

ARRIVED SHIP AND DEMURRAGE:
AN ENGLISH AND A SWEDISH APPROACH

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1. Let us imagine a tramp vessel coming into port with her cargo after a hard voyage. She is now in sheltered waters, and those on board can see the church spires and the taller buildings of the city they are heading for. A little later they can also make out the cranes in the area where ships are being loaded and discharged, turning and swinging in the distance. But the ship is not yet admitted into that busy area. She must wait here, practically in sight of the loading and discharging ships, because no berth is free for her.

Has the ship completed her voyage? Has she “arrived” at her port of destination?

Let us ask the captain. He has gone through fog, storms, sleet and all sorts of foul weather on his way across the sea. He is now waiting in front of the agreed place of delivery. To him the question seems ridiculous: of course he has completed the voyage! Of course the ship has “arrived”!

Next, let us ask the charterer. He is paying for a maritime service, i.e. the transportation of the goods from A to B. But at both A and B he has the right to order the ship to a place of his choice, where he himself can conveniently deliver and receive the cargo. The ship is now waiting off B for the order, but the charterer cannot give it, because he has no berth to send the ship to. I think he will have to admit, albeit reluctantly, that the ship has done what can be required of her for the time being.

Now let us ask the courts. They are faced with the question because in tramp shipping the law distinguishes between the voyage—or “carrying” stage of the transport—and the terminal or loading and discharging stages. Delay during the voyage is the carrier’s risk, while delay during the terminal stages is to a large extent the charterer’s risk, because the charterer’s engagement in the terminal proceedings may be a cause of delay to the ship. So the courts must decide whether they consider the voyage to be at an end, or in other words, whether they consider the ship to have “arrived” at the port of loading or discharge.

The courts in different countries have different ways of tackling the problem. I shall illustrate two different types of approach by attempting to view the situation, in fictitious cases, through the eyes of an English and a Swedish court, and what I have to say about the Swedish court will not be

fundamentally different from the approach of many Continental courts. We shall assume, of course, that the courts are applying their own domestic laws.

2. But before presenting any solutions, let us examine the situation more closely, considering in particular the function of the “arrival” point which the courts have to determine.

As I mentioned, the ship’s duty is essentially the performance of a maritime service, namely the moving of the goods along with the ship. As soon as the ship is stopped by other than nautical conditions—the nautical ones being by their nature incidental to the carrying obligation—this job of carrying is over, and we have reached a twilight zone where there is cause for a redistribution of the risks between the parties. Sometimes the parties provide for this new risk division in their contract, but often they leave the matter open or express themselves unclearly. It is then for the court to make the risk division.

The courts, in their decision-making, develop instruments for future contractors, to be used by them in shaping their relationship. “This formula”, says the court, “gives this result.” “That formula gives that result.” And no formula at all gives such-and-such a result. However the courts choose to divide the time risks between ship and charterer when the ship is stopped on her way to the place where she can discharge, it is essential that they should do it in such a way as to *provide future contractors with suitable instruments for shaping their relationship in an economically efficient manner.*

The usual instrument for dividing time risks between the parties is the provision of a fixed or determinable laytime, with a rate of demurrage to be paid by the charterer for delay thereafter, as compensation for the ship’s loss. One important purpose of this arrangement is that it should enable the shipowner to plan ahead. The shipowner must be able to count with reasonable certainty upon the sufficiency of the laytime which he reserves at each port for the temporary immobilization of his ship. The threat of having to pay demurrage should deter the charterer from protracting the operations beyond the laytime. This enables the tramp owner to fix his schedule for the ship so that she can operate profitably; and profitable ship operations should, in the long run, bring the freights down.

But this need for future planning is not the only factor of importance. The shipowner can plan with a certain amount of flexibility, reserving a more or less ample margin for the beginning of each future shipment, and to a certain extent he can also make up for lost time by forcing ahead at increased speed and bunker cost, just as he can slow down if the ship is

ahead of schedule. To the extent that an exact keeping of the ship's schedule is without interest for the shipowner, another factor gains in importance, namely, the function of demurrage as a *substitute* for the freight; it immunizes the ship against loss through delays at the various ports. An adequate demurrage rate protects the shipowner from unexpected losses and allows him to operate profitably without undue margins for delays. In this short presentation I shall concentrate on this aspect, which is the more important one for relatively moderate delays—such as regularly form part of the shipowner's everyday experience.

