Voyage Charterparties - Notice of Readiness

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[Strict approach of the English Courts over the years regarding Notice of Readiness but some relief to the owners of vessels by way of the recent Court of Appeal decision in The "Happy Day", in the context of waiver and the commencement of the loading or the discharging of cargo.]

1. During the last thirty years or so there has been a considerable divergency of views between the approach of London maritime arbitrators and the commercial judges to the all important subject, Commencement of Laytime, in particular regarding the readiness and the geographical destination (usually port or berth) of the vessel. Due to court decisions over the years the legal position has now been well clarified whereby the courts have taken a strict approach to the subject, although the waiver/estoppel contention (in the context of the vessel having commenced loading or discharging cargo), has only recently been considered by the Court of Appeal in The "Happy Day" [2002] 2 Lloyd's Rep 487.

2. Under English Law, leaving waiver/estoppel aside, there is a strict and literal approach to a notice of readiness clause. For laytime to commence the wording of the clause has to be satisfied; there is now no escape from a literal application of its words. The broader approach, once favoured by London maritime arbitrators, has not found favour with the courts. One only need refer back to The "Tres Flores" [1973] 2 Lloyd's Rep 247 where the arbitrators (by way of a joint award without the need to call on an umpire) took a practical and robust approach to circumstances where the vessel arrived at the port (a port charterparty) and gave a notice of readiness so that, other matters being equal, laytime would have commenced ; she could not be inspected because of bad weather and five days later, when the charterers' inspectors boarded, they found a very small amount of infestation. The arbitrators decided that the intention of the parties, as gleaned from the words used by them, was that laytime should commence and run while the vessel was waiting to be inspected, after having tendered a notice of readiness. However, the Commercial Court and the Court of Appeal decided differently in that the vessel was not ready when she gave her notice of readiness (because of the small amount of infestation which was not "de minimis") and that laytime could not commence. It was put by Lord Denning (a broader constructionist than most judges), as follows :-

> "One thing is clear, in order for a notice of readiness to be good, the vessel must be ready at the time the notice is given, and not at a time in the future. Readiness is a preliminary existing fact which

must exist before you can give a notice of readiness."

The words of Lord Denning have been cited in later cases where the judges have taken a stricter approach to the commercial realities than the maritime arbitrators. Parties have been held to the wording of the notice of readiness clause which they have agreed; in other words, readiness means readiness at the time when the notice is tendered and, as will be seen in later cases, that means readiness when the vessel has reached her geographical destination and not before; nothing less will suffice.

3. Despite the Tres Flores judgment maritime arbitrators were often sympathetic to the owners of vessels regarding the commencement of laytime and for a long time adopted the "inchoate theory" whereby they found that a notice of readiness which was premature was validated when facts came into existence which made the notice of readiness good, even though no further notice of readiness may have been given by the master or the owners of the vessel. They took what they thought was a commercially sensible approach without applying, strictly speaking, the precise wording of the notice of readiness clause that the vessel was ready to load/discharge at the time that the notice of readiness was tendered. This commercially sensible approach was adopted by the arbitrators in The "Mexico 1" 1990 [1] Lloyd's Rep 507, a well known case which went to the Court of Appeal and where short thrift was given to the inchoate theory it being held, contrary to the decision of the arbitrators, that there was no room for this theory. The facts of the case were that the vessel loaded part cargoes of maize and beans for the charterers and the owners also loaded various cargoes for their own account. At the final discharge port of Luanda the master cabled a notice of readiness to the agents on 20th January when he arrived at the port and he telexed a further notice to the receivers on the following day. At that time the cargo of maize was partially overstowed with beans and also with cargo carried for the owners' account. Unloading of the cargo commenced on 28th January and it was not until 6th February that the maize cargo was cleared of overstowed cargo and was accessible. No further notice of readiness was tendered at that time. Discharge of maize was not then begun because the vessel was put out of berth to give priority to another vessel. After a delay of eight days the vessel re-berthed and commenced discharging the maize cargo. The two arbitrators agreed a joint award (not calling upon the umpire who attended the hearing). They applied the inchoate theory to the maize cargo and decided that the initial cabled notice of readiness (which was not valid because the maize was inaccessible when given) became valid when the maize became accessible on 6th February. They found that the discharging of the other cargo overstowing the maize was an operation openly performed with the active participation of the mutual agent to the parties, and was patent to the charterers. They also found that it appeared that the receivers, agents and the master

