject to the direction of the Minister. After consultation with the Authority or its Chairman, the Minister may give special or general directions to the Authority with respect to matters affecting the public interest, or matters of policy which have arisen or may arise in connection with the affairs of the Authority.<sup>17</sup> The Authority is bound to give effect to such directions.<sup>18</sup>

The Authority shall afford the Minister facilities for obtaining information with respect to the property and functions of the Authority. Furthermore, it shall furnish accounts and other information with respect thereto.<sup>19</sup> In addition, the Authority shall afford the Minister facilities for the verification of information furnished in such manner,

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<sup>15</sup> s. 2(a).

<sup>16</sup> ss. 2(b) & 2(c).

<sup>17</sup> s. 3(1).

<sup>18</sup> *ibid.*

<sup>19</sup> s. 13(3), Ports Act.



and at such times as are deemed necessary.<sup>20</sup>

The Minister has final approval of regulations and bye-laws made by the Authority. Unless approval has been received, regulations and bye-laws do not come into effect.<sup>21</sup> However, regulations relating solely to the levying of rates and dues do not require the Minister's approval, provided that the rates and dues do not exceed the limits approved by the Minister.<sup>22</sup>

The Minister may modify regulations and bye-laws as he deems fit, provided that the Authority has been afforded an opportunity to make representations in relation to the proposed modifications and after such representations have been considered.<sup>23</sup>

S. 3, Ports Act provides that when powers are conferred or duties imposed on the Authority, by or under the Ports Act, such powers may be exercised or such duties discharged by or through any duly authorized agent or servant of the Authority.

The Chief Executive Officer of the Authority is the General Manager. He is responsible for the execution of the Authority's policy and the transaction of its day to day business.<sup>24</sup> The General Manager is not a member of the

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<sup>20</sup> *ibid.*

<sup>21</sup> s. 4(1), Ports Act 1963.

<sup>22</sup> s. 4(3).

<sup>23</sup> s. 4(2).

<sup>24</sup> s. 21A(1), Ports Act.

Authority, although he has a right to be present at all or any of its meetings.<sup>25</sup> This right does not apply when any matter involving him personally is being discussed.<sup>26</sup> The General Manager shall also be furnished with copies of all notices, agenda and minutes of all meetings of the Authority.<sup>27</sup> The General Manager shall be appointed by the Authority, with the prior approval of the Minister.<sup>28</sup>

The Authority shall delegate to the General Manager such of its functions as are necessary to enable him to efficiently transact the day to day business of the Authority. For this purpose, written instructions under the Authority's common seal may be issued.<sup>29</sup>

The Authority shall also employ such servants and agents as it may deem necessary for the due discharge of its functions, and upon such terms of remuneration as it may determine.<sup>30</sup> S. 23(1), Ports Act empowers the Authority to make regulations relating to the conditions of service of its

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<sup>25</sup> s. 21A(5).

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> s. 21A(2).

<sup>29</sup> s. 21A(4). In N.P.A. v Construzioni Generali Farsura (Cogefar) S.p.A & Anor [1972] N.C.L.R. 199(H.C. Lagos), Taylor, C.J. decided that where by the N.P.A.'s conduct the General Manager was held out as having the power to contract on its behalf, a contract signed by the General Manager was binding on the N.P.A. This decision was affirmed by the Supreme Court in (1974) 12 S.C. 81.

<sup>30</sup> s. 22.

servants. Such matters include the appointment and dismissal of servants, appeals procedures against dismissal or other disciplinary measures, pensions, gratuities and other allowances.<sup>31</sup> In Nwana v N.P.A.,<sup>32</sup> it was held that neither s. 23(1) nor the N.P.A. conditions of service had vested in the General Manager the function, power or duty to retire officers from the services of the N.P.A. However, it was decided that such function, power or duty may be vested in the Chairman. In contrast, in N.P.A. v Ike Okoye,<sup>33</sup> the Court of Appeal emphasized that an employer could terminate the appointment of an employee, provided that the procedures that were set out in the employee's contract of service had been complied with. This was particularly relevant in the case of employees whose positions had not been specially protected by statute. In this case, it appears that the fact that the letter of termination had been signed by the General Manager was not material.

The Authority shall delegate to the General Manager, the power to exercise supervision and control over acts and proceedings of all servants of the Authority, in matters pertaining to the executive administration and the accounts and records of the Authority.<sup>34</sup> Subject to restrictions which

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<sup>31</sup> s. 23(1)(a)-(d).

<sup>32</sup> (1981) 1-3/C.C.H.C.J. 282(H.C. Lagos).

<sup>33</sup> (1981) 7 C.A. Part II 1(C.A).

<sup>34</sup> s. 21A(3).

it may impose, the Authority shall also delegate to the General Manager, the power to dispose of all questions relating to the service of the servants of the Authority and their pay, privileges and allowances.<sup>35</sup>

## **8.2 Mechanics of Regulation**

The functions of a Port Authority may be wide ranging or quite limited. Its principal function lies in the operational sector, i.e. traffic regulation. In addition, some port authorities perform other functions pertaining to pilotage, conservancy, health and sanitation, Customs and immigration.<sup>36</sup> S. 10(1), Ports Act enumerates the duties of the N.P.A. It shall provide and operate in the ports specified in Part 1, First Sched.<sup>37</sup> such port facilities<sup>38</sup> as are best calculated to serve the public interest.<sup>39</sup> It shall also maintain, regulate and improve the use of ports specified in

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<sup>35</sup> *ibid.* See also, L.N. 1964 No. 112.

<sup>36</sup> L.G. Taylor, Seaports (1975) p. 7.

<sup>37</sup> i.e. Lagos, Port Harcourt, Warri, Calabar and Burutu.

<sup>38</sup> s. 10(3), Ports Act defines port facilities as "facilities for berthing, towing, mooring, moving or drydocking of ships in entering or leaving a port or its approaches, for the loading and unloading of goods or embarking or disembarking of passengers in or from any such ship, for the lighterage or the sorting, weighing, warehousing or handling of goods, and for the carriage of passengers or goods in connection with such facilities.

<sup>39</sup> s. 10(1)(a).

Parts 1 & 2, First Sched.<sup>40</sup> and the port facilities transferred to the Authority, to such extent as appears expedient in the public interest.<sup>41</sup> The Authority is also required to provide for the ports specified in Parts 1 & 2, First Sched., the approaches to such ports, and the territorial waters of Nigeria, such pilotage services and such lights, marks and other navigational services<sup>42</sup> and aids as appear to be necessary in the public interest.<sup>43</sup> In determining what is in the public interest, the N.P.A. should not act under any rule of thumb but should give consideration to the broad interest of the public.<sup>44</sup> S. 10(1)(d) is a general stipulation which provides that subject to the provisions of s. 11, the Authority shall provide and operate such other services as the Minister may require. Therefore, it appears that the N.P.A.'s principal duties relate to traffic regulation, conservancy and pilotage.

By virtue of s. 11(1), Ports Act, the N.P.A. is empowered to carry on such activities as are deemed advantageous, necessary or convenient for, or in connection with the

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<sup>40</sup> The ports specified in Part 2, First Sched. include Akassa, Bonny, Degema, Forcados, Koko and Sapele.

<sup>41</sup> s. 10(1)(b),

<sup>42</sup> s. 10(3) states that navigational services includes "the cleaning and improving of any waterway".

<sup>43</sup> s. 10(1)(c).

<sup>44</sup> Per George, J. in Palm Line Ltd v N.P.A. [1969] N.C.L.R. 403, 411(H.C. Lagos).

discharge of their duties under s. 10. Without any prejudice to s. 11(1), the N.P.A, has powers to carry on 20 specified activities. In the context of its major duties, the Authority may appoint, license and manage pilots.<sup>45</sup> It has considerable powers vis-a-vis other activities. It may carry on the business of carrier by land or sea, stevedore, wharfinger, warehouseman or lighterman, or any other business recommended as desirable for the purposes of the Authority.<sup>46</sup> It may load or unload any ship at any wharf for the time being vested in, or in the possession of the Authority, provided that the owner or charterer of any ship may employ on the ship, his own agents and labour with their ordinary gear for such purposes.<sup>47</sup>

Other relevant powers specify that the N.P.A. may clean, deepen, improve or alter any port or its approaches, or if so required by the Minister, any other waterway.<sup>48</sup> S.

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<sup>45</sup> s. 11(1)(h).

<sup>46</sup> s. 11(1)(b). As a warehouseman, the N.P.A. is obliged to exercise reasonable foresight and care. This ensures that goods placed in its custody are delivered to the rightful consignees upon the production of title documents: Koko v N.P.A. [1973] N.C.L.R. 342(H.C. Lagos). See also, s. 91, Ports Act. On its plain meaning, s. 91 places the burden of proof of want of reasonable foresight and care on the plaintiff: N.P.A. v Ali Akar & Sons [1965] 1 All.N.L.R. 259(S.C).

<sup>47</sup> s. 11(1)(c). s. 11(1)(g) further provides that the N.P.A. may acquire any undertaking affording or intending to afford facilities for the loading and unloading or warehousing of goods in any port.

<sup>48</sup> s. 11(1)(d). Also, the N.P.A. may provide and use both within Nigeria and on the high seas, ships and appliances for the towage or protection or salvage of life and property or

11(1)(m)(ii) provides that the Authority may enter into agreements with any persons for the operation or provision of any of the port facilities which may be operated or provided by the Authority. Finally, the Authority may engage in any other activity which may be sanctioned by the Minister.<sup>49</sup>

### **8.2.1 The Harbour Master**

The N.P.A. directs the movement and control of traffic through the Harbour Master. The position has a long history. In Lagos Harbour legislation prior to 1878, there were numerous references to the Harbour Master (or Assistant Harbour Master) and the duties which he had to discharge. S. 5, Ord. No. 2 1862 provided that the Harbour Master was responsible for fixing a limit of draught of water for vessels entering or leaving the Harbour, in accordance with changes of the Bar.<sup>50</sup> Vessels drawing more than the depth fixed were not allowed to be towed into or out of the Harbour.<sup>51</sup>

The Harbour Master was also responsible for formulating

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for the prevention of fire: s. 11(1)(e).

<sup>49</sup> s. 11(1)(u).

<sup>50</sup> See also, s. 5, Ord. No. 6 1863. S. 7, Ord. No. 3 1868 additionally provided that the Harbour Master should from time to time post a notice in a conspicuous part of the Customs House indicating the alteration in the limit of the draught of water over the Bar. See further, s. 30, Lagos Pilotage and Harbour Ord. 1878.

<sup>51</sup> *ibid.* Also, s. 32, Lagos Pilotage and Harbour Ord. 1878 empowered the Harbour Master to delay ships if the state of the tide, wind or sea would endanger vessels crossing the Bar.

Harbour Regulations which, subject to the Governor's approval had the force of law.<sup>52</sup> The Harbour Master's authority was reinforced by the fact when he took charge of vessels going into or out of the Harbour, all pilots and Masters of the tug and the vessel towed were obliged to obey his orders.<sup>53</sup>

S. 10, Ord. No. 3 1868 introduced a new dimension to the Harbour Master's powers. It provided that upon the production of a Certificate of Fitness from the Harbour Master (or Assistant Harbour Master), the Administrator (or Acting Administrator) may grant a license appointing the applicant a Lagos Pilot.<sup>54</sup>

In the pre-1878 Lagos Harbour legislation, the actual mode of appointment of the Harbour Master was not specified. Presumably, he was a direct appointee of the Governor or Administrator. However, s. 2, Lagos Pilotage and Harbour Ord.

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<sup>52</sup> s. 6, Ord. No. 2 1862; s. 5, Ord. No. 6 1863; s. 7, Ord. No. 3 1868 referred to the Administrator as the approving authority. This reflected the change in status of the Settlement of Lagos between February 19th, 1866 and July 24th, 1874. During this period, Lagos was part of the West African Settlements. The Governor was based in Freetown, Sierra Leone, although Lagos retained its Legislative Council. It is noted that in contrast to previous legislation, s. 52, Lagos Harbour and Pilotage Ord. 1878 authorized the Governor to make Rules for further, or better carrying into effect of the Ordinance's purposes. See also, s. 7 Harbour Regulation Ord. 1908.

<sup>53</sup> s. 4, Ord. No. 2 1862; s. 4, Ord. No. 6 1863; s. 6, Ord. No. 3 1868.

<sup>54</sup> However, s. 13, Lagos Pilotage and Harbour Ord. 1878 stated that the Pilotage Board, which was chaired by the Harbour Master would be responsible for granting Certificates of Fitness. It is noted that s. 16 stipulated that the Harbour Master had a duty to keep a Register of Pilots.



1878 stipulated that,

Harbour Master "includes every Officer appointed by the Governor by the designation of Harbour Master of Lagos, or lawfully acting as such".<sup>55</sup>

S. 35, Lagos Pilotage and Harbour Ord. 1878 empowered the Harbour Master to direct and regulate the locality, position and method of anchoring and the moving of ships within the Harbour.<sup>56</sup> However, this power was subject to the Rules which had been made by the Governor, with the advice and consent of the Legislative Council. The Lagos Pilotage and Harbour Ord. 1878 was characterized by detailed penalties which were expressly specified for the breach of Harbour Regulations.<sup>57</sup>

The Lagos Pilotage and Harbour (Amendment) Ord. 1909 provided for the substitution of the words "Director of Marine" for "Harbour Master" in the principal Ordinance,<sup>58</sup> and s. 2(a), Lagos Pilotage and Harbour (Amendment) Ord. 1911 provided that,

"Harbour Master or Harbour Master of Lagos" means Director of Marine and includes every officer acting as Director of Marine"

Instead of operating independently as a direct appointee of

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<sup>55</sup> See also, s. 3, Harbour Regulation Ord. 1908.

<sup>56</sup> s. 36 stipulated that the Harbour Master was liable for damages resulting from ignorance or want of care with respect to the mooring of vessels. Similar provisions are included in ss. 4 & 5, Harbour Regulation Ord. 1908.

<sup>57</sup> e.g, see ss. 30-35.

<sup>58</sup> s. 2(a).

the Governor, the effect of these Ordinances was to include the Lagos Harbour Master within the organizational structure of the Marine Department.

The Ports Ordinances<sup>59</sup> had similar provisions relating to the Harbour Master and the nature of his duties and powers.

S. 3(ii), Cap. 100 stipulated that,

"The Governor may by notice in the Gazette  
(ii) Appoint officers to perform the duties and  
exercise the powers conferred upon the harbour-  
masters by or under this Ordinance."<sup>60</sup>

The power of the Harbour Master to direct and regulate the locality, position and method of anchoring and the movement of vessels within the port was reiterated.<sup>61</sup> Additionally, a monetary penalty for a breach of the Harbour Master's directions was specified.

Although, between 1909 and 1917, the Lagos Harbour Master was also the Director of Marine, s. 16, Cap. 100 and s. 19, Cap. 173 indicated that both positions had been separated.<sup>62</sup> This was apparent from the fact that disputes between a Harbour Master and the Master, charterer, consignee or owner

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<sup>59</sup> i.e. Cap. 100 (1917) and Cap. 173 (1948).

<sup>60</sup> See also, s. 3(b), Cap. 173.

<sup>61</sup> s. 12, Cap.100; s. 15, Cap.173.

<sup>62</sup> In L.N. 1922 No. 100, the Deputy Director of Marine was appointed the Lagos Harbour Master, whilst three senior Executive Officers of the Marine Department were appointed Harbour Masters for other ports. In L.N. 1939 No. 18, the Principal Marine Officer was appointed Lagos Harbour Master, whilst four senior Executives of the Marine Department were appointed Harbour Masters at other ports.

of a ship, relating to the performance of the Harbour Master's duties or directions were to be referred to the Director of Marine. In the case of Lagos Harbour legislation, similar disputes had been referred to the Governor.<sup>63</sup> Both Port Ordinances gave effect to the delegation of the Harbour Master's powers and duties to duly authorized officers.<sup>64</sup>

Current provisions relating to the Harbour Master include s. 40, Ports Act which states that the N.P.A. may appoint a Harbour Master in respect of any port. Subject to Port Regulations, the Harbour Master may

"(a) direct where any ship shall be berthed, moored or anchored and the method of anchoring within the port and approaches thereto;

(b) direct the removal of any ship from any berth, station or anchorage to another berth, station or anchorage and the time within which such removal is to be effected within the port and the approaches thereto;

(c) regulate the moving of ships within the port and the approaches thereto."<sup>65</sup>

### **8.2.2 Port Regulations**

S. 41(1), Ports Act provides that the N.P.A. may make regulations for the maintenance, control and management of any port and the approaches thereto. The Section further enumerates 18 activities in respect of which regulations may

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<sup>63</sup> See, s. 37, Lagos Pilotage and Harbour Ord. 1878. In respect of other Harbours, see, s. 6, Harbour Regulation Ord. 1908.

<sup>64</sup> s. 17, Cap. 100; s. 20, Cap. 173.

<sup>65</sup> s. 42(a)-(c), Ports Act.

be made. For present purposes, some of the relevant activities pertain to regulating traffic within the limits of a port or the approaches to a port;<sup>66</sup> regulating the berths and stations to be occupied by ships and the removal of ships from one berth, station or anchorage to another berth, station or anchorage, and the time within which such removal shall be effected.<sup>67</sup>

Other activities include regulating ships whilst taking in or discharging ballast or cargo;<sup>68</sup> keeping free passages of such width as is deemed necessary within any such port, and along or near to the piers, jetties, landing places, wharves, quays, docks, moorings and other similar works in or adjoining the same, and for marking out the spaces so to be kept free.<sup>69</sup>

The N.P.A. may regulate the placing and maintaining of moorings or buoys;<sup>70</sup> the anchoring, fastening, mooring and unmooring and warping of all ships and the use of warps, mooring buoys, chains and other moorings.<sup>71</sup> It is also empowered to regulate the manner in which ships arriving shall

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<sup>66</sup> s. 41(1)(a).

<sup>67</sup> s. 41(1)(b).

<sup>68</sup> s. 41(1)(c).

<sup>69</sup> s. 41(1)(d). In respect of the regulation of traffic, the prevention of obstructions and the maintenance of good order on piers, jetties and wharves, see, s. 41(1)(f).

<sup>70</sup> s. 41(1)(p).

<sup>71</sup> s. 41(1)(e).

be boarded by the Harbour Master, and the information to be supplied by the Master of the ship.<sup>72</sup>

The current Port Regulations which were introduced in 1955 deal with most of the activities specified in s. 41(1). The Regulations apply to all ports with the exception of regs. 58-73 which are applicable only to the Port of Lagos.<sup>73</sup> Specific regulations which control the entrance of ships and their management whilst in a port provide that the owner or agent of a ship shall give as long as possible, written notice to the Harbour Master of the expected date and time of the ship's arrival at a port.<sup>74</sup> The Master of a ship within a port is bound to comply with the Harbour Master's instructions regulating the draught of the ship.<sup>75</sup> Upon arrival at a port, the Master shall if requested by the Harbour Master, make a Declaration of the ship's particulars.<sup>76</sup> Additionally, if the ship is in ballast (other than water), the Master shall give to the Harbour Master, within 12 hours after arrival a written account of the quantity of ballast.<sup>77</sup> The Master shall not

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<sup>72</sup> s. 41(1)(j).

<sup>73</sup> regs. 58-73 relate to matters such as compulsory towage, prohibited anchorages, navigation under bridges and the operation of floats.

<sup>74</sup> reg. 4. This regulation is probably now superseded by the provisions of the Ports (Emergency Provisions) Decree 1975. See further, *infra*, Chapter 9, pp. 216-220.

<sup>75</sup> reg. 7.

<sup>76</sup> reg. 22.

<sup>77</sup> reg. 23.

discharge the ballast except in accordance with the Harbour Master's instructions.<sup>78</sup>

The Harbour Master controls the turn of ships upon entry or departure from the port,<sup>79</sup> and ships shall not berth alongside other ships at an N.P.A. mooring or quay except with the consent of the Harbour Master.<sup>80</sup> It is further provided that the Harbour Master and any person duly authorized may at any time board any ship entering or remaining within a port.<sup>81</sup> With the exception of emergencies, vessels shall be moored, anchored, placed, loaded, unloaded or moved under the direction of the Harbour Master.<sup>82</sup> S. 41(2) and reg. 74 prescribe a fine not exceeding N100 for a breach of any of the regulations. In the case of a continuous breach, there is a further fine not exceeding N10 per day for every day after the first or a term of imprisonment not exceeding three months, or both such term of imprisonment and fine.

### **8.2.3 Imposition of Dues and Charges**

Apart from the management of vessels entering or departing from a port or its approaches, port regulation also has a revenue aspect. The N.P.A. may levy harbour and ship's

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78     ibid.

79     reg. 24.

80     reg. 25.

81     reg. 26.

82     reg. 28.

dues and other rates. At common law, where a Port Authority invites vessels to berth in its port and collects tolls or dues from shipowners, the relationship between the Port Authority and shipowners is that of invitor and invitees.<sup>83</sup> The Port Authority has a duty to ensure that, the port is safe for those vessels navigating within its boundaries for reward to the Port Authority.<sup>84</sup> So that independent of any statutory duty to manage and maintain the port, the common law duty arises de novo as each vessel enters the Port Authority's jurisdiction.

Harbour dues are payable by every ship entering or leaving a port, in respect of passengers, animals or cargo carried thereof.<sup>85</sup> Ship's dues is an inclusive term. It covers light, buoyage, anchorage, mooring buoy, berthing and pilotage dues.<sup>86</sup> Rates are payable in respect of any works and port appliances provided by the N.P.A., or any service which it performs in respect of any ships or goods.<sup>87</sup> In each case, the scale of dues and rates payable will be prescribed

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<sup>83</sup> Mersey Docks & Harbour Board Trustees v Gibbs (1866) L.R. 1 H.L. 93(H.L); Palm Line Ltd v N.P.A [1969] N.C.L.R. 403(H.C. Lagos).

<sup>84</sup> The duty arises irrespective of whether the tolls or dues are collected for the private profit of the members of the Port Authority. Therefore, a statutory corporation is similarly bound although the tolls or dues are expended for the maintenance and operation of port facilities.

<sup>85</sup> s. 61, Ports Act.

<sup>86</sup> s. 67.

<sup>87</sup> s. 70.

in regulations.<sup>88</sup> Vessels belonging to any branch of the Armed Forces or a foreign Government are exempted from the payment of dues and rates.<sup>89</sup> However, goods belonging to the Federal Government are not exempt from the payment of dues or rates.<sup>90</sup>

In order to assess the scale of harbour dues payable, upon arrival, the Master of a vessel shall provide to the N.P.A. in the form and within the time prescribed, information relating to the ship, passengers, animals and cargo thereof.<sup>91</sup> Upon departure, the Master shall provide similar information in the form prescribed.<sup>92</sup> In the case of inward and outward voyages, harbour dues are payable at the time of the report inwards or outwards as the case may be.<sup>93</sup> The Master or owner of a ship shall be liable for the payment of harbour and ship's dues.<sup>94</sup> A consignor or agent of a ship who has paid or made himself liable to pay any charge on account

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<sup>88</sup> s. 82. See also, N.P.A. (Dues & Rates) Regulations 1987. Although, the N.P.A. makes regulations subject to the approval of the Minister of Transport, in the case of regulations for dues or rates, the Minister's approval may be dispensed with provided the limits set by the Minister have not been exceeded: s. 4(3), Ports Act 1963.

<sup>89</sup> s. 84, Ports Act.

<sup>90</sup> s. 85.

<sup>91</sup> s. 62.

<sup>92</sup> s. 63.

<sup>93</sup> s. 64.

<sup>94</sup> ss. 65 & 68.



of a ship in the port of arrival/discharge or departure may also be liable for the payment of harbour and ship's dues.<sup>95</sup> The N.P.A. may either alone or with any other person, enter into any ship within the limits of any port or the approaches thereto, in order to ascertain the dues or rates payable in respect of a ship.<sup>96</sup>

The payment of dues and rates shall be in U.S. dollars, although national carriers are exempted from this requirement.<sup>97</sup> It is the responsibility of the National Maritime Authority to grant national carrier status to a shipping company on the grounds that seven conditions have been satisfied,<sup>98</sup> viz, (i) Nigerian individuals, or enterprises fully owned by Nigerian individuals hold 60% of its equity and the company is registered in Nigeria; (ii) The company's vessels operate on the deep sea; (iii) The head office is located in Nigeria and its management and control emanate from the Nigerian head office; (iv) The company owns at least one ocean-going vessel of not less than 5000 net registered tonnage; (v) The terms and conditions of the employment of seafarers complies with Nigerian laws and accepted international rules and standards; (vi) The company's vessels are registered on the Nigerian Register of Ships and

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<sup>95</sup>     ibid.

<sup>96</sup>     s. 76.

<sup>97</sup>     N.P.A. (Dues & Rates) (Amendment) Regulations 1989.

<sup>98</sup>     ss. 4(c) & 7, National Shipping Policy Decree 1987.

the vessels satisfy all conditions stipulated in the Nigerian Merchant Shipping Act 1962; (vii) 100% of the crew and at least 75% of the shipboard officers including Captain and Chief Officer and wherever possible Chief Engineers, are Nigerians.

Attempted evasion or evasion of dues or rates by any shipowner or Master, or any owner or consignor or consignee of goods is an offence punishable by a term of imprisonment not exceeding four months or a fine not exceeding N100 or to both such term of imprisonment and fine.<sup>99</sup> In addition, a penalty double the relevant amount of dues or rates shall be paid to the N.P.A.<sup>100</sup>

The N.P.A. has a lien for the amount of rates payable in respect of any goods.<sup>101</sup> Rates are payable upon the landing or, shipment of the goods.<sup>102</sup> In the case of goods to be removed from the N.P.A. premises, rates are payable before removal.<sup>103</sup> The lien may be discharged upon payment of the rates claimed.<sup>104</sup> It is possible to preserve a lien for freight, primage, general average or other charges if at, or before the time of landing, written notice of the existence of

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<sup>99</sup> s. 108.

<sup>100</sup> *ibid.*

<sup>101</sup> s. 71.

<sup>102</sup> ss. 71(2) & 71(3).

<sup>103</sup> s. 71(3).

<sup>104</sup> s. 73.

the lien is given to the N.P.A.<sup>105</sup> The lien may be discharged upon the production to the N.P.A., of a document purporting to be a release for the amount of the lien to which the goods are liable under s. 72.<sup>106</sup> However, the N.P.A. should exercise reasonable care with respect to the authenticity of such a document.<sup>107</sup>

The N.P.A. is empowered to sell any of the goods in respect of which rates have not been paid.<sup>108</sup> There is also a power of sale of goods subject to a lien for freight, primage, general average or other charges of which the N.P.A. has notice.<sup>109</sup> In the latter event, the N.P.A. may be required to act by or on behalf of the person claiming such lien.<sup>110</sup> The sale by public auction shall not take place until the expiration of 90 days from the time when they were placed in the N.P.A.'s custody.<sup>111</sup> Public notice of the sale

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<sup>105</sup> s. 72(1). Notification is required from the Master or owner of the ship, or his agent, or the person by whom the goods are landed.

<sup>106</sup> s. 73.

<sup>107</sup> *ibid.*

<sup>108</sup> s. 74(1).

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.* Nevertheless, a shorter period may be necessary if the goods are perishable, although it shall not be less than 24 hours after the landing of the goods. S. 75(1) prescribes the application of the proceeds of sale. It reflects s. 71(4) which stipulates that the lien for such rates shall have priority over all other liens and claims, except claims for money payable to any Government of the federation.

amounting to 10 days shall be given unless the goods are of such a perishable nature that a shorter notice is required.<sup>112</sup> If the address of the owner of the goods or his agent is known, and such address is within Nigeria, the owner or his agent shall be notified of the sale by post.<sup>113</sup> However, the title of a bona fide purchaser is not affected by the failure to notify the owner or his agent, neither shall any purchaser be bound to inquire whether such notice has been sent.<sup>114</sup>

The N.P.A. may distrain or arrest a ship and its tackle, apparel or furniture if the Master refuses or neglects to pay dues or rates on demand.<sup>115</sup> In Awosika v Okafor Lines,<sup>116</sup> it was decided that although s. 79(1) refers to the Master, notice for payment of dues or rates may be served on the shipowner if he is within the Court's jurisdiction. If after the expiration of 14 days, the dues or rates, or the expenses involved in the distraint or arrest or detention remain unpaid, the ship and its tackle, apparel or furniture may be sold.<sup>117</sup>

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112 s. 74(2).

113 s. 74(3).

114 *ibid.*

115 s. 79(1).

116 1 N.S.C. 87(H.C. Lagos).

117 s. 79(2).

S. 79(3) provides that the N.P.A. may deduct from the proceeds of sale the amount of dues, rates or costs which are owing, and the balance shall be delivered to the Master on demand. In N.P.A. v Okafor Lines,<sup>118</sup> the question to be decided was whether the N.P.A. could deduct from the proceeds of sale of a vessel, dues or rates incurred by other vessels owned or chartered by the defendant. It was held that although s. 79(3) appears to deal with a claim in respect of a single vessel, s. 81 allows the N.P.A. to make deductions in respect of several claims. S. 81 states that notwithstanding the provisions of ss. 71-80, the N.P.A. may recover by civil suit any dues, rates, expenses, costs or in the case of a sale, the balance thereof, when proceeds of sale are insufficient. It was further held that, it could not have been contemplated that the N.P.A. should institute separate proceedings for the claims it may have against a single shipowner.

S. 80(1) provides additional powers to secure the prompt payment of dues or rates. It enables the N.P.A. to withhold the outwards clearance of a vessel until dues or rates have been paid, or sufficient security has been provided. In order to be effective, the N.P.A. shall give to a "proper officer"<sup>119</sup> of the Customs & Excise Department, a notice stating the amounts outstanding in respect of dues and rates.

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<sup>118</sup> [1967] N.C.L.R. 203(H.C. Lagos).

<sup>119</sup> "Proper officer" means the officer whose duty it is to grant clearance outwards from a port, of the ship in respect of which notice is given: s. 80(2).

## **CHAPTER NINE**

### **PORT PROCEDURES**

- 9.1 The Consequences of Trade Expansion
  - 9.1.1 Patterns & Problems of Trade 1962-1968
  - 9.1.2 Patterns & Problems of Trade 1970-1974
  - 9.1.3 Patterns & Problems of Trade 1975-1980
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- 9.2 Ship Entry Notice (S.E.N.)
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  - 9.2.2 Effect of S.E.N.
- 9.3 General Berthing Procedures
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## **CHAPTER NINE**

### **PORT PROCEDURES**

#### **9.1 The Consequences of Trade Expansion**

The starting point for an assessment of documentation requirements at Nigerian Ports is the Ports (Emergency Provisions) Decree 1975. Its stated purpose is the decongestion of ports by the use of the Ship Entry Notice (S.E.N). This Chapter explores the factors that have necessitated the employment of S.E.N. and the legal consequences of the substantive rules. In addition, other berthing procedures which may influence arrival are considered. Quite apart from the ordinary procedures that precede berthing at a port, it appears that specialized procedures were initially introduced for the purposes of controlling the consequences of trade expansion. Subsequently, specialized procedures have been adopted with the aim of curbing consumer demand and achieving fiscal and economic objectives.

##### **9.1.1 Patterns and Problems of Trade 1962-1968**

Primary producing countries such as Nigeria benefitted from the increased demand for agricultural and mineral exports

that occurred during and after the Second World War. Between 1950 and 1960, the value of exports both in terms of quantity and price had risen from £88.5 million (N177 million) to £165.6 million (N331.2 million).<sup>1</sup> Higher Government revenues and individual incomes was also reflected in an expansion of imports.<sup>2</sup> By way of illustration, the value of non-durable consumer goods such as textiles, fish, sugar and flour increased from £68.5 million (N137 million) to £79.9 million (N159.8 million) between 1956 and 1964.<sup>3</sup> The value of durable consumer goods, e.g. cars and furniture, escalated from £14.7 million (29.4 million) to £16.6 million (N33.2 million) during the same period, although in the peak year of 1960 the total value was £24.9 million (N49.8 million).<sup>4</sup> Similarly, the value of capital goods imported, e.g. steel, cement, office and industrial equipment, increased from £48 million (N96 million) to £118.4 million (N236.8 million) between 1956 and 1965.<sup>5</sup> As a result, cargo throughput increased from 3.16 million tons in 1950 to 7.31 million tons in 1960.<sup>6</sup> Against the background of

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<sup>1</sup> Federal Ministry of Economic Development, National Development Plan 1962-68 (1962) pp. 10-11. Conversion Factor: £1 = N2.

<sup>2</sup> International Bank for Reconstruction & Development, The Economic Development of Nigeria (1955) pp. 13-14 & 19.

<sup>3</sup> Economic Associates, Nigerian Ports: Traffic & Development (1967) vol. 1, p. 135.

<sup>4</sup> Nigerian Ports: Traffic & Development, vol. 2, p. 160.

<sup>5</sup> *ibid*, p. 186.

<sup>6</sup> National Development Plan 1962-68, p. 12.



a buoyant import and export trade, it was forecast that congestion would worsen at major ports such as Lagos<sup>7</sup> and Port Harcourt, which already handled 86% of port traffic.<sup>8</sup> As a matter of the highest priority, the Nigerian Ports Authority, (N.P.A.) was allocated £23.6 million (N47.2 million) for the expansion of port facilities during the duration of the First National Development Plan, 1962-68.

The main objectives of the grant were:

(i) The provision of five berths at Lagos and two berths at Port Harcourt;<sup>9</sup>

(ii) The development of the Niger Delta Ports, e.g. Koko; and

(iii) Extensive dredging at the Escravos Bar to facilitate the passage of vessels to ports such as Warri and Sapele.

At the end of the Plan period, berthage (excluding pool anchorages, mooring buoys and tanker jetties) at Lagos had risen from 10 to 15 berths, whilst at Port Harcourt, it had increased from seven to eight berths.

#### **9.1.2 Patterns and Problems of Trade 1970-1974**

The onset of the Civil War in 1967 resulted in the closure of all ports (with the exception of Lagos) to foreign

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<sup>7</sup> i.e. Apapa Wharf and Customs Quays.

<sup>8</sup> Nigerian Ports: Traffic & Development, vol. 2, p. 212.

<sup>9</sup> In the event only one berth was built at Port Harcourt during the Plan period: N.P.A., Bilingual Magazine, 2nd edn. p. 33.

trade. The concentration of traffic at Lagos increased the berthing time at that port. This was compounded by the inadequate provision of cargo-handling equipment and poor maintenance of port equipment. Other Delta and Eastern Ports, including Calabar, Warri and Burutu,<sup>10</sup> which were under-utilized fell into a state of disrepair. By the conclusion of the Civil War in 1970, Lagos was handling 3,951,656 tonnes of the 4,157,809 tonnes of cargo that passed through all ports.<sup>11</sup>

The emphasis in the Second National Development Plan 1970- 74, was the rehabilitation and reconstruction of economic infrastructure. £2.1 million (N4.2 million) was set aside for the rehabilitation of ports whilst £16 million (N32 million) was allocated to the construction of four additional berths at Lagos and two berths each at Calabar and Warri.<sup>12</sup> However, slow progress meant that construction had to be phased into the next Plan period. The rehabilitation and reconstruction programme promoted imports of capital goods. In the particular case of cement, the imports of which had been steadily decreasing between 1965 and 1969, there was a

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<sup>10</sup> These three ports which had previously been under private ownership were transferred to the N.P.A. in 1969 and 1970: ss. 1 & 2 Ports (Amendment) Decree 1969; Port of Burutu (Appointed Day) Notice 1970.

<sup>11</sup> *infra*, Table 1.

<sup>12</sup> Federal Ministry of Economic Development, Second National Development Plan 1970-74 (1970) p. 206.

six-fold increase between 1970 and 1972.<sup>13</sup>

A berth occupancy rate of 75% is regarded as a portent of port congestion. By 1975/76, the berth occupancy rate at Lagos was 95%.<sup>14</sup> Capacity had increased to 18 berths<sup>15</sup> but this was insufficient to cope with the scale of traffic.<sup>16</sup> In 1974, the average berthing time was 50 days.<sup>17</sup> Previously, it had never exceeded 10 days in the worst cases. At the height of the congestion in 1975/76, 455 vessels were waiting to discharge at Lagos and the average berthing time was 180 days.<sup>18</sup> It may be that the expansion of traffic at Lagos induced the Federal Government to establish the Lagos Port Operations Committee.<sup>19</sup> Members were appointed from all the agencies involved in port operations, for example, N.P.A., Customs Department and Federal Ministry of Transport. Their primary function was the coordination of activities at the Port.<sup>20</sup> Despite its wide-ranging supervisory and

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<sup>13</sup> infra, Table 2. Also, Nigerian Ports: Traffic & Development vol. 2, p. 185.

<sup>14</sup> N.P.A., "Port Congestion in Nigeria and How It Was Tackled by the Nigerian Ports Authority" (1976) p. 8.

<sup>15</sup> There were 11 berths at all other seaports.

<sup>16</sup> infra, Table 3.

<sup>17</sup> Central Bank of Nigeria, Annual Report, (1974) p. 35.

<sup>18</sup> N.P.A., Bilingual Magazine, 2nd edn. p. 35.

<sup>19</sup> s. 1, Lagos Port Operations (Special Provisions Act) 1971.

<sup>20</sup> ss. 2 & 3.

disciplinary powers, such as the right to direct the N.P.A. to supply any plant, equipment or vehicle necessary for the efficient operation of the port,<sup>21</sup> the Committee appears to have been unsuccessful in defusing the congestion crisis.

