Notice of readiness and the commencement of laytime

Most voyage charterparties make the commencement of laytime conditional on the tender of a valid notice of readiness. If the notice is invalid, then in the absence of a waiver by charterers laytime will not commence at all, even if the charterers knew or ought to have known that the vessel was in all respects ready.

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Overview

The tender of a valid notice of readiness and the subsequent commencement of laytime has been a fertile area of debate in the English courts and given the financial consequences, will no doubt continue to be litigated.

If a notice is required but none is given then strictly, laytime will not start to run. Arbitrators may, however, take a more commercial view and decide on the facts that the charterers were aware or ought to have been aware that the vessel was ready to load and knew that loading was taking place, and that therefore laytime should commence on loading. The burden of proof, however, is on the owners to show that laytime should start to run even though a notice of readiness was not given. This is not satisfactory from the owners' point of view as there is no assurance for them that laytime will commence at all.

Where a notice is required then in the absence of an express provision to the contrary, this is required only at the first load port and not at the subsequent load ports or at the discharge port(s).

At common law, the notice may be given orally or in writing. Where the charterparty requires service of the notice, e-mail will not be considered permissible unless expressly provided for in the charterparty – see the "PORT RUSSEL" [2013] EWHC 490 (Comm); [2013] 2 Lloyd's Rep 57. Best practice is to make sure when fixing the vessel that the charterparty provides for service of the notice of readiness by e-mail as some older forms still refer to telex.

The contents of the notice of readiness

The notice of readiness is the notice to the charterer, shipper, receiver or other person as may be required under the charterparty that:

(1) The vessel has arrived at the specified destination where the notice of readiness can be given. The question of whether the vessel is an 'arrived' one for the purposes of commencement of laytime has been the subject of much discussion and case law which is outside the scope of this article. However, it can be said briefly that the specified destination will depend on the terms of the contract. If the charterparty is a berth charterparty then the specified destination is the nominated berth or, if a berth has not been nominated, it will be the first available berth to which the vessel is ordered and the notice of readiness may be tendered at that place subject to the other conditions being satisfied. If, however, the charterparty is a port charterparty then the notice of readiness must be tendered when the vessel is in berth within the specified port or, if a berth is not available, when the vessel is within the port limits and at the waiting area where vessels usually wait for a berth.

Various clauses in the charterparty may put forward the time that the vessel may tender the notice even though she may not be at the specified destination. The most familiar is the WIBON (whether in berth or not) provision which means that under a berth charterparty, if the berth is not immediately accessible, the notice of readiness may be given when the vessel is in the port in which the berth is situated.

Similarly, a WIPON (whether in port or not) provision will enable the notice in certain circumstances to be tendered even if the vessel has not yet entered the port

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area.

(2) The vessel is ready to load or discharge the cargo as the case may be. This means that the vessel must be both physically ready in that the holds are ready to receive the cargo and legally ready in that all documentation necessary to enable her to commence loading is in order. If, however, the vessel is ready subject only to a mere formality then the notice may still be able to be tendered. For example, if customs clearance is only obtainable on berthing but the notice can be tendered when the vessel is off berth then this will not affect the vessel's readiness.(3) All other requirements under the charterparty concerning the form, timing and the party to whom the notice is to be tendered have been complied with.

* *Validity of the notice of readiness A notice of readiness therefore contains several statements of fact. In order to be a valid notice, those statements must be true. If the statements are incorrect the notice is invalid and a nullity so far as the contract is concerned and ineffective to start laytime. Further, as was made clear in the leading authority of the "MEXICO I"* *[1990] 1 Lloyd's Rep. 507 (CA) if the statements were untrue when they were made, the notice does not subsequently become valid when the circumstances change. If therefore, there is any doubt as to the validity of the notice, it is always advisable for the master to tender a further notice.