The shipowner's cost for his ship during the laytime must, of course, be covered by the freight, and thus the longer the laytime, the higher the freight must be. In practice the laytime is often longer than necessary for loading or discharge because it includes a margin for possible delays. If the shipowner cuts down the laytime to a minimum he must be prepared to lower the freight, not because the ship will get off any earlier, but because the charterer will have to pay for the delay. Let us suppose for the sake of simplicity that the shipowner lowers his freight by the amount of the demurrage due for the expected delay—he cuts the laytime by a day, for which a thousand pounds will be payable as demurrage, and lowers his freight by the same amount—and let us leave out the special complication of despatch money. It is easy to see that, as long as the actual delay stays within the limits of that which the shipowner would normally reserve, it is better for the charterer to pay demurrage than the higher freight, since the ship in fact loses less time than the shipowner would have covered by that freight. Which of the parties should undertake the risk of delay beyond the strict minimum will depend, clearly, upon who can best foresee such delays and cope with them.

The laytime is intended mainly for loading and discharging. Assuming there are no delays in these operations—and such are not part of our subject—we can calculate with a certain amount of precision the most economical length of loading and discharging times for each ship.¹ These optimal periods vary in length according to whether or not it pays to use overtime work for the ship. To us the important thing is that *the fixed laytime must be made into a suitable instrument for parties who are prepared and able to calculate the laytime with precision and in awareness of its money-saving possibilities.*

Now, as concerns our problem of a ship prevented from getting into berth, we can distinguish a number of type situations. First, let us imagine a shipowner who controls the waiting periods at the port or who has good

reason for not expecting any delays. This shipowner will be prepared to undertake to reach a berth at the port and bear the risk of any obstacles on the way there. But once at the berth, if he is economically minded, he wants the laytime to be triggered off as soon as the work can be expected to begin. And the economy-minded charterer will agree with him, because he will know that this is the way to get the freight down. The court, to meet the needs of such economically minded parties, should take care that the laytime is made available just for the operations for which it has been cut out, and that it is not extended unnecessarily by free time.

Again, the *charterer* may have such control or such knowledge of the situation at the port that *he* is willing to bear the risk that our ship may be stopped at the approaches. This he may do by undertaking to let the laytime start as soon as the ship reaches the port, or to let it run when she is unable to proceed owing to lack of quay space at the port. The former is often taken to be the purpose of the so-called port charter, where the carrier only undertakes to go to a certain port and load there, and the latter is the generally accepted effect of various "waiting-for-berth" clauses which have been introduced in late years. Here the courts should shape the fixed laytime instrument to fit the needs of him who calculates an optimum loading or discharging period, and who would allow in excess of that period only the normal steaming time necessary to reach the berth and get the work started.

What I have said about parties who control the berths or who can foresee that there will be no delay applies correspondingly where both parties do foresee a certain delay, but are differently placed to evaluate it. He who can evaluate the odds best should take the risk. Suppose the charterer can foresee that there may be up to five thousand pounds' worth of delay, but the shipowner—who is less at home at the port—must calculate upon anything up to £12,000, it is clear that the shipowner must make a larger reservation in his freight than the charterer needs to make in respect of probable demurrage. The cheaper contract will be the one where the charterer undertakes to pay demurrage for the waiting time.

Of course, it may be that the charterer can foresee certain hindrances which the shipowner cannot, and is prepared to accept the risk of these, but not of others. Often what the charterer may be able to foresee better than the shipowner is such matters as congestion, while on the other hand he will seldom be prepared to accept marine risks, such as storms, tides, and fog. Risks which the charterer does not want to bear can be excepted by an exemption clause, provided it is framed in terms which clearly protect the charterer.

But even without any exceptions, it does not seem likely that our "port"

charterer has really intended to bear all waiting risks that the ship may encounter after reaching the port. Rather, one would assume that since the parties made no provision for port risks they left these to be divided in some equitable way by the court. For why should the naming of a port to go to—the most natural and indeed indispensable element in any voyage charter—be regarded as an indication of some particular risk division? How can it be thought that the parties meant the shipowner's carrying obligation to be over as soon as the ship has arrived within the boundaries of the port which they have named, leaving the shipowner to the complacent reflection that the further progress of the ship is now the charterer's business? It seems to me that the conscious contractors whom we must always have in mind would use this form of charter because it is simple and relieves them from speculating about imaginary hindrances and providing for these. But they would still require a risk division to be made on sound economic principles.

3. Now we return to our ship, riding at anchor and waiting to be admitted to a berth where she can discharge her cargo. She is under a port charter, and the port is the one whose cranes we can see swinging to and fro in the distance. The charterparty makes no exception for congestion. We are in the year 1972, and the question is raised before an English court whether the laytime for this ship can begin.

The court, with complete familiarity, will review an impressive number of cases cited by counsel and will then concentrate on a crucial issue: *What did Lord Justice Kennedy mean when he said, in the Leonis case from 1908,² that in a commercial document a "port" must be conceived of in a commercial sense and that the ship must have reached the "commercial area" before the laytime can begin?* The court will then proceed to the *Aello* case from 1961³ and will discuss what Lord Justice Parker in the Court of Appeal may have meant that Lord Justice Kennedy meant in *Leonis* and whether Lord Justice Parker was right in thinking that Kennedy's "commercial area" was *that part of the port where the ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available*. As a result, in 1972, the court would conclude that the parties must have "intended" to place the entire waiting risk upon the shipowner; the ship has not performed her voyage until she is among those swinging cranes, and the laytime cannot begin until then.