Apart from the requirements of the 1970-74 Development Plan, the port congestion at Lagos was exacerbated by the armada of cement ships bearing consignments for the Ministry of Defence. In the light of insufficient local production of cement, the Ministry had placed orders for the importation of 16 million tonnes of cement, for the purposes of completing the Army Barracks Development Programme and various Airforce and Navy Bases. Despite the slump between 1972 and 1974, cement imports had risen to 1,894,183 tonnes by the end of 1976.<sup>22</sup>

#### **9.1.3 Patterns and Problems of Trade 1975-1980**

The congestion problem was addressed in the Third National Development Plan, 1975-80. Port capacity was to be increased by the construction of six berths at Lagos and four berths each at Port Harcourt, Warri and Calabar. Also, cargo handling was to be improved by the provision of mechanical bulk handling facilities at Lagos and Port Harcourt. Apart from the construction of an alternative Ocean Terminal in the Lagos area, another decongestion measure that was contemplated

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<sup>21</sup> ss. 5-7.

<sup>22</sup> infra, Table 4.

was the reduction of port dues & charges in the Delta and Eastern Ports in order to stem the influx of cargo into Lagos. Statutory measures included the prohibition of foreign vessels which were more than 15 years old from trading in or from Nigerian waters.<sup>23</sup> It had been alleged that unseaworthy vessels were being employed to incur substantial demurrage, but the shipping community objected to the statute.<sup>24</sup> As a result, the Federal Government deferred its commencement date.<sup>25</sup>

One of the factors that may aggravate port congestion is the slow evacuation of cargo from alongside the quays or warehouses. Even if a vessel can berth, it would seem pointless to open hatches if prompt evacuation or safe storage of the cargo cannot be guaranteed. In this respect, the Ports Decongestion Committee was constituted in 1979 for the purposes of disposing of overtime and abandoned goods.<sup>26</sup> In all, a total of N322 million was allocated to ports

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<sup>23</sup> s. 1, Merchant Shipping (Amendment) Decree 1978.

<sup>24</sup> Financial Times, "Congestion Eases Off", August 30th, 1978, pp. 31-32.

<sup>25</sup> s. 1, Merchant Shipping (Amendment) No 2 Decree 1978.

<sup>26</sup> s. 5, Ports Decongestion Committee Act 1979. See also, Ports Decongestion Decree 1985 which established a "Task Force for the Disposal of Unclaimed Containers". The Decree was extended until June 30th, 1996, by the Ports Decongestion (Amendment) Decree 1986. In Musa Yakubu Farms (Nig.) Ltd v Nigerian Ports Authority & Ors, 2 N.S.C. 643(F.H.C), it was held that any purported ouster of the Court's jurisdiction was null and void, unless the Task Force had acted in accordance with the terms of the enacting Decree.

development during the 1975-80 Plan period.<sup>27</sup>

The new Ocean Terminal for the Lagos Area, Tin Can Island Port (T.C.I.P.), is located North-West of Apapa Wharf. It was opened on October 11th, 1977, with a capacity of 10 berths. Although, T.C.I.P. is a separate complex, it is served by the same entrance channel as Apapa Wharf. Its impact can be deduced from the fact that by November 1977, the number of vessels waiting at Lagos had been reduced to 50 and the average berthing time was 30 days.<sup>28</sup> Other measures which had alleviated congestion included the use of mooring buoys midstream. With the aid of barges equipped with heavy cranes, vessels were loaded and discharged both day and night, without berthing at quay berths. Cement imports had been curtailed by the Federal Government's decision to ban further consignments, and the transfer of foreign exchange until the back-log at all ports had been cleared.

Further improvements in port capacity resulted from the opening of the Third Apapa Wharf Extension on April 24th, 1979. In common with T.C.I.P., it has facilities for specialized vessels such as RORO ships.<sup>29</sup> In addition, it is

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<sup>27</sup> Federal Ministry of Economic Development, Third National Development Plan 1975-80 (1975) pp. 222-223.

<sup>28</sup> Economist Intelligence Unit, Quarterly Economic Review, No 1 (1978) p. 10.

<sup>29</sup> RORO vessels, i.e. roll on/roll off vessels have ramps which can be lowered when the vessel berths so that cargo can be driven into or from the vessel. The Third Wharf Extension has one RORO berth whilst T.C.I.P. has two.

the main container terminal at Lagos Port.<sup>30</sup> Whereas the main Apapa Wharf has one container berth, the Third Wharf Extension has four container berths capable of handling 4-6 vessels at a time. It was estimated that in 1980, Apapa Wharf and T.C.I.P. handled 60% of Nigeria's port traffic, i.e. 10 million tonnes out of 18 million tonnes.<sup>31</sup> There was also an expansion of port capacity nationwide. Calabar and Warri New Ports were completed in June 1979. Calabar New Port consists of four general cargo berths whilst at Warri New Port, there are eight berths, viz, five general cargo berths, one RORO berth, one container berth and one bulk cargo berth.

#### **9.1.4 Patterns and Problems of Trade 1981-1985**

The Fourth National Development Plan, 1981-85, concentrated on the maintenance and efficient operation of ports. Total allocation for ports development was N360 million.<sup>32</sup> Projects concluded during this Plan period included the Federal Lighters Terminal, Onne, near Port Harcourt. It began operations in November 1981, providing three general cargo berths, one bulk cargo berth, one container berth and one RORO berth. In addition Sapele New

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<sup>30</sup> i.e Apapa Wharf and T.C.I.P. The construction of a Ring-Road around Lagos Island in 1976 resulted in the loss of the three berths that constituted Customs Quays.

<sup>31</sup> Economist Intelligence Unit, Quarterly Economic Review, No 3 (1981) p. 17.

<sup>32</sup> Federal Ministry of Economic Planning, Fourth National Development Plan 1981-85 (1981) p. 247.

Port was opened in May 1982. Its facilities comprise of five general cargo berths and one RORO berth. However, with the exception of Port Harcourt, the provision of modern infrastructure for conventional and specialized vessels has not resulted in the optimum utilization of the Delta and Eastern Ports. The N.P.A. estimates that the revenue loss per annum in respect of Calabar and Sapele Ports amounts to N80 million.<sup>33</sup> The problem may be resolved by the provision of wider and deeper entrance channels so as to improve access by larger vessels. Proper maintenance of road networks may also promote the prompt evacuation of goods to and from these ports. In any event, the rate of economic development in the catchment area of each port will determine the extent to which its capacity will be utilized.

## **9.2 Ship Entry Notice**

The expansion of port capacity by the provision of additional infrastructure represents the medium/long term prescription for port congestion. In the short term, traffic controls may streamline the movement of vessels into or out of a port. Consequently, a Port Authority may qualify the legal stipulations of arrival by the imposition of traffic rationalization measures. The Ports (Emergency Provisions) Decree 1975 appears to have been primarily directed against

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<sup>33</sup> Economist Intelligence Unit, Quarterly Economic Review, No 3 (1981) p. 17.



"tramps", i.e. vessels which do not operate in accordance with a fixed schedule. Vessels belonging to liner conferences such as U.K.W.A.L.<sup>34</sup> and C.O.W.A.C.<sup>35</sup> have been allocated priority berths. As a result, during the congestion at Lagos, they were able to operate scheduled sailings with very little disruption.<sup>36</sup>

#### **9.2.1 Relevant Provisions**

s. 7(1) provides that owner also includes any agent of the owner. S. 1 of the Decree requires the owner of every ship intending to enter any Nigerian Port, to furnish in writing to the N.P.A., not later than two months before the vessel's departure to Nigeria, a statement<sup>37</sup> setting out matters such as:

- (i) The name and physical particulars of the ship.
- (ii) The name of the port or ports of sailing and estimated time of departure for Nigeria.
- (iii) The name of the port or port of discharge in Nigeria.
- (iv) Detailed information (including tonnage) in respect of cargo carried in the ship.

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<sup>34</sup> i.e. United Kingdom/West Africa Line.

<sup>35</sup> Continent of Europe/West Africa Conference.

<sup>36</sup> The Times, "Port Development Answer to Shipping Congestion", July 22nd, 1976 p. x; Financial Times, "Shippers Find Little Cheer Except in the Long Term", November 3rd, 1981, p. xxiv.

<sup>37</sup> See, specimen Application for Ship Registration, appendix x.

Upon the receipt of this information, s. 2 authorizes the N.P.A. to issue a Ship Entry Notice (S.E.N.) to the shipowner.<sup>38</sup>

The S.E.N. specifies:

(i) The port or ports in Nigeria to which the ship may proceed for any purpose.

(ii) The date on which the ship may enter any port or approach to a port in Nigeria.

(iii) The berth allocated to the ship in the Port concerned and the period during which the ship may remain at such berth.

Significantly, s. 3 prohibits vessels from entering any port or approach to any port in Nigeria without S.E.N.<sup>39</sup> In s. 7(2) it is stipulated that, without prejudice to s. 7(1), expressions in the Decree have the same meaning as in the Ports Act. Presumably, references to ports and approaches to ports have the same definition as in s. 6, Ports Act. However, the commercial view appears to be that the relevant limits are not the legal limits but the limits of Nigeria's territorial waters which extend for 30 nautical miles (55.56km) off the coast.<sup>40</sup>

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<sup>38</sup> See, specimen Ship Entry Notice, appendix xi.

<sup>39</sup> Oil tankers are exempt from obtaining S.E.N.

<sup>40</sup> Guide to Port Entry (1987/88) vol. 2, p. 1136. Extent of territorial waters, see, s. 1(2), Territorial Waters (Amendment) Decree 1971. For the purposes of national law, Nigerian territory does not include its territorial waters: Board of Customs & Excise v Ogunyemi Gunye (1978) 4 F.R.C.R. 197(F.R.C).

### 9.2.2 Effect of S.E.N.

The efficacy of the Ports (Emergency Provisions) Decree 1975 is dependent upon the prompt application for S.E.N. as soon as a charterparty fixture has been concluded. It is also essential that the N.P.A. grants S.E.N. prior to the vessel's arrival in Nigerian territorial waters at the latest. The objective should be to avoid a situation where vessels are queuing up outside Nigerian Ports awaiting S.E.N.'s. Apart from the penalties prescribed in ss. 6(1) & 6(2), in respect of entry into a port without S.E.N. or in breach of its stipulations, the N.P.A. will not accord berthing facilities to vessels arriving seven days earlier or later than their E.T.A.'s, i.e. estimated time of arrival.

It is quite clear that the allocation of S.E.N. is not a mere formality in the sense that a vessel can be prohibited from a port if it is not in receipt of S.E.N. In its absence, even if by virtue of her geographical position, the vessel is an "arrived ship", the computation of laytime will probably be postponed on the grounds that the vessel is not completely ready. The rationale is that it would be unfair to make time count against the charterer if he has been prevented from having access to the vessel. In The Austin Friars,<sup>41</sup> it was held that the vessel was not ready at the time that she tendered notice of readiness because she had not received

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<sup>41</sup> (1894) 10 T.L.R. 633.

health clearance. Similarly, in White v Winchester S.S. Co.,<sup>42</sup> where access to a ship was prevented by quarantine regulations, it was decided that at the material time, the laydays could not count. However, it is noted that the combined effect of some of the judgments in The Aello<sup>43</sup> and The Delian Spirit<sup>44</sup> suggest that compliance with documentation requirements and port procedures may be relaxed provided that:

(i) The relevant procedure or formality does not strike at the state of the ship, its crew and passengers (presumably, quarantine restrictions would be an example of such a procedure or formality); or,

(ii) Failure to comply immediately with the procedure is not likely to cause delay to the commencement of loading or discharge or any interference with the charterer's use of the vessel.

It is probably fair to describe the S.E.N. requirement as a formality which may interfere with the charterer's use of the vessel thereby causing delay to the commencement of loading or discharge.

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<sup>42</sup> (1886) 23 Sc.L.Rep. 342.

<sup>43</sup> [1961] A.C. 135, 174-175(H.L).

<sup>44</sup> [1972] 1 Q.B. 103, 124(C.A). See also, In the Matter of Nimba Offshore Corp'n & Ors (1973) A.M.C. 1060, 1066(N.Y.Arb).

### 9.3 General Berthing Procedures

Prior to 1900, the most frequent cause of delay at Nigerian Ports would have been navigational conditions. In most cases, access to seaports has been impeded by constantly shifting sandbars which limit ship's draught. It is pertinent to note that old Delta ports such as Gwato and Ode Itsekiri, which were one of the first points of contact with foreign merchants had become defunct due to poor access channels. In a period when functional arrival rules prevailed and the crucial factor was the vessel's proximity to the usual loading/discharging place,<sup>45</sup> the topographical peculiarities of Nigeria's seaports meant that vessels compelled to wait beyond these sandbars would not have been considered as "arrived ships";<sup>46</sup> moreover, when ports such as Warri, Port Harcourt and Sapele are located 40km, 66km and 93km from the sea respectively.

Between 1900 and 1980, modern engineering techniques were employed in the improvement of entrance channels. In the case of Lagos, breakwaters were constructed between 1908 and 1914. In other ports such as Port Harcourt, the maintenance of a navigable sea channel was dependent on constant dredging. Until 1967, Nigeria's port capacity was adequate for its import and export trade.<sup>47</sup> As the economy expanded, imports

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<sup>45</sup> See further, *supra*, Chapter 3, pp. 42-46.

<sup>46</sup> See further, *supra*, Chapter 7, pp. 160-163.

<sup>47</sup> Nigerian Ports: Traffic & Development, vol. 2, p. 250.

escalated and exports (excluding petroleum products) gradually decreased.<sup>48</sup> Nevertheless, cargo throughput was such that by the mid-1970's, Lagos and to a lesser extent Port Harcourt were experiencing congestion. At this stage, port administration was integrated under the N.P.A. Additionally, port limits were well documented in statutes.<sup>49</sup> Arrival at a Nigerian Port might have been determined by reference to the functional or commercial test. The latter considers the extent of port jurisdiction or the status of the vessel's waiting place as paramount.<sup>50</sup> In 1973, the formal test of arrival was formulated. Its essence was that arrival turned on whether the vessel was waiting within the legal limits of the port.<sup>51</sup> The advantages and limitations of each test have been discussed in previous Chapters. It suffices to state that, in the case of the commercial and formal tests, anchorage zones had been specified for each port.<sup>52</sup> Secondly, port limits had been defined since 1917.<sup>53</sup> These factors would have simplified the

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<sup>48</sup> W. Ezeagu, Comprehensive Guide to Nigerian Exporters (1987) pp. 1-3.

<sup>49</sup> i.e. Declaration of Port Limits Order 1959; Declaration of Port Limits Order 1965; Ports (Declaration of Port Limits) Order 1975.

<sup>50</sup> See further, *supra*, Chapter 4.

<sup>51</sup> See further, *supra*, Chapter 5.

<sup>52</sup> These are usually located near the Fairway Buoys, although some Ports have other recognized anchorages, e.g. Bonny Town (Port Harcourt); Bennett Island (Warri); Parrot Island (Calabar).

<sup>53</sup> See, L.N. 1917 No. 137 and L.N. 1939 No. 17. Also, fn 49.

ascertainment of arrival.

### **9.3.1 Judicial Aspects**

In the relevant reported cases, Nigerian Courts have not expatiated upon the concept of arrival. The widespread assumption appears to be that a vessel waiting within the port limits is an "arrived ship".<sup>54</sup> Technicalities such as the vessel being placed at the charterer's disposition are not amplified. In the particular case of Lagos, it could have been argued that the persistent nature of the 1970's congestion prevented the vessel from being placed at the charterer's effective disposition, although she might have been waiting at the usual place within the port. This proposition might have been successful despite the fact that most of the demurrage clauses had included W.I.B.O.N. provisions.<sup>55</sup> It would have encouraged shipowners to minimise delay by the imaginative use of insurance policies. "Alternative destination" stipulations could also have been secured in charterparties. In any event, the demurrage that was paid out was on such a scale that the total cost to the economy has been estimated at N7 billion.<sup>56</sup> In its Report on the Importation of Cement, the Belgore

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<sup>54</sup> See, M.L. Polak & Zoon v G. Cohen (Nig) Ltd [1967] N.C.L.R. 71, 72(H.C. Lagos); Anglo-French Steel Corp v Panfixing Shipping Co Ltd [1978] N.C.L.R. 149, 173(F.R.C).

<sup>55</sup> i.e. "whether in berth or not". The scope of the provision is discussed in Chapter 10.

<sup>56</sup> Financial Times, "Ports Aim to Keep Ahead of Demand", November 11th, 1981 p. xv.

Tribunal remarked upon the arbitrary manner in which demurrage had been fixed in the various sales contracts without any reference to port capacity.<sup>57</sup> Also, it pointed out malpractices such as declaring fictitious ships as awaiting a berth.<sup>58</sup> On the basis of the W.I.B.O.N. provision, shipowners were able to claim that, whether or not a vessel had berthed, demurrage which varied between \$3,500 and \$4000 per day was payable as soon as the agreed laydays had expired. A more progressive development of caselaw on this subject might have occurred, if in the few cases that were decided locally, the Courts had provided a lucid explanation of their decisions. It is essential that technical terms which are common to the shipping trade are discussed in greater depth.

### **9.3.2 Basic Routines**

This Section assesses the period since 1980. Although, periodic congestion due to seasonal changes in consumer demand still occurs, this has not been on a scale comparable with the situation in the 1970's.<sup>59</sup> Berthing delays are now a consequence of documentation requirements stipulated in economic or fiscal policies. In contrast to other regional ports, per ton cost of loading and discharge at Nigerian Ports

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<sup>57</sup> See, Report of the Tribunal of Inquiry into the Importation of Cement (1976) pp. 75-78.

<sup>58</sup> *ibid*, p. 77.

<sup>59</sup> Fourth National Development Plan 1981-85, pp. 243-244.



is still comparatively high.<sup>60</sup> The situation is compounded by the fact that work is not done on a 24 hour basis. Furthermore, stevedores are not effectively controlled and port equipment is subject to frequent breakdowns.<sup>61</sup> At this juncture, it is pertinent to explain the basic routines involved in bringing a vessel into a Nigerian Port.

The first stage is the declaration of the vessel. The ship's agent declares to the N.P.A. at the Berthing Committee meeting particulars such as the name, length and draught of the vessel, destination in Nigeria, type and tonnage of cargo, S.E.N. No. and date of issue and estimated time of arrival (E.T.A).

Depending on the port, the number of copies of Cargo and Freight Manifests required for submission varies. These are distributed to agencies including the Traffic Division, N.P.A., Nigerian Maritime Authority (N.M.A),<sup>62</sup> Customs Department, Port Health and the Immigration Department. Upon the basis of the Cargo Manifest,<sup>63</sup> the N.P.A. prepares a

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<sup>60</sup> M. Magoro, "The Future of Maritime Industry in Nigeria" pp. 9-10. Paper delivered at a Conference organized by the Shipping Trade Group and Clearing & Forwarding Trade Group, Lagos Chamber of Commerce & Industry, October 19th, 1988.

<sup>61</sup> *ibid.*

<sup>62</sup> The N.M.A. was established to coordinate Nigeria's shipping policy and supervise compliance with the United Nations Code of Conduct for Liner Conferences 1974: ss. 1-5, National Shipping Policy Decree 1987.

<sup>63</sup> See, specimen Cargo Manifest, appendix xii. Also, s. 62, Ports Act; reg. 19(1), N.P.A. (Dues & Rates) Regulations 1987.

provisional bill in respect of port dues and charges. The Freight Manifest is the basis upon which the 3% freight surcharge,<sup>64</sup> levied by the N.M.A. is calculated. It is essential, prior to the computation of the provisional bill to ensure that the vessel is not carrying any contraband or toxic goods. Furthermore, vessels which have called at South African Ports are not permitted in Nigeria's territorial waters unless a period of six months has elapsed since calling at the South African Port or Ports. A final bill for port dues and charges may be prepared if en route to Nigeria the vessel loads additional cargo or upon the completion of discharge.

As the vessel proceeds to Nigeria, she is expected to advise the N.P.A. of her E.T.A. Upon arrival at the specified anchorage, the Master will notify the time of arrival to the Harbour-Master by V.H.F. radio. Subsequently, he may be required to sign a Master's Declaration, providing details of the vessel and her cargo.<sup>65</sup> The ship's agent having knowledge of the vessel's arrival and readiness will notify the charterer or receivers of cargo by a notice of readiness.<sup>66</sup> As soon as the notice of readiness is accepted, laytime will commence subject to other contractual stipulations. The ship's agent may also be required to book a pilot, particularly in a

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<sup>64</sup> ss. 17 & 22, National Shipping Policy Decree 1987.

<sup>65</sup> See, specimen Master's Declaration, appendix xiii. Also, s. 62, Ports Act; reg. 19(2), N.P.A. (Dues & Rates) Regulations 1987.

<sup>66</sup> See, specimen notice of readiness, appendix xiv.

compulsory pilotage district.<sup>67</sup> Where pilotage is compulsory, the shipowner has a duty to ensure that the vessel navigates under a pilot.<sup>68</sup>

Upon confirmation that the provisional bill has been settled, the vessel may berth. The ship's agent will be expected to arrange with the Customs Department, Port Health, Immigration Department and State Security Agencies, the inspection of the vessel, its crew and cargo. Stevedores will also be notified. During loading or discharge, the Master usually keeps a Statement of Facts (S.O.F.) which is a record of operational and non-operational periods.<sup>69</sup> As a "contemporaneous" document, the S.O.F. may be significant if there is a dispute relating to the demurrage payable.

Once the loading or discharge has been completed and

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<sup>67</sup> The relevant provisions are s. 45(2), Ports Act; Pilotage Districts Order 1959; Pilotage Districts (Amendment) Order 1963; reg. 14, N.P.A. (Pilotage) Regulations 1961 as amended by reg. 2, N.P.A. (Pilotage) (Amendment) Regulations 1961 and reg. 2, N.P.A. (Pilotage) (Amendment) Regulations 1963.

<sup>68</sup> Axis v Tidex (Nig.) Ltd & Anor [1972] N.C.L.R. 397, 416-417 (H.C. Lagos). The N.P.A. is protected from third party claims, and claims from a shipowner who suffers damage whilst the vessel is under the navigation of a compulsory pilot: ss. 59 & 96(2), Ports Act. See further, Palm Line Ltd v N.P.A. [1969] N.C.L.R. 403 (H.C. Lagos); Workington Harbour & Dock Board v Towerfield [1951] A.C. 142 (H.L.). The Port Authority in circumstances of compulsory pilotage does not have a duty to manage and control the vessel, but merely a duty to license and appoint duly qualified pilots: Fowles v Eastern & Australian S.S. Co [1916] 2 A.C. 556 (P.C.). It is noted that s. 96(1), Ports Act stipulates that, the grant or renewal of a pilot's license shall not impose any liability on the Authority for any loss occasioned by any act or default of the pilot.

<sup>69</sup> See, specimen S.O.F., appendix xv.

Customs clearance has been obtained, provided the vessel has settled all bills, she may leave the port.<sup>70</sup> If a pilot has been engaged, the Master is obliged to sign a Pilotage Chit when entering or leaving the port since pilotage dues are calculable on this basis.<sup>71</sup>

### 9.3.3 Specific Routines

Nigerian Ports experienced a contraction of cargo throughput during the 1980's. Non-oil exports had decreased from 2,255,000 tonnes in 1978 to 1,411,223 tonnes in 1985.<sup>72</sup> Similarly, imports slumped from 30,479,00 tonnes to 11,883,396 tonnes during the same period.<sup>73</sup> Whist the neglect of non-oil exports could be explained by the increasing reliance on oil receipts, the slow-down in imports seems to have resulted from specific economic and fiscal policies.

In 1979, the Federal Government stipulated that consignments into Nigeria (with a few exceptions) had to be inspected by appointed agents prior to shipment.<sup>74</sup> The object

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<sup>70</sup> With regards to the submission of Master's Declaration and Cargo Manifests for export cargoes, see, s. 63, Ports Act; regs. 19(3) & 19(4), N.P.A. (Dues & Rates) Regulations 1987.

<sup>71</sup> See, specimen Pilotage Chit, appendix xvi.

<sup>72</sup> Central Bank of Nigeria, Annual Report, (1980) p. 32; Nigerline, "Maritime Technology" No. 3 (1988) vol. 18, p. 9.

<sup>73</sup> *ibid.*

<sup>74</sup> s. 1(1), Pre-Shipment Inspection of Imports Act 1978, as amended by Pre-Shipment Inspection of Imports (Amendment) Decree 1984. Exempted goods are listed in s. 1(5) of the 1978 Act. See also, in respect of exempted goods, Pre-Shipment

was to obtain an independent assessment of the price, quality and quantity of inward consignments, so as to deter the submission of false or inflated invoices for foreign exchange purposes. Importers are now required to furnish their Bankers with the following documents:

- (i) Pro Forma Invoice.
- (ii) Marine Insurance Policy on C. & F. value of Invoice.
- (iii) Application to Purchase Foreign Exchange, Form M.<sup>75</sup>
- (iv) Provisional Duty Advance Declaration, Form C188A, which is obtainable from Clearing Agents.<sup>76</sup>

Upon the receipt of these documents, the Bank will forward Forms M & C188A to the Inspecting Agent overseas. The seller is obliged to provide the Inspecting Agent with documents relevant to the transaction, e.g. Pro Forma Invoice, Purchase Order, Sales Contract and Price List.<sup>77</sup> The seller is also expected to facilitate access to and inspection of the goods. If details relating to the price, quality and quantity of the goods satisfy the Inspecting Agent, a Clean Report of Findings (C.R.F.) will be issued to the seller.<sup>78</sup> Alternatively, if a Non-Negotiable Report of Finding is issued, the seller may

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Inspection of Imports (Exemption) Order 1980, as amended by Pre-Shipment Inspection of Imports (Exemption) (Amendment) Order 1981.

<sup>75</sup> See, specimen Form M, appendix xvii.

<sup>76</sup> See, specimen Form C188A, appendix xviii.

<sup>77</sup> s. 1(3).

<sup>78</sup> s. 2(1). See, specimen C.R.F., appendix xix.

still obtain a C.R.F. if adjustments are made to the satisfaction of the Inspecting Agent.<sup>79</sup>

Failure to present a C.R.F. with the shipping documents of goods liable to pre-shipment inspection, will result in the prohibition of foreign exchange payments.<sup>80</sup> In addition to the C.R.F., the Inspecting Agent has to issue an Import Duty Report (I.D.R.) which certifies the final Customs Duty payable.<sup>81</sup>

The problem lies in the fact that delays in the remittance of the C.R.F and I.D.R. from the overseas Inspecting Agent to the Importer's Bankers may cause further delay to the vessel. The Customs Department approach is to refuse to release the cargo until the Importer or his Clearing Agent produces both documents. If the vessel has berthed or is waiting at an anchorage within the port limits, demurrage liability may be incurred. If she is waiting outside the port limits, she may not be granted berthing facilities by the N.P.A. if there is a likelihood of indefinite delay after berthing. Therefore, the vessel may be prevented from becoming an "arrived ship" due to the late remittance of the C.R.F. and I.D.R. It is probably these difficulties which have persuaded the Federal Government to approve the local issuance of

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<sup>79</sup> s. 2(2).

<sup>80</sup> s. 3(2).

<sup>81</sup> See, specimen I.D.R., appendix xx.

I.D.R.'s.<sup>82</sup> The idea is for Inspecting Agents to open local offices where I.D.R's are directly despatched from overseas. For these purposes, it has been suggested that each port should forward on a daily basis, the name of each vessel that has been "declared" to it and voyage number. This information would be incorporated on I.D.R.'s and would facilitate their onward transmission to the respective ports.<sup>83</sup>

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<sup>82</sup> The Nigerian Guardian, "Government Approves Local Issuance of Import Duty Reports" November 2nd, 1988.

<sup>83</sup> L.A. Salami, Keynote Address at a Conference organized by the Shipping Trade Group and Clearing & Forwarding Trade Group, Lagos Chamber of Commerce & Industry, October 19th, 1988, p. 6.

**TABLE 1**

**CARGO THROUGHPUT FOR MAJOR NIGERIAN PORTS 1966/67-1969/70**

**(TONNES)**

	1966/67	1967/68	1968/69	1969/70
LAGOS	3169899	3834685	3832316	3951656
PORT HARCOURT	1008471	-	-	136180
WARRI	-	-	-	-
CALABAR	-	-	-	69973
TOTAL	4178370	3834685	3832316	4157809

Source: N.P.A.<sup>84</sup>

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<sup>84</sup> N.P.A., "Port Congestion in Nigeria and How It Was Tackled by the Nigerian Ports Authority" (1976) p. 8.



**TABLE 2****CEMENT CARGO DISCHARGED AT ALL NIGERIAN PORTS 1965/66 -**  
**1971/72 (TONNES)**

YEAR	LAGOS	WARRI	KOKO	BURUTU	P.H	CALABAR	TOTAL
65/66	140551	-	-	-	42878	-	183429
66/67	108916	-	-	-	63629	-	172545
67/68	107310	-	-	-	-	-	107310
68/69	45235	-	2120	-	-	-	47355
69/70	88809	-	5482	-	1206	4112	99609
70/71	415564	23347	10214	-	108799	3696	561620
71/72	757288	76603	38447	-	221673	2092	1096103

Source: N.P.A.<sup>85</sup>

P.H = Port Harcourt

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<sup>85</sup> *ibid*, p. 13.

**TABLE 3****CARGO THROUGHPUT IN MAJOR NIGERIAN PORTS 1970/71 - 1975/76****(TONNES)**

	1970/71	1971/72	1972/73	1973/74	1974/75	1975/76
LAGOS	5112500	5173975	4620029	5372774	5225436	6941309
PORT HARCOURT	400914	746804	697503	787112	933241	1360883
WARRI	339502	401901	259352	314395	399750	543474
CALABAR	118531	114526	62610	58696	126906	198031
TOTAL	5971447	6437206	5639494	6532977	6685333	9043697

Source: N.P.A.<sup>86</sup>

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<sup>86</sup> *ibid*, p. 8.

**TABLE 4****CEMENT CARGO DISCHARGED AT ALL NIGERIAN PORTS 1972/73 -**  
**1975/76 (TONNES)**

YEAR	LAGOS	WARRI	KOKO	BURUTU	P.H	CALABAR	TOTAL
72/73	336167	86541	-	-	70343	-	493051
73/74	277573	90093	4131	-	97710	-	469507
74/75	752748	43395	8509	-	281906	7317	1093875
75/76	1135212	165364	58381	31	520703	21492	1894183

Source: N.P.A.<sup>87</sup>

P.H = Port Harcourt

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<sup>87</sup> ibid, p. 13.

## CHAPTER TEN

### ADVANCEMENT OF LAYTIME CLAUSES

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  - 10.1.1 Types of Compensatory Provisions
- 10.2 W.I.B.O.N. and Arrival within the Port
  - 10.2.1 Effect of Exceptions Clauses
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## CHAPTER TEN

### ADVANCEMENT OF LAYTIME CLAUSES

#### 10.1 Introduction

The consistent theme in some of the precedents on the "arrived ship" is that a ship which drops anchor just short of the limits of the port, for whatever reason, has not arrived at its destination.<sup>1</sup> The type of charter involved (port, dock or berth), the status of the anchorage or the fact that it just outside the port limits are all irrelevant details. It is the shipowner who will bear the risk of delay.

Since the field of laytime and demurrage is one in which statutory control is absent,<sup>2</sup> it has been the function of the Courts to provide, (where the parties have not made their own provisions), the actual specifications of the position that the vessel has to attain for the purposes of arrival.

"The function of the court is to provide the parties to the transaction with a lexicon, establishing the meaning of the words which they express; and also, to reinforce the bargain by establishing the norms which are to apply to those

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<sup>1</sup> The Johanna Oldendorff [1974] A.C. 479, 535 & 553 (H.L.); The Maratha Envoy [1978] A.C. 1, 9 (H.L).

<sup>2</sup> At least in the major common law jurisdictions such as England and the U.S.A.

aspects which the parties have not themselves spelt out."<sup>3</sup>

The particular problem of port charters and the changes in the law relating to such charters have already been outlined.<sup>4</sup>

(i) Pre 1908: The vessel had to get to the berth or the usual place within the port for loading/discharge. It was not sufficient that she merely reached the entrance to the port.

(ii) (1908): Kennedy, L.J.'s test was to require the vessel to be waiting within the commercial area of the port.<sup>5</sup>

(iii) (1958): The Parker test redefined the commercial area as that part of a port where a ship could be loaded or discharged when a berth is available, albeit she cannot be loaded until a berth is available.<sup>6</sup>

(iv) (1973): The Reid test, which replaced the Parker test, required that the vessel must be within port and at the immediate and effective disposition of the charter.<sup>7</sup>

These tests, in particular (i) and (iii), were not favourable to the shipowner because their application usually had the consequence of converting port charters into berth or dock charters. The shipowner had to accept that, even if the vessel

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<sup>3</sup> Per Mustill, L.J. "Decision-making in Maritime Law" [1985] L.M.C.L.Q. 314, 323.

<sup>4</sup> *supra*, Chapters 3-6.

<sup>5</sup> Leonis v Rank [1908] 1 K.B. 499, 521(C.A.).

<sup>6</sup> The Aello [1958] 2 Q.B. 385, 401(C.A). This test was subsequently overruled in The Johanna Oldendorff, *supra*.

<sup>7</sup> The Johanna Oldendorff, pp. 535-536.

was completely ready in all respects, he would still have to bear the risk of delay. In the case of berth and dock charters, waiting (whether within or outside the port limits) was at the shipowner's expense provided that the ship had not reached the specified berth or dock respectively. The dissatisfaction with some of these judicial principles probably contributed to the use of compensatory provisions designed to transfer to the charterer the whole or part of the risk which would otherwise fall on the shipowner.

#### **10.1.1 Types of Compensatory Provisions**

Compensatory provisions can be classed into five major groups: (i) Those which advance laytime by providing that time is to count although the vessel has not yet reached a position at which she can become an "arrived ship".

e.g. "Time to load/discharge to commence ..... whether in berth or not";<sup>8</sup> "Time for loading/discharge to be counted .... on or after arrival at or off loading or discharging berth as ordered";<sup>9</sup> "Time for loading/discharge to count whether in port or not."<sup>10</sup>

(ii) Those which provide that waiting time is to count as

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<sup>8</sup> Synacomex, Cl 6; Medcon, Cl 10; C(Ore) 7, Cl 6; Austwheat, Cl 18; Baltimore Form C Charter, Cl 14.

<sup>9</sup> Cemenco, Cl 5; Panstone, Cl 7.

<sup>10</sup> Medcon, Cl 10; C(Ore) 7, Cl 26.

loading/discharging time<sup>11</sup> or laytime.<sup>12</sup>

(iii) Those which stipulate the payment of demurrage for all waiting time.<sup>13</sup>

(iv) Clauses which postpone the commencement of laytime are far less common and are usually found in ore charters.<sup>14</sup>

e.g. "Vessel to load or discharge in regular turn".

(v) Clauses which specify that the charterer will provide a berth that is reachable on arrival.<sup>15</sup> A breach of such a provision does not result in the advancement of laytime. Nevertheless, the charterer may be liable for the payment of damages if the vessel is delayed by port congestion or weather/nautical conditions.

In addition there are special clauses which deal with specific ports. Baltimore Form C Charter, Cl 19 provides that,

"If vessel is unable to enter Avonmouth or Hull or Glasgow immediately upon arrival owing to congestion, vessel shall be permitted to tender on arrival at anchorage in Walton Bay or Spurn Head or Tail of the Bank as applicable, and laytime to commence in accordance ... Time shifting from anchorage to discharge berth not to count as laytime."

Also, the Weser Lightship clause which was discussed in The

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<sup>11</sup> Gencon, Cl 6.

<sup>12</sup> See, The Darrah [1977] A.C. 157 (H.L.). Also, Hydrocharter, Cl 5(d); Scancon, Cl 8.

<sup>13</sup> Austral, Cl 2.

<sup>14</sup> Riodoceore, Cl 10; Orecon, Cl 2.

<sup>15</sup> Exxonvoy 1969, Cl 9.



Maratha Envoy stipulates that,

"If vessel is ordered to anchor at Weser Lightship by Port Authorities, since a vacant berth is not available, she may tender notice of readiness upon arriving at anchorage near Weser Lightship, as if she would have arrived at her final loading/discharging port. Steaming time for shifting from Weser Lightship to final discharging port, not to count".

Some charterparties have a general clause which deals with the problem of congestion. Ferticon, Cl 3 provides that,

"If prevented from entering port, harbour or docks, or from arriving at or off the loading or discharging place, by reason of congestion of shipping or shore traffic not due to strikes, lock-outs, civil commotions, frosts, floods, storms, bad weather, or accidents, the vessel shall be regarded as if ready in berth from first high water on or after arrival at or off the port, or so near thereunto as she may be permitted to approach, and time shall begin as above, but the actual time occupied in moving from the place of stoppage to the actual place of loading or discharge shall not count."<sup>16</sup>

It is noted that North American Grain Charter (Norgrain),<sup>17</sup> Cl 17(b) is more specific on the position that the vessel should attain if she is waiting outside the commercial limits of the port.

"If the vessel is prevented from entering the commercial limits of the loading/discharging port(s) because the first or sole loading/discharging berth or a layberth or anchorage is not available, or on the order of the charterers/receivers or any competent official body or authority, and the Master warrants that the

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<sup>16</sup> Also, Austwheat, Cl 18.

<sup>17</sup> Norgrain was formulated in 1973 to replace the Baltimore Form C Charter.

vessel is physically ready in all respects to load or discharge, the time spent waiting at a usual waiting place outside the commercial limits of the port or off the port shall count against laytime. Such laytime shall count from vessel's arrival at such usual waiting place .....

Whilst Baltimore Form C Charter, Cl 19 is only applicable in cases of congestion, it is suggested that Norgrain, Cl 17(b) can be applied in those situations where Port Authorities have ordered the vessel to wait outside the commercial limits because of the threat of, or actual, bad weather or for some other reason and also where the charterers/receivers have decided to load or discharge other ships out of turn. Chapters 10-12 will examine the extent to which these compensatory provisions can be regarded as alternatives to a standard test of arrival.