on the spot all realistically treated the initial notice of readiness as one which would be effective as soon as all the requisite conditions of accessibility were met. On appeal to the High Court the arbitrators were reversed on the inchoate status of the notice of readiness but the case was decided in favour of the owners on the basis of an estoppel or waiver in that the receivers and agents proceeded on the basis that the original notice became valid and effective when the state of unreadiness caused by the overstowage was replaced by one of readiness for discharge. The Court of Appeal upheld the High Court on the inchoate status of the notice of readiness but reversed it on estoppel or waiver. Regarding the inchoate theory Lord Justice Mustill (later to become a Law Lord) gave the judgment of the court and thought it appropriate to consider the question entirely afresh: he was adamant in concluding that there was no room for the theory where the parties had agreed a notice of readiness. The result is abundantly clear in that, absent special factors like an implied agreement, waiver, estoppel etc., laytime does not commence, where there is a contractrual written notice of readiness which triggers off laytime, until a valid notice of readiness has been tendered. Later judgments adopted the same approach, including the recent Court of Appeal decision in The "Happy Day", so that it can be taken as settled law that there is no such thing as an inchoate theory; I think that is now accepted and applied by all in the commercial world (albeit reluctantly by some) in respect of notice of readiness clauses.

4. The strict approach of the courts in the context of the geographical arrival of the vessel was evidenced in The "Agamemnon" [1998] 1 Lloyd's Rep 675 where the High Court, in reversing the arbitrators, decided that, where the notice of readiness clause stated, "if the loading … berth is not available on vessel's arrival at or off the port of loading…or so near thereto as she may be permitted to approach, the vessel should be entitled to give notice of readiness on arrival there as if she were in berth…", a valid notice of readiness could not be tendered until the vessel arrived at the Baton Rouge anchorage (the master had tendered one many hours earlier on arriving at the South West Pass in the Mississipi River) even though the charterers' agents were in contact with the master during the up river passage of the vessel. The judge made the point that when the initial notice of readiness was tendered the notice was not truthful, yet alone correct.

5. Returning to The "Mexico 1", Lord justice Mustill considered the waiver or estoppel contention of the owners in some depth and rejected it. He said that the materials were too thin for the inference of any waiver, estoppel, or agreement in the context of what he thought was necessary, which was as follows :-

"Conduct from which one could infer either a bilateral agreement to vary the charter, or the existence of what has come to be called 'estoppel by convention' ; namely, a situation

in which the parties, having conducted themselves on the mutual assumption that their legal relations take a certain shape, cannot afterwards be heard to assert the contrary. I do not for a moment doubt that such a state of affairs, if proved to exist, could justify the conclusion that laytime began, after the giving of an invalid notice, but before the moment of actual discharge".

The above analysis, while no doubt very erudite, makes it very difficult, if not impossible, for the owners of vessels to establish appropriate facts to prove that the charterers have agreed to vary the charterparty or that the charterers have adjusted their legal relations so that laytime commences, after an invalid notice of readiness, prior to the commencement of the loading or the discharging of cargo.

The Court of Appeal was not even prepared to concede that, by commencing the discharge of cargo, the charterers waived any entitlement to a fresh notice of readiness. Lord Justice Mustill had this to say:-

> "I confess to some difficulty in finding the necessary elements of a waiver in the bare fact that a discharge was carried out …I am content to accept the charterers' concession without further scrutiny, reserving the point for detailed exploration if it should arise in the future".

The above words were, of course, only obiter so as not to be binding albeit that they might have some persuasive effect; not likely with commercial persons but possibly with some lawyers per se (as happened, at first instance, in The "Happy Day"). It was not until some twelve years after The "Mexico 1" that the point was fully canvassed by a later Court of Appeal in The "Happy Day", see below.