The "MEXICO I" The owners let their vessel to the charterers for the carriage of a part cargo of maize from Argentina to Angola. Under the charterparty, the owners had a right to complete the vessel with other cargo. On completion of loading, the vessel was also carrying a cargo of beans for the same charterer under another agreement. Both the maize and the beans were overstowed by parts of the completion cargo. On arrival at the discharge port, the vessel tendered notice of readiness on 25th January. However, at the time of tender neither of the charterers' cargo was accessible due to the overstow of the completion cargo. The charterers' maize cargo became accessible on 6th February and the beans on 19th February which is when discharge of both cargoes commenced. The owners claimed that laytime commenced when the cargo became fully accessible on 6 February. Charterers on the other hand claimed that time commenced only when discharge actually commenced on 19 February.

The Court of Appeal held that the notice was invalid and a nullity when given and ineffective therefore to commence laytime even if the charterers knew or ought to have known of the vessel's subsequent readiness. Accordingly, the charterers were entitled to insist on a further notice of readiness in order for laytime to commence unless they had in the meantime waived their right to a further notice or agreed that it would not be necessary. On the particular facts in this case, the Judge found that although the notice was invalid, the charterers had nevertheless accepted it via their agents on the commencement of discharge. As a matter of principle, however, the judge confirmed that an acceptance of an invalid notice in circumstances where the charterers were unaware of the inaccuracy in the notice could not bind the charterers and they were not prevented from subsequently disputing the effect of the notice. What will constitute a waiver of the defect or acceptance of an invalid notice is considered in more detail below.

Unless there is provision to the contrary in the charterparty, the statements in the notice must relate to the time that they are made and when the notice is given. There is a distinction, however, between an invalid notice and one that is uncontractual in that it has been tendered to the wrong party or at the wrong time of day. A notice

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that falls within the second category may still be regarded as valid.

The "AGAMEMNON" The "AGAMEMNON" [1998] 1 Lloyd's Rep. 675 was chartered to load a cargo of steel pipes from Baton Rouge to Brisbane. The charterparty provided that the vessel was at the South West Pass and "ready to proceed to loading port weather permitting". The South West Pass, however, was 170 miles from Baton Rouge and it did not form part of that port. A notice of readiness was tendered at the South West Pass. It was not until two days later, however, that the vessel arrived at Baton Rouge general anchorage but, due to the designated berth being unavailable, loading did not commence until later the following day.

The charterparty provided that if the berth was not available on the vessel's arrival at the port or so near thereto as she may be permitted to approach, the notice could be tendered on arrival and laytime would then commence as if she were in berth and in all respects ready.

The charterers considered that the notice of readiness tendered at the South West Pass was premature, since it was given prior to the vessel's arrival at a point so near to Baton Rouge as she could approach, i.e. the Baton Rouge general anchorage, and as no notice was given when the vessel reached that point later, laytime did not commence until loading started.

The charterers failed to persuade the arbitrators to agree with this view, but on appeal, the Judge found in their favour. In accepting their arguments, the Judge relied on the Court of Appeal decision in the "MEXICO I" which made clear that when a notice is to be given in order to start laytime running, this must be a valid notice and not an 'inchoate' or 'delayed action device' seeking to commence laytime automatically on the happening of a certain event. In such cases, a fresh notice must be given. Applying that case to the facts before him, the Judge found that the notice of readiness in this case represented that the vessel was at the place at which it was permissible for the notice to be tendered, i.e. the Baton Rouge anchorage. This was clearly not the case and the notice was therefore invalid and could not trigger the commencement of laytime.

The "PETR SCHMIDT" In this case, the charterparty provided that the notice of readiness had to be tendered to the charterer or his agent within 0600 and 1700 hours local time and laytime was to commence six hours from the receipt of that notice or upon the vessel's arrival, whichever first occurred. Of the various notices given at the load and discharge ports, one was given at 0100 hours and the other two at 1800 hours. The charterers argued that since the notices were tendered outside the specified period, they were non-contractual being in breach of the relevant clause and therefore invalid and of no effect in accordance with the principles in the "MEXICO I".

It was common ground that (a) when the notice of readiness was given the vessel had then arrived at the appropriate place within the port in question (b) the vessel was in fact ready to load or discharge as required by the charterparty and the statement of readiness was therefore correct (c) the vessel continued to be ready and (d) no further notices were given.