#### **10.2 W.I.B.O.N. and Arrival Within the Port**

The "whether in berth or not" (W.I.B.O.N.) clause, is a common device for advancing laytime under a berth charterparty. An important aspect of the clause relates to the extent of its application. In Northfield Steamship Co v Compagnie L'Union des Gaz,<sup>18</sup> the charterparty provided that time was to commence when the vessel was ready to unload and written notice had been issued, whether in berth or not. It was further provided that, in the event of strikes, lock-outs,

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<sup>18</sup> [1912] 1 K.B. 434(C.A). Relevant American authorities include: W.K. Niver Coal Co v Cheronea 142 F. 402(1 CCA, 1905); Hellenic Trans. Co v McNeill & Sons Co 273 F. 290(DC Md, 1921).

civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging, time was not to count unless the vessel was already on demurrage. The vessel arrived at Savona (Italy), on September 22nd, 1909, and had to wait inside the harbour until September 25th, because there were no available berths. She could not have been discharged where she waited because of certain rules which had been sanctioned by the Port Authority. Those rules provided that shore labourers would not discharge vessels until they had berthed, and further that they (i.e. shore labourers) would be solely responsible for bringing cargo to the ship's rail. The charterer denied the claim for demurrage on the grounds that the vessel was not an "arrived ship" and was also not ready to unload until she had berthed. It was further contended that, since the delay was a consequence of the port rules, it was covered by the strike clause.

The Court of Appeal ruled in favour of the shipowner.<sup>19</sup> With respect to the strike clause it was held that, "... the other causes" must be restricted to causes ejusdem generis. The delay caused by regulations sanctioned by the Port Authorities was not ejusdem generis with that caused by any of the events specified in the strike clause. A further point had been whether the charterer could be excused liability because the port regulations made it impossible for the vessel to

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<sup>19</sup> Cozens-Hardy, M.R. and Farwell, L.J. at pp. 439-440.

deliver at the specified rate before she berthed. This argument was rejected on the grounds that the words "provided the steamer can deliver" had no bearing on the issue of when time could commence. They merely referred to the mechanical facilities and structural capacity of the vessel.<sup>20</sup>

In Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency,<sup>21</sup> the charterparty contained a variant of the W.I.B.O.N. clause. The laydays were to commence from the time that the vessel was ready to receive or discharge her cargo, the Master having issued six hours notice to the charterer's agents, berth or no berth.<sup>22</sup> There were exceptions in respect of the Act of God, perils of the sea, arrest and restraint of princes, rulers and people. The vessel arrived in Batoum Roads on November 5th, 1921. On that same date, she was granted free pratique but was prohibited from communicating with the shore. Although the prohibition was lifted on November 6th, as the 7th was a general holiday, the Master was unable to notify the charterer's agents about the vessel's arrival and readiness until November 8th. The shipowner's claim for demurrage was calculated on the basis that the laytime started from 2 p.m. on November 8th and ran continuously until 8 a.m. on December 5th, when the loading was completed. In addition, they argued

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<sup>20</sup> At pp. 440-441.

<sup>21</sup> [1912] 2 K.B. 172(C.A).

<sup>22</sup> It is noted that Charterparty Laytime Definitions 1980, Cl 26 regards the expression "berth or no berth" to be equivalent to "whether in berth or not", see, appendix i.

that the exceptions were inapplicable to excuse the charterer from liability for delay ensuing from the Russian Government sending the vessel away from the port between November 8th and 25th.

The Court of Appeal agreed with the shipowner on both points. Although there was no detailed inquiry into the meaning of the expression "berth or no berth", the Court accepted that the laytime ran from 2 p.m. on November 8th. Apart from reiterating the strict obligations of the charterer where the laytime was fixed,<sup>23</sup> the Court concluded, that even if the acts of the Russian Government fell within the scope of the exceptions clause, the charterer could not have avoided liability because that clause was inserted only for the benefit of the shipowner.

In both cases, there had been no inquiry involving the type of charter in which the W.I.B.O.N. clause could be used. It appears that Northfield Steamship Co v Compagnie L'Union des Gaz involved a wharf charter but it is not quite clear what was the nature of the charter in the second case. Furthermore, there was very little discussion about the legal concept of arrival. Since the vessel in the first case was waiting inside the inner harbour, the presumption is that, she

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<sup>23</sup> These were affirmed in Love & Stewart v Rowtor S.S. Co [1916] 2 A.C. 527(H.L); William Alexander & Sons v Akt. Dampskibet Hansa [1920] A.C. 88(H.L). See also, United States v Czarnikow-Rionda Co (1930) A.M.C. 647(2 CCA, 1930); Eugenia N.G. Livanos v Bisbee Linseed Co (1931) A.M.C. 1724(SDNY, 1931).

was waiting within the port. In the second case the vessel was described as waiting in Batoum Roads for a considerable period before gaining access into the usual loading place, viz, Petroleum Harbour. As in the previous case, the vessel must be presumed to have been waiting within the port otherwise the Courts would probably not have permitted laytime to run.

This point was reinforced by The Seafort,<sup>24</sup> which considered whether the W.I.B.O.N. clause could be relied upon, where the vessel was clearly waiting outside the confines of the port. Under a Baltimore Form C Charter, the charterer ordered the vessel to discharge at Hull. On January 30th, 1955, she dropped anchor at Spurn Head Anchorage. This was due to the fact that the only place in Hull where bulk grain could be discharged was full. The Anchorage constituted the usual and safest waiting place for a vessel of the size of the Seafort. It was also the nearest anchorage to the usual discharging place. The vessel remained there until February 9th when she eventually berthed.

The shipowner submitted that the effect of the W.I.B.O.N. clause was that, time counted at Hull whether the vessel was actually in berth, or waiting for a berth in the usual place. The charterer countered that time could not count until the vessel's arrival within the usual discharging place for a vessel of her type and size. Alternatively, even if the vessel had arrived at some point of time and place before entering

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<sup>24</sup> [1962] 2 Lloyd's Rep. 147.

the usual discharging place, she was not then ready to discharge because she had not yet received both Customs and quarantine clearances.

McNair, J. ruled in the charterer's favour. It was held that unless the case could be distinguished by the inclusion of the W.I.B.O.N. clause in the charterparty, the matter was concluded against the shipowner by the House of Lord's decision in The Aello.<sup>25</sup> In his opinion, the material question was whether the vessel had arrived at the port. Since the Seafort had been waiting outside the legal, fiscal and administrative limits of the port, she could not be regarded as an "arrived ship". Therefore, the view that the inclusion of the W.I.B.O.N. clause could override the strict conception of arrival was rejected.<sup>26</sup> In conclusion, the learned judge referred to the case of The Werrastein.<sup>27</sup> His decision was not considered to be inconsistent with Sellers, J.'s in the latter case, which had also involved a ship that was compelled to wait at Spurn Head because of congestion. The particular proviso relied upon by the shipowner was different in nature from the W.I.B.O.N. clause and it was held to be adequate to transfer to the charterer the liability for delay. Although, the English authorities take the view that the W.I.B.O.N. provision has no application if the vessel is waiting outside

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<sup>25</sup> [1961] A.C. 135(H.L).

<sup>26</sup> The Seafort, p. 154.

<sup>27</sup> [1957] 1 Q.B. 109.

the port limits, it is noted that some American awards have adopted a contrary position.<sup>28</sup>

### **10.2.1 Effect of Exception Clauses**

In Reardon Smith Line Ltd v East Asiatic Co,<sup>29</sup> the vessel could not berth because of congestion which had resulted from the requisition of ships and quay space by the Government, at the Port of Dairen. The shipowner's claim for demurrage in respect of the delay was mainly based on the W.I.B.O.N. provision. The charterer resisted the claim on account of the exceptions clause which read in part,

".....If the cargo cannot be loaded by reason of riots, civil commotions .... or by reason of obstructions or stoppages beyond the control of the charterers ..... in the docks or other loading places ..... the time for loading ..... shall not count during the continuance of such causes ....."

The charterer's contended that under those circumstances, the delay in loading arose from "obstructions in the docks or loading places". Branson, J. upheld this contention. He considered that he was bound by the case of Leonis v Rank (No. 2).<sup>30</sup> In that case, Bigham, J. and the Court of Appeal had held on a similar point that the charterer was relieved from liability because the delay had resulted from the berths which

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<sup>28</sup> e.g. The Polyfreedom (1975) A.M.C. 1826(N.Y.Arb).

<sup>29</sup> (1938) 62 Ll.L.Rep. 23.

<sup>30</sup> (1908) 13 Com.Cas. 161 & 295.



might otherwise have been available to the vessel being occupied by other ships. As a result, Branson, J. rejected the argument that the W.I.B.O.N. clause would have to prevail.

The Court of Appeal considered the matter in The Amstelmolen.<sup>31</sup> When the vessel arrived at the port of New Orleans on July 20th, 1959, she was unable to berth due to congestion and had to wait until August 4th for a vacant berth. The Centrocon strike clause (amended) was also included in the charterparty.<sup>32</sup> The shipowner, relying on the W.I.B.O.N. clause contended that laytime started on July 21st (the day on which the notice of readiness was tendered and accepted) and ran continuously without any interruptions. The charterer, on the other hand, dissented on the grounds that the word "obstruction" in the Centrocon Strike Clause covered congestion at a port. Consequently, they were excused from liability.

By an unanimous decision, the Court of Appeal held that if the term "obstruction" was given its plain and ordinary meaning, it covered instances of port congestion. Therefore, the strike clause could suspend the laytime.<sup>33</sup> It is suggested that this approach to the the exceptions clause was proper. If the time which is counted upon the W.I.B.O.N.

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<sup>31</sup> [1961] 2 Lloyd's Rep. 1(C.A).

<sup>32</sup> For the essential parts of the clause, *ibid*, pp. 6-7.

<sup>33</sup> Per Ormerod, L.J., p. 10. Also, Upjohn and Davies, L.J.J., pp. 11-12.

clause taking effect is part of the specified laytime, it should be subject to excepted periods where applicable.<sup>34</sup>

### **10.3 Effect of W.I.B.O.N.**

The question which now arises is what is the true effect of the W.I.B.O.N clause? It has been decided that it has no application if the vessel is waiting outside the port limits. But once the vessel gets within the port, how does it affect the position of the parties? Is a berth charter converted into a port charter so that once the vessel gets within the port limits, she becomes an "arrived ship", or does it merely advance the commencement of laytime whilst leaving the primary obligations created by the charterparty intact? The inquiry is not purely academic. It is relevant in determining who is to be held responsible for shifting expenses, although those expenses, when compared with demurrage costs may not be too excessive.

#### **10.3.1 The Johanna Oldendorff**

Buckley, L.J. in The Johanna Oldendorff<sup>35</sup> had posed the same question. He was of the view that the point was not crucial. Nevertheless, he held that the W.I.B.O.N. clause

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<sup>34</sup> See also, Retla Steamship Co v Canpotex Ltd (1977) A.M.C. 1594(N.Y.Arb), in which arbitrators decided that the strike clause in the "FOSFO" phosphate charterparty could override the W.I.B.O.N. provision.

<sup>35</sup> [1974] A.C. 479.

advanced the commencement of laytime whilst leaving the primary charterparty obligations intact.<sup>36</sup> On the other hand, Roskill, L.J. decided that the W.I.B.O.N. clause was designed to convert a berth charterparty into a port charterparty.<sup>37</sup> On the face of it, the statements would appear to reflect different views but in The Shackleford,<sup>38</sup> Buckley, L.J. stated that there had been mutual agreement as to the true effect of the clause.<sup>39</sup> Furthermore, in Lord Diplock's opinion, the W.I.B.O.N. provision makes the Reid test applicable to a berth charter.<sup>40</sup>

The foregoing suggests that the true effect of W.I.B.O.N. is to convert a berth charterparty into a port charterparty, so that once the vessel starts to wait within the port limits, the voyage stage is deemed to have been concluded. Nonetheless, Webster, J. in The Kyzikos<sup>41</sup> did not consider that the W.I.B.O.N. clause altered the primary obligations of the charterparty.<sup>42</sup> Although Buckley, L.J.'s dictum in The Johanna Oldendorff was cited in support of this proposition,

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<sup>36</sup> *ibid*, p. 501.

<sup>37</sup> *ibid*, p. 515.

<sup>38</sup> [1978] 2 Lloyd's Rep. 154(C.A.).

<sup>39</sup> At p. 163.. Contra, Webster, J. in The Kyzikos [1987] 1 Lloyd's Rep. 48, 56, who was of the opinion that Buckley and Roskill L.J.J. had adopted different viewpoints.

<sup>40</sup> The Maratha Envoy [1978] A.C. 1, 14(H.L.).

<sup>41</sup> [1987] 1 Lloyd's Rep. 48.

<sup>42</sup> At p. 50.

there was no allusion to The Shackelford, in which Buckley, L.J. had stated that his views were the same as Roskill, L.J.'s.

### **10.3.2 The Kyzikos**

The facts of The Kyzikos were particularly interesting because the vessel had been delayed by fog instead of congestion. At the time that the notice of readiness was issued at the discharge port, Houston, and at all material times thereafter, a berth had always been available for the vessel. She had been chartered under a berth charterparty for the carriage of steel and/or steel products from Italy to the U.S. Gulf. The vessel reached Houston on December 17th, 1984, but was not able to get to a discharging berth until December 20th. Loading was completed on January 11th, 1985. The shipowner's claim was for demurrage on the basis that time started to count on December 17th.

Webster, J. ruled in favour of the charterer. Previous authorities were not regarded as binding because they had not been concerned with a ship delayed by weather conditions. Apart from stating that the W.I.B.O.N. provision did not override the primary obligations created by the charterparty, it was held that even if the berth charter had been converted to a port charter, the vessel did not become an "arrived ship" because she was not at that time, at the immediate and effective disposition of the charterer even though she was not

being used for the owner's purposes.

The matter went on appeal and the Court of Appeal overruled Webster, J.'s decision. It was held that the true effect of the W.I.B.O.N. clause was to convert berth charters into port charters, and that despite the delay being attributable to weather conditions, the vessel had been placed at the charterer's disposition.<sup>43</sup>

Recently, the House of Lords has had the opportunity to review the matter.<sup>44</sup> By an unanimous decision, their Lordships have ruled that the W.I.B.O.N. clause results in the conclusion of the voyage stage and the advancement of laytime only if the vessel is waiting for a vacant berth. Poor weather or navigational conditions are regarded as risks which the shipowner has to bear. Their incidence would prevent the vessel from being placed at the charterer's disposition although she was waiting at the usual place within the port and was also ready in all other respects.

The major considerations in the House of Lords decision was the fact that there were no precedents to the effect that the W.I.B.O.N. clause was applicable in a situation where bad weather has prevented the vessel from reaching a vacant berth.<sup>45</sup> Furthermore, within the context of the charterparty,

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<sup>43</sup> [1987] 1 W.L.R. 1565, 1570-1572, 1574-1575 & 1576-1577(C.A).

<sup>44</sup> [1988] 3 W.L.R. 858(H.L).

<sup>45</sup> *ibid*, pp. 863-864.

the W.I.B.O.N. clause had been juxtaposed against other compensatory provisions, e.g. the "time lost" clause, which were only applicable in cases of port congestion.<sup>46</sup> According to Lord Brandon, the acronym, W.I.B.O.N. should be construed as shorthand for "whether in berth (a berth being available) or not in berth (a berth not being available)."<sup>47</sup>

Although most of the previous authorities have only been concerned with congestion, Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency<sup>48</sup> perhaps suggests that the W.I.B.O.N. clause is applicable in cases of non-physical obstructions brought about by the acts of a Government or Port Authority. In its unanimous decision in The Kyzikos,<sup>49</sup> the Court of Appeal had concluded that the W.I.B.O.N. clause was so generally worded that it could still be applicable even if the delay to the vessel was not caused by congestion.<sup>50</sup>

In The Werrastein,<sup>51</sup> Sellers, J. had explained the circumstances in which the charterer would be held responsible for any delay to the vessel. If the charterer has the selection of the place of loading/discharge, he is held liable

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<sup>46</sup> *ibid*, p. 864.

<sup>47</sup> *ibid*, pp. 864 & 866. Cf, C. Butcher, "An Inconsistency of Approach?" [1989] L.M.C.L.Q. 263, 265-266.

<sup>48</sup> [1912] 2 K.B. 172 (C.A.).

<sup>49</sup> [1987] 1 W.L.R. 1565 (C.A.).

<sup>50</sup> At pp. 1570 & 1576.

<sup>51</sup> [1957] 1 Q.B. 109.

for any loss that results from waiting for a vacant berth whilst the shipowner bears any loss resulting from storms, fog, tides and other events of that nature.<sup>52</sup> This might explain Webster, J.'s opinion that the W.I.B.O.N. clause was not applicable because the vessel had not been waiting for a berth. Consequently, the ordinary rules of arrival would have to determine the outcome of the dispute. Charterer's counsel had expanded this point in the Court of Appeal. The argument was that navigational delays had never been placed at the risk of the charterer. But this contention failed. In his consideration of the argument, Lloyd, L.J. referred to the dictum of Lord Diplock in The Maratha Envoy,<sup>53</sup> where in relation to the inclusion of the W.I.B.O.N. clause in charterparties, it was said that time would run "... when the vessel is waiting within the named port of destination for a berth there to become vacant." It was stated that, although the dictum is correct as it stands for those cases in which the cause of delay was congestion, it would also be correct for other cases if the last seven words were replaced by "to proceed to her berth."<sup>54</sup>

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<sup>52</sup> At pp. 120-121.

<sup>53</sup> [1978] A.C. 1, 14(H.L).

<sup>54</sup> Per Lloyd, L.J., The Kyzikos [1987] 1 W.L.R. 1565, 1572(C.A).

### 10.3.3. Charterparty Laytime Definitions 1980

On the issue of "relevant obstructions", the Charterparty Laytime Definitions 1980, which were compiled by the shipping community provides that W.I.B.O.N. is applicable in those cases where a berth is not "immediately accessible". Since "immediately accessible" is considered to be wider in scope than "immediately available",<sup>55</sup> the W.I.B.O.N. clause by virtue of such a definition would be effective irrespective of whether the delay is a consequence of port congestion or bad weather.

It was found that the Kyzikos was waiting within the port. In The Johanna Oldendorff,<sup>56</sup> it was held that if a vessel is waiting at some place within the port, whether the usual waiting place or not, the presumption is that she is at the charterer's disposition. It is suggested that if the words "at the immediate and effective disposition of the charterer" have the meaning proposed in Chapter 5,<sup>57</sup> the vessel could be regarded as being at the full disposition of the charterer. The fact that the vessel was only exposed to poor weather for three days, and the charterer's had not alleged that there had been a complete breakdown of communications links might have

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<sup>55</sup> ibid, pp. 1572-1573. The special provision under consideration in The Werrastein contained a reference to "immediately available". Sellers, J. held that it was only applicable to cases of congestion: [1957] 1 Q.B. 109, 120.

<sup>56</sup> [1974] A.C. 479, 535(H.L).

<sup>57</sup> supra, pp. 106-112.



been an alternative ground for holding that the vessel was always at the charterer's disposition.

Finally, as a matter of construction, it appears that there is no reason why the W.I.B.O.N. clause, simpliciter, should not be applicable when the vessel is waiting outside the port limits. However, it would appear that the strict concept of arrival has made it necessary to require that the vessel should be waiting within the port. The definition of the W.I.B.O.N. clause in the Charterparty Laytime Definitions 1980 simply refers to the arrival of the vessel at the port. It is suggested that the word "at" indicates a less rigid attitude and that the clause might have effect if the vessel waits at the port entrance or just beyond it. However, it is admitted that such a widening of the scope of the clause is not likely to occur whilst a formalistic test of arrival prevails. Until the "within the port" requirement is replaced, it is probably fair to state that the W.I.B.O.N. clause will continue to be applicable only within the port.<sup>58</sup>

#### **10.3.4 The W.I.B.O.N. Clause and Port Charters**

Most of the authorities prior to 1973, with the exception of Northfield Steamship Co. v Compagnie L'Union des Gaz and The Amstelmolen involved port charters. In The Johanna Oldendorff, the effect of the W.I.B.O.N. clause in a port charter was raised. Before Donaldson, J. the shipowner had not

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<sup>58</sup> Contra, The Polyfreedom (1975) A.M.C. 1826(N.Y.Arb).

relied on the clause. But before the Court of Appeal, the shipowner argued that laytime could run on account of the clause, when the vessel started to wait at the usual place within the legal, administrative and fiscal limits of the port.

Lord Denning, M.R. dissenting from the rest of the Court was of the view that the clause could have some effect in a port charter. It was held that the expression had been expressly inserted so as to cater for the particular circumstances of ports which have waiting places within the port limits.<sup>59</sup> However, Buckley and Roskill L.JJ. were of the view that the clause had no place in a port charter.<sup>60</sup> The Court of Appeal decision was reversed in the House of Lords, but there was no decision on this point although Viscount Dilhorne had expressed support for the reasons cogently stated by Buckley, L.J.<sup>61</sup>

The same point was canvassed before the Court of Appeal in The Maratha Envoy.<sup>62</sup> In that case the vessel was waiting outside the port limits but at the usual place. Lord Denning, M.R. and Stephenson, L.J. were prepared to give effect to the clause despite the weight of authority which suggested that

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<sup>59</sup> The Johanna Oldendorff [1974] A.C. 479, 491-492.

<sup>60</sup> *ibid*, pp. 501 & 515.

<sup>61</sup> *ibid*, p. 553.

<sup>62</sup> [1977] Q.B. 324 (C.A).

the clause was surplusage in a port charter.<sup>63</sup>

In the House of Lords, where the decision of the Court of Appeal was reversed, Lord Diplock emphasized that the W.I.B.O.N. clause was redundant in the case of a ship waiting within the port because she would already have arrived under the Reid test. Its inclusion in such charters was attributed to the fact that, printed forms which were appropriate to berth charters had been used by the parties for charters in which the destination of the loading or carrying voyage was a range of named ports.<sup>64</sup>

It is proposed that the clause should be given effect in the case of a vessel waiting outside the port limits under a port charter. It would be more appropriate to use provisions such as the "time lost" clause<sup>65</sup> or W.I.P.O.N.<sup>66</sup> Nevertheless, the inclusion of the W.I.B.O.N. clause in a port charter should be regarded as an attempt to advance laytime. This expansive approach will be particularly useful if vessels are delayed at ports which prohibit waiting within the port limits and which have their usual waiting places outside those limits. However, any modification of the Reid test will invalidate the use of W.I.B.O.N. for such purposes. It is noted that the definition of W.I.B.O.N. in the Charterparty

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<sup>63</sup> At pp. 339 & 347. Also, Shaw, L.J., p. 353.

<sup>64</sup> The Maratha Envoy [1978] A.C. 1, 14(H.L.).

<sup>65</sup> *infra*, Chapter 11.

<sup>66</sup> *infra*, Section 10.4.

Laytime Definitions 1980 specifically limits their use to berth charters. This is probably a reflection of the fact that the concept of the port that is described in the Definitions enables a vessel to become an "arrived ship" although she is waiting outside the port limits. Under those circumstances, the W.I.B.O.N. clause would be unnecessary in port charters.<sup>67</sup>

#### 10.4. Whether in Port or Not (W.I.P.O.N.)

Unlike the W.I.B.O.N. provision, the W.I.P.O.N. clause has not been subjected to intensive judicial scrutiny. Consequently, the relevant law, such as it is consists almost entirely of obiter dicta. If the W.I.B.O.N. provision is considered to be more suitable for berth charters, then the W.I.P.O.N. clause can be regarded as its equivalent within the context of port charters. However, it is noted that both provisions are usually included in the same charter irrespective of whether the final destination is a berth or port.

As with the W.I.B.O.N. provision, there are several outstanding issues, the most significant of which appears to be at what point outside the port limits does the clause take effect, or alternatively, how near to the port must the vessel be?

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<sup>67</sup> This is the position in America, see further, Benedict on Admiralty (1988) vol. 2b, p. 2-13.

#### 10.4.1 The Position of the Vessel

In The Tres Flores,<sup>68</sup> which involved a Synacomex charterparty, the vessel was compelled to wait for a free berth upon her arrival at Varna Roads (Bulgaria). In addition, she could not be inspected because of poor weather. When the inspection was finally carried out, fumigation of the holds was ordered. The charterer subsequently accepted the notice of readiness. However, the vessel had to wait for a few more days before berthing. The shipowner claimed that time started to run as soon as the notice of readiness was issued. This argument was rejected by Mocatta, J.<sup>69</sup> and the Court of Appeal on the grounds that both under a specific clause of the charterparty and at common law, the vessel had to be completely clean in all her holds before a notice of readiness could be issued. Therefore, it had been proper for the charterer to accept the notice after, and not before the fumigation.

As to the true effect of W.I.B.O.N., the Court of Appeal was of the view that it altered the common law position and prima facie, placed the loss of time between arrival in the Roads and getting into berth upon the charterer.<sup>70</sup> However, there was no specific reference to the W.I.P.O.N. provision which was also included in the charterparty.

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<sup>68</sup> [1974] Q.B. 264 (C.A).

<sup>69</sup> [1972] 2 Lloyd's Rep. 384.

<sup>70</sup> e.g. Roskill, L.J. at p. 275.

In The Shackelford,<sup>71</sup> the vessel was chartered under a Baltimore Form C Charter for the carriage of grain from the U.S Gulf to Constantza (Bulgaria). She arrived at Constantza Roads on October 15th, 1976, and remained there because of congestion until November 26th. Constantza Roads constituted the usual waiting place for the port but whilst waiting there, the vessel was not eligible for Customs clearance. According to the custom of the port, Customs clearance could only be obtained after the vessel had berthed. The vessel was granted free pratique and Customs clearance after her arrival in a bunkering berth on November 26th. Between that date and November 30th, when the vessel finally berthed, there had been a further shift to a lay-by berth. The shipowner claimed that the laytime started when the vessel anchored in the Roads because the W.I.B.O.N. provision overrode the requirement for Customs entry. The notice of readiness could therefore have been issued on October 15th.

Donaldson, J. rejected this submission. Nevertheless, the claim for demurrage and shifting expenses was allowed due to the fact that the charterer had accepted the notice on no less than three occasions and had therefore been estopped from rejecting the shipowner's claims. It was held that the W.I.B.O.N. provision was compatible with the requirement for Customs entry and in the absence of a premature acceptance of the notice of readiness, laytime would have started once the

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<sup>71</sup> [1978] 1 Lloyd's Rep. 191.

vessel was at the port in a state of readiness, having obtained Customs entry.

With respect to the W.I.P.O.N. clause, Donaldson, J. held, obiter that it covered the possibility of a bunkering or other berth being "at" but not "in" the port, and also the possibility of a change in the regulations of the port allowing Customs entry whilst a vessel lay in the Roads.<sup>72</sup> Apart from this brief reference to the W.I.P.O.N. clause, the judgment did not elaborate on what was meant by being "at" the port. It is suggested that "arrival at the port" does not necessarily mean that the vessel is waiting inside the port. It may extend to waiting at the entrance to the port, or just beyond its limits. In other words, the expression entails some proximity between the vessel's position and the port limits.<sup>73</sup>

In The Adolf Leonhardt,<sup>74</sup> which was an action between sellers and buyers upon a G.A.F.T.A.<sup>75</sup> contract for the sale

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<sup>72</sup> ibid, p. 197. When the dispute was heard by the Court of Appeal, the scope of the W.I.P.O.N. clause was not considered: [1978] 2 Lloyd's Rep. 154(C.A). In Konkar Maritime (New York) Agencies Ltd v Continental Grain Co (1977) A.M.C. 1794(N.Y.Arb), it was decided that the application of the W.I.P.O.N. provision at Constantza was not displaced by the Customs entry procedure. Consequently, the vessel was an "arrived ship" whilst she waited in the Roads.

<sup>73</sup> There is no guidance from Borg (Owners) v Darwen Paper Co. (1921) 8 Ll.L.Rep. 49, since Rowlatt, J. did not discuss the scope of the expression, "arrival at or off the port".

<sup>74</sup> [1986] 2 Lloyd's Rep. 395.

<sup>75</sup> i.e. Grain and Feed Trade Association.

of grain, the buyers complained of delay to a ship owned by a third party and sought demurrage from the sellers.

That contract provided as follows:

"Special conditions: .... Time to count as per Centrocon Charterparty, W.I.B.O.N, W.I.P.O.N, W.I.F.P.O.N. Demurrage/Despatch as per C/P ....."

The sellers did not intend to ship the goods, instead they bought upon F.O.B. terms. The buyers also did not intend to receive the goods and agreed to sell a much larger quantity to V/O Exporthleb, Moscow, under a contract which provided that at loading, sellers would pay demurrage as per charterparty rate. The charterparty referred to was that between V/O Sovfracht as time charter-owners and V/O Exportkhleb as charterers. The buyers, Finagrain, nominated the vessel from V/O Exportkhleb. She was ordered by the sellers, Pagnan Fratelli, to proceed to Rosario, a port on the River Plate (Argentina). On April 15th 1978, the vessel arrived at a place called Intersection, which was 200 miles from Rosario. On the 19th, the buyers were notified of the vessel's readiness. However, the vessel was delayed at Intersection because of congestion. She was granted free pratique on April 27th and on May 2nd, she proceeded to and anchored at Rosario Roads. The vessel berthed on May 18th, and loading was completed on the 24th.

As the charter was a two-port charter, the vessel proceeded to the next loading port, Buenos Aires. She arrived at Buenos Aires Roads on May 25th, and awaited a free berth.



Loading eventually commenced on June 29th, and was completed on July 1st. The buyers claimed that the sellers were liable for the three periods of waiting, viz, April 15th to May 1st; May 2nd to 19th; May 25th to June 29nd. Staughton, J. rejected this claim on the grounds that the words of incorporation in the G.A.F.T.A. contract referred to the Centrocon charter rather than to any particular charterparty concluded between any two persons. Therefore, provisions of the Centrocon charter which control the commencement of laytime and its interruption were applicable to the contract. The liability for delay could not be placed on the sellers since the "obstructions" provision in the Centrocon charter covers congestion at a port.

The buyers had argued that the purpose of W.I.P.O.N. was to avoid the rule that the vessel must have arrived at the port before laytime could commence, but the sellers contended that time did not commence at Intersection because the vessel had not then reached a point where a proper notice of readiness could be given. After a review of the brief judicial history of the clause, Staughton, J. concluded that Donaldson, J.'s distinction between being "at" or "in" the port was not helpful in those ports which do not have waiting areas within their limits.<sup>76</sup> He was of the opinion that there was a need for geographical proximity. Furthermore, the vessel should be waiting at the usual place for the port. Other factors such as

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<sup>76</sup> The Adolf Leonhardt, p. 403.

the requirement that the vessel should be at the immediate and effective disposition of the charterer were also relevant. It was held that whilst the vessel waited at Intersection she was as effectively at the disposition of the charterer as modern conditions demanded, and she could issue a notice of readiness, given that she was not required to be at the port of Rosario by reason of the words "whether in port or not".

If the expression "whether in port or not " is given its natural and ordinary meaning, notice of readiness may be issued at any place the vessel anchors outside the port limits. As this is too wide a proposition, reasonable limits should be placed on the advantages which the expression confers on the shipowner.<sup>77</sup> There are several possibilities, for example, Staughton, J. decided that the vessel should be placed at the immediate and effective disposition of the charterer. It was held by Sir John Megaw in The Kyzikos<sup>78</sup> that such a requirement forms part of the definition of the place where the vessel must be and has no connection with the reasons for her delay. In view of the instantaneous nature of modern communications, this approach might still be too favourable to the shipowner. The vessel could anchor anywhere outside the port limits on the grounds that it is possible for the charterer to communicate his instructions as soon as a

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<sup>77</sup> Cf, the comments of Lloyd, L.J. in The Kyzikos [1987] 1 W.L.R. 1565, 1570(C.A).

<sup>78</sup> *ibid*, p. 1577.

berth becomes vacant, and that the vessel could proceed to the vacant berth without a significant loss of time.

It is suggested that in the interest of certainty, in addition to being placed at the immediate and effective disposition of the charterer, the vessel should be waiting at the usual or customary place for vessels of her type and size. This is an important requirement because in some cases a vessel waiting at the usual place will probably count for turn whereas a vessel waiting elsewhere might not. This may result in further delay, if, after waiting at an alternative place, the vessel has to get to the usual waiting place in order to count for turn. However, since the practice at each port varies, the issue of "turn" may be controlled by other factors, e.g. entry at the Customs House. In The Adolf Leonhardt, there was a specific finding that the vessel did not count for turn at Intersection, nevertheless, the vessel was considered to be at the immediate and effective disposition of the charterer whilst she waited there. It seems that Staughton, J. decided that the requirement relating to turn should not be rigidly applied. In order not to succumb to "verbal manipulation" which might lead to a conclusion that flouts business commonsense,<sup>79</sup> it is suggested that the W.I.P.O.N. clause should still be effective even if the vessel waits at the usual place but does not count for turn. The most

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<sup>79</sup> Per Lord Diplock, in The Miramar [1984] A.C. 676, 685(H.L).

important factor is that she has reached a clearly recognised waiting place.

However, the reference to the usual place will be useless in a port which lacks an official waiting place. In those circumstances, the question is, if the vessel cannot get into the port, when will she be deemed to have sufficiently completed the voyage so as to enable the W.I.P.O.N. clause to take effect? Although factors such as the usual port practice may be pertinent, in order to bypass the problems that may arise from conflicting evidence on this point, the extent of the Port Authority's jurisdiction may be employed as the final determinant.

#### **10.4.2 Effect of W.I.P.O.N.**

As with the W.I.B.O.N. clause, there is nothing in the wording of the W.I.P.O.N. clause that prevents its application in other situations of delay caused by, for example, bad weather. However, in view of the House of Lords decision in The Kyzikos,<sup>80</sup> the clause will only probably be deemed effective where the cause of delay is congestion.

Secondly, since the time which is computed under the W.I.P.O.N. clause constitutes part of the specified laytime, the clause can be deprived of effect by a suitably worded exceptions clause which determines when laytime shall cease to count. This was a point which was clearly illustrated by the

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<sup>80</sup> [1988] 3 W.L.R. 858(H.L).

decision in The Adolf Leonhardt.<sup>81</sup>

None of the previous cases have directly considered the issue of arrival requirements in any detail. However, in Baird & Co v Price, Walker & Co,<sup>82</sup> it was held obiter that, the effect of the W.I.B.O.N. clause in a berth charter was that readiness of the vessel could be ascertained prior to berthing. It is suggested that as the W.I.P.O.N. clause only alters the geographical requirements of arrival, other conditions such as notification of readiness and the actual readiness of the vessel would still have to be complied with.

The effect of the clause must not only be to advance laytime, but also to transfer the risk of waiting for a free berth to charterers. The clause will be particularly useful in the case of ports lacking waiting areas within their limits and which suffer from chronic congestion. Prima facie, there is no reason why its use should be limited to port charters. The fact that it has appeared with the W.I.B.O.N. provision in berth charters may be considered to be a pointer as to what the parties intended. In order to compensate for the limitations of the formalistic test of arrival, the W.I.B.O.N. and W.I.P.O.N. clauses should be available for use in both berth and port charters. However, if the formalistic test were

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<sup>81</sup> Cf, Reardon Smith Line Ltd v East Asiatic Co (1938) 62 Ll.L. Rep. 23; The Amstelmolen [1961] 2 Lloyd's Rep. 1(C.A). Also, Retla Steamship Co v Canpotex Ltd (1977) A.M.C. 1594(N.Y.Arb).

<sup>82</sup> (1916) 115 L.T. 227, 228.

to be modified, the W.I.P.O.N. clause would cease to be of any use in port charters. In fact, such a change would mean that the W.I.B.O.N. and W.I.P.O.N. clauses would only have relevance in berth charters.

## **CHAPTER ELEVEN**

### **THE TIME LOST CLAUSE**

- 11.1 The Concept of Independence
  - 11.1.1 Commencement of Laytime Requirements
- 11.2 Application of Laytime Exceptions
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## CHAPTER ELEVEN

### THE TIME LOST CLAUSE

#### **11.1 The Concept of Independence**

Gencon, Cl 6(c) which is also referred to as the "time lost" clause provides that,

"Time lost in waiting for berth to count as loading or discharging time, as the case may be."

Unlike the W.I.B.O.N. and W.I.P.O.N. provisions, the clause expressly specifies that berth congestion is the relevant obstruction. Nevertheless, in The Tirgu Mures,<sup>1</sup> it was decided that the "time lost" clause was inoperative despite the fact that the vessel had been delayed by congestion. In that case, the charterparty had included a W.I.B.O.N. provision in addition to the "time lost" clause. In effect, both compensatory provisions advance the commencement of laytime. In the case of the "time lost" clause, the general approach has been that its applicability is not dependent upon the fulfilment of the pre-requisites for the commencement of laytime.<sup>2</sup> By its emphasis on the notice of readiness

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<sup>1</sup> (1980) S.M.A. Award Service Ref. No: 1427(N.Y.Arb).

<sup>2</sup> See further, pp. 277-281, *infra*.



requirement, the award in The Tirgu Mures indirectly gave priority to the W.I.B.O.N. provision, although its applicability had not been argued. A similar juxtaposition of compensatory clauses arose in The Kyzikos,<sup>3</sup> but the vessel had been delayed by fog. Therefore, there was no need to consider whether the "time lost" clause would prevail over the W.I.B.O.N. provision.

Other variations of the "time lost" clause can be found in charters such as, Hydrocharter, Cl 5(d), which provides that,

"Time lost in waiting for berths at ports of loading and half the time lost in waiting for berths at ports of discharge shall count as laytime, but if Norsk Hydro are the Receivers the time so lost at ports of discharge shall count in full."