Let us suppose that the same case comes up today, in 1975. The court

² *Leonis S. S. Co. v. Rank* [1908] 1 K.B. 499, 519f.

³ *Agrimpex Hungarian Trading Co. v. Sociedad Financiera de Bienes Raices S.A.* [1958] 2 Q.B. 385, [1958] 2 Lloyd's Rep. 65, *affirmed sub nom. Sociedad Financiera de Bienes Raices S.A. v. Agrimpex Hungarian Trading Co.* [1961] A.C. 135, [1960] 1 Lloyd's Rep. 623.

will increase its list of authorities by *The Johanna Oldendorff* from 1973⁴ and will observe that the Lords in that case finally decided what Lord Justice Kennedy really meant in *Leonis*, and that it was not what had been thought in the *Aello* case. So we now know what our parties intended by naming a port as destination: they meant that it was the charterer and not the shipowner who should bear the waiting risk, provided the ship has reached the "port" in a more general sense than the "commercial area". If the place where our ship is anchored is in the usual waiting area for the port, there is a *prima facie* case that the ship has arrived.

But suppose the cranes which are swinging to and fro on the horizon belong to two distinct ports, designated by different names, and that our ship has one of these ports as destination. Suppose further that the waiting area is common to both ports, so that it cannot be said by any stretch of imagination that the ship has reached either one of them. Then the court must say that the ship has not arrived, and as is shown by the recent *Maratha Envoy* case⁵ it will not help the carrier to send the ship on a short trip up to the port, to prove that she is physically capable of completing her voyage to it. The parties' intention was apparently the contrary one again—that the shipowner has undertaken the whole risk.

Now we present our situation to a Swedish court. The members are not very familiar with the subject, but will consult the Swedish Maritime Code. Under its sec. 82 they will find that the laytime does not begin until the ship is ready in berth, in accordance with a notice of readiness which can be given when the ship has reached the "locality" for which she is bound, and under sec. 83 they find that if the ship is prevented—after reaching the "locality" and giving the notice—from reaching her berth by congestion or other circumstances which the carrier could not reasonably foresee, laytime runs where she is waiting.

There may be some doubt whether our ship has reached the relevant "locality". The court will check the Scandinavian cases but will find none on the meaning of the word in question, which was introduced in 1936. They will then turn to the legislative history of the Code, and though they will find no definition of "locality" there, they will see that the demurrage regulation was conceived of by the legislator as a division of risks which ought to harmonize with the respective tasks allotted to each of the parties. The court will conclude that the exact definition of "locality" is not crucial where the voyage is substantially performed, but that the decisive issue is rather whether the prevention relates to the ship's job of carrying or the charterer's duty of providing a berth. On this there can be no doubt: the

⁴ *Oldendorff & Co. G.m.b.H. v. Tradax Export S.A.* [1973] 2 Lloyd's Rep. 285.

⁵ *Federal Commerce and Navigation Co. Ltd v. Tradax Export S.A.* [1975] 2 Lloyd's Rep. 223.

risk is borne by the charterer, though the shipowner remains responsible for navigational risks until the ship is berthed.⁶ The court will be fortified in its decision by two earlier Supreme Court cases—decided before the introduction of the “locality” test—in which ships were held to have “arrived” under dock charters even though in one case the vessel had to wait outside the dock gates (1926 ND 379) and in the other case it was ordered to a neighbouring port to wait there (1931 ND 193).

I might continue this presentation by an exposition of the German law on the subject, where the discussion has turned mainly on the meaning of the Code’s requirement of reaching a customary loading place, or of the French law, where a pro-charterer solution has resulted from the prevailing conception that demurrage constitutes damages which cannot be due unless the ship is in a position where she can be worked, or of the Italian cases, which are strongly influenced by English case law. However, what I have already said should be sufficient for the point which I wish to make. And for this purpose the actual solutions found in various systems are less interesting than the wide difference of approach which we find between a basically formalistic method and a more economically orientated one.

4. I have sought to confront two systems—one where the courts are thoroughly familiar with the subject but too little concerned with the economic purpose of the transaction, and another where the courts are forced by their very lack of familiarity with the subject to adopt a realistic approach to the economic problem. It may, of course, be said that the straight-jacket solution of the English courts is conditioned by the case-law system and the vast number of precedents which have to be taken into account, but I do not think that is the whole truth.