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In their judgment, the Court of Appeal confirmed the principle decided in the "MEXICO I" namely, that in order to be a valid notice, it must contain accurate statements of existing fact. In the "MEXICO I" the notice stated that the vessel was ready when in fact she was not and the notice was therefore invalid. In the "PETR SCHMIDT", [1997] 1 Lloyd's Rep 284; (CA) [1998] 2 Lloyd's Rep 1), however, the notice was correct in that the vessel was ready and at the required place but was sent to the charterers outside office hours. The Court drew a distinction between the requirement to 'tender' a notice of readiness and to 'give' or to 'receive' one. The Court found in this case that the telex notice was sent out of office hours but was 'tendered' at the receivers' office opening at 0600 hours the following morning and that this therefore complied with the charterparty requirement. However, the Court also considered what the position would be if the charterparty required the notices of readiness to be 'given' or 'received' by charterers within certain periods and they are in fact given or received outside these periods. The Court held that in such cases, provided the notice was otherwise correct, the notice would be non-contractual and therefore wrong but not invalid at the time it was given. The practical effect of a non-contractual notice which is tendered outside the required time is, that while it may not be effective to start the laytime clock running, the defect may be 'cured' by, for example, the passage of time and laytime will start at that point. As the Court pointed out, whether the defect can be so 'cured' is a question of fact rather than the law and will vary from case to case.

The charterers may choose to accept an otherwise invalid notice. However, this acceptance must be in clear terms and in these circumstances, owners will leave themselves open to the argument that this acceptance was induced by an incorrect representation in the notice as happened in the "MEXICO I". In those cases, the charterers would not be precluded from disputing the effect of the invalid notice.

Acceptance/waiver by charterers The "HAPPY DAY" The HAPPY DAY [2002] 2 Lloyd's Rep 487 (CA) was chartered to carry wheat from Odessa to Cochin. The Master tendered the notice of readiness before the vessel could enter the port due to tidal conditions and no valid notice was subsequently tendered. The vessel entered the port the next day and continued to berth. The charterers did not reject the notice of readiness and ordered the vessel to load and only later contested demurrrage on the ground that laytime had not commenced due to the invalid notice.

The Court of Appeal heldthat under a voyage charterparty which requires a notice of readiness to be served, laytime can commence even where no valid notice of readiness had been served in circumstances where:

- a notice of readiness in the prescribed form is served upon the charterers/receivers prior to the arrival of the vessel;

- the vessel subsequently does arrive and is, or is expected to be, ready to discharge to the knowledge of the charterers; and

- discharge commences to the order of the charterers/receivers without either having given any indication of rejection or reservation in respect of the notice of readiness already served, or any indication that a further notice of readiness is required before laytime commences.

In these circumstances, the charterers may be deemed to have waived their right to

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rely on the invalidity of the original notice of readiness as from the time of commencement of discharge and laytime will commence in accordance with the charterparty as if a valid notice of readiness had been served at that moment.

In The "SHACKLEFORD" [1978] 2 Lloyd's Rep. 154 (CA) charterers were deemed to have accepted an invalid notice of readiness when they endorsed the notice "accepted" in the full knowledge that it was defective. "

Even where a receiver or agent do not have express authority, they may have implied or ostensible authority to accept a defective NOR" – see "THE NORTHGATE" [2008] 1 Lloyd's Rep 511.

Conclusion Demurrage disputes are common, hence the name of legal cost insurance product "Freight Demurrage and Defence or "FDD". English case law may be slowly moving from the literal to the more practical as evidenced by the cases on waiver. Terms vary between charterparties and grey areas remain. In order therefore, to be absolutely certain that time will start to count at the earliest opportunity, if there is any doubt as to the validity of the original notice the master should issue a further notice of readiness expressly stating that it is without prejudice to the validity of the previous notice(s).

*This article was first published in 1998. We are grateful to Stuart Kempson and Kelly Wagland, senior and experienced solicitors in Gard's London Defence team for their review and update. *

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