Scancon, Cl 8 also provides that,

"Any time lost in waiting for berth at or off the port of loading and port of discharge shall count as laytime."

Section 11.1.1 concentrates on the problems which were first associated with the "time lost" clause. The question was whether the waiting time that was computed under the special clause was completely independent from the stipulations with respect to the commencement of laytime and relevant exceptions.

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<sup>3</sup> [1988] 3 W.L.R. 858 (H.L.).

### 11.1.1 Commencement of Laytime Requirements

In The Radnor,<sup>4</sup> laydays were to commence 24 hours after vessel was dunnaged, matted and all hatches were ready for cargo, the Master having given written notice, within business hours to that effect to charterers or their agents. The charter further stipulated that "time lost" in waiting for a berth was to count as loading time. The vessel arrived off Dairen Port on June 3rd, 1951. As a pilot was not forthcoming, she anchored at the quarantine anchorage. She was subsequently cleared by Customs and free pratique was granted. The vessel remained at the anchorage until June 10th, when a pilot boarded her and she was taken into what turned out to be a preliminary berth.

During that period, the vessel was unable to communicate with the shore, neither could its personnel go on shore leave. On the 11th, the charterer's agents received from the Master, a notice of readiness. The vessel was then moved into another berth and on June 16th, she proceeded to her final loading berth. Loading commenced on June 17th and was completed on June 25th. The shipowner claimed £6,396 13s 4d as demurrage, part of which was made up of a sum of £4975 representing the period of delay between June 3rd and 10th. The charterer disputed liability for the amount of £4,975 but when the matter was submitted for arbitration, the umpire made out an award in favour of the shipowner.

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<sup>4</sup> [1956] 1 Q.B. 333(C.A).

On a case stated to the High Court, McNair, J. declined to award to the shipowner the extra sum of £4,975. Charterer's counsel had argued that the "time lost" clause had not materially altered the charterparty. If the contract was to be viewed as a port charter, the three requirements of the commercial area test, which were laid down by Kennedy, L.J. in Leonis v Rank<sup>5</sup> would have to be satisfied. That test placed on the charterer the risk of getting to a berth. Therefore, the "time lost" clause was not inconsistent with it. Alternatively, if the charterparty was considered to be a berth charter, the "time lost" clause merely brought forward the time and place at which the notice of readiness had to be given. It did not dispense with the giving of such notice. The shipowner, on his part argued that it was not necessary to categorise the charterparty since the contractual provisions were explicit about the consequences of the loss of time due to the unavailability of a berth.

McNair, J. agreed that there was nothing to be gained from trying to fit the charterparty into any particular category. The critical issue was when did the loss of time commence? It was doubted that time could be lost before it began to run. On the basis that the charterparty stipulated that the loading time was to start when the vessel was dunnaged, matted and all hatches were ready for cargo, and the notice of readiness had been tendered, it was held that time

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<sup>5</sup> [1908] 1 K.B. 499(C.A).

was not lost until notice had been given. In addition, it was decided that the wording of the clause did not support the shipowner's claims. Consequently, the time computed under the "time lost" clause was regarded as falling within the numerical calculation of laytime.<sup>6</sup>

On further appeal by the shipowner, the Court of Appeal unanimously rejected the grounds upon which McNair, J. had reached his decision. Whilst McNair, J. had decided that the charterer was not obliged to nominate a berth until the notice of readiness had been tendered by the Master, the Court of Appeal ruled that the "time lost" clause was independent of the notice of readiness provision.<sup>7</sup> On the issue of what was meant by "time lost" and what type of waiting would be relevant for the purposes of the clause, Singleton, L.J. concurred with the contention that "time lost" meant time wasted or time which had gone to no purpose. Accordingly, time was lost in waiting for a berth if there was a duty upon the charterer to nominate a berth and he failed to do so when he knew that the vessel had arrived at the port.<sup>8</sup> In the opinion of Jenkins, L.J. at the relevant date, June 3rd, the vessel having arrived within the commercial area of the port was fully ready and could have proceeded to any berth which the charterer might have nominated. In those circumstances, the

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<sup>6</sup> [1955] 2 Lloyd's Rep. 73, 81.

<sup>7</sup> [1956] 1 Q.B. 333, 340-341 & 349-350(C.A).

<sup>8</sup> At p. 339.

period from June 3rd to June 10th was "time lost" in waiting for a berth according to the natural and ordinary meaning of those words and would have to count as loading time.<sup>9</sup> It was held that a construction to the contrary would have made the clause for all intents and purposes "a mere idle and otiose expression of a consequence which would equally have ensued if they had been omitted."<sup>10</sup>

Unfortunately, the Court of Appeal did not elaborate on what exactly was meant by the independence of the two time codes. Did independence mean that the codes were completely separate in every sense or just simply that the "time lost" provision was not subject to the conditions for the commencement of laytime? This lacuna was to become a source of problems in future disputes. It is suggested that the Court of Appeal probably had the latter interpretation in mind because the question that had been put before it was whether the notice of readiness had to be given before "time lost" could count.<sup>11</sup>

In Point Venture Corpn v Federal Directorate, Fertilizer Imports, Govt of Pakistan,<sup>12</sup> the relevant charterparty had included the "time lost" provision and a further stipulation that at the second loading port, time was to count from the

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<sup>9</sup> At pp. 346-347.

<sup>10</sup> Jenkins, L.J., p. 347.

<sup>11</sup> Contra, D. Davies, Commencement of Laytime (1987) p. 40.

<sup>12</sup> (1983) S.M.A. Award Service Ref. No: 1838(N.Y.Arb).

receipt of the notice of readiness during office hours, vessel having arrived within the geographical limits of the port, whether in berth or not. The arbitrators held by a majority that, the "time lost" clause was nullified by the non-receipt of the notice at the second loading port. However, the dissenting arbitrator concluded that although there was no proof of notice, the operation of the "time lost" clause had merely been postponed until the charterer had been able to receive the notice, if one had been tendered.

In The Tirgu Mures,<sup>13</sup> it was also decided that the tender of notice was a pre-requisite to the commencement of time under the "time lost" clause. It has been contended that the award in The Tirgu Mures turned on particular circumstances, viz, the fact that the vessel had suffered numerous winch breakdowns in the loading port.<sup>14</sup> Nevertheless, the direct cause of delay at the discharge port was not winch breakdowns but port congestion. Furthermore, the charterparty had provided that time lost as a result of winch breakdowns was chargeable to the shipowner. Therefore, if time had been counted under the "time lost", it could have been interrupted if there had been winch breakdowns.

Independence in this restricted sense would also mean that the ship need not be completely ready before the "time

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<sup>13</sup> (1980) S.M.A. Award Service Ref. No: 1427(N.Y.Arb).

<sup>14</sup> Per Blanding, W. G. in Point Venture Corpn v Federal Directorate, Fertilizer Imports, Govt of Pakistan (1983) S.M.A. Award Service Ref. No: 1838(N.Y.Arb).

lost" clause can take effect. In The Massalia,<sup>15</sup> where the charterer's cargo had been overstowed with cargo belonging to other consignees, it was decided that the "time lost" clause was effective from the time that the vessel started to wait for a berth. However, in The Agios Stylianos,<sup>16</sup> it was held that time could not be lost until the overstowed cargo had been removed. The difference being that in the latter case, there were two separate charterparties. Therefore, where a cargo of cement had been overstowed by vehicles, the "time lost" clause in the cement charter referred to "time lost" in getting to the cement berth and not the vehicle berth. It was of no consequence if the cement charterers had decided to nominate the berth at which the vehicles had been discharged. In this light, the precedent set by The Massalia appears to be limited to cases where there is just a single charterparty.

The waiting time can also be subject to reductions pro tanto if the ship requires time to uncover hatches, rig discharging gear or obtain free pratique.<sup>17</sup> So that provided the ship's unreadiness does not contribute to the delay, the "time lost" clause will be operative. It is this feature of independence from the commencement of laytime requirements that distinguishes the "time lost" clause from the W.I.B.O.N.

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<sup>15</sup> [1962] 2 Q.B. 416.

<sup>16</sup> [1975] 1 Lloyd's Rep. 426.

<sup>17</sup> Donaldson, J., The Loucas N [1970] 2 Lloyd's Rep. 482, 485.

and W.I.P.O.N. provisions.

At the time The Radnor was decided, the area within which the vessel had to wait before it could become an "arrived ship" was the subject of uncertainty, i.e. with respect to the scope of the commercial area of the port. Consequently, it was to the shipowner's advantage if the liability for delay could be transferred to the charterer as soon as the vessel had started to wait for a berth. In order to achieve this, the "time lost" clause had to be dissociated from the conditions for the commencement of laytime. If this had not been done, there would have been no change in the shipowner's position and the inclusion of the "time lost" clause would not have served any purpose whatsoever. The problem was that the Court of Appeal's decision was not as specific as it might have been. Although the judgment of McNair, J. was overruled because it suggested that time could not be lost until the notice of readiness had been tendered, the notion that waiting time and laytime could run contemporaneously was to reappear in a subsequent case, within the context of an "arrived ship" under a port charter.<sup>18</sup> One can speculate on whether the decision of the lower court would have been overruled if the charterparty had been a port charter and the ship had been waiting within the commercial area. It is likely that it probably would not have been reversed and the independence of the two time codes would not have been so rigidly maintained

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<sup>18</sup> The Darrah [1977] A.C. 157(H.L).



thereafter for at least two decades.

### **11.2 Application of Laytime Exceptions**

On his part, in the The Radnor, McNair, J. had taken the view that waiting time and loading time were one and the same thing and occurred contemporaneously. On the other hand, the Court of Appeal regarded the waiting time as an additional time period that was to be added to the agreed loading or discharging time when the final calculations were made. However, the actual method by which this was to be done was not specified. Maybe if the Court's attention had been directed to this issue, it might have taken a closer look at the calculations underlying the shipowner's claims.

The issue of whether the laytime exceptions such as Sundays and public holidays were applicable to the "time lost" provision was not argued in The Radnor. The vessel had arrived on a Sunday and was kept waiting till the following Sunday. The second Sunday would not have counted if the ship had arrived and laytime had started to run. But the amount claimed by the shipowner did not make any such deductions and was approved by the Court of Appeal. The situation was described in the following terms:

"The sole question posed to the Court was whether the time so lost was to be counted or not for demurrage, and not if it did so count, how the demurrage should be calculated .... Thereafter it was assumed that the decision of the Court of Appeal covered not only the question of law but also the manner in which, in such circumstances,

demurrage had to be calculated."<sup>19</sup>

### 11.2.1 The Vastric

In The Vastric,<sup>20</sup> both the loading and discharging clauses provided that "time lost" in waiting for a berth was to count as loading or discharging time respectively. By the time the vessel reached the first discharging port, Genoa (Italy) on August 17th, 1963, there was only available as laytime, 2 days 20 hours and 25 minutes. She anchored in the Roads outside the commercial area of that port until August 20th, when she was able to shift to a berth. On August 19th, the shipowners had issued a notice of readiness but this was ruled invalid because the ship was not then an "arrived ship". The shipowner's claimed demurrage on the ground that the "time lost" waiting for a berth was the whole of the period from August 17th, until the vessel shifted to a berth on August 20th. There was further reliance upon a finding by the arbitrator that if a discharge berth had been available upon the vessel's arrival in Genoa on August 17th, she would have been able to proceed there immediately. On the other hand, the charterer contended that the whole of this period was not lost in waiting for a berth. As the ship had arrived after 12.00 noon on a Saturday, she could not claim or put herself in a position to say that the laydays commenced before 1 p.m. on

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<sup>19</sup> F.M. Ventris, "Reachable on Arrival" Charterparty International No 1 (1984) vol. 1, 11.

<sup>20</sup> [1966] 2 Lloyd's Rep. 219.

the following Monday. If any time was lost, this was between 1 p.m. on Monday and 1 p.m. on Tuesday, when in fact the laytime actually started to count. The basis of the charterer's claims was that even if the vessel had arrived, a proportion of the time would not have counted because of the exceptions. If laytime could not be counted then it could not have been lost.

McNair, J. (who had also heard The Radnor at first instance) was sympathetic to the charterer's claim. But he declined to give effect to it on the grounds that he was bound by The Radnor.<sup>21</sup> It has been argued that a different decision could have been reached on the basis that although the case involved a berth charter, the question that had to be decided was not whether notice should be given before the "time lost" clause could take effect but how was the waiting time to be calculated.<sup>22</sup>

#### 11.2.2 The Loucas N

The Court of Appeal's decision on whether laytime exceptions are applicable to the "time lost" provision was given in The Loucas N.<sup>23</sup> The exceptions clause under

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<sup>21</sup> See also, Schlüssel-Reederei O.H.G. v Phenix Trading & Transp. S.A. (1970) S.M.A. Award Service Ref. No: 527(N.Y.Arb), which also emphasized the independence of the "time lost" provision.

<sup>22</sup> F.M. Ventris, "Reachable on Arrival", op cit, p. 11.

<sup>23</sup> [1971] 1 Lloyd's Rep. 215(C.A).

consideration was a strike clause which had been lifted from another type of charterparty, the Centrocon charter. The Loucas N was chartered for a voyage from Europe to America. As a result of berth congestion upon her arrival at Caen (one of the loading ports), on January 24th 1969, the vessel had to wait outside the commercial area for 1 day 9 hours 15 minutes. On the completion of loading, the vessel proceeded to Houston and on February 25th, anchored in Galveston Roads outside the commercial area of that port. She had to remain there for 49 days 10 hours 30 minutes because of the unavailability of berths. This was due to a strike by stevedores but even after the strike ended, the Loucas N was still delayed because she had to await her turn.

The shipowner claimed demurrage on the basis that time was lost in waiting, both at Caen and Houston. The charterer admitted that time was lost in waiting off Caen because if a berth had been immediately available, the vessel would have gone alongside and begun loading. They however argued that the situation at Houston was different and that time was not lost at all on account of the fact that even if the vessel had been able to go straight to a berth she could not have begun discharging. It was contended that the vessel had in fact been waiting for the strike to end.

Donaldson, J. disagreed with the charterer's submissions. He ruled that the vessel was waiting for a berth and none of the time spent off Houston had advanced the ship's duty to

secure alongside a discharging berth.<sup>24</sup> The main thrust of the charterer's submissions was the establishment of a connection between the "time lost" code and the strike clause. The contention was that if waiting time was to count as loading and discharging time and the strike clause provided that time for loading or discharging would not count if by reason of strikes or obstructions in the docks, cargo could not be loaded or discharged, then waiting time itself could not be counted during such periods.

Donaldson, J. conceded the attractiveness of their submissions but discounted them on the grounds that it would render the "time lost" clause valueless to the shipowner, and it would also be contrary to precedent. It was held that the laytime provision was concerned with the actual loading and discharging time. It started to count after the ship had arrived, although the occurrence of certain events such as those stipulated in the strike clause may interrupt its running. Since the strike clause dealt with the use and non-use of time when the ship was ready, whether or not she was able to load or discharge, it was deemed to be concerned with actual loading or discharging time.<sup>25</sup> In contrast, the "time lost" clause was viewed as being concerned with the period of time prior to the vessel getting into a place in

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<sup>24</sup> The Loucas N [1970] 2 Lloyd's Rep. 482, 485.

<sup>25</sup> ibid, p. 486.

which she can load or discharge. It dealt with notional loading and discharging time, therefore, the provisions which relate to actual loading and discharging time, such as the requirement of notice of readiness and the strike clause were considered to be inappropriate and inapplicable.

The charterer further argued that an anomaly would arise if the shipowner's claims were accepted. A ship which had not yet completed her voyage by becoming an "arrived ship" would be able to count waiting time as discharging time but a ship which had arrived would not be able to do so in cases in which the strike clause applied, although she was delayed just as much. Donaldson, J. disregarding this contention, dealt with the matter by explaining that under berth charters, the time when the vessel becomes an "arrived ship" and when she ceases to wait would be almost contemporaneous, whilst under a port charter, there might be a long interval between the two events. In the latter case the "time lost" provision would operate both before and after the vessel had become an "arrived ship."

"In such a case the laytime provisions can be ignored so long as the ship is waiting for a berth, for the same moment of time cannot count twice. Once the waiting time is over, it is necessary to look again at the laytime provisions, if the ship is not already on demurrage, in order to see whether, although time is no longer counting by virtue of being lost in waiting for a berth, it is then counting as loading or discharging time properly so called."<sup>26</sup>

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<sup>26</sup>     ibid.

The judgment went against the charterer who then appealed to the Court of Appeal. As to the point that "obstruction" covered congestion at the port<sup>27</sup> and that if the strike clause was applied the waiting time would be interrupted, Lord Denning held that the argument had some force but if correct, it would deprive the "time lost" provision of any practical effect because in practice, a vessel only waits for a berth when there is congestion at the port.<sup>28</sup>

Whereas in the lower court, Donaldson, J. had distinguished between actual and notional loading/discharging times, Lord Denning regarded the dispute as one which could be resolved by drawing a distinction between the periods prior to and after the vessel's arrival. The strike clause was dealing with the situation after the ship had arrived and was ready to load or discharge as the case might be. It did not apply to a situation before the ship's arrival. That was covered by the loading and discharging clauses under which "time lost" due to insufficient berths counted as loading or discharging time. If Lord Denning's approach was to be applied to a port charter, it would mean that contrary to the obiter views of Donaldson, J. laytime would not fall into abeyance but would start to run upon the vessel's arrival in the legal sense. Consequently, laytime exceptions would be applicable. However, the Court of

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<sup>27</sup> See further, The Amstelmolen [1961] 2 Lloyd's Rep. 1(C.A); The Radauti [1988] 2 Lloyd's Rep. 416(C.A).

<sup>28</sup> [1971] 1 Lloyd's Rep. 215, 218. Also, Sach and Megaw L.JJ., pp. 219 & 220.

Appeal did not fully consider Donaldson, J.'s obiter dictum.<sup>29</sup> The latter has been criticised on the basis that it would deprive the charterer of the notice time which he was entitled to under the laytime provision and which he had paid for by way of freight.<sup>30</sup> Although, Donaldson, J. had referred to the fact that the same period could not be counted twice, the real explanation for his comments might lie in the view taken of the true nature of the "time lost" clause. If it was separate from and completely independent of the laytime provisions and if laytime exceptions were not applicable to it, once it had begun, it would run continuously without interruption until the waiting ends. In this sense, it is analogous to the rule, "once on demurrage, always on demurrage" which specifies that in the absence of a contrary agreement, once demurrage has started, it runs continuously without interruptions.<sup>31</sup>

The decision in The Loucas N placed the shipowner in an advantageous position if the charter contained the "time lost"

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<sup>29</sup> In The Finix, Donaldson, J. had expressed the view that the Court of Appeal had not affirmed his obiter dictum: [1975] 2 Lloyd's Rep. 415, 420.

<sup>30</sup> D. Davies, "The Arrived Ship Concept" (1977) p. 11.

<sup>31</sup> See, Union of India v Compania Naviera Aeolus S.A. [1964] A.C. 868(H.L); The Delian Leto [1983] 2 Lloyd's Rep. 496; Continental Grain Co v Armour Fertilizer Works (1938) A.M.C. 414(SDNY,1938); U.S.A. v Atlantic Refining Co (1953) A.M.C. 554(DCNJ,1981). Cf, Steamship Co of 1949 v Montmorency Shipping Ltd (1954) A.M.C. 519(Mont.Arb). A more recent case is Marc Rich & Co Ltd v Tourloti Compania Naviera S.A [1988] 2 Lloyd's Rep. 10(C.A).



clause. If the ship had to wait for a berth, waiting time would run continuously without any interruptions and the shipowner would benefit financially because periods such as holidays and weekends which would normally have been excluded from the permitted laytime would count. It was irrelevant whether the ship had arrived or not or whether the charter was a port or berth charter, the essential factor was that the vessel was waiting for a berth.

### 11.2.3 The Darrah

The House of Lords reviewed the issue of independent time codes in The Darrah.<sup>32</sup> The vessel arrived at Tripoli Roads (Libya) on January 2nd, 1973, and immediately gave her notice of readiness. Tripoli Port consisted of a large harbour with a few berths and as there was congestion the vessel had to wait until January 9th, before she could move to her discharging berth. Discharging commenced immediately and was completed on January 24th. The parties agreed that when the vessel anchored in the Roads, she was an "arrived ship." But the shipowner claimed that the effect of the "time lost" clause was to make the whole of the time that the vessel was waiting for a berth count against the time allowed for discharge. They claimed 14 days on demurrage thereafter. On the other hand, the charterer contended that the "time lost"

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<sup>32</sup> [1977] A.C. 157 (H.L.).

clause was inapplicable because during the whole period that the vessel was waiting for a berth, she was an "arrived ship." Therefore, laytime had begun to run and the exceptions had to be taken into account in computing how much of the laytime the vessel had used up whilst waiting. They reckoned that the vessel had waited on demurrage for 4 days only.

In contrast to previous authorities, The Darrah involved a port and not a berth charter. In addition, the vessel was an "arrived ship" and the "time lost" clause had been altered to read " ... to count as laytime" instead of " ... to count as discharging time." Ackner, J. regarded the whole of the period between January 2nd, and January 9th, as time which had been lost in waiting for a berth. The vital question was whether the whole of that time should count as laytime.<sup>33</sup> With respect to the charterer's reliance on the views of Lord Denning as to the situation before and after the vessel's arrival, Ackner, J. ruled that the judgment had to be read in the light of The Radnor and that arrival meant "arrival in the berth".<sup>34</sup> It is suggested that Lord Denning was not just referring to arrival in the berth. Ackner, J.'s interpretation would have placed port charters on the same footing as berth charters.<sup>35</sup> The fact that as a result of the Reid test, a

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<sup>33</sup> [1974] 2 Lloyd's Rep. 435, 437.

<sup>34</sup> *ibid*, p. 439.

<sup>35</sup> On appeal, Roskill, L.J. disagreed with Ackner, J.'s interpretation of Lord Denning's judgment: [1976] 1 Lloyd's Rep. 285, 290(C.A).

vessel could become an "arrived ship" under a port charter whilst waiting some distance from the berth does not appear to have been deemed significant.

The charterer appealed to the Court of Appeal. Lord Denning considered that it would be erroneous to apply any of the previous precedents to a dispute which involved an "arrived ship" under a port charter. The problem as he saw it was that in subsequent cases, the word "independent" had been lifted out of the context in which it was used in The Radnor.<sup>36</sup> The rejection of the charterer's contention would have amounted to giving the shipowner an uncovenanted benefit and would also have deprived the charterer of the amount of laytime for which he had paid.

Similarly, Roskill, L.J. held that the shipowner's construction could not be accepted. Even if the two time codes had been in conflict, the laytime provision which was a general provision would have prevailed. But there was no conflict because each clause was dealing with a different subject-matter.<sup>37</sup> By way of illustration, The President Brand<sup>38</sup> and The Delian Spirit<sup>39</sup> were both alluded to as cases in which the laytime provision was held to prevail over a special provision in circumstances in which the vessel was an

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<sup>36</sup> *ibid*, pp. 288-289. Also, Roskill, L.J., p. 290.

<sup>37</sup> *ibid*, p. 291.

<sup>38</sup> [1967] 2 Lloyd's Rep. 338.

<sup>39</sup> [1972] 1 Q.B. 103(C.A).

"arrived ship."

Geoffrey Lane, L.J. also concurred with the rest of the Court. The appeal was allowed on the grounds that, if the "time lost" clause had not been included in the charterparty, the charterer would have succeeded. The dispute was therefore to be dealt with as if that provision did not exist. Secondly, the general rule was that if there was any doubt as to the meaning of an expression, it would have to be construed against the person seeking to benefit from it, in this case the owners.<sup>40</sup>

Although it was decided that the laytime exceptions would be applicable if the vessel had arrived and was waiting for a berth, there was no definitive pronouncement as to whether they could be applied prior to arrival. Lord Denning decided to keep the matter open. Nonetheless, he felt that as a matter of commonsense they should be applicable.<sup>41</sup> Both Roskill and Lane L.JJ. would not be drawn on the basis that the point had not been raised for decision.

The shipowner appealed to the House of Lords.<sup>42</sup> As in the Court of Appeal, their Lordships found in favour of the charterer. The alteration of the clause was considered to be immaterial by all three Law Lords. However, Lord Diplock was of the opinion that shipowners and charterers would not have

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<sup>40</sup> The Darrah [1976] 1 Lloyd's Rep. 285, 292-293 (C.A.).

<sup>41</sup> *ibid*, p. 289.

<sup>42</sup> The Darrah [1977] A.C. 157 (H.L.).

gone to such trouble, unless they wanted the modified clause to bear some other meaning than that which had been ascribed by judicial decision to the original clause.<sup>43</sup> The correctness of the decision in The Radnor was reiterated but the decisions in cases such as The Vastric and The Loucas N were overruled on the grounds that they were commercially unsound and had made delay to the vessel financially rewarding to the shipowner.

According to Lord Diplock, "time lost" in waiting for a berth was that 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 from reaching a berth. In the computation of "time lost" in waiting for a berth, there was to be excluded all periods which would have been left out in the computation of permitted laytime if the vessel had actually been in berth. So that in the case of an "arrived ship" under a port charter, there was no conflict between the laytime provision and the "time lost" provision. The calculations under both provisions were the same and neither need prevail over the other.

It is interesting to compare their Lordships' decision with McNair, J.'s in The Radnor. In the latter, it was held that "time lost" in waiting and loading or discharging time

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<sup>43</sup> Also, A.M. Costabel, "Time Lost in Waiting for Berth to Count as Laytime" [1975] L.M.C.L.Q. 150-151.

ran concurrently. But the decision in the lower court erred in law by ruling that the notice of readiness requirement was applicable to the "time lost" clause.

With respect to the position of a ship waiting for a berth and which had not yet become an "arrived ship", the House of Lords decision in The Darrah is possibly obiter.<sup>44</sup> That dispute had involved a ship which had arrived and not one which was merely waiting prior to arrival. But from their judgments, it seems that their Lordships were not restricting the scope of their decision to the facts as presented but were also seeking to produce a general proposition.<sup>45</sup>

The law on the "time lost" clause as it now stands makes good commercial sense.<sup>46</sup> The shipowner no longer reaps unnecessary profits merely because of the inclusion of the "time lost" clause in the charter and by the mere fact that the vessel arrived at the port on a non-working day. However,

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<sup>44</sup> J. Trappe, "Laytime Problems and Comparison of Law" [1986] L.M.C.L.Q. 251, 255.

<sup>45</sup> See in particular, Lord Diplock, p. 168. Also, Lord Russell, p. 176.

<sup>46</sup> The decision in The Darrah was applied in The Finix [1978] 1 Lloyd's Rep. 16(C.A.) and The Camelia [1978] 2 Lloyd's Rep. 182. See further, the unanimous award by American arbitrators in John A. Kistvad & Co A/S v W.W. Young Interests S.M.A. Award Service Ref. No: 1855, summarized in Fairplay International Shipping Weekly, January 1st, 1982 pp. 33-34. Also, Reefer Express Lines Pty Ltd v Bessa Trading Organization (1981) S.M.A. Award Service Ref. No: 1561(N.Y.Arb).

this approach does not enjoy universal application.<sup>47</sup> It is still argued that the wording of the clause indicates that the waiting time is completely independent of the laytime provisions.<sup>48</sup> Accordingly, when waiting time starts, it runs continuously without interruption. A charterparty should not exist in a vacuum. It should operate within the context of commercial considerations. In some cases, a literal mode of interpretation may enhance certainty of the law, but if it will lead to a decision which is contrary to business commonsense, it ought to make way to a more purposive construction. Prior to The Darrah, it would appear that these considerations were neglected. The controversy about the inclusion of laytime exceptions in the time counted under the "time lost" clause could be laid to rest if the clause reads as follows:

"Time lost in waiting for a berth at or off the port to count against laytime or loading/discharging time".

It is instructive that Norgrain, Cl 17(b) which is a general provision dealing with "waiting for berth" has a similar provision. That clause further provides that laytime

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<sup>47</sup> See Chapter 6, pp. 138-139. It appears that the effects of The Darrah may be bypassed by a suitably worded clause, e.g. "Time lost in waiting to berth, regardless of exceptions to laytime, to count as laytime or loading/discharging time, see, Reefer Express Lines Pty Ltd v Albury Sales Co Inc (1981) S.M.A. Award Service Ref. No: 1583(N.Y.Arb).

<sup>48</sup> J. Trappe, "Laytime Problems and Comparison of Law", p. 256.

exceptions are applicable to the period spent in waiting. Such an amendment would obviate inquiries as to whether the final decision in The Darrah has any effect with regards to a vessel waiting prior to arrival.

#### 11.2.4 Causative Exceptions

In The Darrah, it was decided that non-working days, such as Sundays or Fridays (in Islamic countries), could be deducted from the waiting time. But their Lordships did not discuss whether a causative exception could prevent the waiting time from running. A causative exception as opposed to a descriptive exception deals with events such as rain or strikes which may interrupt the loading or discharge of the vessel when she is at her berth. The matter was briefly considered by Brandon, J. in The Camelia.<sup>49</sup> He was of the opinion that the fact that The Loucas N was overruled by their Lordships in The Darrah indicated that there was no distinction between causative and descriptive exceptions. The question which had arisen in The Camelia was whether, having regard to the exception clause, periods in which rain would have interrupted the discharge of the vessel were to be deducted from the the "time lost". It was held that they could be deducted.

The matter recently came before Staughton, J. in The

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<sup>49</sup> [1978] 2 Lloyd's Rep. 182.



Radauti.<sup>50</sup> Due to congestion the vessel had to wait for about two months in Tripoli Roads before a berth became available. The charterparty contained the "time lost" clause as well a "force majeure" clause which provided inter alia that,

"... any other causes or hindrances happening without the fault of the charterer ... preventing or delaying the ... discharging or receiving of the cargo are excepted ... and time lost by reason thereof shall not count as laydays or days on demurrage."

The shipowner argued that the "force majeure" clause was only applicable after the vessel had reached her berth and that time counted as soon as the vessel started to wait. The charterer on the other hand, argued that time counted only from the time that the vessel berthed.

Staughton, J. ruled that although other events specified in the "force majeure" clause related to the handling of the cargo, the word "hindrance" was wide enough to include congestion which had delayed the ship's entry to her berth. He held that as a matter of construction, the charterer's claim was entitled to succeed. The Darrah and The Camelia could not be held up as authorities to the effect that obstacles which prevented the vessel from reaching a berth could not, if provided for in the exceptions clause, stop waiting time from running.<sup>51</sup> He concluded that the fact that The Loucas N was overruled in The Darrah was authority to the contrary since

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<sup>50</sup> [1987] 2 Lloyd's Rep. 276.

<sup>51</sup> *ibid*, p. 280.

The Loucas N had involved both congestion as well as a strike.

The Court of Appeal has recently affirmed the decision at first instance.<sup>52</sup> It is suggested that the current legal position on the issue of causative exceptions is proper. It reinforces the view that as a matter of substance and effect, the "time lost" clause advances the commencement of laytime. However, it differs from other clauses which advance laytime because the shipowner is not required to satisfy conditions precedent to the commencement of laytime.

### 11.3 Final Calculations

In The Loucas N,<sup>53</sup> Donaldson, J. had ruled that the waiting time should be deducted from the permitted laytime as and when the delay occurred.<sup>54</sup> The matter was not raised in the Court of Appeal but Lord Denning had remarked on the fact that in the lower Court, both parties had agreed to this system of calculation. In The Radnor,<sup>55</sup> the issue was discussed in very general terms. Both Singleton and Parker L.J.J. had spoken of the waiting time being added to the loading time when the final calculation was made so as to

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<sup>52</sup> [1988] 2 Lloyd's Rep. 416(C.A).

<sup>53</sup> [1970] 2 Lloyd's Rep. 482.

<sup>54</sup> *ibid*, p. 487. Also, Reefer Express Lines Ltd v Albury Sales Co Inc (1981) S.M.A. Award Service Ref. No: 1583(N.Y.Arb).

<sup>55</sup> [1956] 1 Q.B. 333(C.A).

reach the true position between the parties.<sup>56</sup>

The subject came up again in The Massalia.<sup>57</sup> The vessel was to load at Antwerp (Belgium) and Bordeaux (France), a part cargo of flour and being so loaded was to proceed to Colombo (Sri Lanka) or so near thereto as she could safely get. The vessel proceeded on her voyage and pursuant to a provision of the charter, loaded additional cargo at Port Said (Egypt). On October 18th 1956, she anchored in the outer anchorage at Colombo which was within the legal, fiscal and administrative limits of that port. It was established that cargo had never been loaded or discharged in the outer anchorage. Later that same day, the Master issued the notice of readiness to the charterer. The vessel remained at the anchorage until October 24th, when she finally berthed. By October 27th, all the general cargo had been removed so that the flour was accessible and discharge was completed on November, 3rd. The shipowner's successful claim for demurrage was on the basis that time was lost in waiting between October 18th, and October 24th.

In Diplock, J.'s opinion, the additional length of time taken to discharge the cargo as a result of having to wait for the berth was "time lost" in waiting for a berth.<sup>58</sup> With

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<sup>56</sup> At pp. 340 & 350.

<sup>57</sup> [1962] 2 Q.B. 416.

<sup>58</sup> At p. 427. Cf, The Agios Stylianos [1975] 1 Lloyd's Rep. 426.

regards to the issue of whether the time that was lost was to be added before or after the laytime calculations, it was held, without giving any reason that it should be added after the calculations.<sup>59</sup> Although the point was considered to be of minor importance, nevertheless, it affected the outcome of the final calculations. If the "time lost" had been added at the beginning, Sunday October 28th would not have been included in the laytime and would have counted as a demurrage day. But when added at the end, that Sunday came up during laytime and therefore did not count. The latter mode of calculation was one which clearly benefitted the charterer.

#### 11.3.1 Pragmatism

It seems that Donaldson, J. settled on his particular mode of calculation for pragmatic reasons. The time spent waiting affects the period that has been set aside for the completion of the loading or discharging processes and ultimately the computation of demurrage itself. The receivers of cargo, who may or may not be the charterers, are entitled to know at the time when they have to take delivery whether the ship has any laytime left and how much. Moreso, if their bill of lading contracts make them liable to pay the proportion of demurrage apportionable to their cargo. In addition, the owners need to know the position at that time, in order that they may exercise a lien on demurrage if

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<sup>59</sup> The Massalia, p. 428.

necessary.<sup>60</sup> In opposition to this view, it has been argued that the charterer is significantly disadvantaged if the waiting time exceeds the laytime and the vessel is put on demurrage even before she berths. In those circumstances, the shipowner is financially rewarded due to the fact that, (i) the charterer loses notice time, and (ii) does not benefit from the periods which would have been excepted during permitted laytime.<sup>61</sup> In The Loucas N itself, Donaldson, J.'s mode of calculation meant that accrued demurrage at Houston increased from 48 days 10 hrs 26 mins, to 51 days 7hrs 38 mins, an increase of 2 days 21 hrs 12 mins. Nonetheless, it has been contended that this unfavourable consequence may in fact be financially acceptable to charterers since waiting in the Roads in most cases causes additional expenses due to the dropping and weighing of anchor and the employment of pilots.<sup>62</sup> Presumably such losses would erode some of the shipowner's gains.

It is probably fair to state that although Donaldson, J.'s mode of calculation may advance the time at which the vessel comes on demurrage in certain cases, it is preferable because it provides the parties with an idea of their true financial position even before the vessel's arrival in her

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<sup>60</sup> The Loucas N [1970] 2 Lloyd's Rep. 482, 487.

<sup>61</sup> D. Davies, "The Arrived Ship Concept," (1977) p. 11 paras. 23 & 24.

<sup>62</sup> J. Trappe, "Laytime Problems and Comparison of Law" [1986] L.M.C.L.Q. 251, 256.

berth. Furthermore, it has been pointed out that since laytime exceptions now apply to the waiting time, it is appropriate that waiting time should be brought into account as it occurs.<sup>63</sup>

In The Darrah, their Lordships did not comment on which of the two methods was to be adopted. The question is whether in view of the fact that The Loucas N was overruled, the method favoured by Donaldson, J. still stands. This particular matter might still come up before the Courts but for now it can only be presumed that The Loucas N was only overruled on the issue of the applicability of the laytime exceptions to the period spent in waiting for a berth and that Donaldson, J.'s mode of calculation is still applicable.

#### 11.4 Shifting Time

Shifting time is the time spent in getting to a berth from the waiting place, or in moving from one berth to another. Shifting time will not be covered by the "time lost" clause because it is not time spent in waiting. Nonetheless, there is still the problem of whether the incidence of shifting can interrupt laytime or demurrage time. In The Johanna Oldendorff,<sup>64</sup> the vessel shifted from the Mersey Bar to the Prince's Pier and then back to the Mersey Bar before eventually proceeding to her berth. In his analysis of the

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<sup>63</sup> J.S. Schofield, Laytime and Demurrage (1986) p. 137.

<sup>64</sup> [1974] A.C. 479 (H.L.).

four stages of the voyage, Lord Diplock did not expressly deal with these incidences of shifting. There might have been a reason for this and it may be deduced from comments about the distance of the vessel from the berth. His Lordship held that the distance between the waiting place and the berth was bound to be of very little significance in an era of steam and diesel power and also instantaneous radio communications. By implication, shifting times were in those circumstances also bound to be negligible. Although shifting times may now be quite short, expenses such as pilotage and towage fees may have been incurred. The general rule, subject to express provisions is that shifting expenses incurred after arrival are for the charterer's account.<sup>65</sup>

#### **11.4.1 Elements of the Voyage**

If one attempts to include shifting time within the framework of the "four stages", it is apparent that there are no problems within the context of berth charters. In the absence of special provisions such as W.I.B.O.N., the shifting time will constitute part of the loading or carrying voyages. In the case of port charters, whether the shifting time is included within the voyage stages or is in the alternative, deemed to be part of the loading or discharging operation will depend on whether the vessel has arrived or not. The Reid test provides that arrival turns on whether the vessel has reached

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<sup>65</sup> M. Summerskill, Laytime (1982) p. 201.

a point within the port where if she cannot proceed immediately to the appointed berth, she is as effectively at the disposition of the charterer as she would have been in the vicinity of the berth.<sup>66</sup> So that if the shifting occurs after the vessel has reached such a position, the laytime will not be interrupted by the shifting and would be for the account of the charterers.