In 1971 the case of *Christensen v. Hindustan Steel Ltd*⁷ raised the question whether notice of readiness might be given before the ship was actually ready, though in time for her to become ready by the beginning of the laytime. The idea was, of course, that the ship would like to use the “free time” between notice and laytime for preparations, so that the laytime would be the actual time needed for loading. It is absolutely clear that our conscious contractors who intend to save money by providing an exact and optimal laytime need one which is not going to be extended by further periods during which the charterer has the ship at his disposal.

The leading English books on the subject stated, however, that a ship must be ready for loading before giving notice, so that the free time would

⁶ On the Swedish courts’ application of legislative material, see, in particular, Schmidt in *1 Sc.St.L.*, pp. 155 ff., especially pp. 185 f. (1957).

⁷ [1971] 1 Lloyd’s Rep. 395.

run after that, and postpone the beginning of the laytime. There were also some dicta which appeared to be to the same effect, although one or two of these might have been cited to the contrary. But, as Mr Justice Donaldson stated in the beginning of his judgment, the matter was not authoritatively decided. Still, His Lordship based his decision on those dicta which the books regarded as orthodox. It was held, not only that advance notice is in general unacceptable, but also that the master cannot even expressly declare that his notice is given for a later moment of time, unless a right to do so is specifically granted by the charterparty. Thus the court, though technically unbound by precedent, chose the orthodox rather than the economic solution.

In *The Johanna Oldendorff*⁸ the courts considered themselves technically bound by the previous *Aello* decision to say that a ship cannot “arrive” unless she has reached that commercial area of the port where she “can be loaded when a berth is available, albeit she cannot be loaded until a berth is available”. When finally the Lords decided to overrule *The Aello* they did not content themselves with restating the law as they thought it ought to be, but turned and twisted the words of Lord Justice Kennedy in *Leonis* to try and make them support the new solution. Only Lord Diplock stated his proposition in general terms and expressly refrained from “a minute verbal analysis of the judgments in *Leonis v. Rank*”. I do not think I am alone in finding that Lord Diplock’s is by far the more interesting and constructive of the judgments given in that case.

While *Johanna Oldendorff* can be said to illustrate two widely different approaches to the use of precedent in commercial law, there is no doubt that it also breaks new ground in the law of demurrage concerning the arrived ship, and it has significantly widened the scope for further development of the law. But the limits of these possibilities are clearly set—they are firmly posted at the outer limits of whatever can possibly be referred to as the “port”—and the removal of these limits requires a new and free way of thinking which is hard to reconcile with the courts’ traditional deference to precedent and in particular with that slavish adherence to prior judgments which allows itself to be guided by “a minute verbal analysis” of words and phrases.

5. Indeed, there is reason to suspect that a case-law system built up by piecemeal application of rules designed for construing individual contracts is not the most fertile ground for the development of purposeful economic planning tools. Here demurrage is but one example, and there is reason to

⁸ *Supra*, note 4.

question the capacity of the common law for the furtherance of economic aims in other fields of commercial law as well. While Continental and Scandinavian courts also have their authorities, these favour a more generalizing approach, and the prevailing freer evaluation of precedent is less apt to lead the courts into entanglements.⁹

Since the days of Britain's undisputed preeminence in the shipping industry, English courts and the English legal profession have maintained the lead in the adjudication of shipping disputes, especially in chartering and demurrage matters. Their unparalleled familiarity with the relevant issues, coupled with a consistency of adjudication based upon *stare decisis* and assisted by a highly developed reporting system, have earned them the confidence of the shipping world, and English arbitration has become a standard feature in many charterparties, even where they have no other substantial connection with England. In days of hardening competition and decreasing profit margins, however, there arises a new need for economic efficiency, which English law is not at present well fitted to satisfy.

But the shipping world also needs uniformity of law, and is this to be expected from the various jurisdictions in Europe and the world over? There are different possible answers to this. The standard answer when solutions have become too diverse for the commercial world is to ask for a convention. This proposal had no success at Athens in 1961, and the time is certainly not yet ripe for it. But there are other possibilities, which this paper is not the right place for expounding. With good will and the cooperation of the shipping industry the problem could certainly find a very satisfactory solution.

⁹ However, the recent *Darrah* decision in the Court of Appeal (*Aldebaran Compania Maritima S.A. v. Aussenhandel A.G.*, November 20, 1975), decided after the time of writing and not yet reported, is a hopeful sign in the demurrage area. It was thought to be settled law that the so-called "time lost waiting" clause—devised to overcome the inconvenience resulting from the English interpretation of the "port" charter—must be construed as being entirely independent of the laytime clause. According to this construction, it was better for the shipowner to be prevented from "arriving" than to arrive and find a berth but be prevented from working the ship there. The Court of Appeal, overruling a considerable number of well-established cases, cited and relied upon in all the textbooks, said that the question was simply one of construction, and that as a matter of construction it was "simply not permissible to treat the 'time-lost' clause in this way".