6. Turning to the facts of The "Happy Day", the vessel was voyage chartered to carry 23,000 tonnes of wheat from Odessa to Cochin. She arrived off Cochin on Friday, 25 September 1998 and tendered a notice of readiness ("NOR") at 1630 Hours; the notice was invalid as it was a berth charterparty. The vessel entered the port on 26 September and berthed; discharge commenced on that day but was not completed until 25 December mainly because of the absence of original bills of lading or a suitable letter of indemnity. The charterers did not raise any objection to the notice of readiness until six months later, in written submissions to the arbitrators, about the amount of demurrage due to the owners. The notice of readiness was ruled as invalid by the arbitrators but they decided that it had been accepted by the charterers (which turned out to be incorrect) and that laytime commenced on 28 September. The charterers were given permission to appeal on the single issue of whether laytime could commence under a voyage charterparty requiring

service of a NOR when no valid NOR was ever served. The arbitrators were reversed by Mr Justice Langley in the High Court on the basis that where discharge commenced without a valid NOR having been tendered, even with the knowledge and consent of the charterers or their agents, and without any protest or reservation on their part, laytime did not start; in his view, to find for the owners would be to re-write the contract as if the notice provision contained the words, "…and in any event laytime commences when discharge begins". He was obviously much influenced by the obiter of Lord Justice Mustill in The "Mexico 1". The owners appealed to the Court of Appeal where the judgement was reversed. Variation by agreement, waiver and estoppel by convention were fully argued in the Court of Appeal as was the "futility" contention of the owners (no need to give a notice of readiness if the charterers knew that the vessel had arrived and was ready, as such would be futile). Variation by agreement was dismissed by the Court because of no positive offer and acceptance by way of the conduct of the parties, and the futility contention was also dismissed on the basis that the well known Barrett Brothers v. Davies decision (Lord Denning – the law never compels a person to do that which is useless and unnecessary) was propounded in the context of a case of unilateral waiver (where the terms of a contract included a provision inserted entirely for the benefit of the insurer) and, like the later decisions in The "Mozart" and The "Chanda", involved the application of the principle in different circumstances which were not concerned, as here, with the service of a notice which had not merely the function of conveying information but also the function of bringing into effect a particular provision in the contract in a particular manner (a NOR) ; the application of Lord Denning's principle would be to extend it beyond that anticipated by him at the time. Estoppel by convention was also dismissed by the Court on the grounds that the facts found by the arbitrators were inadequate to sustain an inferred estoppel by convention (some mutually manifest conduct by the parties which was based upon a common assumption which the parties have agreed upon).

All of the above decisions were, strictly speaking, obiter dicta and not therefore binding because of the Court of Appeal's decision that the owners' appeal succeeded on the basis of a waiver by the charterers, see below.

7. Lord Justice Potter, giving the judgment of the Court of Appeal, concluded that laytime could commence under a voyage charterparty requiring the service of a NOR (when no valid NOR had been served) provided :-

   (a) A NOR valid in form (albeit invalid because the vessel was in the wrong place) was served upon charterers or receivers, as required by the charterparty.

(b) The vessel thereafter arrived and was, or was accepted to be, ready to discharge to the knowledge of the charterers.

(c) Discharge thereafter commenced to the charterers' or the receivers' order without any intimation that the previous NOR was being treated as rejected or an indication that a further NOR was required.

The legal doctrine which supported the above was waiver; the charterers were to be treated as having waived reliance upon the invalidity of the original NOR and laytime would be treated as having commenced as if a valid NOR had been served at that time.

8. While the decision as set out in paragraph 7 above goes down well with commercial persons and many others, it does not satisfy the legal purist because of silence by charterers not satisfying the requirements of waiver in respect of freedom from ambiguity and equivocality; however, there have been cases in the past, albeit relatively few, where silence has amounted to a waiver. But let us forget the legal purist (fortunately very small in number in the maritime legal world) and far better to remember the words of the famous and great Justice of the United States Supreme Court, Oliver Wendell Holmes (attractive to maritime commercial persons) in that, "the life of the law has not been logic, it has been experience". The Court of Appeal decision in The "Happy Day" is to be welcomed although it does, because of what has been set out in paragraph 7 (c) above, pose the question of what happens (in identical or similar circumstances) if the charterers or the receivers intimate that the previous NOR is rejected or indicate that a further NOR is required, prior to the commencement of the loading or the discharging of cargo. This will usually not arise, in practice, but may do so on particular occasions and if it does a shipowner will have to ensure that another NOR is tendered otherwise laytime will not commence and the charterers will be entitled to despatch money. This brings me around to the point (made by me over the years) that shipowners should give serious consideration to making a radical approach to the tendering of a NOR and should be thinking of a notice of arrival (NOA) clause in their charterparties whereby laytime commences as soon as the vessel arrives at or off the pilotage area of the port (advocated by me for years) or, at least, to get provided in the charterparty that the charterers will be deemed to have accepted the NOR and the commencement of laytime once the loading or the discharging of cargo commences.

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