In the absence of a provision such as the "time lost" clause, the most vital issue appears to be the determination of when the shifting occurred. So long as it occurs before arrival, it will be the shipowner's responsibility. But as soon as there is arrival and laytime has begun, the latter will continue uninterrupted unless the charterparty,<sup>67</sup> or the custom of the port, (provided that the custom is not inconsistent with the terms of the charterparty), stipulate that shifting time is to be excluded or the shifting is carried out for the shipowner's convenience and the charterer is consequently deprived of the use of the vessel.<sup>68</sup>

#### **11.4.2 Impact of the "Time Lost" Clause**

If the "time lost" clause has been included in the charter, it appears that the waiting time will count just as

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<sup>66</sup> Per Lord Reid, The Johanna Oldendorff, pp. 535-536.

<sup>67</sup> e.g. Baltimore Form C, Cl 19; Ferticon, Cl 36; Austwheat, Cl 18.

<sup>68</sup> Per Donaldson, J. in The Shackelford [1978] 1 Lloyd's Rep. 191, 199.



if the vessel had been able to get into her berth immediately.

In Lloyd, L.J.'s opinion, until there is an authoritative

pronounced "The only significance of a vessel becoming an arrived ship is to start the clock ticking. Provided the clock starts to tick it is immaterial whether the ship is an arrived ship or not, or whether she has reached her contractual destination. To ask whether she is still theoretically engaged on the carrying stage of the adventure is to ask a barren question without practical import".<sup>69</sup>

This comment was made with respect to the W.I.B.O.N. clause.

In view of the final decision in The Darrah, it should be equally applicable to the "time lost" clause. Therefore, it may not be necessary to determine whether the vessel has arrived or not, in order to assign responsibility for the shifting time. It should be deducted from the laytime unless there is a specific provision to the contrary.<sup>70</sup> Similarly if the vessel is already on demurrage at the time she starts to wait, the shifting time will constitute part of the time on demurrage unless there is an exception which is specifically directed to demurrage days.<sup>71</sup> Nevertheless, there is authority to the effect that it is still material to determine

respect to charters involving specialized vessels such as LASH

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<sup>69</sup> The Kvzikos [1987] 1 W.L.R. 1565, 1571(C.A).

<sup>70</sup> Cf, Exxonvoy 1969, Cl 7 which provides that, shifting time between the anchorage and berth shall not count as part of the used laytime.

<sup>71</sup> Cf, STB Voy, Cl 7(c) which provides that "Time consumed by the vessel in moving from loading or discharge port anchorage even if lightering has taken place at the anchorage, to the vessel's loading or discharging berth, or in discharging ballast water, will not count as laytime or time on demurrage." Also, Beepevoy 2, Cl 17(i).

whether the vessel has arrived or not.<sup>72</sup> It seems that the confusion will persist until there is an authoritative pronouncement on the point by either the Court of Appeal or the House of Lords. The "time lost" clause still has a part to play within the context of berth charters. In its absence, the shipowner would have to bear all the expenses of waiting. In the case of an "arrived ship" under a port charter, the clause constitutes surplussage particularly in the light of the consequences of the Reid test. But if the vessel is waiting outside the port limits, the clause will be effective. The position is that when a vessel is waiting outside the port limits and the charterparty includes a "time lost" clause, the waiting time can be counted on a laytime basis but in the absence of the clause, the shipowner has to bear all the loss. By widening the scope of the Reid test and making it possible for a vessel to arrive outside the port limits, the "time lost" clause will be rendered obsolete within the context of port charters and will only be useful in berth charters.

The possible limitations of the "time lost" clause with respect to charters involving specialized vessels such as LASH and BOB ships have been highlighted in Chapter 6.<sup>73</sup> It appears that employing the provision in such charters may produce difficulties of interpretation.

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<sup>72</sup> e.g. Donaldson, J., in The Shackleford [1978] 1 Lloyd's Rep. 191, 199.

<sup>73</sup> supra, pp. 139-141.

## **CHAPTER TWELVE**

### **PAYMENT OF DEMURRAGE CLAUSES**

- 12.1 Payment of Demurrage in Respect of Waiting Time
  - 12.1.1 Effect of Waiting Time Provision
  - 12.1.2 Waiting & Shifting Time
- 12.2 Reachable on Arrival Clause
  - 12.2.1 Meaning of "Reachable"
  - 12.2.2 Meaning of "Arrival"
  - 12.2.3 Comparisons with Previous Forms
- 12.3 Interrelationship of the Reachable and Laytime Provisions
  - 12.3.1 The Scope of Relevant Authorities
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- 12.5 Computation of Demurrage
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## CHAPTER TWELVE

### PAYMENT OF DEMURRAGE CLAUSES

#### 12.1 Payment of Demurrage in Respect of Waiting Time

Another device by which the risk of delay can be transferred to the charterer is for the charterparty to provide that waiting time is to be paid for at the demurrage rate. This type of provision came up for determination in The Werrastein.<sup>1</sup> The relevant clause, Austral Grain Charter, Cl 2 provided as follows:

"Being so loaded the vessel shall proceed with all reasonable speed ..... to discharge at one safe port ... or so near thereunto as the vessel can safely get, always afloat, and there deliver the cargo in accordance with the custom of the port for steamships ..... at any customary dock, wharf or pier ... Provided always that if such discharging place is not immediately available, demurrage in respect of all time waiting thereafter shall be paid at the rate mentioned ..."

The vessel had been ordered to discharge a cargo of bulk grain at Hull but as a result of congestion, she had to wait outside the port limits, at a place 22 miles from the dock area. She arrived at the anchorage on January 9th, 1955, and was delayed until January 16th. The shipowner insisted on compensation at

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<sup>1</sup> [1957] 1 Q.B. 109.

the rate of demurrage but the consignees rejected the claim on the grounds that the waiting time provision in Cl 2 was only applicable after the order to proceed to the discharging place had been given. In any case, they argued that the claim would have to fail as the vessel was waiting outside the port. Sellers, J. allowed the shipowner's claim on the basis that the waiting time provision dealt with waiting time due to the discharging place being unavailable.<sup>2</sup>

#### **12.1.1 Effect of Waiting Time Provision**

Unlike the W.I.B.O.N. clause, the waiting time provision can be employed even if the vessel is waiting outside the port limits. This is apparent from the wording of clause and the judgment supports this viewpoint. As to whether the vessel should be waiting at the customary place, it is suggested that as the provision is also not restrictive on this point, it may be that the vessel can wait anywhere provided that she is as near to the port as circumstances permit.

It is similarly clear from the wording of the provision that the delay envisaged is one resulting from congestion. The unavailability of a discharging place is emphasized. If the delay results from the unavailability of tugs or pilots, variable tides or bad weather conditions, provided that there is always a free berth available for the vessel, the provision will probably not be applicable.

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<sup>2</sup> Cf, The Seafort [1962] 2 Lloyd's Rep. 147.

The purpose of the waiting time provision is not the advancement of laytime. It merely stipulates that waiting time shall be paid for at a specified rate. That being the case, it would appear that the vessel need not be ready in all respects before the clause can be applied.<sup>3</sup> However, if her state of unreadiness has significantly contributed to the delay, the shipowner's claim may not succeed.<sup>4</sup>

Another advantage which this provision confers on the shipowner is that the waiting time is computed on a continuous basis and is not subject to the laytime exceptions such as legal holidays and Sundays. In this respect, it differs from the waiting time computed under the W.I.B.O.N., W.I.P.O.N. and "time lost" clauses. The point was not specifically dealt with by Sellers, J. although he decided that the shipowner was entitled to his full claim.

Consequently, the provision is in several respects favourable to the shipowner. He is neither required to get the vessel within the port nor to make her completely ready. Provided the ship is delayed by congestion, he can claim the agreed compensation. The use of the term "demurrage" is itself very misleading in this context. "Proper" demurrage is payable only after the stipulated period for loading or discharging has been exhausted, and in those cases where the vessel is at

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<sup>3</sup> It is noted that the "Werrastein" was completely ready whilst she waited at the anchorage.

<sup>4</sup> Provided that a berth is available.

the loading or discharging place, extra time is required to complete these operations.<sup>5</sup> If the term is employed before the laytime or even loading or discharging has commenced, the intended effect must be to indicate, and to fix in advance the scale of compensation that will be payable for a particular type of delay. So that the use of the term "demurrage" probably does not imply that the exceptions applicable to the demurrage days should also interrupt the waiting time that is computed by virtue of the provision.

#### 12.1.2 Waiting & Shifting Time

In view of authorities such as The President Brand,<sup>6</sup> The Delian Spirit<sup>7</sup> and The Darrah,<sup>8</sup> which emphasize that charterers cannot be deprived of the benefits of the laytime provision, if the vessel is the subject of a port charter and is waiting within the port, the laytime (if any), will

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<sup>5</sup> The provision that came up for determination in American Trading & Production Corp v Amoco Trading Int. Ltd (1971) A.M.C. 571(N.Y.Arb) stipulated that if upon arrival at or off the port, charterers or shippers were unable to load the vessel for political or other reasons, waiting time was to count as laytime and was to be paid for at the demurrage rate, irrespective of whether notice of readiness had been tendered or accepted. The arbitrators did not decide whether the provision was only applicable before the expiration of laytime or after the laytime had been exhausted. This was on account of the fact that the delay was not attributable to an event of a political nature.

<sup>6</sup> [1967] 2 Lloyd's Rep. 338.

<sup>7</sup> [1972] 1 Q.B. 103(C.A).

<sup>8</sup> [1977] A.C. 157(H.L).

commence and the waiting time provision will have no effect. However, if the vessel waits outside the port, waiting time under the special provision will count until the vessel shifts to her berth. Thereafter, demurrage may be payable if the laytime is exhausted and there is further delay. If there are two stages of delay, i.e. within and outside the port, time under the waiting time provision will count prior to the vessel shifting into the port. Thereafter, laytime (if any), will run until the vessel shifts to her berth. In the case of berth charters, all the time spent waiting for the berth, whether within or outside the port limits will fall within the scope of the provision.

The clause specifically states that demurrage is to be payable only for waiting time. Therefore, shifting time between the vessel's waiting place and the berth will not be paid for at the demurrage rate. In the absence of specific provisions dealing with shifting time, it is suggested that general principles will apply. This means that the charterer will only be responsible for shifting time if it occurs after the vessel has become an "arrived ship".

As the application of the waiting time provision is limited to discharging ports, notice need not be given unless there is a specific stipulation or custom to the contrary.<sup>9</sup> Where there is such a requirement and notice is given whilst

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<sup>9</sup> e.g. Austral, Cl 22 provides that time for discharging at the destination shall be in accordance with the custom of the port.



the vessel is waiting outside the port, it is suggested that the notice will probably have to be repeated as soon as she gets within the berth, dock or port, as the case might be.<sup>10</sup>

There have been no reported cases on the waiting time provision since The Werrastein was decided. It is possible that there might have been arbitrations but due to their private nature, these awards have not been placed in the public domain.

## 12.2 Reachable on Arrival Clause

Unlike the W.I.B.O.N., W.I.P.O.N. and "time lost" clauses, the reachable on arrival provision does not deal with the advancement of laytime. In certain respects, it can be regarded as providing for an additional demurrage payment.<sup>11</sup> Its usefulness to the shipowner lies in the fact that damages payable by the charterer for being in breach of the clause may provide a bonus where the vessel is delayed prior to getting to her destination which may be a port, dock or berth.

The current difficulties with respect to the clause will now be examined separately.

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<sup>10</sup> See, The Mexico I [1990] 1 Lloyd's Rep. 507(C.A).

<sup>11</sup> Cf, The "Werrastein" clause which is discussed in Section 12.1.

### 12.2.1 Meaning of "Reachable"

A typical example of the reachable clause is illustrated by Exxonvoy 1969, Cl 9<sup>12</sup> which provides (inter alia) as follows:

"SAFE BERTHING-SHIFTING The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer...."

It is possible to ascribe at least four different meanings to the word "reachable". First, it could refer to the ease of passage of the vessel from the place where she waits to the berth. Secondly, it could be an adjectival description of the state of the berth itself, i.e. whether it is occupied or not. The third meaning, a combination of these definitions may describe the state of the berth and the ease of passage to the berth. Fourthly, it could be descriptive of the vessel's handling capabilities. It could perhaps be argued that the reference to the ship's ability to always lie afloat and the implications of a safe berth point to the second alternative, but it is suggested that "reachable" admits of a wider construction. It is probably meant to be descriptive of the state of the berth as well as the ease of passage to the berth. Where the vessel has not been delayed by port

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<sup>12</sup> Exxonvoy 1969 is a private form that was devised by Exxon Corp. It is also known as Asbatankvoy 1977.

congestion or the effect of port regulations or weather/navigational conditions, the berth nominated by the charterer ought to be regarded as reachable.

However, it is noted that universal approval of an expansive definition does not exist. A shipping commentator has made a distinction between the judicial, dictionary and marine definitions of "reachable". In the judicial sense, he regards the expression as meaning "unoccupied". The dictionary definition is said to be equivalent to "attainable", whilst in the marine sense, the reference is to the "sufficiency of water". It is contended that in the case of a fixed berth which is not subject to the charterer's control, it would be impractical for the charterer to guarantee that the berth would be attainable and unoccupied. Upon this basis, it is contended that "reachable" should only be employed in the restricted, marine sense.<sup>13</sup> But it seems that the preponderant judicial opinion favours a broad view of "reachable". In The Angelos Lusis,<sup>14</sup> the vessel was delayed by congestion and had to wait in the Roads outside the port of Constanza (Bulgaria). The Roads constituted the usual waiting place for vessels of her type. Megaw, J. took the view that, it was the charterer's responsibility to ensure that there was at the relevant time, a berth which the vessel proceeding

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<sup>13</sup> F.M. Ventris, "Alongside Vessels or Lighters Reachable on her Arrival" [1980] L.M.C.L.Q. 174, 176.

<sup>14</sup> [1964] 2 Lloyd's Rep. 28.

normally, would be able to reach and occupy.<sup>15</sup> In The President Brand,<sup>16</sup> one of the causes of delay had been insufficient water. Roskill, J. held that, "reachable" in the grammatical sense meant "able to be reached". Port congestion was further listed as a reason why a berth might not be reachable.<sup>17</sup>

These cases suggest that the preference of the Courts is for the third meaning.<sup>18</sup> More recently, in The Kyzikos,<sup>19</sup> the shipowner had in the alternative argued that the berth nominated by the charterer was not "always accessible". In construing that expression, Webster, J. considered that "accessible" was equivalent in meaning to "reachable" and that the term referred to physical obstructions preventing access to the berth. So that if weather conditions prevented the vessel from getting to her berth, the charterer would not be in breach of the obligation to nominate a berth which was "always accessible or reachable". This alternative argument was not considered in the Court of Appeal<sup>20</sup> or the House of

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<sup>15</sup> *ibid*, p. 34.

<sup>16</sup> [1967] 2 Lloyd's Rep. 338.

<sup>17</sup> *ibid*, p. 349.

<sup>18</sup> In Hellenic Int. Shipping S.A. v Amoco Trading Int. Ltd (1975) A.M.C. 2311(N.Y.Arb), the reachable warranty was considered to have been breached when the charterer nominated a discharge berth at an exposed sealine facility which could not accommodate the vessel during expectable swell conditions.

<sup>19</sup> [1987] 1 Lloyd's Rep. 48.

<sup>20</sup> [1987] 1 W.L.R. 1565(C.A).

Lords,<sup>21</sup> Nonetheless, in The Laura Prima,<sup>22</sup> Lord Roskill had stated that "reachable" meant that if a berth could not be reached on arrival, the warranty was broken unless there was some relevant protecting exception.<sup>23</sup> The inference from his Lordship's judgment is that if the vessel suffers any delay not directly attributable to the shipowner, which prevents her from proceeding to the allocated berth, the charterer would be in breach of the obligation to provide a reachable berth. This expansive definition of "reachable" has been recently applied in The Fjoordas<sup>24</sup> and The Sea Queen.<sup>25</sup> In the former, Steyn, J. ruled that "reachable" did not mean "reachable on arrival without delay due to physical causes". Upon that basis, the charterer was held in breach of the reachable provision where a ban on night navigation coupled with the unavailability of tugs and bad weather had prevented the vessel from berthing immediately after arrival at the port. Similarly in The Sea Queen, Saville, J. held that the charterer was in breach, where the unavailability of tugs and bad weather had also delayed berthing.<sup>26</sup>

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<sup>21</sup> [1988] 3 W.L.R. 858 (H.L.).

<sup>22</sup> [1981] 3 All.E.R. 737 (H.L.).

<sup>23</sup> At p. 743.

<sup>24</sup> [1988] 2 All.E.R. 714.

<sup>25</sup> [1988] 1 Lloyd's Rep. 500.

<sup>26</sup> It is noted that in U.S.A. v Atlantic Refining Co (1953) A.M.C. 554 (DCNJ, 1951), it was decided that the unavailability of tugs during a strike did not render a berth unreachable. It

It is noted that Charterparty Laytime Definitions 1980, Cl 5 also describes the charterer's obligation in the broadest terms. It provides that,

"REACHABLE ON ARRIVAL" OR "ALWAYS ACCESSIBLE"- means that the charterer undertakes that when the ship arrives at the port there will be a loading/discharging berth for her to which she can proceed without delay."

In the absence of an unambiguous contractual stipulation which restricts its scope, "reachable" in relation to a berth can be construed as "able to be reached or unoccupied" and it is apparent from commercial practice and judicial opinion that the expression has no bearing on the vessel's handling capabilities.<sup>27</sup>

#### **12.2.2 Meaning of "Arrival"**

It is doubtful that "arrival" is employed in the technical sense because the reachable provision still takes effect although the vessel has not reached her stipulated destination. This view may be supported on the grounds that

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was particularly significant that the vessel could have docked without the assistance of tugs. Furthermore, river pilots who could have taken the vessel quite close to the docks had been available during the strike. Consequently, the delay in berthing was not due to the unsuitableness of the berth or its approaches. In Concord Petroleum Corp v Mobil Shipping & Transp. Co (1977) A.M.C. 953(N.Y.Arb), arbitrators decided that even if the berth was rendered unsafe by a tug strike which prevented the vessel from berthing, the shipowner could not recover demurrage because of an express stipulation in respect of that type of delay.

<sup>27</sup> See also, W.E. Astle, The Safe Port (1986) p. 61.

the reachable on arrival provision and the laytime requirements are usually contained in separate clauses. The reachable clause contains no reference to the commencement of time or to laydays counting, whilst the laytime clause specifically provides that laydays are to commence after certain requirements are fulfilled. This is distinguishable from the position in The Seafort,<sup>28</sup> a case which the charterer in The Angelos Lysis had relied upon. His contention was that the obligation to provide a reachable berth arises only after the vessel has become an "arrived ship". It is noted that in The Seafort the special provision under consideration, W.I.B.O.N., was included in a sentence which began as follows, "Time ... to count ..." McNair, J. subsequently decided that the W.I.B.O.N. clause was only effective if the vessel was waiting within the port. Another reason for rejecting a technical interpretation of "arrival" is that, in circumstances where the vessel is the subject of a port charter and she is prohibited from waiting within the port, the reachable provision would be deprived of any meaningful effect. Similarly in the case of berth charters where arrival and berthing would normally coincide.

Although a consequence of Lord Diplock's analysis of the charter is that the shipowner cannot call upon the charterer to nominate a berth before the completion of the voyage

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<sup>28</sup> [1962] 2 Lloyd's Rep. 147.

stage,<sup>29</sup> the reachable clause appears to have the effect of inducing the charterer to make prompt berthing arrangements. The question is whether the vessel is required to reach a specific place, for example, the usual or customary anchorage for the port?<sup>30</sup> It is suggested that such a requirement would curtail the ambit of the reachable clause. Thus, in the case of a port which has its usual or customary waiting place within its limits, the clause would be ineffective until a vessel starts to wait within such a port. If the charter is a port charter, the reachable and laytime provisions would coincide and there is authority to the effect that the laytime stipulation would prevail.<sup>31</sup>

In Megaw, J.'s view, the obligation to provide a reachable berth arises,

" ... where the indication or nomination of a particular loading place would become relevant if the vessel were to be able to proceed without being held up".<sup>32</sup>

Such an approach is preferable to one which stipulates that the vessel must wait at the usual or customary waiting place because it allows for the application of the reachable clause either within or outside the port. The nomination or

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<sup>29</sup> The Johanna Oldendorff [1974] A.C. 479, 556-557 (H.L.).

<sup>30</sup> In The Angelos Lysis and The President Brand, the vessels had waited at the customary anchorages of the respective ports.

<sup>31</sup> e.g. The Delian Spirit [1972] 1 Q.B. 103 (C.A.).

<sup>32</sup> The Angelos Lysis [1964] 2 Lloyd's Rep. 28, 34.



indication of a loading/discharging place becomes relevant, at the very least, as soon as the vessel gets to the port in a commercial sense. It has been proposed that the scope of the port in the commercial sense should be determined by reference to the administrative and traffic-regulatory powers of a Port Authority.<sup>33</sup> It is noted that Exxonvoy 1969, Cl 6 specifically provides that notice of readiness shall be given when the vessel gets to the customary anchorage but there is no limitation in respect of the reachable obligation. This might have been an attempt on the part of the Exxon draughtsmen to dispel the impression created by the early authorities that, the vessel was required to get to the usual or customary anchorage before the reachable provision could take effect.

### **12.2.3 Comparisons with Previous Forms**

Apart from the specific reference to the place at which the notice may be given, Exxonvoy 1969 is different from previous antecedents in certain respects. In The Laura Prima, the charterer had argued that the difference in punctuation between Exxonvoy 1969, Cl 9 and its antecedents was significant. It was contended that the position of the comma after "wharf" meant that "reachable" applied only to "vessels or lighters". At every stage that the case was heard, the

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<sup>33</sup> supra, Chapter 6, pp. 126-133 & 141-142.

Courts declined to give effect to this argument.<sup>34</sup> It is argued that the inclusion of the comma could not have been printer's error because the Warshipoilvoy form which was in use before 1945 and from which Exxonvoy 1969 draws its inspiration also included a comma.<sup>35</sup> It may be true that the position of the comma might make "reachable" applicable only to "vessels or lighters", but it is doubtful whether there was an intention to attach any significance to this. It would probably have been more straightforward to phrase the clause in the following terms, viz,

"The vessel shall load and discharge alongside vessels or lighters reachable on her arrival or at any safe place or wharf."

A further difference relates to the fact that Exxonvoy 1969, Cl 9 states that the charterer shall designate and procure a place where the vessel shall load and discharge, but in previous forms, the charterer was merely required to indicate such a place.

### **12.3 Interrelationship of the Reachable and Laytime Provisions**

If a vessel becomes an "arrived ship" whilst waiting for a berth, the question is whether the charterer should be

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<sup>34</sup> See especially, Mocatta, J., The Laura Prima [1980] 1 Lloyd's Rep. 466, 468-469. Contra, F. M. Ventris, "Reachable on Arrival" Charterparty International No 1 (1984) vol. 1, 11, 12.

<sup>35</sup> F.M. Ventris, "Reachable on Arrival", op cit. Also, F.M. Ventris, "Alongside Vessels or Lighters Reachable on her Arrival" [1980] L.M.C.L.Q. 174, 175-176.

liable for demurrage, as well as damages under the reachable provision.<sup>36</sup> In The Delian Spirit,<sup>37</sup> this point came up. At first instance, Donaldson, J. ruled that the charterer was responsible for damages and also for the demurrage that had accrued.<sup>38</sup> On appeal, this part of the decision was reversed. The Court of Appeal unanimously decided that the charterer was entitled to the full laytime and could use it to depress or extinguish any delay for which he would otherwise be responsible.<sup>39</sup> In other words, where there is a single period of waiting and the vessel is an "arrived ship" whilst she awaits a berth, the shipowner cannot claim damages separately. He will only be entitled to receive demurrage if there is a further delay after the laytime has expired. In The President Brand,<sup>40</sup> the vessel had been delayed in two stages. The first period, which took place outside the commercial limits of the port of Lourenco Marques (Mozambique), was caused by insufficient water. The second period occurred within the port limits, just before a berth became available. Roskill, J. held that the charterer could not be made to pay for the whole of the second period because the shipowner had issued a valid

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<sup>36</sup> Prima facie, the damages payable is usually fixed at the demurrage rate.

<sup>37</sup> [1972] 1 Q.B. 103(C.A).

<sup>38</sup> *ibid*, pp. 112-113.

<sup>39</sup> See especially. Lord Denning, M.R., p. 123.

<sup>40</sup> [1967] 2 Lloyd's Rep. 338.

notice of readiness before its conclusion.<sup>41</sup>

In the computation of time that was lost during the first period of waiting, Roskill, J. had not excluded days such as Sundays or holidays or any other period specifically excepted under the laytime clause. This suggests that the time counted under the reachable clause is not subject to any of the laytime exceptions. Therefore, it will run uninterrupted until when the vessel becomes an "arrived ship". Once this occurs, the laytime exceptions will become applicable to the remainder of the laytime, if any. It is argued that the decision in The President Brand results in a practice which the House of Lords has disregarded in The Darrah.<sup>42</sup> In effect, it maintains a distinction between waiting time on the one hand, and loading or discharging time on the other.<sup>43</sup> In addition, the shipowner receives a bonus if the vessel is delayed before it becomes an "arrived ship". However, it is pointed out that the relevant clause in The Darrah contained words of limitation, i.e. "... to count as laytime", which in a sense circumscribes the measure of damages. It should perhaps be stated that the provision of a bonus to the shipowner, for any delay which his vessel might encounter is not unusual. In its effect, the "Werrastein" clause typifies such a provision.

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<sup>41</sup>     ibid, p. 352.

<sup>42</sup>     [1977] A.C. 157(H.L).

<sup>43</sup>     J.S. Schofield, Laytime and Demurrage (1986) p. 142.

### 12.3.1 The Scope of Relevant Authorities

The combined effect of the decisions in The President Brand and The Delian Spirit appears to be that, where the vessel immediately becomes an "arrived ship", laytime will start to run and the shipowner's compensation for any delay will be demurrage, provided that the specified laydays are exceeded. Where the vessel has to wait in two stages outside and within the port, and the total time spent waiting within the port for the completion of loading or discharge exceeds the permitted laytime, the shipowner's remedy for delay within the port lies in demurrage. However, even if the total time spent within the port is less than the specified laydays, the charterer may still be liable for damages under the reachable clause for the detention outside the port. If the vessel is not permitted to wait within the port and the total time spent in the berth exceeds the laytime, the shipowner may as in the preceding example, recover demurrage as well as damages for the detention of the vessel outside the port. Where the laytime is not exceeded, the charterer will only be liable for damages under the reachable provision.

Some of these scenarios relate to how the charterer's liability is to be calculated where the vessel is not an "arrived ship" whilst waiting for a berth. In The Delian Spirit,<sup>44</sup> Sir Gordon Willmer held obiter that the charterer would not necessarily be entitled to produce an independent

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<sup>44</sup> [1972] 1 Q.B. 103(C.A).

claim for damages in those circumstances.<sup>45</sup> Similarly, Davies submits that irrespective of whether the vessel waits inside or outside the port, the charterer should be allowed to offset the laytime when assessing damages for delay arising from a breach of contract situation.<sup>46</sup> Apart from the fact that it would be illogical if the charterer can offset laytime if the vessel drops anchor 1 mile (1.6km) within the port limits, but he cannot do so if the vessel is anchored 1 mile (1.6km) outside the limits, it is contended that the general principle is that in the calculation of damages in a breach of contract situation, there should be no windfall for the party breached against.<sup>47</sup> Nonetheless, the provision of a bonus results from the "within the port" requirement for an "arrived ship". If the "within the port" requirement is discarded, the practical value of the reachable provision in port charters will be diminished. However, it will continue to be useful within the context of berth charters.

#### **12.4 Effect of Exceptions Clauses**

Exxonvoy 1969, Cl 6 provides as follows:

"NOTICE OF READINESS Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the vessel is ready to load or

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<sup>45</sup> At p. 127.

<sup>46</sup> D. Davies, Commencement of Laytime (1987) pp. 64-65.

<sup>47</sup> *ibid.*

discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the vessel's arrival in berth (i.e. finished mooring when at a sealoading or discharging terminal and all fast when loading or discharging alongside a wharf), whichever first occurs. However, where delay is caused to vessel getting into the berth after giving notice of readiness for any reason over which charterer has no control, such delay shall not count as used laytime."

The problem is whether the last sentence in Cl 6 applies in all cases of delay and secondly, whether it is only operative after the charterer has designated or procured a berth under the reachable clause, Cl 9. If the sentence is literally interpreted, it would appear to be useful in all situations of delay.<sup>48</sup> However, should the words "for any reason over which the charterer has no control" be considered to be superfluous since most of the events which may delay the ship, for example, fog, insufficient water or congestion will be outside the control of the charterer. It has been contended that these words are not superfluous and that they merely indicate that the last sentence of the clause should only be relevant if weather or navigational conditions interfere with berthing.<sup>49</sup> However, it has been suggested that this interpretation can be nullified by a stipulation that,

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<sup>48</sup> Although the operation of the clause may be curtailed by specific stipulations, see, Nimba Offshore Corpn v Japan Lines Ltd (1973) A.M.C. 1060(N.Y.Arb).

<sup>49</sup> D. Davies, "Laytime under Asbatankvoy" Charterparty International No 1 (1984) vol. 1, 3; M.W. Arnold, "Stare Decisis et Non Quieta Movere" [1977] L.M.C.L.Q. 24, 28.

"Time lost to the vessel after Notice of Readiness has been given caused either directly or indirectly by bad weather shall count as laytime or if vessel on demurrage always on demurrage at the full charterparty rate."<sup>50</sup>

The reason being that traditionally, charterers have always borne the risk of delay arising from port congestion after the ship has arrived, whilst shipowners have had to bear the risk of delay arising from bad weather or navigational conditions.<sup>51</sup>

#### 12.4.1. The Laura Prima

In The Laura Prima,<sup>52</sup> when the vessel arrived at the loading place in Libya, the notice of readiness was tendered but due to congestion, the vessel waited for just over nine days before securing a loading berth. The shipowner claimed demurrage but the charterer denied liability on the basis of the last sentence of Cl 6. Both Mocatta, J.<sup>53</sup> and Lord Roskill<sup>54</sup> reading the main judgment of the House of Lords accepted the shipowner's submission that, the only way in

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<sup>50</sup> N. Winterson, "The Laura Prima" - The End of the Story, or is It? A Lecture delivered at the Charterparties Conference organized by Lloyd's of London Press, September 21st-22nd, 1982 pp. 25-26.

<sup>51</sup> See, The Werrastein [1957] 1 Q.B. 109, 120-121.

<sup>52</sup> [1981] 3 All.E.R. 737(H.L).

<sup>53</sup> [1980] 1 Lloyd's Rep. 466, 468-469.

<sup>54</sup> At p. 742.



which effect could be given to the reachable provision was to give effect to the last sentence of Cl 6 only after a berth had been procured and designated. But the Court of Appeal decided that the last sentence in Cl 6 was a clear provision to the effect that any delay beyond the charterer's control, after notice of readiness had been issued was not to count as used laytime.<sup>55</sup>

As the final decision stands, it supports the long-standing tradition which attaches responsibility for delay caused by port congestion to charterers. Apart from tradition, the House of Lord's decision has also been supported on the grounds that it accords with the overall logic of Exxonvoy 1969 which stipulates that, the notice of readiness may be tendered berth or no berth. Additionally, it prevents the charterer from taking advantage of his failure to secure a berth reachable on arrival.<sup>56</sup> Nevertheless, the decision appears stringent where there is a different cause of delay, for example, bad weather or the unavailability of tugs or pilots.<sup>57</sup> It is argued that it is useless to designate a

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<sup>55</sup> [1981] 2 Lloyd's Rep. 24, 28(C.A).

<sup>56</sup> N. Winterson, "The Laura Prima" - The End of the Story, or is It?," op cit, pp. 25-26.

<sup>57</sup> See further, T.C.M. Howard, "Demurrage Aspects in the United Kingdom" (1988) 23 E.T.L. 403, 404; J.S. Schofield, Laytime and Demurrage, p. 251. However, with respect to a similar clause in the ESSOVOY charter, arbitrators ruled that the delay in reaching the loading berth, which was attributable to adverse weather conditions was excused and did not count as used laytime: Hellenic Int. Shipping S.A. v Amoco Trading Int. Ltd (1975) A.M.C. 2311(N.Y.Arb).

berth because in those situations, it will be impossible for the vessel to reach it. The only logical step would seem to be to ignore the reachable provision and apply the notice provision in so far as it relates to the running of laytime and delay in berthing. Consequently, delay in berthing due to events other than congestion would not count against the charterers. In contrast to this construction, the Court of Appeal's decision reflects a more literal interpretation of the proviso. Its effect is comparable with that of the "in regular turn" provision which also allocates the risk of delay arising from congestion to the shipowner.<sup>58</sup>

#### 12.4.2 The Notos

The obiter remarks of their Lordships in The Notos<sup>59</sup> suggest that the express warranty by the charterer to provide a reachable berth is materially significant.<sup>60</sup> In that case there was an opportunity for the House of Lords to construe STB Voy, Cl 6 which is almost identical to Exxonvoy 1969, Cl 6.<sup>61</sup> The vessel had been unable to discharge at the only sealine at the port as a result of bad weather conditions, and

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<sup>58</sup> See, The Cordelia [1909] P. 27; United States Shipping Board v Frank C. Strick [1926] A.C. 545(H.L); Union Sulphur Co v Percy 180 F. 1(1st Cir Me, 1910).

<sup>59</sup> [1987] 1 Lloyd's Rep. 503(H.L).

<sup>60</sup> *ibid*, p. 507.

<sup>61</sup> STB Voy was devised by Exxon in 1974 as a replacement for Exxonvoy 1969. Although, it is regarded as an improvement on Exxonvoy 1969, it has not been gained widespread acceptance.

also because she had to await her turn. In reply to the shipowner's claim that the laytime or demurrage counted from the time that the notice was issued, the Court held that with respect to the first period of delay which had been caused by navigational conditions, the charterer was protected by Cl 6.<sup>62</sup> The Notos was distinguished from The Laura Prima on the basis that STB Voy did not contain a reachable clause. It merely provided that the charterers were to nominate a sealine upon or before the vessel's arrival. That obligation was satisfied if the vessel was ordered to a port which only had one sealine. It is important that delay in in Cl 6 was construed as applying to time loss resulting from port congestion or weather/navigational conditions. However, it appears that if the exceptions provisions and the reachable clause are included in the same charter, the judicial view is that the operations of the exceptions provision is dependent on the fulfilment of the reachable warranty.<sup>63</sup> Although

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<sup>62</sup> See also, [1985] 1 Lloyd's Rep. 149; [1985] 2 Lloyd's Rep. 335(C.A). In this particular case, unlike The Laura Prima, the charterer had conceded that he had control over the berthing of vessels at the sealine. Therefore, it was held that Cl 6 was not applicable to the period in which the vessel had been awaiting her turn. In Dominant Navigation Ltd v Alpine Shipping Co (1982) A.M.C. 1231(N.Y.Arb), it was held by a majority of the arbitral panel that, Cl 6 could only excuse the charterer from laytime or time on demurrage if the vessel "was getting into berth" and not waiting for a berth to be ready. Therefore, laytime or time on demurrage can be computed even if after arrival at the customary anchorage, notice of readiness has been tendered and the vessel is subsequently delayed by adverse weather or sea conditions or congestion resulting from adverse weather or sea conditions.

<sup>63</sup> See, The Johns Stove [1984] 1 Lloyd's Rep. 38, 40-41.

commercial opinion accepts that "delay" in Cl 6 is capable of being given a broad interpretation, it is contended that the exceptions provision should have unrestricted application in every situation of delay except port congestion.<sup>64</sup>

#### **12.4.3 Proposed Reforms**

The current position of the law is therefore quite fluid. In order to avoid future controversy, the last sentence of Exxonvoy 1969, Cl 6 should perhaps be worded without the phrase "any reason beyond the charterer's control". Secondly, the types of delay to which the sentence applies should be specified. It is noted that in Exxonvoy 1984, which like STB Voy does not contain a reachable provision, the events liable to interrupt laytime are clearly specified.<sup>65</sup>

#### **12.5 Computation of Demurrage**

Where the agreed period of laytime is exhausted at the loading port, the charterer may contend that demurrage should not be counted as soon as the vessel gets to the discharging

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<sup>64</sup> D. Davies, Commencement of Laytime, p. 53.

<sup>65</sup> Exxonvoy 1984, Cl 14(b). Cl 14(d) further provides that any delays due to events which have not been specified in the Charter and which are beyond the reasonable control of the owner or charterer shall count as laytime, or time on demurrage as the case might be. Demurrage in such situations shall be half the demurrage rate.

port. In The Tsukuba Maru<sup>66</sup> which had involved a charter from a Gulf port to Mohammedia (Morroco), the vessel arrived at the discharging port after the total laytime had already been exhausted. The shipowner contended that demurrage counted immediately without interruptions but the charterer argued, inter alia, that there should be a deduction in respect of the six-hour notice period stipulated in Exxonvoy 1969, Cl 6. Deductions were also claimed for the time which was lost as a result of bad weather after the expiration of the notice period and shifting time from the anchorage to the berth.

The charterer relied upon Cl 8 of the charterparty which provided that,

"Charterer shall pay demurrage per running hour and pro rata for a part thereof..... for all time that loading and discharging and used laytime exceeds the allowed laytime herein specified.."

It was argued that "used laytime" was a term of art which was distinct from "all time loading and discharging". The latter expression merely referred to the actual loading and discharging times. In the charterer's opinion, those clauses in the charterparty which provided that certain periods could be excluded from the "used laytime" were applicable whether

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<sup>66</sup> [1979] 1 Lloyd's Rep. 459. American arbitrators have also considered the point. Although, there are conflicting approaches: M.W. Arnold, "Stare Decisis et Non Quieta Movere" [1977] L.M.C.L.Q. 24, 25.

the vessel was on demurrage or not.<sup>67</sup> Mocatta, J. disagreed.<sup>68</sup> He ruled that the charterparty had not been consistent in its use of the phrase "used laytime" because in another clause, "allowed laytime" had been referred to. This suggested that there was no distinction between "allowed laytime" and "used laytime" and that the latter was not a term of art. Decisions such as Union of India Compania v Naviera Aeolus S.A.,<sup>69</sup> Dias Compania Naviera S.A. v Louis Dreyfus Corp<sup>70</sup> and Pagnan & Fratelli v Tradax Export S.A.<sup>71</sup> had emphasized that once demurrage had started, no exceptions were applicable unless the exceptions clause was clearly worded so as to have that effect. It was held that there was nothing in Cl 6 and the rest of the charterparty to indicate that their provisions as to time not counting as "used laytime" were applicable, once the laytime had been used up. The decision accords with established practice.<sup>72</sup> The charterer could only

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<sup>67</sup> Also, F.M. Ventris, "Quot Homines Tot Sententiae" [1977] L.M.C.L.Q. 533, 534-535. The Atlantic Monarch (1975) A.M.C. 1991(N.Y.Arb).

<sup>68</sup> The Tsukuba Maru, pp. 471-472.

<sup>69</sup> [1964] A.C. 868(H.L).

<sup>70</sup> [1978] 1 W.L.R. 261(H.L).

<sup>71</sup> [1969] 2 Lloyd's Rep. 150.

<sup>72</sup> See, Fadi Shipping Co S.A. v Amoco Transp. Co S.M.A. Award Service Ref. No: 1927 summarized in Fairplay Shipping International, June 28th, 1984 p. 39. A majority of American arbitrators have also adopted the view that, in the absence of an express stipulation, demurrage time runs continuously without any interruptions. Their primary considerations have been uniformity and consistency of the law and the general

have succeeded if the charterparty clearly stipulated that he was entitled to the notice period even if the vessel was on demurrage and further that in those circumstances, certain interruptions were to be deducted from the time on demurrage.

#### **12.5.1 Concept of Specialized Laytime**

It has been contended that on its true construction, Exxonvoy 1969 deals with two notions of time, i.e. the "used laytime" and the "time for loading and discharging." The notice period is regarded as part of the used laytime, that is, "all the time outside that required for pumping the cargo on board and subsequently ashore during which the charterer retains the vessel except in so far as such time is excluded by the terms of the charter-party".<sup>73</sup> Furthermore, it is argued that that since the used laytime is separately calculated, exceptions which are applicable to it remain effective whether or not the vessel is on demurrage.<sup>74</sup> In the absence of explicit stipulations in the charterparty itself, it is very difficult to accept this concept of a specialized laytime which can co-exist and prevail over the demurrage time scale.

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principle that a clause will be construed against a person seeking to rely upon it, see, D.T. McCune, The Asbatankvoy Charter (1984) pp. 26-30.

<sup>73</sup> F.M. Ventris, "Quot Homines Tot Sententiae", p. 534.

<sup>74</sup> *ibid.* See also, Shipping Corp. of India v Sun Oil Co 569 F. Supp. 1248 (E.D. Pa, 1983). Also, D.T. McCune, The Asbatankvoy Charter, pp. 30-32.

### 12.5.2 Protection of Charterer's Interests

Another criticism of the decision is that it would result in charterers being made to pay twice over for the notice period.<sup>75</sup> Once at the freight rate and again at the demurrage rate. In order to protect their interests, charterers should insist on a specific provision in the charterparty which establishes their right to the notice period,<sup>76</sup> or to the specific exclusion of certain events from the time on demurrage. Finally, demurrage clauses similar to Cl 8 could be further simplified by replacing references to "used laytime" and "allowed laytime" in the charterparty with "laytime" For example,

"Charterer shall pay demurrage per running hour and pro rata for a part thereof once the total laytime has been exceeded."<sup>77</sup>

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<sup>75</sup> F.M. Ventris, "Quot Homines Tot Sententiae", pp. 534-535.

<sup>76</sup> Cf, Exxonvoy 1984, Cl 13(a). Also, STB Voy, Cl 6.

<sup>77</sup> Cf, Exxonvoy 1984, Cl 13(c).



The problems associated with the determination of arrival at a port derive from immobility in maritime transport, and their impact on port operations. It is fair to state that arrival theories have become divergent. Some movement away from the nucleus of port operations has benefitted the shipowner. It is not possible to foresee a scenario whereby a universal theory of arrival will be restored. Indeed, a return to the strict, functional view of arrival would nullify the significant advances that have been accomplished, for example, the introduction of faster and larger vessels, instantaneous communications and the employment of specialized vessels which bypass shore-side facilities.

**CHAPTER THIRTEEN**

**CONCLUSIONS**

The question is whether it is necessary to extend the scope of arrival beyond the legal limits of a port. It is suggested that there are urgent reasons for proposing an expansive test of arrival which can be applied to most types of ports, irrespective of ship type. The objective is to replace the formalistic test which hinders port operations with a more practical test.

## CHAPTER THIRTEEN

### CONCLUSIONS

The problems associated with the determination of arrival at a port derive from innovations in maritime transport, and their impact on port evolution. It is fair to state that arrival theories have progressively become divergent. This movement away from the nucleus of port operations has benefitted the shipowner. In the future, it is not possible to foresee a scenario whereby a convergent theory of arrival will be restored. Indeed, a return to the strict, functional view of arrival would nullify the significant advances that have been accomplished, for example, the introduction of faster and larger vessels, instantaneous communications and the employment of specialized vessels which bypass shoreside facilities.

The question is whether it is necessary to extend the scope of arrival beyond the legal limits of a port. It is suggested that there are cogent reasons for proposing an expansive test of arrival which can be applied in most types of ports, irrespective of ship type. The inadequacies of the formalistic test which highlights the legal limits of the port

can be briefly summarized as follows:

(i) Impracticability with respect to ports lacking legal limits.

(ii) Vagueness on matters such as temporary fluctuations of port limits, and voyages of convenience.

(iii) The possibility of obtaining different results in the case of vessels waiting at ports of a similar size, merely on the basis of the location of usual or customary anchorages.

At the very least, any replacement test should resolve these difficulties. The standard test, which is rooted in the commercial approach propounded by Brett, M.R. in Sailing Ship Garston v Hickie<sup>1</sup> appears to satisfy this criterion. In this particular context, "commercial" does not describe a category of port limits. Instead, it indicates that for the purposes of arrival, the crucial factors are the location of the usual or customary anchorages, or the extent of port jurisdiction. "Jurisdiction" means any area, within or outside the legal limits of the port, within which vessels consent to the control of a Port Authority.

It is still necessary to retain the requirement of the vessel being placed at the effective disposition of the charterer. This ensures that at the purported time of arrival, the vessel is in such a position that she can respond to the

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<sup>1</sup> (1885) 15 Q.B.D. 580(C.A). Also, Leonis v Rank [1908] 1 K.B. 499(C.A).

charterer's berthing instructions. If the vessel is unable to respond immediately, irrespective of whether the vessel has been delayed by events other than port congestion, it is suggested that the crucial point is the extent of the loss of time. If there has been no significant loss of time, having regard to the duration of the voyage and the normal shifting times for vessels of a similar size and type, the vessel should be deemed to have been placed at the effective disposition of the charterer.

A standard test of arrival which will produce the same result, irrespective of the forum where any dispute is settled and which does not refer to any characteristic or function of a port will promote certainty of the law. Furthermore, it may minimise the use of compensatory provisions. It has already been shown that the application of these compensatory provisions has not been free from difficulties, particularly with respect to the position that the vessel should attain and the relevant events which affect the applicability of a particular clause.

The primary consideration in the implementation of the standard test should be the rapidity with which change can be effected. In this case, national or international legislation may not be appropriate mechanisms. Similarly, judicial action may not be very effective, particularly in those jurisdictions where the doctrine of binding precedent is strictly observed. Consequently, the modality of implementation should be a

contractual stipulation. Institutions involved with shipping have already produced a set of definitions for the field of laytime.<sup>2</sup> However, it is noted that it lacks an express definition of what constitutes arrival at a port. Nevertheless, the definition of "port" has been couched in expansive terms. The definition of common laytime terms is a significant step towards the goal of uniformity and harmonization of international trade laws.<sup>3</sup> Unfortunately, it appears that the definitions have not been widely adopted. It is hoped that in future, this will be rectified by chartering brokers and legal advisers who will suggest the adoption of modern definitions to their principals.

In the particular context of Nigerian port evolution and regulation, it is suggested that the unified structure of port regulation that the Nigerian Ports Authority represents should be retained. It is possible that in the drive to attain economic sufficiency in the public sector, commercialization of services and some facilities may be promoted. However, those duties of the N.P.A. which relate to the movement and

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<sup>2</sup> See, appendix i.

<sup>3</sup> Already, the International Chamber of Commerce regularly issues a set of uniform rules for the interpretation of terms commonly employed in foreign trade contracts, see, INCOTERMS 1990 which took effect from July 1st, 1990. However, it is for the parties to a contract to decide whether or not to incorporate any of the rules. Also, shipping organizations have proposed a uniform charterparty which can be used for every trade and commodity. The objective being to significantly reduce the variety of charterparties employed in the dry cargo trades.

control of vessels, e.g. traffic-regulation, conservancy and pilotage should not be privatized and split up amongst diverse entities.

If importers and exporters and other port users are dissatisfied with the operations of the N.P.A., this is probably a problem relating to the calibre of management and other personnel, and the application of resources. In the areas that have been examined in this study, it is clear that the N.P.A. has a well defined organizational and administrative structure. It exercises wide-ranging powers and has considerable control over the raising of revenues. It is for the Federal Minister of Transport to exercise the full range of his supervisory powers and for the N.P.A. to ensure that qualified and diligent personnel are recruited for the prosecution of its business.

It is also required that the Federal Government should have an awareness of the possible consequences of its economic and fiscal policies on port operations. It has been shown that the documentation requirements which emanate from such policies may affect the relationship between shipowners on the one hand, and charterers and consignees on the other. Therefore, there is a need for effective consultation between the Federal Government, all port users and representatives of the business sector. The objective of these consultations should be the provision of port services and facilities at rates which reflect the level of investment required for a

particular port. Although port capacity for general cargo is adequate until the next century, further investment in facilities for third generation container vessels, i.e. 4,500 T.E.U. vessels will be required in ports such as Lagos, Port Harcourt, Warri and Calabar.<sup>4</sup> In return for the payment of such rates, port users should have a reasonable expectation that there will be a streamlining of documentation requirements and reasonable turnaround times for vessels.

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<sup>4</sup> Lloyd's List "Nigerian Economy Faces Structural Adjustment" June 15th, 1990, p. 15.

# Laytime Definitions 1980

The following definitions are widely accepted by the trade, in the absence of overriding conditions to the contrary. They may be adopted by the parties to a charter party in order to avoid differences in interpretation. For example, in the present state of the law, judgments of the Court do not equate with the traditional understanding in the market as set down in Numbers 16 and 17. The agreement of the parties, during Charterparty negotiations, to adopt those two definitions of interpretation would override any common law judgment.

## *List of Definitions*

1. "Port"
2. "Safe port"
3. "Berth"
4. "Safe berth"
5. "Reachable on arrival" or "always accessible"
6. "Laytime"
7. "Customary despatch"
8. "Per hatch per day"
9. "Per working hatch per day" or "per workable hatch per day"
10. "As fast as the vessel can receive/deliver"
11. "Day"
12. "Clear day" or "clear days"
13. "Holiday"
14. "Working days"
15. "Running days" or "consecutive days"
16. "Weather working day"
17. "Weather working day of 24 consecutive hours"
18. "Weather permitting"
19. "Excepted"
20. "Unless used"
21. "To average"
22. "Reversible"
23. "Notice of readiness"
24. "In writing"
25. "Time lost waiting for berth to count as loading/discharging time" or "as laytime"
26. "Whether in berth or not" or "berth no berth"
27. "Demurrage"
28. "On demurrage"
29. "Despatch money" or "despatch"
30. "All time saved"
31. "All working time saved" or "all laytime saved"

## *Definitions*

1. "Port" – means 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 no matter the distance from that area.

If the word "port" is not used, but the port is (or is to be) identified by its name, this definition shall still apply.

2. "Safe port" – means a port which, during the relevant period of time, the ship can reach, enter, remain at and depart from without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.



If the word "berth" is not used, but the specific place is (or is to be) identified by its name, this definition shall still apply.

4. "Safe berth" – means a berth which, during the relevant period of time, the ship can reach, remain at and depart from without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.
5. "Reachable on arrival" or "always accessible" – means that the charterer undertakes that when the ship arrives at the port there will be a loading/discharging berth for her to which she can proceed without delay.
6. "Laytime" – means the period of time agreed between the parties during which the owner will make and keep the ship available for loading/discharging without payment additional to the freight.
7. "Customary despatch" – means that the charterer must load and/or discharge as fast as is possible in the circumstances prevailing at the time of loading or discharging.
8. "Per hatch per day" – means that laytime is to be calculated by multiplying the agreed daily rate per hatch of loading/discharging the cargo by the number of the ship's hatches and dividing the quantity of cargo by the resulting sum. Thus:

$$\text{Laytime} = \frac{\text{Quantity of Cargo}}{\text{Daily Rate} \times \text{Number of Hatches}} = \text{Days}$$

A hatch that is capable of being worked by two gangs simultaneously shall be counted as two hatches.

9. "Per working hatch per day" or "per workable hatch per day" means that laytime is to be calculated by dividing the quantity of cargo in the hold with the largest quantity by the result of multiplying the agreed daily rate per working or workable hatch by the number of hatches serving that hold.

Thus:

$$\text{Laytime} = \frac{\text{Largest quantity in one hold}}{\text{Daily Rate per hatch} \times \text{Number of Hatches serving that hold}} = \text{Days}$$

A hatch that is capable of being worked by two gangs simultaneously shall be counted as two hatches.

10. "As fast as the vessel can receive/deliver" – means that the laytime is a period of time to be calculated by reference to the maximum rate at which the ship in full working order is capable of loading/discharging the cargo.

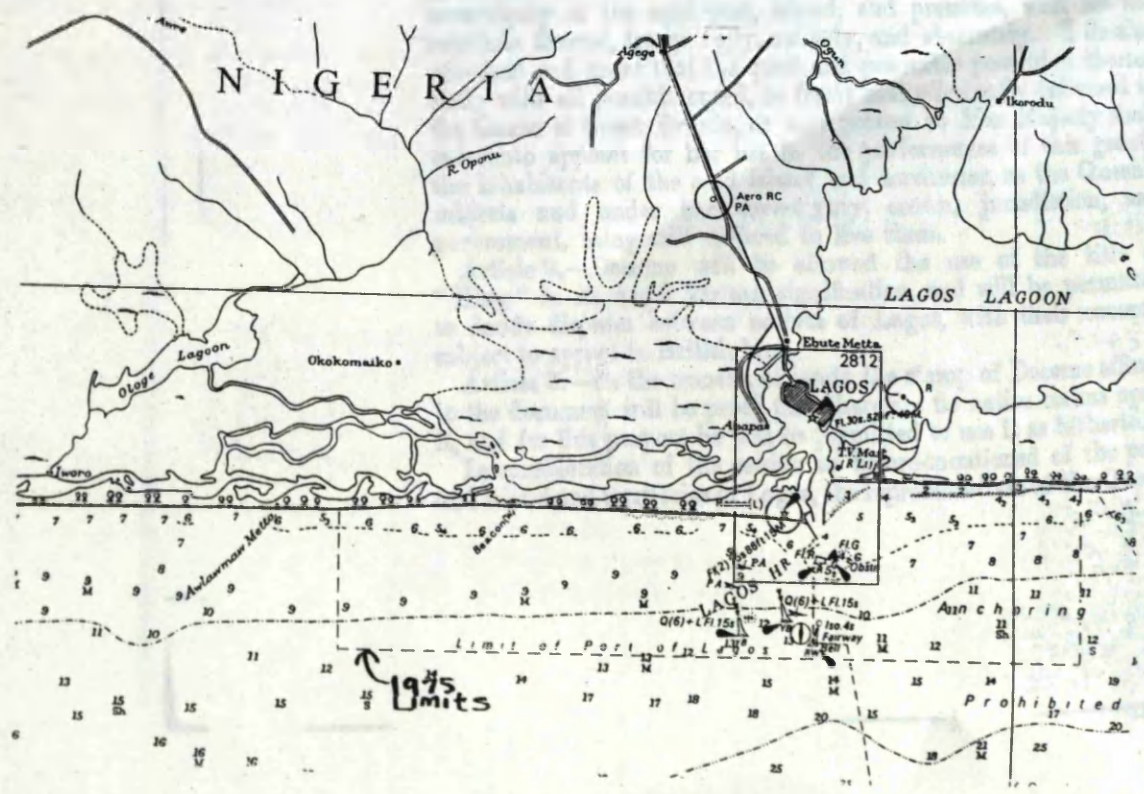
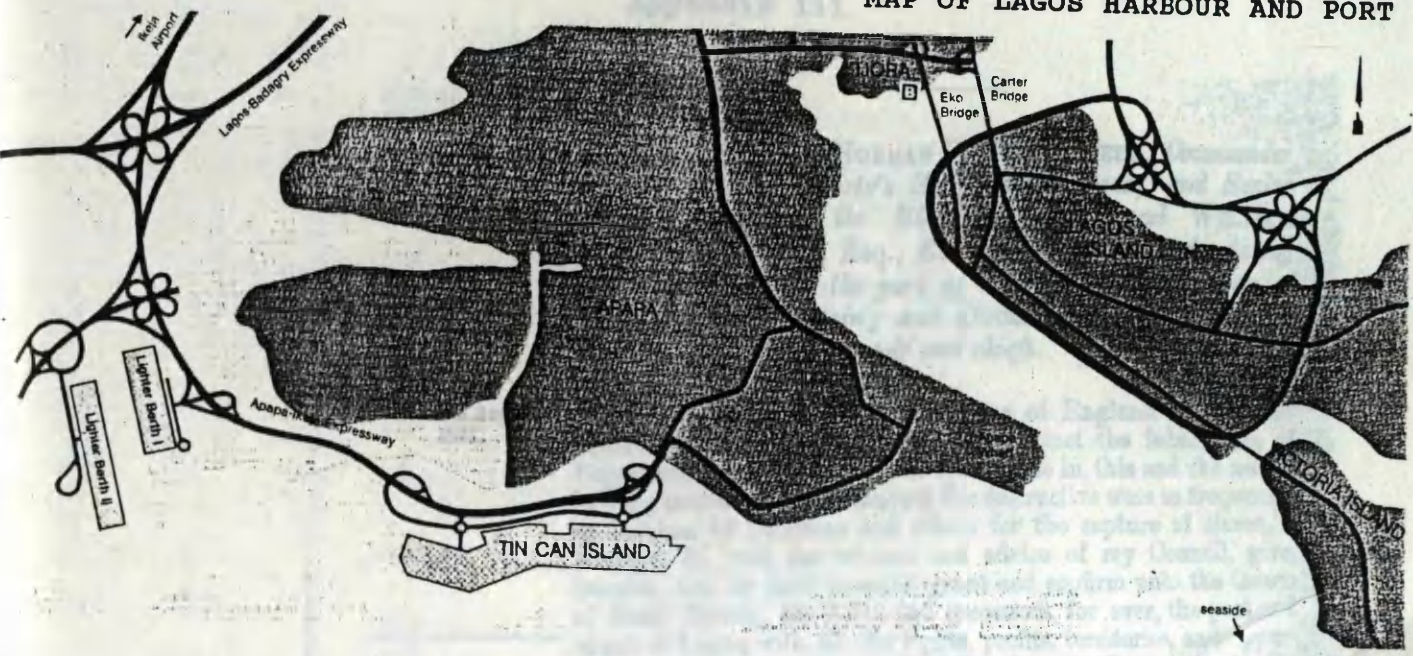
notice of readiness – means notice to the charterer, shipper, receiver or other person as required by the charter that the ship has arrived at the port or berth as the case may be and is ready to load/discharge.

24. “In writing” – means, in relation to a notice of readiness, a notice visibly expressed in any mode of reproducing words and includes cable, telegram and telex.
25. “Time lost waiting for berth to count as loading/discharging time” or “as laytime” – means that if the main reason why a notice of readiness cannot be given is that there is no loading/discharging berth available to the ship the laytime will commence to run when the ship starts to wait for a berth and will continue to run, unless previously exhausted, until the ship stops waiting. The laytime exceptions apply to the waiting time as if the ship was at the loading/discharging berth provided the ship is not already on demurrage. When the waiting time ends time ceases to count and restarts when the ship reaches the loading/discharging berth subject to the giving of a notice of readiness if one is required by the charterparty and to any notice time if provided for in the charterparty, unless the ship is by then on demurrage.
- \*26. “Whether in berth or not” or “berth no berth” – means that if the location named for loading/discharging is a berth and if the berth is not immediately accessible to the ship a notice of readiness can be given when the ship has arrived at the port in which the berth is situated.
27. “Demurrage” – means the money payable to the owner for delay for which the owner is not responsible in loading and/or discharging after the laytime has expired.
28. “On demurrage” – means that the laytime has expired. Unless the charterparty expressly provides to the contrary the time on demurrage will not be subject to the laytime exceptions.
29. “Despatch money” or “despatch” – means the money payable by the owner if the ship completes loading or discharging before the laytime has expired.
30. “All time saved” – means the time saved to the ship from the completion of loading/discharging to the expiry of the laytime including periods excepted from the laytime.
31. “All working time saved” or “all laytime saved” – means the time saved to the ship from the completion of loading/discharging to the expiry of the laytime excluding any notice time and periods excepted from the laytime.

\* The definition should be used selectively. For example in Numbers 5 and 26 the words “always accessible” and “immediately accessible” might, in the trend of recent judgments, be interpreted as meaning that although a berth is free any delay to the vessel in reaching it (bad weather, shortage of pilots, strikes of tugmen) would be the risk of charterers (not the traditional market approach).

11. "Day" means a continuous period of 24 hours which, unless the context otherwise requires, runs from midnight to midnight.
12. "Clear day" or "clear days" – means that the day on which the notice is given and the day on which the notice expires are not included in the notice period.
13. "Holiday" – means a day of the week or part(s) thereof on which cargo work on the ship would normally take place but is suspended at the place of loading/discharging by reason of:
- (i) the local law; or
  - (ii) the local practice
14. "Working days" – means days or part(s) thereof which are not expressly excluded from laytime by the charterparty and which are not holidays.
15. "Running days" or "consecutive days" – means days which follow one immediately after the other.
16. "Weather working day" – means a working day or part of a working day during which it is or, if the vessel is still waiting for her turn, it would be possible to load/discharge the cargo without interference due to the weather. If such interference occurs (or would have occurred if work had been in progress), there shall be excluded from the laytime a period calculated by reference to the ratio which the duration of the interference bears to the time which would have or could have been worked but for the interference.
17. "Weather working day of 24 consecutive hours" – means a working day or part of a working day of 24 hours during which it is or, if the ship is still waiting for her turn, it would be possible to load/discharge the cargo without interference due to the weather. If such interference occurs (or would have occurred if work had been in progress) there shall be excluded from the laytime the period during which the weather interfered or would have interfered with the work.
18. "Weather permitting" – means that time during which weather prevents working shall not count as laytime.
19. "Excepted" – means that the specified days do not count as laytime even if loading or discharging is done on them.
20. "Unless used" – means that if work is carried out during the excepted days the actual hours of work only count as laytime.
21. "To average" – means that separate calculations are to be made for loading and discharging and any time saved in one operation is to be set against any excess time used in the other.
22. "Reversible" – means an option given to the charterer to add together the time allowed for loading and discharging. Where the option is exercised the effect is the same as a total time being specified to cover both operations.

Appendix ii MAP OF LAGOS HARBOUR AND PORT



Source: Nigerian Ports Authority, Bilingual Magazine, 2nd edn. & Admiralty Chart 1861.



TREATY between NORMAN B. BEDINGFIELD, *Commander of Her Majesty's Ship "Prometheus," and Senior Officer of the Bights Division, and WILLIAM McCOSKRY, Esq., Her Britannic Majesty's Acting Consul, on the part of Her Majesty the Queen of Great Britain; and DOCEMO, King of Lagos, on the part of himself and chiefs.*

6th August,  
1861.

Article 1.—In order that the Queen of England may be the better enabled to assist, defend, and protect the inhabitants of Lagos, and to put an end to the slave trade in this and the neighbouring countries, and to prevent the destructive wars so frequently undertaken by Dahomey and others for the capture of slaves, I, Docemo, do, with the consent and advice of my Council, give, transfer, and by these presents, grant and confirm unto the Queen of Great Britain, her heirs and successors, for ever, the port and island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging; and as well as the profit and revenue as the direct, full, and absolute dominions and sovereignty of the said port, island, and premises, with all the royalties thereof, freely, fully, entirely, and absolutely. I do also covenant and grant that the quiet and peaceable possession thereof shall, with all possible speed, be freely and effectually delivered to the Queen of Great Britain, or such person as Her Majesty shall thereunto appoint for her use in the performance of this grant; the inhabitants of the said island and territories, as the Queen's subjects and under her sovereignty, crown, jurisdiction, and government, being still suffered to live there.

Article 2.—Docemo will be allowed the use of the title of "King" in its usual African signification, and will be permitted to decide disputes between natives of Lagos, with their consent, subject to appeal to British laws.

Article 3.—In the transfer of lands, the stamp of Docemo affixed to the document will be proof that there are no native claims upon it, and for this purpose he will be permitted to use it as hitherto.

In consideration of the cession as before-mentioned of the port and island and territories of Lagos, the representatives of the Queen



## LOCATION OF NIGERIAN PORTS

of Great Britain do promise, subject to the approval of Her Majesty, that Docemo shall receive an annual pension from the Queen of Great Britain, equal to the net revenue hitherto annually received by him; such pension to be paid at such periods and in such a mode as may hereafter be determined.

(Their marks)

x TELAKE.  
x ROCAMENA.  
x ORALEKOW.  
x ACHEBONG.

DOCENO.

NORMAN B. BEDINGFIELD, Her Majesty's Ship "Prometheus," Senior Officer, Bights Division.

Lagos, Aug. 6, 1861.

W. McCOSKRY, Acting Consul.

*Additional Article to the Treaty of Cession of the Island of Lagos to the British Crown.*

King Docemo having understood the foregoing Treaty, perfectly agrees to all the conditions thereof; and with regard to the 3rd Article consents to receive as a pension, to be continued during his lifetime, the sum of 1,200 (twelve hundred) bags of cowries per annum, as equal to his net revenue; and I, the undersigned, representative of Her Majesty, agree on the part of Her Majesty, to guarantee to the said King Docemo an annual pension of 1,200 (twelve hundred) bags of cowries for his lifetime, unless he, Docemo, should break any articles of the above Treaty, in which case his pension will be forfeited. The pension shall commence from July 1 of the present year, 1862, from which day he, the King, resigns all claim upon all former farmers of the revenue.

18th Feb.,  
1862.

DOCENO, his x mark.

HENRY STANHOPE FREEMAN, GOVERNOR.

We, the undersigned, witness that the above Treaty and ratification was explained to King Docemo, in our presence was signed by him, and by Henry Stanhope Freeman, Esq., as representative of Her Majesty the Queen of England, on this the 18th day of February, in the year of our Lord, 1862.

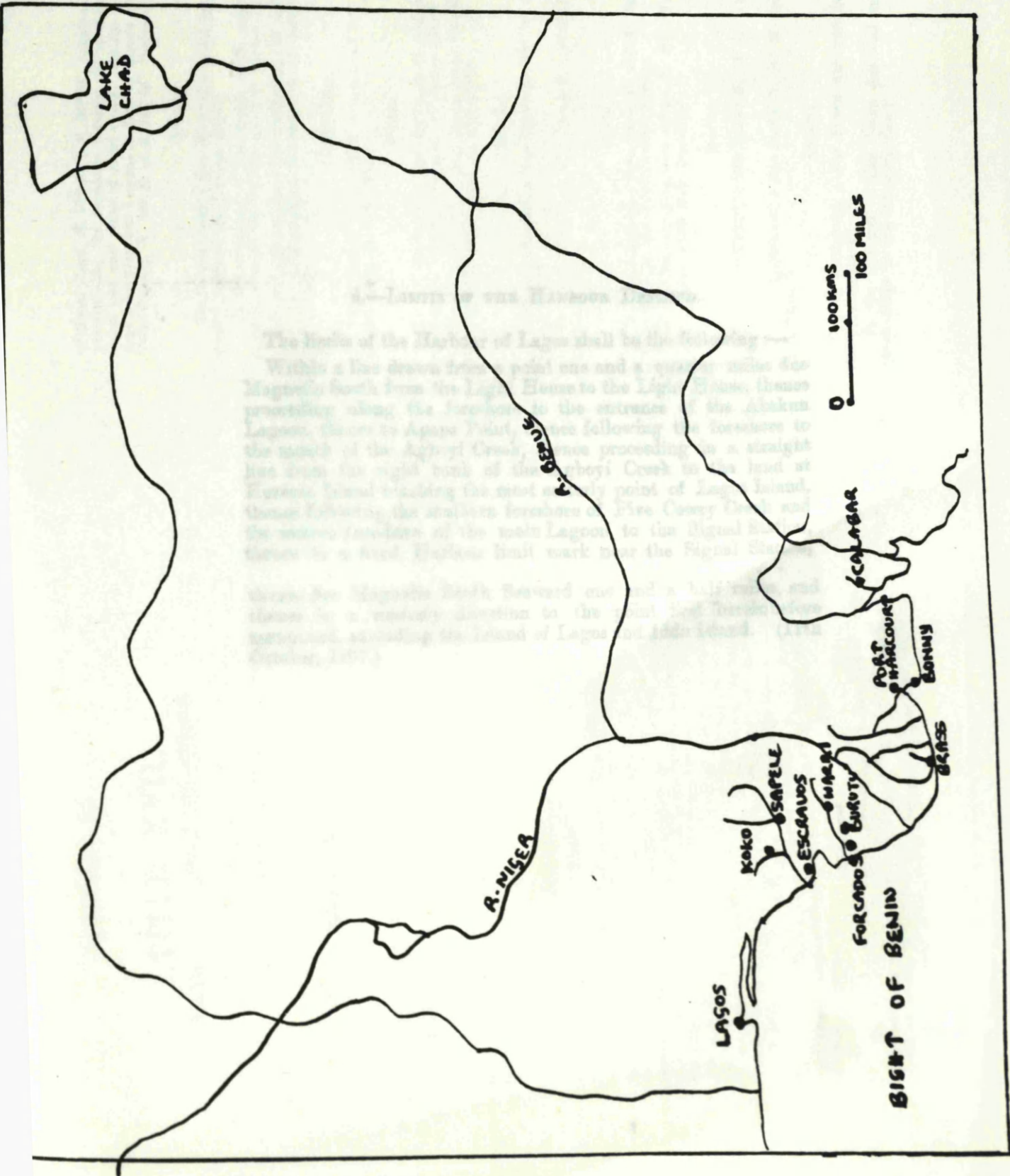
JOHN H. GLOVER, Lieut. R.N.

SAMUEL CROWTHER.

J. C. THOMAS, Secretary to the King Docemo.

S. B. WILLIAMS, British Interpreter.

LOCATION OF NIGERIAN PORTS





4.—LIMITS OF THE HARBOUR DEFINED.

The limits of the Harbour of Lagos shall be the following:—

Within a line drawn from a point one and a quarter miles due Magnetic South from the Light House to the Light House, thence proceeding along the foreshore to the entrance of the Abekun Lagoon, thence to Apapa Point, thence following the foreshore to the mouth of the Agboyi Creek, thence proceeding in a straight line from the right bank of the Agboyi Creek to the land at Kuramo Island touching the most easterly point of Lagos Island, thence following the southern foreshore of Five Cowry Creek and the eastern foreshore of the main Lagoon to the Signal Station, thence to a fixed Harbour limit mark near the Signal Station,

thence due Magnetic South Seaward one and a half miles, and thence in a westerly direction to the point first hereinbefore mentioned, excluding the Island of Lagos and Iddo Island. (11th October, 1897.)

Appendix vi

TITLE XVII.

WAYS AND COMMUNICATIONS

(a) Ports, Harbours and Shipping.

CHAPTER 100.

TITLES

(Lagos and Dependencies)

Agreement of Ports (Lagos Island & Iddo Island) 1897.

The Government has effected the plans mentioned in the Schedule to this title for the purpose of the Government.

SCHEDULE.

Lagos

Within a line drawn from a point one and a quarter miles due Magnetic South from the Light House, to the Light House, thence proceeding along the foreshore to the entrance of the Abekun Lagoon, thence to Apapa Point, thence following the foreshore to the mouth of the Agboyi Creek, thence proceeding in a straight line from the right bank of the Agboyi Creek to the land at Kuramo Island touching the most easterly point of Lagos Island, thence following the southern foreshore of Five Cowry Creek and the eastern foreshore of the main Lagoon to the Signal Station, thence to a fixed Harbour limit mark near the Signal Station, thence due Magnetic South Seaward one and a half miles, and thence in a westerly direction to the point first hereinbefore mentioned, excluding the Island of Lagos and Iddo Island.

On the northern (or north-western) side, a line drawn from the western extremity of the buildings at Harvie and east to the western extremity of Mount Head S. 85° E. On the southern (or south-western) side, a line drawn from the western extremity of Mount Head S. 85° E. On the northern (or north-western) side, a line drawn due west (magnetic) to the Government wharf.

To the eastward, a line drawn due west (magnetic) to the Government wharf.

To the eastward, a line drawn due west (magnetic) to the Government wharf.

of Mount Head N. 67° E. or S. 67° W. (magnetic). On the western side, the harbour follows the western limit of Point and west point of Mount Head. On the western side, a line drawn from a point one and a quarter miles due Magnetic South from the Light House to the Light House, thence proceeding along the foreshore to the entrance of the Abekun Lagoon, thence to Apapa Point, thence following the foreshore to the mouth of the Agboyi Creek, thence proceeding in a straight line from the right bank of the Agboyi Creek to the land at Kuramo Island touching the most easterly point of Lagos Island, thence following the southern foreshore of Five Cowry Creek and the eastern foreshore of the main Lagoon to the Signal Station, thence to a fixed Harbour limit mark near the Signal Station, thence due Magnetic South Seaward one and a half miles, and thence in a westerly direction to the point first hereinbefore mentioned, excluding the Island of Lagos and Iddo Island.

To the eastward, a line drawn due north (magnetic) to the Government wharf.

To the eastward, a line drawn due north (magnetic) to the Government wharf.

To the eastward, a line drawn due north (magnetic) to the Government wharf.

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To the eastward, a line drawn due north (magnetic) to the Government wharf.



## Appendix vi

# TITLE XVII.

## WAYS AND COMMUNICATIONS.

### (a) Ports, Harbours and Shipping.

## CHAPTER 100.

### PORTS.

(Colony and Protectorate.)

#### APPOINTMENT OF PORTS UNDER SECTION 3 (1) OF THE PORTS ORDINANCE.

Notice  
No. 137 of  
1917.  
1st Jan.  
1918.

The Governor-General has appointed the places mentioned and defined in the Schedule to be ports for the purposes of the above Ordinance.

#### SCHEDULE.

##### LAGOS.

Within a line drawn from a point, three miles south 14 west magnetic from the Light House, to the Light House, thence proceeding along the foreshore to the entrance of the Abekun Lagoon, thence to Apapa Point, thence following the foreshore to the mouth of the Aghoyi Creek, thence, proceeding in a straight line, from the right bank of the Aghoyi Creek to the land at Kuramo Island, touching the most easterly point of Lagos Island, thence following the southern foreshore of Five Cowry Creek and the eastern foreshore of the main lagoon to the Victoria Signal Station at Greshie Point, thence along the foreshore to a line drawn due magnetic south from the Victoria Signal Station Flagstaff at Greshie Point thence due magnetic south four miles from the Signal Station Flagstaff, and thence in a westerly direction to the point first hereinbefore mentioned excluding the Island of Lagos and Iddo Island.

##### FORCADOSS.

On the northern (or north-eastern) side, a line drawn from the western extremity of the buildings at Burutu and open of the south extremity of Boma Head S. 56° E. On the southern side, west point of Muri Creek in line with the north-eastern extremity

of Boma Head, N. 67° E. or S. 67° W. (magnetic). On the western side, the foreshore between the western limit of Point and west point of Muri Creek. On the western side drawn between two bearings in line on Quorra Point and Point beuron, N. 54° E. or S. 54° W. (magnetic).

##### SAPELE.

To the eastward, a line drawn due north (magnetic) to eastern point of the Ethiopie River.

To the westward, a line drawn north and south (magnetic) passing through the eastern point of Munro Island.

To the southward, a line drawn due east and west (magnetic) across the Ethiopie River two cables to the south of the southernmost factory.

##### KOKO TOWN.

Those waters lying within a radius of five cables from custom house at Koko Town.

##### WARRI.

To the eastward, a line drawn north and south (magnetic) crossing the western extremity of James Island.

To the westward, a line drawn south (magnetic) across river from the south point of Wall Creek.

##### AKASSA.

To the northward, a line drawn N. 76° W. (magnetic) Trotter Point.

To the southward, a line drawn S. 76° E. (magnetic) Barracocon Point.

##### BRASS.

To the northward, a line drawn N. 63° W. from a point cables north of the northernmost factory.

To the southward, a line drawn N. 63° W. or S. 63° joining Canoe Point with Tua Creek.

##### BONNY.

To the northward, a line drawn S. 74° E. from Peter Point.

To the southward, a line drawn N. 74° W. from the Government flagstaff.

##### DEGEMA.

To the northward, a line drawn due west (magnetic) from the Government wharf.

To the eastward, a line drawn due west (magnetic) from Fetich Point in the Abonema Creek.



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To the southward, a line drawn due east (magnetic) across the river from a point two cables south of the southernmost factory.

#### OPOBO.

To the northward, a line drawn due east and west (magnetic) connecting the two banks of the Opopo River five cables north of Essene Creek.

To the southward, a line drawn connecting Steep Point with the south point of Strongface Creek N. 53° E. or S. 53° W.

#### CALABAR.

To the northward, a line drawn due north (magnetic) from Duke Town Point.

To the Southward, a line drawn N. 33° W. from Henshaw Creek.

#### PORT HARCOURT.

To the northward, a line drawn north and south (magnetic) across the main creek above Port Harcourt cutting the entrance to the Omo Ene Creek.

To the southward, a line drawn east and west (magnetic) across the main creek cutting the entrance to the Okabakri Creek.

#### BURUTU.

On the north-west, a line N. 87° E. and S. 87° W. (magnetic) joining West Point and Boma Head.

On the south-west, a line S. 60° E. and N. 60° W. joining West Point and Clough Point.

On the north, the foreshore from Boma Head to the end of Britten Island.

On the south, the foreshore from Clough Point to the easternmost building at Burutu.

On the east, an imaginary line drawn due north (magnetic) half a mile east of the easternmost building to the opposite bank.



## CHAPTER 173

## PORTS

*(Colony and Protectorate)*

## APPOINTMENT OF PORTS UNDER SECTION 3 (a) OF THE PORTS ORDINANCE.

Notice  
of 1939  
and June)

Under section 3 (a) of the Ports Ordinance the Governor has been pleased to appoint the areas mentioned and defined in the Schedule hereto to be ports for the purposes of the Ordinance.

## SCHEDULE

## LAGOS

Within a line drawn from a point bearing 180 degrees and distant three miles from the lighthouse, to the lighthouse; thence proceeding along the foreshore to a beacon marked P.B.L. 3518 on Meridian Point; thence to a beacon at Badagri Point marked P.B.L. 3517; thence along the foreshore to a beacon marked P.B.L. 3519, at Aimirunfide Mofafefo Village which is situated on an island, approximately four cables west of Oko-babalawo; thence following a line bearing 360 degrees to the southern foreshore of the Apapa mainland; thence along the foreshore, round Apapa Point to a beacon marked P.B.L. 3521, on the north side of Oke Wata Village near the right bank at the mouth of Agboyi Creek; thence following a line bearing 150 degrees to the land at Kurama Island; thence following the southern foreshore of Five Cowrie Creek and the eastern foreshore of the main lagoon until the old signal mast at Greslie Point is bearing 090 degrees; thence to the old signal mast; thence to a point bearing 090 degrees and distant five cables from the old signal mast; thence following a line bearing 180 degrees for 3.85 miles and thence to the starting point. (Admiralty Chart No. 2812. Captain Speeding's Chart of Lagos Harbour dated 1898.)

## FORCADOS

From a point with Goshawk Point Beacon bearing 352 degrees distant 7.4 cables; thence following a line bearing 108 degrees for 2.08 miles; thence following a line of bearing 234 degrees to the foreshore on West Point; thence along the foreshore in a north-westerly direction, to a point at Kwarra Point with Goshawk Point Beacon bearing 352 degrees; thence to the starting point. (Admiralty Chart No. 3115.)

## KOKO TOWN

Those waters lying within a circle having a radius of eight and a half cables, with the Customs House at Koko as the centre.

## SAPELE

At a point on the right bank of the Ethiope River bearing 057° 50' from survey pillar No. 26 P; thence on a bearing 360 degrees to a point

## SCHEDULE—continued

on the right bank of the Benin River; thence along the river bank in a westerly direction as far as a point bearing 360 degrees from survey pillar No. 45 P; thence on a bearing of 180 degrees to the left bank of the Benin River; thence in an easterly direction along the left banks of the Benin and Ethiope Rivers as far as a point on the river bank bearing 90 degrees from survey pillar No. 22 P; thence on a bearing of 360 degrees to a point on the opposite bank of the Ethiope River; thence along the right bank of the Ethiope River in a northerly direction to the starting point. (Survey Department Plan of Sapele, Sheets 11 and 12, dated July, 1936.)

## WARRI

That part of the main stream of the Warri River bounded to the eastward by a line of bearing 360 degrees drawn across the main river from a position at Ogbe Sobu, in Latitude 5° 30' 00" North, Longitude 5° 45' 14" East; and to the westward, by a line of bearing 180 degrees drawn across the main river from a position at the south point of Wall Creek in Latitude 5° 31' 20" North, Longitude 5° 43' 07" East.

(Admiralty Chart No. 461 and Marine Department Plan No. 44. Warri River dated June, 1927.)

## AKASSA

From a point on the foreshore at Baracon Point, with the cement block marking the site of the Government flagstaff at Akassa bearing 307 degrees; thence along the foreshore to a point with the cement block hereinbefore mentioned bearing 139 degrees; thence along a line bearing 106 degrees to the mainland at Trotter Point; thence to the starting point. (Admiralty Chart No. 146.)

## BONNY

That part of the main stream of the Bonny River bounded to the northward by a line drawn 90 degrees from a position at Peter Fortia Point with Commander Pullen's Observation Stone at Bonny bearing 166½ degrees.

To the southward by a line drawn 270 degrees from a position with aforementioned observation stone bearing 360 degrees. (Admiralty Chart No. 622.)

## DEGEMA

That part of the main stream of the Sombreiro River bounded to the northward by a line drawn 270 degrees from the centre of the inshore end of the Government wharf at Degema across the Sombreiro River.

To the eastward by a line bearing 108 degrees from the southernmost point of Degema in Latitude 4° 44' 17.20" North, Longitude 6° 45' 43.80" East to the foreshore at Abonema.

To the southward by a line drawn from a point in Latitude 4° 43' 29.55" North, Longitude 6° 45' 49.75" East bearing 270 degrees across the Sombreiro River. (Marine Department Plan No. 127A, New Calabar and Sombreiro Rivers, Sheet 111, dated July, 1926.)



That part of the main stream of the Opobo River bounded to the northward by a line drawn across the Opobo River 270 degrees from a point in Latitude  $4^{\circ} 36' 00''$  North, Longitude  $7^{\circ} 32' 00''$  East and to the southward by a line drawn across the Opobo River 006 degrees from a point in Latitude  $4^{\circ} 30' 13''$  North, Longitude  $7^{\circ} 32' 38''$  East.

(Admiralty Chart No. 628.)

#### CALABAR

That part of the main stream of the Calabar River bounded to the northward by a line drawn 180 degrees from a point on a bearing of 259 degrees 1,980 feet from Calabar Township Boundary Post No. 177 (Survey Plan No. 3040) and to the southward by a line drawn 316 degrees from a point at the mouth of Henshaw Creek in Latitude  $4^{\circ} 56' 52''$  North, Longitude  $88^{\circ} 18' 09''$  East across the river.

(Admiralty Chart No. 3423.)

#### PORT HARCOURT

That part of the main stream of the Bonny River bounded to the northward by a line drawn 180 degrees from a point at the mouth of the Oma Ema Creek in Latitude  $4^{\circ} 46' 00''$  North, Longitude  $6^{\circ} 59' 00''$  East across the Bonny River and to the southward by a line drawn 270 degrees from a point at the mouth of the Okubiakri Creek in Latitude  $4^{\circ} 43' 24''$  North, Longitude  $7^{\circ} 00' 57''$  East across the Bonny River.

(Admiralty Chart No. 622.)

#### BURUTU

Within a line of bearing drawn 075 degrees from a position at West Point in Latitude  $5^{\circ} 21' 12''$  North, Longitude  $5^{\circ} 27' 00''$  East to Boma Head; thence along the foreshore to a position in Latitude  $5^{\circ} 21' 54''$  North, Longitude  $5^{\circ} 30' 40''$  East; thence along a line of bearing 070 degrees for a distance of .80 miles; thence along a line of bearing 180 degrees for a distance of .70 miles to a point at the western side of the mouth of Kuka Creek; thence along the foreshore to a position at Clough Point in Latitude  $5^{\circ} 20' 47''$  North, Longitude  $5^{\circ} 27' 47''$  East and thence to the starting point at West Point.

(Admiralty Charts Nos. 461 and 3115.)

#### VICTORIA

Within a line drawn from a position at Morton Point in Latitude  $3^{\circ} 59' 49.2''$  East, Longitude  $9^{\circ} 12' 16''$  East to a position at the northern end of Mondoleh Island in Latitude  $3^{\circ} 58' 45.6''$  North, Longitude  $9^{\circ} 11' 34''$  East; thence to a position at the northern end of Ambas Island in Latitude  $3^{\circ} 58' 47.4''$  North, Longitude  $9^{\circ} 10' 12''$  East; thence to a position at the southern end of Bobia Island in Latitude  $4^{\circ} 00' 07''$  North, Longitude  $9^{\circ} 10' 44''$  East; thence to a position on the foreshore of the mainland in Latitude  $4^{\circ} 00' 32''$  North, Longitude  $9^{\circ} 10' 44''$  East; thence along the foreshore to the starting point.

(Admiralty Chart No. 1455.)

#### TIKO

*Northern Boundary.*—A line East and West (True) from the north corner at the western end of the causeway connecting Tiko Island with the mainland, Latitude  $4^{\circ} 4' 17''$  North, Longitude  $9^{\circ} 22' 40''$  East, to a position in Latitude  $4^{\circ} 4' 17''$  North, Longitude  $9^{\circ} 24' 11''$  East.

*Eastern Boundary.*—From a position in Latitude  $4^{\circ} 4' 17''$  North, Longitude  $9^{\circ} 24' 11''$  East, to a position due south in Latitude  $4^{\circ} 2' 48''$  North, Longitude  $9^{\circ} 24' 11''$  East.

*Western Boundary.*—A straight line from the western end of the causeway in Latitude  $4^{\circ} 4' 17''$  North, Longitude  $9^{\circ} 22' 40''$  East, to a position in Latitude  $4^{\circ} 2' 30''$  North, Longitude  $9^{\circ} 23' 45''$  East.

*Southern Boundary.*—The left bank of the river from Latitude  $4^{\circ} 2' 48''$  North, Longitude  $9^{\circ} 24' 11''$  East, to Latitude  $4^{\circ} 2' 30''$  North, Longitude  $9^{\circ} 23' 45''$  East.

The astronomical positions are taken from Admiralty Chart No. 1455 corrected to 1926.



Supplement to Official Gazette No. 99, Vol. 52, 16th December, 1965—Part B

L.N. 132 of 1965

**PORTS ACT (CAP. 155)**

**Declaration of Port Limits Order 1965**

*Commencement : 23rd December 1965*

In exercise of the powers conferred on me by section 6 of the Ports Act and of all other powers enabling me in that behalf, I hereby make the following Order:—

1. This Order may be cited as the Declaration of Port Limits Order 1965, and shall apply throughout the Federation.
2. The limits specified in the Schedule hereto are hereby declared to be the limits of the ports of Lagos, Port Harcourt, Calabar and Sapele, respectively, for the purposes of the Act.
3. The limits specified for the ports of Lagos, Port Harcourt, Calabar and Sapele, respectively, as contained in Public Notice No. 17 of 1939, are hereby cancelled.

Citation and application.

Declaration of port limits. Schedule.

Cancellation of previous limits. (Vol. IX p.1776).

**SCHEDULE**

**LIMITS OF THE PORT OF LAGOS**

Within a line drawn from a point 180° and distant 3 miles from the lighthouse, to the lighthouse; thence proceeding along the foreshore to a beacon marked P.B.L. 3518 on Meridian Point; thence to a beacon at Badagri Point marked P.B.L. 3517; thence along the foreshore to a beacon marked P.B.L. 3519 at Aimirunfide Mofafejo Village which is situated on an island, approximately four cables west of Okobabalawo; thence along the foreshore to a point on the foreshore bearing 312° and distant 800 feet from a beacon marked P.B.L. 6509; thence across Porto Novo Creek (now called Badagri Creek) on a line bearing 312° to a point on the southern foreshore of an island known as Tin Kan Island distant 5 cables; thence along the southern foreshore of this island in an easterly direction and in a westerly direction along the northern foreshore reaching a point bearing 132° distant 480 feet from a beacon marked P.B.L. 6506 on the Apapa mainland; thence from this point on a bearing 312° to P.B.L. 6506; thence along the southern foreshore of Apapa mainland round Apapa Point (now taken to include the Apapa Quay extensions) to a beacon marked P.B.L. 352 on the north side of Oke Wata Village near the right bank at the mouth of Agboyi Creek; thence following a line bearing 150° to the land at Kurama Island; thence following the southern foreshore of Five Cowrie Creek and the eastern foreshore of the main lagoon until the position of the old signal mast at Grestle Point is bearing 090° and distant 5 cables from the old signal mast; thence following a line bearing 180° for a distance of 3.68 miles and thence to the starting point.

(Admiralty Chart No. 2812)



**LIMITS OF THE PORT OF HARCOURT**

Within a line drawn 180° from a point at the mouth of the Omo Ema Creek in Latitude 4° 46' 01" N Longitude 6° 59' 18" N across the Bonny River to the western bank; thence following this bank in an easterly and southerly direction and excluding all tributary streams to a point bearing 270° from the mouth of Okubiakri Creek in Latitude 4° 43' 33" N Longitude 7° 00' 55" E; thence east across the river to the mouth of Okubiakri Creek; thence in a northerly direction along the east bank of the Bonny River to a point at the mouth of Dockyard Creek in Latitude 4° 44' 03" N Longitude 7° 00' 44" E; thence in a northerly direction along the east bank of Dockyard Creek (excluding tributary streams) till the Longitude of 7° 01' 14" E is reached; thence on a line 360° across Dockyard Creek to the western bank; thence following this bank in a southerly direction till the main stream of the Bonny River is reached in Latitude 4° 44' 06" N Longitude 7° 00' 40" E; thence in a northerly direction following the eastern bank of the Bonny River (excluding tributary streams) to the starting point at the mouth of Omo Ema Creek in Latitude 4° 46' 01" N Longitude 6° 59' 18" E.

(Admiralty Chart No. 3288).

**LIMITS OF THE PORT OF CALABAR**

That part of the main stream of the Calabar River bounded to the north by the parallel of Latitude 5° 1' 20" N and to the southward by a line drawn 316° from a point at the mouth of Henshaw Creek in Latitude 4° 56' 52" N Longitude 8° 18' 09" E across the river.

(Admiralty Chart No. 3423).

**LIMITS OF THE PORT OF SAPELE**

From a point on the south bank of the Benin River in Latitude 5° 54' 40" N Longitude 5° 40' 00" E of Greenwich on a line bearing 360° across the Benin River to a point on the south shore of Munro Island being in Latitude 5° 54' 46" N Longitude 5° 40' 00" E; thence along the shore of Munro Island rounding the south eastern tip of the island to a point on the north shore in Latitude 5° 54' 34" N Longitude 5° 40' 41" E; thence on a line 090° across Munro Creek to a point on the northern bank in Latitude 5° 54' 34" N Longitude 5° 40' 44.5" E; thence in an easterly direction along the northern shore of the Munro Creek, the Benin River and the Jamieson River to a point on the northern bank of the Jamieson River in Latitude 5° 54' 14" N Longitude 5° 41' 41" E; thence on a line 180° across the Jamieson River to a point on the southern bank in Latitude 5° 54' 08" N Longitude 5° 41' 41" E; thence following the eastern bank of the Ethiope River in a southerly direction to a point on this bank in Latitude 5° 53' 28" N Longitude 5° 41' 52" E; thence on a line 180° to the western bank of the Ethiope River in Latitude 5° 53' 25" N

Longitude 5° 41' 52" E; thence in a northerly direction following the western bank of the Ethiope River to Millers Point; thence round Millers Point following the southern bank of the Benin River in a westerly direction to the starting point.

(Charts of Reference: N.P.A. Port of Sapele and Benin River Sheet III).

MADZ at Lagos this Seventh day of December, 1965.

ALHAJI ZANNA BUKAR DIFCHARIMA,  
Federal Minister of Transport

**EXPLANATORY NOTE**

This Order re-defines the limits of the ports of Lagos, Port Harcourt, Calabar and Sapele in order to have effective control and jurisdiction over the creeks and waters of the ports and their respective navigable channels.



L.N. 121 of 1975

## PORTS ACT (CAP. 155)

## Ports (Declaration of Port Limits) Order 1975

In exercise of the powers conferred by section 6 of the Ports Act, and of all other powers enabling me in that behalf, I, Lieutenant-Colonel Shehu Musa Yar'adua, Federal Commissioner for Transport, hereby make the following Order :—

*Commencement* : 8th December 1975

1. The limits specified in the Schedule hereto are hereby declared to be the limits of the ports of Lagos, Port Harcourt, Calabar, Koko, Sapele, Forcados, Burutu, Warri, Degema and Bonny, respectively, for the purposes of the Act.

Declaration  
of ports  
limits.

2. The ports limits shall include all water-ways, creeks and swamp-land below the highest astronomical tide level and all beaches, moles, piers, jetties, slipways, quays and other works extending beyond the natural line of the line of the high water level. All ocean beaches within 100 metres of this high water level shall be deemed to be within the limits of the ports.

Definition  
of ports  
limits.

3.—(1) This Order may be cited as the Ports (Declaration of Port Limits) Order 1975.

Citation and  
revocation.

(2) The Declaration of Port Limits Order 1965 is hereby revoked.

L.N. 132 of  
1965.

## SCHEDULE

## Section 1

## LIMITS OF THE PORT OF LAGOS

The limits of the port of Lagos shall be confined by parallels of Latitude 6 degrees 20 minutes North and 6 degrees 35 minutes North and by Meridians of Longitude 3 degrees 10 minutes East and 3 degrees 32 minutes East.

(Charts of reference : Federal Surveys sheet 279 Lagos S.W. and Lagos S.E. and sheet 280 Ijebu-Ode S.W.).

## LIMITS OF PORT OF PORT HARCOURT

The limits of the port of Port Harcourt shall be confined by parallels of Latitude 4 degrees 40 minutes North and 4 degrees 50 minutes North and by Meridians of Longitude 6 degrees 59 minutes East and 7 degrees 09 minutes East.

(Charts of reference : Federal Surveys Sheet 328 Degema and sheet 334 Port Harcourt).

## LIMITS OF THE PORT OF CALABAR

The limits of the port of Calabar shall be confined by parallels of Latitude 4 degrees 55 minutes North and 5 degrees 02 minutes North and by Meridians of Longitude 8 degrees 15 minutes East, and 8 degrees 20 minutes East.

(Charts of reference : Federal Surveys sheet 331 N.E. Calabar N.E. and sheet 323 UWET S.E.).



**LIMITS OF THE PORT OF KOTO**

The limits of the port of Koto shall be confined by parallels of Latitude 5 degrees 58 minutes North and 6 degrees 01 minutes North and by Meridians of Longitude 5 degrees 25 minutes East and 5 degrees 29 minutes East.

(Charts of reference : Federal Surveys sheet 308 N.E. Benin River N.E. and sheet 297 S.E. Okomu S.E.)

**LIMITS OF THE PORT OF SAPELE**

The limits of the port of Sapele shall be confined by parallels of Latitude 5 degrees 52 minutes North and 5 degrees 57 minutes North and by Meridians of Longitude 5 degrees 38 minutes East and 5 degrees 44 minutes East.

(Chart of reference : Federal Surveys sheet 309 N.W. Warri N.W.)

**LIMITS OF THE PORT OF FORCADOS**

The limits of the port of Forcados shall be confined by parallels of Latitude 5 degrees 20 minutes North and 5 degrees 25 minutes North and by Meridians of Longitude 5 degrees 16 minutes East and 5 degrees 27 minutes 20 seconds East.

(Chart of reference : Federal Surveys sheet 317 N.E., Forcados N.E.)

**LIMITS OF THE PORT OF BURUTU**

The limits of the port of Burutu shall be confined by parallels of Latitude 5 degrees 20 minutes North and 5 degrees 25 minutes North and by Meridians of Longitude 5 degrees 27 minutes 20 seconds East and 5 degrees 34 minutes East.

(Charts of reference : Federal Surveys, 317 N.E., Forcados N.E. and sheet 318 N.W. Burutu N.W.)

**LIMITS OF THE PORT OF WARRI**

The limits of the port of Warri shall be confined by parallels of Latitude 5 degrees 28 minutes North and 5 degrees 33 minutes North and by Meridians of Longitude 5 degrees 40 minutes East and 5 degrees 49 minutes East.

(Charts of reference : Federal Surveys sheet 318 N.W., Burutu sheet 318 N.E., Burutu sheet 309 S.W., Warri sheet 309 S.E. Warri.)

**LIMITS OF THE PORT OF DEGEMA**

The limits of the port of Degema shall be confined by parallels of Latitude 4 degrees 43 minutes North and 4 degrees 46 minutes North and by Meridians of Longitude 6 degrees 45 minutes East and 6 degrees 47 minutes East.

(Chart of reference : Federal Surveys sheet 328 Degema)

**LIMITS OF THE PORT OF BONNY**

The limits of the port of Bonny shall be confined by parallels of Latitude 4 degrees 23 minutes North and 4 degrees 30 minutes North and by Meridians of Longitude 7 degrees 7 minutes East and 7 degrees 15 minutes East.

(Chart of reference : Federal Surveys sheet 334 Port Harcourt)

MADA at Lagos this 8th day of December 1975.

**LT-COLONEL S. MUSA YAN'ADUA,**  
*Federal Commissioner for Transport*

**EXPLANATORY NOTE**

The Order re-defines the limits of the ports of Lagos, Port Harcourt, Calabar, Koko, Sapele, Forcados, Burutu, Warri, Degema and Bonny in order to have effective control and jurisdiction over the creeks and waters of the ports and their respective navigable channels.



To: The Nigerian Ports Authority **MV "SVEA ATLANTIC"**

1. Name of Ship: **DANISH**

2. Nationality of Ship: **DANISH**

3. Gross Register Tonnage as per Certificate of Registry: **499.99** Tonne

4. Net Register Tonnage as Per Certificate of Registry: **322.07** Tonne

5. Draft of Ship: **4.2** Metre

6. Length of Ship: **72.45** Metre

7. Port of Registry: **SVENDBORG**

8. Certificate of Registry No: **D 12853**

9. Owners and/or Agents in Nigeria: **PANALPINA WORLD TRANSPORT (NIG.) LTD.**

10. Port of Origin: **POINTE NOIRE**

11. Port(s) Desired in Nigeria: **APAPA PORT**

12. Expected Date of Arrival: **13/12/88**

13. Total Tonnage of Cargo to be carried:

Inward Cargo                      Outward Cargo                      Total

**IN BALLAST**                      **1.400 M/TONS**                      **1.400 M/TONS**

14. Ship: Ship for which clearance is sought is to discharge/disembark and/or load/embark the following cargo(s), animals, passengers, or other goods:

**DESCRIPTION OF LANDINGS AND LOADINGS FOR WHICH PERMISSION IS SOUGHT**

DESCRIPTION	INWARD			OUTWARD		
	Dead Weight (Tonne)	Measurement (Cu. m)	Number	Dead Weight (Tonne)	Measurement (Cu. m)	Number
1. CARGO(S): GENERAL	1.400	M/TONS	COCOA			TO NORFOLK FOR APAPA PORT
(i) GENERAL (including Container and Fish)						
(ii) CONTAINER						
(a) in Container vessel						
(b) in mixed Cargo vessel						
(iii) FISH						
(a) in Fish Vessel						
(b) in mixed Cargo vessel						
(iv) CEMENT						
(v) BULK DRY						
(a) Wheat						
(b) Coal						
(c) Clinkers						
(d) Gypsum						
(e) Others (specify)						
(vi) BULK LIQUID						
(a) Refined Petroleum						
(b) Crude Petroleum						
(c) Vegetable Oil						
(d) Other Oils (specify)						
(e) Liquefied Gas						
(vii) OTHERS						
(a) Propane						
(b) Timber						
(c) Timber						
(d) Any other (specify)						
2. ANIMALS:						
3. PASSENGERS:						
(a) 1st Class & Cabin						
(b) 2nd Class & Deck						
			PANALPINA WORLD TRANSPORT (NIG) LTD.			
			AS AGENTS			

Signature of Applicant: \_\_\_\_\_  
 Date: 21/11/88

No Cargo included in the Import Prohibition Order LN. 16 and Export Prohibition Order LN. 17 contained in the Federal Republic of Nigeria Extra-ordinary Gazette NO 17 Vol 83 of 1st April, 1976 will be allowed.

FOR CONDITIONS SEE BACK



Form B 171416



NIGERIAN PORTS AUTHORITY

①

## SHIP ENTRY NOTICE

To: FROZEN FISH  
(Shipowner/Agent).

11/11

THE SHIPPING MANAGER  
AZCO MARITIME LTD  
25 CALCUTTA CRESCENT APAPA

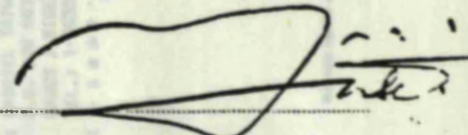
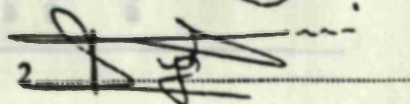
Dear Sir,

Approval is hereby given for the vessel whose particulars are stated below to commence loading for the port of: APAPA H/QUAY

## PARTICULARS:

1. Name of Ship: SIERRA ARACENA
2. Nationality: PANAMA
3. Gross Register Tonnage: 1386.2
4. Net Register Tonnage: 677.53
5. Port of Registry: FLUSHING (HOLLAND)
6. Certificate of Registry No: 7149228
7. Name and Address of Agents in Nigeria: AZCO  
MARITIME LTD  
25 CALCUTTA CRESCENT APAPA
8. Port of Origin: FLUSHING
9. E.T.A. (expected time of arrival) of Vessel in Nigerian port: 17-11-88
10. E.T.D. (expected time of departure) of Vessel from Nigerian port: 21-11-88

N.P.A. Authorised Signatories: 1

  
2 

Date: 31-10-88

Valid for 2 calendar months from the date stated above.



**COBELFRET**  
 Compagnie Belge d'Affrètements  
 N. V.  
 ANTWERP

G & C West Africa Service Outward  
 17/09/88  
 Voy 6120

**CARGO MANIFEST**

THIS COLUMN FOR CUSTOMS USE

1. Name of vessel	2. Number and kind of packages; Description of goods	3. Marks and Nos. on packages	4. Name of commodity	5. Net weight or measure	6. Gross weight or measure	7. Page No.
AMR-LOS B/L 1 PE. 1	SH: COBELFRET N.V. - ANTWERP As agents CO: BOLBACAR KASSARE C/O DR. INGAMU SALLISU 21, ANHAI PAIGI ROAD P.M.B. 2248 LAGUNA / NIGERIA NF: .....	LAGOS SERIAL NR. 004681	1 UNPACKED USED NISSAN SENTRA ***** TRANSHIPMENT CARGO EX N/S ATLANTIC COMPASS VOY. 8331 B/L NYAM007 *****	860	10,336	1
B/L 2 PE. 2	SH: COBELFRET N.V. - ANTWERP As agents CO: DR. UVI-KEPER OGEBIDE C/O NO. 19 AGRADO STREET BENIN CITY BENEUE NIGERIA NF: .....	LAGOS SERIAL NR. 105717	1 UNPACKED USED RENAULT ALLIAN- CE ***** TRANSHIPMENT CARGO EX N/S ATLANTIC COMPASS VOY. 8331 B/L NYAM003 *****	907	7,836	1
B/L 3 PE. 3	SH: COBELFRET N.V. - ANTWERP As agents CO: AIR - VICE MARSHALL N.O.O YUSUFF P.O. BOX 2144 IKIJA - LAGOS / NIGERIA NF: .....	LAGOS SERIAL NR. 156991	1 UNPACKED USED PORSCHE 1986 ***** TRANSHIPMENT CARGO EX N/S ATLANTIC COMPASS VOY. 8331 B/L NYAM001 *****	1.250	10,467	1
B/L 4 PE. 4	SH: COBELFRET N.V. - ANTWERP As agents CO: GABRIEL TALMO OLADINDE P.O. BOX 6835 LAGOS / NIGERIA TEL.: 1-863080 NF: .....	LAGOS SERIAL NR. 162028	1 UNPACKED USED TOYOTA CELICA ***** TRANSHIPMENT CARGO EX N/S ATLANTIC COMPASS VOY. 8331 B/L NYAM012 *****	1.100	9,628	1

This form may be printed by parties provided it conforms to the official form in use in the country of origin. It may be used for inland traffic to and from the U.S. ports. It may be used for inland traffic to and from the U.S. ports. It may be used for inland traffic to and from the U.S. ports.



**COBELFRET**  
Compagnie Belge d'Affrètements  
N. V.  
ANTWERP

G & C West Africa Service Outward

**CARGO MANIFEST**

Final destination and required by U.S. Bureau of Customs use only  
APAPA 17/09/88

1. Name of ship	2. Port of origin	3. Number and kind of packages	4. Description of goods	5. Gross weight (kg)	6. Net weight (kg)	7. Volume (m <sup>3</sup> )	8. Remarks
SH: COBELFRET N.V. - ANTWERP As agents CO: MR. STEPHEN AYO AKIBU-OKE 207, OJO ROAD AJEGUNLE APAPA LAGOS/NIGERIA NF: .. S S S S S ..	LAGOS	1	UNPACKED USED HONDA CIVIC ***** TRANSHIPMENT CARGO EX N/S CONCERT EXPRESS VOY. 7346 B/L BTAHM013. *****	887			8,059
		1	UNPACKED USED HONDA ACCORD *****	1,000			10,415
		1	UNPACKED USED AUDI 5000 ***** TRANSHIPMENT CARGO EX CONCERT EXPRESS VOY. 8329 - BL BAAWI 008 - 16.08.1988 *****	1,200			12,400
		1	UNPACKED USED JEEP CHEROKEE ***** TRANSHIPMENT CARGO EX N/S COMPANION EXPRESS VOY. 8330 B/L BAAW002 *****	1,599			
SH: COBELFRET N.V. - ANTWERP As agents CO: CAPT. PAUL ADANG EAS AIRLINES P.O. BOX 11965 KANO/NIGERIA NF: ... SAME ...	LAGOS		SERIAL NR. ..... 027772				
SH: COBELFRET N.V. - ANTWERP As agents CO: MR. DAVID CRANG PO BOX 115 IKURU JOS, PLATEAU STATE, NIGERIA NF: .. SAME ..	LAGOS		CHASSIS NBR.: JHMA05330C121770 LICENCE PLATE: LF557				
SH: COBELFRET N.V. - ANTWERP As agents CO: MR. ABABA 18 NGA STREET OFF TALAMA BALEWA CRESCENT SUMILERE LAGOS / NIGERIA NF: .. S S S S S ..	LAGOS		SERIAL NR. ..... 186505				

This manifest was prepared by persons authorized by the vessel owner to the extent that it may be required to show to and not less than 15% of the manifest, including endorsement, date, class of type and quantity and order of paper (including U.S. C.A.J. Per each by detailed description of contents.



**MASTERS DECLARATION  
FOR**

PORT OF.....

NAME OF SHIP..... ENTRANCE No..... ROTATION No..... DATE OF ARRIVAL.....  
 NATIONALITY..... EXPECTED DATE OF DEPARTURE..... DRAUGHT ON ARRIVAL..... Metres LENGTH OF VESSEL..... Metres  
 ESTIMATED DRAUGHT ON DEPARTURE..... PORT OF REGISTRY..... PORTS OF LOADING..... BEAM OF VESSEL..... Metres  
 CERTIFICATE OF REGISTRY No..... LAST PORT OF CALL..... NEXT PORT OF CALL.....  
 GROSS REGISTERED TONNAGE AS PER CERTIFICATE OF REGISTRY..... Tonne NET REGISTERED TONNAGE  
 AS PER CERTIFICATE OF REGISTRY..... Tonne  
 AGENTS IN NIGERIA..... FULL NAME OF MASTER.....  
 ADDRESS.....

To NIGERIAN PORTS AUTHORITY

I hereby declare that the above-named ship arrived to discharge/disembark and/ or load/embark the following passengers, animals, cargo, stores or other goods:-

• Delete as appropriate.

14694-G288

DESCRIPTION	INWARDS				OUTWARDS			
	Total No.	WEIGHT			Total No.	WEIGHT		
		Dead (Tonne)	Measurement	Freight (Tonne)		Dead (Tonne)	Measurement	Freight (Tonne)
<b>PASSENGERS</b>								
1st Class								
Cabin								
3rd Class								
Deck								
<b>ANIMALS</b>								
<b>CARGO</b>								
Crude Oil								
Petroleum Products								
Exports								
Imports								
Dangerous, Hazardous, - Cargo,								
Explosives								
Others								

and that the following spaces not included in the cubical contents forming the ship's net registered tonnages are or will be occupied by cargo.

Deck cargo carried..... cubic metres..... tonne (Give description of goods)  
 Other unregistered space..... cubic metres..... tonne (Give description of goods)  
 Registered space vacant..... cubic metres. Fuel in double bottom tanks..... tonne (If vessel bunkers in the port, total quantity must be stated)

Signature of Master

(Stamp)

Date

LIGHT DUES:- If Light Dues have been paid at another Port in Nigeria during present voyage state:- Port where Dues paid..... Date of arrival at that Port.....

N. R. T. (as computed) on which Light Dues paid..... tonne. Rate paid per tonne..... Light Dues Certificate No.....

Cargo carried on Deck and in Unregistered space..... cubic metre..... tonne Fuel Oil in double bottom tanks..... tonne.

Signature of Master

(Stamp)

Date

N. B. The declaration above may be made only by the Master as demanded by section 62 of the Ports Act. This form duly completed must be handed to the **HARBOUR MASTER OR HIS REPRESENTATIVE** at the time of berthing in respect of an inward vessel or at the time of commencement of loading in respect of an outward vessel. The Harbour Master is empowered to require the production of the ship's Register or other Documents for the purposes of verifying the information given on this form.

(The Master's attention is drawn to section 109 of the Ports Act which prescribes penalties for a Master who contravenes the requirements as to the supply of information.)

050685 H 200 Page X 100 X 1/83



# Panalpina World Transport (Nigeria) Limited

HEAD OFFICE:  
APAPA  
4, Creek Road,  
Tel: 803440-4, 803610-4,  
Telex: 21347.

PORT HARCOURT:  
Plot 462/467  
Trans-Amadi Ind. Layout,  
Tel: 331731, 331038, 330292.  
P. O. Box 170,  
Telex: 61106.

WARRI:  
Warri/Sapele Road,  
Tel: 233818, 2333406,  
P. O. Box 135.

Vessel	Port	Date
LOUIS LYKES	APAPA	10.10.88

To Messrs MEMBERS LOGISTICS  
10, LADIPU CUNULE  
APAPA.

## NOTICE OF READINESS

Dear Sir,

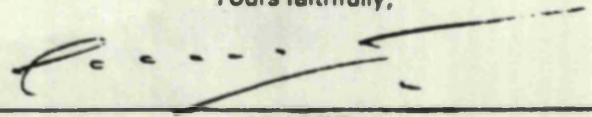
This is to notify you that the vessel M/V LOUIS LYKES  
 has arrived at the roads LADIPU ANCHORAGE  
 on the 9TH of OCT 1988 at 1130 hours (local time)  
 and is as from this time in all respects ready to load/discharge a cargo of 3005 T/S SCROPHUM

in accordance with the terms and conditions of the relevant Charter Party/Booking Note

Notice of Readiness tendered

on the 10TH of OCT 1988  
 at 0800 hours (local time)

Yours faithfully,

  
 AS AGENT  
 PANALPINA WORLD TRANSPORT (NIG.) LTD.

Notice of Readiness accepted

on the 10TH of OCT 1988  
 at 9 21 am hours (local time)

Company's Stamp and Signature



STATEMENT OF FACTS: MV. LOUIS LYKES-LAGOS CALL OF 9/10/88

OWNERS/CHARTERERS. LYKES BROS STEAMSHIP CO. INC.

AGENTS : PANALPINA WORLD TRANSPORT(NIG)LTD, 4, CREEK ROAD-APAPA.

CARGO : 3195 M/TONS SORGHUM

RECEIVERS : NIGERIAN LOGISTICS LTD, 10 LADIPO OLUWOLE RD, APAPA-LAGOS.

VESSEL ARRIVED LAGOS ROADS	9/10/88-1130HRS
NOTICE OF READINESS RECEIVED BY PORT AUTHORITIES	10/10/88-0915HRS
NOTICE OF READINESS ACCEPTED BY RECEIVERS	10/10/88-0915HRS
PILOT ON BOARD	9/10/88-1230HRS
VESSEL BERTHED AT APAPA 19A	9/10/88-1340HRS
FREE PRATIQUE GRANTED	9/10/88-1420HRS
VESSEL COMMENCED DISCHARGING	10/10/88- -

OTHER DELAYS/DISTURBANCES

10/10/88-MON- 6-GANGS-0730HRS	LABOUR ON BOARD HATCHES 1-6
" " - 6- " -0730-0900HRS-	AWAITING CONSIGNEE'S LORRIES HATCHES-1-6
" " - 6- " -1230-1330HRS-	LABOUR ON BREAK HATCHES 1-6
" " - 6- " -1830-2230HRS-	NPA SHED CLOSED & LABOUR CLOSED DOWN.
11/10/88-TUE- 6- " -0730HRS	- OPERATION COMMENCED HATCHES 1-6
" -TUE- 1-GANG -1130HRS	- LABOUR TRANSFERRED TO HATCH 4B.
" -TUE 1- " -1400HRS	- LABOUR TRANSFERRED TO HATCH 3A.
" -TUE 1- " -1400-1530HRS-	WINCH DEFECT HATCH 3.
" -TUE 2-GANGS-1730-2230HRS-	AWAITING LORRIES & SHED CLOSED HATCH 2 & 5
" -TUE 4-GANGS-1900-2230HRS-	SHED CLOSED AND AWAITING LORRIES HATCH 3&4.
" -TUE 6-GANGS-2230HRS	- LABOUR CLOSED DOWN HATCHES 2-5
12/10/88-WED 6-GANGS-0730HRS	- OPERATION RECOMMENCED HATCHES 2-6
" -WED 1-GANG -1000HRS	- 1 GANG FROM HATCH 4 TRANSFERRED TO HATCH 6.
" -WED 1-GANG -1230HRS	- 1 GANG FROM HATCH 6 TRANSFERRED TO HATCH 4B.
" -WED 1-GANG -1530-1730HRS-	AWAITING LORRIES HATCH 2
" -WED 1-GANG -1730-2230HRS-	AWAITING LORRIES HATCH 3
" -WED 2-GANGS-1800-2230HRS-	AWAITING LORRIES HATCH 4
" -WED 2-GANGS-1800-2230HRS-	AWAITING LORRIES HATCH 3
" -WED 1-GANG -1830-2230HRS-	AWAITING LORRIES HATCH 2
" -WED 6-GANGS-2230HRS	- LABOUR CLOSED DOWN HATCHES 2-5
13/10/88-THU 6-GANGS-0730HRS	- OPERATION COMMENCED HATCHES 2-5
" - " 2-GANGS-1730-2230HRS-	AWAITING LORRIES HATCHES 4A & 5
" - " 4-GANGS-1830-2230HRS-	AWAITING LORRIES HATCHES 2, 3 & 4B
" - " 6-GANGS-2230HRS	- LABOUR CLOSED DOWN HATCHES 2-5

2/....



Nº 879292

IN/OUT/MOVE

PORT COMPLEX

QUAY

Name of Vessel

Location of Vessel

3/..



Ship Owner/Agent

Address

14/10/88-FRI-8-GANGS-0730HRS

OPERATION COMMENCED HATCHES 1-6

" - " -8-GANGS-1830-2230HRS-

SHED CLOSED AND AWAITING LORRIES HATCHES

This is to certify that

- 1-6.

" - " -8-GANGS-2230HRS

LABOUR CLOSED DOWN IN ALL HATCHES.

15/10/88-SAT-7- " -0730HRS

OPERATIONS COMMENCED HATCHES 2-6

" " -1- " -1100HRS

DISCHARGING COMPLETED HATCH 6

" " -1- " -1430HRS

" " " 4

" " -2- " -1530HRS

2 " " 3

" " -2- " -1630HRS

" " " 5

" " -7- " -1700HRS

ALL HATCHES COMPLETED DISCHARGING

" " -7- " -1700HRS

LABOUR CLOSED DOWN.

First Detention

Agents in attendance

Tag departure

Moving Lash/straps used

No. of berthing gangs

The "Inward/Outward" Master Discharge

VESSEL COMPLETED DISCHARGING

15/10/88

1705 HRS

VESSEL SAILED

15/10/88

1745 HRS

AGENTS SIGNATURE

*[Handwritten Signature]*  
PANALPINA'S AGENT

RECEIVER'S SIGNATURE

MASTER'S SIGNATURE

*[Handwritten Signature]*

NIGERIAN LOGISTICS LIMITED  
APAPA  
RECEIVED  
17 OCT 1988

S. S. LOUISE LYKES  
OFF #299938



**NIGERIAN PORTS AUTHORITY  
PILOTAGE CHIT**

No 679292

\* IN/OUT/MOVE

..... PORT COMPLEX ..... QUAY

Name of Vessel ..... RTN. No. .... ENTRANCE No. ....

Location of Vessel ..... Date of Operation .....

Ship Owner/Agent. ....

Address. ....

Name of Master .....

This is to certify that Pilot ..... P/N .....

has performed the undermentioned pilotage service(s) to the above vessel of. .... metres draught.

Time Pilot boarded ..... Time Pilot left .....

	From	To
Movement		
Time		

Pilot Detention ..... hrs

Tug(s) in attendance .....

Tug detention ..... hrs.

Mooring Launch(es) used .....

No. of berthing gangs .....

O/T ..... hrs.

The \*Inward/Outward Master Declaration has been submitted to PILOT. .... on .... (date)

FOR ACCOUNT USE			
SERVICE	Quantity	Rate ₦	Amount ₦ k
Pilotage (.30m)			
Pilotage Detention (hrs.)			
Berthing (No. Gang)			
Towage (No. tug(s).			
Tug Detention (hrs)			
Mooring Launch(es)			
Footage			
O/T (1st 1/2hr)			
O/T (Subsequent 1/2 hrs)			
<b>TOTAL</b>			

.....  
Master/Agent ..... Date .....

Rated By .....  
P/N. .... Date .....

Checked By .....  
P/N. .... Date .....

Amount in words .....

.....

.....

\*Delete as appropriate

050705/300bksx50shtsx3-6/4/88



YEAR

MB 360838

# FORM M

(FOR IMPORTS ONLY)

## APPLICATION TO PURCHASE FOREIGN CURRENCY (To be completed in septuplicate)

PREFIX

APPOINTED AGENT'S No.

- \*Please read carefully the notes overleaf and fill in appropriate information in all the blank spaces provided
- \*Shaded Areas are for official use only
- \*Use Capital letters through out this form
- \*Permanent Addresses only (P. O. Box NOT ACCEPTABLE)

FINANCIAL INSTITUTION CODE

Name and full address of Applicant's Banker (Authorised Dealer)

I/We, the undersigned, hereby apply for Foreign Exchange allocation for payment of importation of the goods described below:

### 3. PARTICULARS OF APPLICANT

C.B.N. File No. [ ]-[ ]-[ ]

Applicant's Name [ ]

Address [ ]

[ ]

Town [ ]

State [ ]

Registration/Certificate of Incorporation No. [ ]

Changed Name/Address since last application? If yes, state particulars below

### 4. PARTICULARS OF BENEFICIARY

Beneficiary's Name [ ]

Address [ ]

[ ] City [ ]

State [ ]

Changed Name/Address since last application? If yes, state particulars below

Country [ ]

COUNTRY CODE [ ]

### 5. DESCRIPTION AND QUANTITY OF GOODS (GIVE FULL PARTICULARS)

[ ]

PURPOSE CODE [ ]

Country of Origin [ ] Country of Supply [ ]

SITC CODE [ ]

Ultimate Destination [ ]

### 6. AMOUNT APPLIED FOR (C. & F.)

(Name and Amount applied for in Local/Foreign Currency in words)

[ ]

CURRENCY CODE [ ]

UNIT PRICE	QUANTITY	FOB VALUE	FREIGHT CHARGES	ANCILLARY CHARGES	AMOUNT
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

On Behalf of [ ]

For Account of [ ]

In Favour of [ ]

Payment Mode [ ]  
(ie. Revocable/Irrevocable Letter of Credit or Bill for Collection)

PAY MODE [ ]

L.C. EXP. DATE [ ]  
D D M M Y Y

Transfer Mode [ ]  
(i.e. Telegraphic Transfer, Bank Draft, Mail Transfer, etc)

TRANS [ ]

SHIPMENT DATE [ ]  
D D M M Y Y

Means of Despatch [ ]  
e.g. Air, Sea, Post, etc

### 7. IMPORT LICENCE PARTICULARS

IMPORT LICENCE NUMBER [ ]

VALUE APPROVED [ ]

VALID FROM [ ] TO [ ]

### 8. APPLICANTS DECLARATION

I/We, declare that the above statements are true, that the prescribed supporting evidence is attached or will be surrendered as soon as possible and that the foreign currency will be used solely for the purpose stated in accordance with the provisions of the Exchange Control Act, 1962.

\*Any false declaration will make me/us liable for prosecution.

AUTHORISED DEALER'S STAMP

Full Name: [ ] Signature: [ ] Date: [ ]

Full Name: [ ] Signature: [ ] Date: [ ]



Importers are warned that a "CLEAN REPORT OF FINDINGS" issued by the appointed agent of the Federal Republic of Nigeria or its counter agent must be presented by seller(s) as part of the shipping documents and that "CLEAN REPORT OF FINDINGS" is required to support settlement of any Bill of Exchange or other collection relevant to the application (See notes below).

**AUTHORISED DEALERS STAMP (after shipment only)**

10. Full Name..... Signature..... Date.....

CISS PRE-CHECKING

FCR C.B.N. USE ONLY

A. Document Support Code

Original Application No. In respect of Deferred Payment  YEAR

Customers' Service Unit Stamp .....             CURRENCY CODE

Processing Unit Stamp ..... APPROVED AMOUNT

Action Code  Reject Code

Authorising Signature..... Name..... Status..... Date.....

B. CHECKING

Processing Unit Stamp ..... CURRENCY CODE

Action Code  Reject Code   DISBURSED AMOUNT

Authorising Signature..... Name..... Status..... Date.....

Checking Office Approval

Approved By.....

Name..... Signature..... Stamp.....

**INSTRUCTIONS TO IMPORTERS INTO NIGERIA**

- The C.B.N. file number, if known should be supplied by the applicant in section 3. If not known the Central Bank of Nigeria will inform you of your file number through your Authorised Dealer after your Application has been processed. Your C.B.N. file number should be quoted on all subsequent applications to expedite processing of your applications.
- This form must be completed by importers for all imports and before any order is confirmed and shipment takes place. Importers are therefore advised to warn their overseas sellers of the pre-shipment inspection requirement, and that they should not ship any goods requiring pre-shipment inspection without such inspection having taken place.
- This Application for Foreign Exchange must be completed in septuplicate (seven copies) and handed to the importer's bank for onward transmission to the Central Bank of Nigeria (C.I.S.S. Office) for processing. When importers submit the completed form it must be accompanied by four copies (one of which must be original) of the seller's Proforma Invoice clearly showing the price split into F.O.B. and freight with all ancillary charges such as commissions and interest charges shown separately.
- Importers should ensure that applications are combined on one form in cases where similar goods are being purchased from the same seller, regardless of different countries of supply, suppliers, or the number of part shipment. Where imports form part of a project or contract, one Form 'M' application may be submitted provided it is accompanied by a copy of the contract (photocopy acceptable), and the full address of the contractual seller.
- The Central Bank of Nigeria will put the Appointed Agent's number on the Form and will indicate whether pre-shipment inspection is required by stamping the form with the address of the Agent's contact office. Three copies will be returned to the importer's bank, and upon receipt of these, the importer may confirm his order to the seller and arrange payment procedures. No letter of credit may be opened without a processed Form 'M' being in the hands of the Importer's bank.
- After processing and numbering by the Central Bank of Nigeria, importers are advised to send a photocopy of the processed form to their sellers so that they will be aware of the appointed Agent's contact address, and can arrange for inspection to be undertaken.
- After shipment, payment may be made by presentation by the importer's bank to the Central Bank of Nigeria of original copy of the form supported by a "clean report of findings", where pre-shipment inspection has been prescribed, together with shipping documents, i.e. Bill of Lading, Customs Bill of Entry, Certificate of Insurance, Settlement Invoice, Tally Sheet, Airways Cargo Delivery Gate Pass (also required for goods on consignment), relevant import licence parcel post wrappers, and evidence of compulsory advanced deposit where applicable.
- Importers and Authorised Dealers should note that settlement invoice must henceforth be all inclusive of any additional charges including price variations and applicable contractual escalation clauses, allocated on pro-rata basis. The total value of the final settlement invoice must be supported in all respects by a clean report of findings, where pre-shipment inspection has been prescribed, and importers are warned that separate applications to remit funds in respect of ancillary charges relating to an importation will no longer be entertained unless such charges are supported by a "clean report of findings" issued by the Appointed Agent.
- A processed Form 'M' will be valid for importation within six (6) months of date of processing, and importers are advised that changes in specification, seller, country of supply, quantity within normal trade tolerances, will not require amendment to the form, provided that these details are supported by a "Clean Report of Findings" with regard to the Form 'M' provided.
  - The price is supported in every respect by a clean report of findings issued by Appointed Agent, in cases of pre-shipment inspection, and
  - Any increase over the declared Form 'M' price, does not exceed 10% of the declared total amount of C. and F. Increases in price in excess of 10% require a new Form 'M'.
- For goods exempted from pre-shipment inspection approval will not be granted for more than the value of the original application.
- Where prior registration of orders with the Federal Ministry of Commerce is required for the goods and/or these have been placed under specific import licence, details that these requirements have been complied with must be provided.



PROVISIONAL  
DECLARATION  
**ADVANCE IMPORT DUTY PAYMENT**

CUSTOMS AND EXCISE NIGERIA

SERIAL No B528958

**PART I - TO BE COMPLETED BY IMPORTER/AGENT**

NSPM

(1) Area ONE - AP/PA  
\* Port/Airport/Station/Parcel Post Depot

(2) Importer's name and address (P.O. Box)  
223/25 BROAD STREET  
LAGOS

(3) Import Licence No. and Date  
IFEM

(4) Form M No. and Date  
MD936750 26-1-89

(5) Importers Bankers Name and Address  
UNION BANK OF NIGERIA LIMITED, ALAGOM HOUSE, 160/162 BROAD STREET,  
LAGOS

**(6) Proforma Invoice Particulars**

**(7) EXPORT DUTY DECLARATION**

(a) Quantity and Description of Goods	(b) Value (Cost and Freight)	(c) Country of Origin	(d) Country of Supply
CASSETTE RADIOS RECORDERS 4 BANDS INTERNATIONAL BRAND  1,300 SETS	N282,639.50 CAF 784.32 INS  N283,423.82 (CIF)	CHINA	HONGKONG

(a) Tariff Item No.	(b) Rate of Duty	(c) Advance Import Duty
8527.31	10%	N28,342.38

(8) I/we PROSCO EXPRESS SHIPPING AGENCY LTD hereby declare that  
(Name of Importer or Licensed Agent in Block Letters)

• the total ~~Advance~~ Import Duty payable on the above declared goods is  
N28,342.38

• the above entered goods are free of Duty, and the value as certified above is \_\_\_\_\_

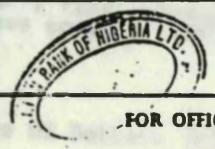
(9) Total ~~Duty~~ in Words: TWENTY-EIGHT THOUSAND THREE HUNDRED AND FORTY-TWO NAIRA THIRTY-EIGHT KOBO

(10) ~~Advance~~ Import Duty Receipt No. and Date: \_\_\_\_\_

*[Signature]*  
AG - CUSTOMS  
 Signature of Proprietor/Partner/Director/Secretary  
\*Delete the Inapplicable  
CHC/R/5-1/89

Agent's Licence No \_\_\_\_\_

- \* Proprietor
- \* Partner
- \* Director
- \* Secretary
- \* Duty authorised employee



**PART II FOR OFFICIAL USE ONLY**

**ASSESSED DUTY**

ICO

Examined By: \_\_\_\_\_

(a) Name in full \_\_\_\_\_

(b) Signature \_\_\_\_\_

(c) Index No \_\_\_\_\_

(d) Stamp and Date \_\_\_\_\_

**CASHIER**

Particulars of CR No \_\_\_\_\_ Date \_\_\_\_\_

Amount \_\_\_\_\_

(a) Name in full \_\_\_\_\_

(b) Signature \_\_\_\_\_

(c) Index No. and Rank \_\_\_\_\_

(d) Stamp and Date \_\_\_\_\_

100258



Ref of CIL Issuing Unit: 21-06-01982

No. 21/06/09973

Form M Appointed Agent No. 020/EA.893558

ORIGINAL TO EXPORTER/SELLER

AS PER INSPECTION ORDER

Description: Cassette Radio Recorders 4 Bands International Brand 1,300 Sets As Per Proforma Invoice No.P/ST/5556/89.

FOB value: USD35,850.00  
C&F value: USD38,350.00  
Origin : China

Seller :  
Importer :  
Code : NO. 32078

SUBMITTED TO INSPECTION

Commodity: "International" Brand 4 Bands Cassette Radios Recorders Model No: SW2823.

1st Parital & Delivery : Final Delivery  
FOB value: USD32,900.00  
C&F value: USD35,400.00

Quantity	Packing	Weight	Marks	H.M.
1200 Sets	300 Ctns.	G: 6192 Kgs 29.44 M3 N: 5850 Kgs		3808 LAGOS NOS. 1-300

FINDINGS

- 1. Quality : The quality of goods submitted to us for inspection is found to comply with the documents presented to the extent that their examination is within our mandate.
- 2. Quantity: The quantity of goods presented to us is as indicated above in paragraph 'SUBMITTED TO INSPECTION'.

3. Price : Seller's final invoice No. LM2283 dated 02/11/89, we have compared and found acceptable, showing

FOB value: USD32,900.00  
C&F value: USD35,400.00

in words C&F value US Dollars THREE/FIVE/FOUR/ZERO/ZERO/ONLY

4. Loading : Shipped at Hong Kong on board "HIMALAYA NARU" as per B/L NO. FKLKLU 836300333 dated 01/11/89

5. Remarks : This document is valid only if signed by an authorised Representative of the Inspection Company and accompanied by the following documents:  
- negotiable bill of lading or equivalent evidence of shipment to Nigeria.  
- copy of seller's final invoice certified by Cotecna International Limited's authorised representative.

Final documents received by us from seller on the 11/11/89  
IDR No. CN2106205334

CONTAINER NO.	SHIPPING CO.'S SEAL NO.	W&B LTD CISS DIV'S SEAL NO.	PACKAGES
KLTU 1078571	41514 11515	0014648	300

100230



At HONG KONG Date 11/11/89

WOOD & BROWNE LIMITED OMIC/COTECNA CISS DIV.  
COTECNA INTERNATIONAL LIMITED REPRESENTATIVE  
signature and stamp

Enclosure to Original Report:  
ONE copy of Seller's Final Invoice(s).  
This Report of Findings does not relieve Sellers from their legal and contractual obligations to Importers.

ROBERT SCOTT

143765



Form M Appointed Agents No. 020/BA.893558

COPY 8

Report of Findings No. 21/06/09973

Dated: 11/11/89

4.

PIA Reference No. 21-06-01982

Form M Exchange Rate(s) USD1.00 = N7.3700

PIDD No. B529959

Exporter Sotach (H.K.) Ltd.

Dutiable Value (Naira) 283,423.82

Importer

Duty Payable (Naira) 28,342.30

Importer Code RC.52098

CONSIGNMENT DETAILS

1. SHIPPING

B/L No. KKLU 836300333

Port of Discharge Apapa

Final Invoice No. LM2283

Total CIF Value (Naira) 261,682.32

2. VERIFIED IMPORT DUTY

ASSESSMENT BY IMPORTER (IF DIFFERENT)

FINAL ASSESSMENT

H.S. Code	Rate (%)	Description of Goods & C.I.F. Value (Naira)	H.S. Code	Rate (%)	Duty Payable (Naira)
		Cassette Radios Recorders 261,682.32	8527.31	10	26,168.23
					N 26,168.23

25100236

TOTAL DUTY PAYABLE (In words) NAIRA TWO/SIXONE/SIXEIGHT/DECIMAL/TWO/THREE/ONLY

Seller's final shipping documents received by us on 11/11/89

WOOD & BROWNE LIMITED OMIC/COTECNA CISS DIV.  
COTECNA INTERNATIONAL LIMITED REPRESENTATIVE

Issued at HONG KONG

(Signature & Stamp)

ROBERT SCOTT



For use of the Acc. General Representative

For use of Customs and Excise

This Import Duty Report is exclusively for the use of the Nigerian Authorities. It does not affect the responsibility of the Report of Findings where applicable.

Cal.	California
Camp.	Campbell
Can. S. C. R.	Canadian Supreme Court Reports
Cap.	<b>ABBREVIATIONS</b>
Ch. D.	Chancery Division
A. C.	Appeal Cases A.
A. M. C.	American Maritime Cases
Ala.	Alabama
All. E. R.	All England Law Reports
All. N. L. R.	All Nigeria Law Reports
App. Cas.	Appeal Cases Report
art.	article
E. & B.	Ellis & Blackburn
B. & Ald.	Barnewall & Adolphus District
Bing.	Bingham Transport Law
Bli, N. S.	Bligh, New Series
Ex. D.	Exchequer Division
C. & E.	Cababe & Ellis
C. A.	Court of Appeal
C. A.	Reserved Judgments, Court of Appeal
C. C. C.	Circuit Court
C. C. A.	Circuit Court of Appeals
C. C. H. C. J.	Certified Copies of High Court
F. R. C. R.	Judgments Revenue Court Law Reports
C. O. pp.	Colonial Office Document
C. P. D.	Common Pleas Division

Cal.	California
Camp.	Campbell
Can.S.C.R.	Canadian Supreme Court Reports
Cap.	Chapter
Ch.D.	Chancery Division
Cir.	Circuit (U.S.A.)
Com.Cas.	Commercial Cases
Conn.	Connecticut
Holt.	Holt, Nisi Prius
D.C.	District Court
D.L.R.	Dominion Law Report
E. & B.	Ellis & Blackburn
E.D.	District Court, Eastern District
E.T.L.	European Transport Law
Ex. C. & Q.	Exchequer Reports
Ex.D.	Exchequer Division
L.N.	Legal Notice
F.Q.R.	Federal Reporter
F.2d	Federal Reporter, 2nd Series
F.H.C.	Federal High Court
F.O.	Foreign Office Document
F.R.C.	Federal Revenue Court
F.R.C.R.	Federal Revenue Court Law Reports
F.Supp.	Federal Supplement
Fed.Cas.	Federal Cases



fn. L. Rep.	footnote List Law Reports
Lloyd's Rep.	Lloyd's List Law Reports
G.L.R.	Gazette Law Reports
M. & W.	Mason & Welby
H. & C. Pol. Mgmt.	Hurlstone & Cottman Management
H. & N. Stud. Mgmt.	Hurlstone & Norman Management
H.C.	High Court
H.L.	House of Lords
Holt.	Holt, Nisi Prius
Mont. Arb.	Montreal Arbitration
Ir. R. C.L.	Irish Reports, Common Law
N.C.L.R.	Nigerian Commercial Law Reports
J.B.L. Y.	Journal of Business Law District
J.M.L.C.	Journal of Maritime Law
N.J.	New Jersey
L.M.C.L.Q.	Lloyds Maritime & Commercial Law
N.S.C.	Quarterly Shipping Cases
L.N.S.C.	Legal Notice Supreme Court
L.Q.R.	Law Quarterly Review
L.T.	Law Times Reports
L.R. A. & E.	Admiralty & Ecclesiastical Cases
L.R. C.P.	Common Pleas Cases
L.R. Ex. J.	Exchequer Cases This Journal
L.R. H.L.	English & Irish Appeals
L.R. Q.B.	Queen's Bench
La. (S).	Louisiana

Ll.L.Rep.	Lloyd's List Law Reports
Lloyd's Rep.	Lloyd's List Law Reports
P.C.	Judicial Committee, Privy Council
M. & W.	Meeson & Welsby
Marit.Pol.Mgmt.	Maritime Policy & Management
Marit.Stud.Mgmt.	Maritime Studies & Management
Mass.	Massachusetts
Md..L.R.	Maryland Law Reports
Me.(s).	Maine(s)
Mont.Arb.	Montreal Arbitration
rev.	revised
N.C.L.R.	Nigerian Commercial Law Reports
N.D.N.Y.	District Court, Northern District, New York Cases
N.J.	New Jersey
N.L.R.Y.	Nigeria Law Reports Northern District
N.S.C.	Nigerian Shipping Cases
N.S.S.C.	Nova Scotia Supreme Court Reports
N.Y.Arb.	New York Arbitration
n.d.s. Stud.	no date Nigerian Studies in Law
n.p.s.	no publisher(s)
New.L.J.	New Law Journal
Nig.Geo.J.	Nigerian Geographic Journal
Or..R.	Oregon Law Reports
Ord(s).	Ordinance(s)

P. ans.	Probate Division
Pa.	Pennsylvania
P.C. (C. T. A. D.)	Judicial Committee, Privy Council and Development
Q.B.	Queen's Bench Reports
Q.B.D.	Queen's Bench Division
Va.	Virginia
R.S.L.R.	Rivers State Law Reports
reg(s).	regulation(s)
Ref. (C. A.)	Reference (a Court of Appeal)
rev. R.	revised Law Reports
Wheat.	Wheaton
S.C.	Reserved Judgments, Supreme Court
S.C.	Session Cases
S.C.	Supreme Court
S.D.N.Y.	District Court, Southern District, New York
S.M.A.	Society of Maritime Arbitrators
Sc.L.R.	Scottish Law Reporter
Scand. Stud. in Law	Scandinavian Studies in Law
Sched.	Schedule
So.	Southern Reporter
Supp.	Supplement
T.L.R.	Times Law Reports
Taunt.	Taunton



trans. translator

U.N.C.T.A.D. United Nations Conference on Trade  
and Development

U.S. United States Reports

Adolf Lohmann, The Pagnan & Pagnan v. Piragrain  
U.S. [1986] 2  
Lloyd's Rep. [1986] 2  
Aello, The Pagnan Finanziaria de Banca v. S.A. v  
Va. [1961] A.C. [1961] 1 W.L.R. [1961] 1  
[1957] 1 W.L.R. [1957] 1  
vol(s). volume(s)

W.A.C.A. West Africa Court of Appeal

W.L.R. Weekly Law Reports

Wheat. Wheaton

Alvin S. v. [1986] 1 Q.B. [1986] 1

American [1971] A.C. [1971] 1

Amodeo [1971] 3 A.C. [1971] 3

Anstalt [1961] 2 Q.B. [1961] 2

Anderson v. [1918] 1 W.L.R. [1918] 1

Angeles [1978] Lloyd's Rep. [1978] 20

Anglo-French [1978] N.C.L.R. [1978] 1

Apollon, The [1971] 1 Q.B. [1971] 1

Apollon, The [1971] 1 Q.B. [1971] 1

Armstrong [1971] 1 Q.B. [1971] 1

Associated [1971] 1 Q.B. [1971] 1

Athamas (Owners) v Dig **TABLE OF CASES** [1983] 1 Lloyd's Rep. 287.

Atlantic Monarch, The (1975) A.M.C. 1991(N.Y.Arb).

A/S Mosvold Maritime Co v Bunge Corpn (1974) A.M.C. 2372(N.Y.Arb).

Adolf Leonhardt, The see, Pagnan & Fratelli v Finagrain Compagnie Commerciale Agricole et Financiere S.A. [1986] 2 Lloyd's Rep. 396.

Aello, The see, Sociedad Financiera de Bienes Raices S.A. v Agrimpex Hungarian Trading Co [1961] A.C. 135; affirming [1958] 2 Q.B. 385; affirming [1957] 1 W.L.R. 1228.

Aylward v Smith 2 Fed. Cas. No. 688(DC Mass 1873).

Agios Stylianos, The see, Agios Stylianos Compania Naviera v Maritime Associates Inter. Ltd Lagos [1975] 1 Lloyd's Rep. 426.

Akt. Reidar v Arcos [1927] 1 K.B. 352.

Albion, The see, President of India v Davenport Marine Panama S.A. [1987] 2 Lloyd's Rep. 365.

Alvion S.S. Corp. Panama v Galban Lobo Trading Co S.A. [1955] 1 Q.B. 430.

Barrett v Patton (1815) 4 Camp. 333.

American Trading & Production Corp v Amoco Trading Int. Ltd (1971) A.M.C. 571(N.Y.Arb).

Amodu Tijani v Sec. Southern Nigeria [1921] 2 A.C. 399(P.C.).

Amstelmolen, The see, N.V. Reederij Amsterdam v President of India [1961] 2 Lloyd's Rep. 1.

Anderson v J.J. Moore 179 F. 68(9 CCA,1910).

Angelos Lusia, The see, Sociedad Carga Oceanica S.A. v Idolinoele Vertriebs GmbH [1964] 2 Lloyd's Rep. 28.

Anglo-French Steel Corp v Panfixing Shipping Co Ltd [1978] N.C.L.R. 149(F.R.C).

Apollon, The (1827) 22 U.S. (9 Wheat.) 362.

Apollon, The see, N.Z. Michalos v The Food Corporation of India [1983] 1 Lloyd's Rep. 409.

Armement Adolf Deppe v Robinson [1917] 2 K.B. 204.

Associated Metals & Mineral Corp v 4,000 Tons of Manganese & Hellenic Lines Ltd (1972) A.M.C. 968(DC Md,1972).



Athamas (Owners) v Dig Vijay Cement Co [1963] 1 Lloyd's Rep. 287.

Atlantic Monarch, The (1975) A.M.C. 1991(N.Y.Arb).

Attorney-General v John Holt & Ors 2 N.L.R. 1(P.C). Lumber 23 F.2d(2d 1927)

Austin Friars, The (1894) 10 T.L.R. 633.

Awosika v Okafor Lines 1 N.S.C. 87(H.C. Lagos). C.A.O. Navigation S.A. v Junta Nacional de Granos S.M.A. Award Shipping Weekly, November 12th, 1967, p. 40.

Axis v Tidex (Nig.) Ltd & Anor [1972] N.C.L.R. 397(H.C. Lagos). The see, Magnolia Shipping Co Ltd v Joint Venture of the International Trading & Shipping Enterprises and Kinship

Aylward v Smith 2 Fed.Cas. No. 688(DC Mass,1872).

Cantiere Navale Triestina v Russian Soviet Naphtha Export  
Bailey v Manufacturers' Lumber Co 224 F. 806(SDNY,1915).

Baird & Co v Price, Walker & Co (1916) 115 L.T. 227. Commerce, Saigon (1970) A.M.C. 945(N.Y.Arb).

Baldhill, The see, U.S.A. v Atlantic Refining Co (1930) A.M.C. 1041(2 CCA,1930). 5 Fed.Cas. No 2,692(CC Mass,1875).

Balley v De Arroyave (1838) 7 Ad. & E. 919. Lloyd's Rep. 385.

Barrett v Dutton (1815) 4 Camp. 333.

Bastifell v Lloyd (1862) 1 H. & C. 388.

Baumwoll Manufactur Von Carl Scheibler v Furness [1893] A.C. 8.

Commercial S.S. Co v Boulton (1875) L.R. 10 Q.B. 346.

Bellota, The 57 F.2d 264(SDNY,1928).

Compania Naviera Azuero S.A. v British Oil & Cake Mills Ltd  
Ben Franklin Transp. Co v Fed. Sugar Refining Co 242 F. 43(2 CCA,1917).

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Board of Customs & Excise v Ogunyemi Gunye & Ors (1978) 4 F.R.C.R. 197(F.R.C).

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Borg (Owners) v Darwen Paper Co (1921) 8 Ll.L.Rep. 49.

Continental Grain Co v Armour Fertilizer Works (1916) A.M.C.

Brereton v Chapman (1831) 7 Bing. 559.

British Westinghouse Electric & Manufacturing Co v Underground Electric Rly Co [1912] A.C. 673.

Crow v Myers 41 F. 806(DC Va,1890).

Brown v Johnson (1842) 10 M. & W. 331.

Cureton Lumber Co v Harwood Lumber Co 29 F.2d 971(5 CCA,1938).

Budgett v Binnington [1891] 1 Q.B. 35.

Bunge Corp v Tradax Export S.A. [1981] 1 W.L.R. 711. *ing sub nom. Nelson v Dahl (1879) 12 Ch.D. 568.*

Caffarini v Walker (1876) Ir.R. 10 C.L. 250.

California & Eastern S.S. Co v 138,00 Feet of Lumber 23 F.2d(Md,1927) *A.G. Zurich [1977] A.C. 157; affirming [1976] 1 Lloyd's Rep. 285; reversing [1974] 2 Lloyd's Rep. 435.*

C.A.O. Navigation S.A. v Junta Nacional de Granos S.M.A. Award Service Ref. No: 2379, summarized in Fairplay International Shipping Weekly, November 12th, 1987, p. 40.

Camelia, The see, Magnolia Shipping Co Ltd v Joint Venture of the International Trading & Shipping Enterprises and Kinship Management Co Ltd [1978] 2 Lloyd's Rep. 182. *Corras Shipping Co [1983] 2 Lloyd's Rep. 496.*

Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency [1912] 2 K.B. 172. *Shipping Developments Corp v V/O Soluzneftexport [1972] 1 Q.B. 103.*

Caribbean Maritime Co Ltd v Directorate General of Commerce, Saigon (1970) A.M.C. 945(N.Y.Arb). *Compania Naviera v Ferrastahl A.G. [1976] 2 Lloyd's Rep. 149.*

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Christensen v Hindustan Steel Ltd [1971] 1 Lloyd's Rep. 395. *Demosthenes v (No 1) The see, Gerani Compania Naviera S.A. v [1975] 1 Lloyd's Rep. 275.*

Clink v Radford [1891] 1 Q.B. 625. *Distrehan Freighters & Tankers Agency Corp v Continental Grain [1978] 1 W.L.R. 261.*

Cochran v Retberg (1800) 3 Esp. 121. *Louis Dreyfus Corp [1978] 1 W.L.R. 261.*

Cockey v Atkinson (1819) 2 B. & Ald. 460. *Dominion Navigation Ltd v Alpine Shipping Co (1982) A.M.C.*

Compania Naviera Azuero S.A. v British Oil & Cake Mills Ltd [1957] 2 Q.B. 293. *Compania Naviera v British Oil & Cake Mills Ltd [1957] 2 Q.B. 293.*

Concord Petroleum Corp v Mobil Shipping & Transp. Co (1977) A.M.C. 953(N.Y.Arb). *Elika Lines 199 U.S. 119(1 CCA 1895).*

Continental Coal Co v Bowne 115 F. 945(1 CCA,1902). *Epphus, The see, Barlow & P.A. v Phillip Bros [1967] 2 Lloyd's*

Continental Grain Co v Armour Fertilizer Works (1938) A.M.C. 414(SDNY,1938). *Eugenia N.G. Livorno v Bisbee Linseed Co (1951) A.M.C.*

Cordelia, The [1909] P. 27. *Padl Shipping Co S.A. v Abaco Transp. Co S.M.A. Award Service Weekly, June 28th, 1984, p. 39.*

Crow v Myers 41 F. 806(DC Va,1890).

Cureton Lumber Co v Hammond Lumber Co 29 F.2d 973(5 CCA,1929).



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Destrehan Freighters & Tankers Agency Corp v Continental Grain Co (1968) A.M.C. 442(N.Y.Arb).

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Epaphus, The see, Eurico S.p.A. v Phillip Bros [1987] 2 Lloyd's Rep. 215.

Eugenia N.G. Livanos v Bisbee Linseed Co (1931) A.M.C. 1724(SDNY, 1931).

Fadi Shipping Co S.A. v Amoco Transp. Co S.M.A. Award Service Ref. No: 1927, summarized in Fairplay International Shipping Weekly, June 28th, 1984, p. 39.



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Felix, The (1868) L.R. 2 A. & E. 273.

Finix, The see, Nea Tyhi Maritime Co Ltd v Compagnie Grainiere S.A. [1978] 1 Lloyd's Rep. 16; reversing [1975] 2 Lloyd's Rep. 415. (N.Y. Arb).

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Foreman v Free Fishers of Whitstable (1869) L.R. 4 H.L. 266.

Fowles v Eastern & Australian S.S. Co [1916] 2 A.C. 556(P.C.).

Franco- British S.S. Co v Watson & Youell Shipping Agency (1921) 9 Ll.L.Rep. 282. reversing [1971] 2 Lloyd's Rep. 96.

Futterer v Abenheim 9 Fed.Cas. No. 5,164(CC Pa,1874). Award Service Ref. No: 1855, summarized in Fairplay International Shipping Weekly, January 1st, 1982, pp. 33-34.

Glara S.S. Corp v Sun Oil Co (1975) A.M.C. 2643(N.Y.Arb).

Good v Isaacs [1892] 2 Q.B. 555.

Grampian S.S. Co v Carver & Co (1893) 9 T.L.R. 210.

Groves, Maclean v Volkart (1884) C. & E. 309.

H & N.Y. No. 11 (1936) A.M.C. 1711(SDNY,1936). 10 Ll.L.Rep. 635.

Harman v Gandolph (1815) Holt, 34.

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Hill v Idle (1815) 4 Camp. 327.

Hellenic Int. Shipping S.A. v Amoco Trading Int. Ltd (1975) A.M.C. 2311(N.Y.Arb).

Hellenic Lines v American Tobacco Co (1949) A.M.C. 607(SDNY,1946).

Hellenic Trans. Co v McNeill & Sons Co 273 F. 290(DC Md,1921).

Heymans v Darwins Ltd [1942] A.C. 356.

Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha [1962] 2 Q.B. 26.

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Leonis v Rank (1908) 1 K.B. 499; reversing [1907] 1 K.B. 344.

Idewu Inasa v Oshodi [1934] A.C. 99(P.C).

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