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THE HAPPY DAY AND ISSUES OF THE INVALIDITY OF A NOTICE OF READINESS UNDER ENGLISH LAW

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In the absence of contract or custom, there is no common law requirement that the shipowner should give a notice of readiness to load or discharge to the charterers.[1] However, voyage charter forms usually provide for a notice of readiness. In most voyage charterparties, a valid notice of readiness to load or discharge is tendered when two conditions have been met:[2]

(a) When the vessel reaches the point designated in the charter as the place where the charter says it can be given, i.e. when the vessel is an "arrived ship."[3]

(b) When the vessel is in all respects (physically and legally) ready to load/discharge,[4] and

If free pratique is an added condition, this condition is fulfilled.[5]

For some time it was accepted that in some cases, if the vessel was not ready to load or discharge when the notice of readiness was given, the notice was treated as inchoate and it was considered complete when the vessel was ready to load (or discharge).[6]

The opinion that a premature notice of readiness took effect when the vessel was in fact ready was supported by Diplock J. in *Government of Ceylon v. Société Franco-Tunisienne d'Armement –Tunis (The Massalia No 2).*[7] By

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[1]Nelson v. Dahl (1879) 12 Ch D 568, at 583.

[2]Gill & Duffus S.A. v. Rionda Futures Ltd [1994] 2 Lloyd's Rep. 67.

[3]Zim Israel Navigation Company Ltd v. Tradax Export S.A. (The Timna) [1970] 2 Lloyd's Rep. 409; [1971] 2 Lloyd's Rep. 91.

[4]By a clause in the voyage charterparty, this requirement can be excluded, as was accepted in The Linardos [1994] 1 Lloyd's Rep. 28; C.Hobbs, R.Driver, "Unhappy Day for Owners" (2001) 1(4) Shipping & Trade Law 9-12, at 11; London Arbitration 7/04- LMLN 636, 31 March 2004, at 3-4.

[5]London Arbitration 14/86- LMLN 179, 11 September 1986, at 4.

[6]London Arbitration 14/86 LMLN 179, 11 September 1986, at 4.

[7]Governement of Ceylon v. Société Franco-Tunisienne d'Armement –Tunis (The Massalia No 2) [1960] 2 Lloyd's Rep. 352.

a voyage charterparty (Gencon charterparty form),[8] the vessel was chartered for the carriage of a part cargo of flour. The shipowners loaded other cargo en route, which overstowed the above cargo.[9] The vessel arrived and a notice of readiness was tendered. Because of the unavailability of a berth, the ship waited in the usual waiting area. This place was the outer anchorage and within the legal, fiscal and geographical limits of the port. It was as near as circumstances permitted to the actual discharging berth. Afterwards the cargo was discharged.

Diplock J. held that at the time the notice of readiness was given the vessel was ready in every respect to begin discharging the cargo. When the charterparty referred to 'cargo', it meant the flour cargo, and under clause 6 readiness to discharge referred to readiness to discharge the flour cargo and not the cargo overstowed upon the flour cargo. Laytime did not begin until all the flour cargo was accessible. He stated that an authority existed according to which, when notice of readiness was given before the vessel was in fact ready, no further notice of readiness was required,[10] because this notice could take effect when the vessel was in fact ready to discharge. This was the doctrine of "inchoate" notice of readiness. A notice was considered "inchoate," i.e. just begun and therefore not clear or developed. This meant that it was not effective when it was given without the requirements of a valid notice being met. However, the notice was not considered invalid. Although it did not have any effect when tendered, it became effective later as soon as the loading or discharging began. This doctrine was adopted by the courts until *The Mexico 1*.[11]

The doctrine of inchoate notice of readiness is apparently in favour of the shipowners. By tendering an inchoate, non effective notice the shipowners fulfil their obligations and it is the charterers' responsibility to do their part so that loading or discharging commences and consequently laytime starts. It is unfair for the charterers to be forced to accept the existence of this doctrine because when they concluded the charterparty they agreed with the shipowners that a valid and effective notice of readiness should be given. This contractual obligation of the shipowners is abolished by this doctrine. Of course, someone might support the opinion that because the notice only becomes effective when the vessel is in fact ready the charterers have real

[8]Clause 6 of the Charterparty provided the following (inter alia): "6 . . . Time to commence at 2 p.m. if notice of readiness to discharge is given before noon, and at 8 a.m. next working day if notice given during office hours after noon. Time lost in waiting for berth to count as discharging time."

[9]Clause 30.

[10]Ibid, at 358.

[11]Transgrain Shipping B.V. v. Global Transporte Oceanico S.A. (The Mexico 1) [1988] 2 Lloyd's Rep. 149; [1990] 1 Lloyd's Rep. 507.

knowledge of the vessel's arrival and readiness. However, it may be suggested that this doctrine is against the charterparty clauses. If the parties agreed for a valid notice of readiness, then no doctrine can change this agreement and clause. This would be against the parties' freedom of contract. The only case in which that would be acceptable would be if there was a further agreement or a waiver to a new valid notice of readiness. Consequently, the Courts correctly abandoned this doctrine of inchoate notice of readiness in *The Mexico* ruling.

A very important case, in which the doctrine of "inchoate" notice of readiness was rejected, is *Transgrain Shipping B.V. v. Global Transporte Oceanico S.A. (The Mexico 1)*.[12] By a voyage charterparty,[13] a vessel was chartered for the carriage of maize. Another cargo was also carried for the charterers under another agreement. When the vessel arrived, the master gave notice of readiness to discharge. Due to the fact that the cargo was overstowed by other cargo, these two cargoes were not accessible until later.

A dispute arose concerning the commencement of laytime and it was referred to arbitration. The charterers appealed after the award had been issued, as they did not agree with the arbitrators that the inchoate notice of readiness became effective and complete when the maize cargo was fully accessible.

Evans J. held that when the charter required a notice of readiness to be given the charterer was entitled to insist that laytime could not begin until the notice had been given, unless he so acted as to waive that right, in whole or in part. The Court of Appeal held that the contract required a notice of readiness in order for laytime to begin. No waiver or agreement to vary this requirement could be inferred. The notice of readiness was invalid. The acceptance of the NOR had no effect on its invalidity. It was also held that laytime did not begin before discharging started.

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[12]Transgrain Shipping B.V. v. Global Transporte Oceanico S.A. (The Mexico 1) [1988] 2 Lloyd's Rep. 149; [1990] 1 Lloyd's Rep. 507.

[13]It has to be mentioned that clause 24 provided the following: "24. At loading and discharging ports Notice of Readiness shall be delivered in writing at the office of the shippers/receivers or their Agents, unless the vessel has to wait outside the commercial port when the Master has the liberty to cable Notice of Readiness, during normal office hours, whether in berth or not, whether in port or not, whether in free pratique or not, and whether custom's cleared or not . . . Time to commence to count next working day 08.00 a.m. whether in berth or not."

In *The Mexico 1*, there was a radical change in jurisprudence. The acceptance of an invalid and inchoate notice of readiness was no longer enough[14] as it was in *The Shackleford*.[15]

Mustill L.J. referred to an "estoppel by convention" which was a situation in which the parties, having conducted themselves on the mutual assumption that their legal relations take a certain shape, could not afterwards be heard to assert the contrary. If this kind of estoppel existed, laytime could begin after the giving of an invalid notice of readiness, but not before the moment of actual discharge.[16]

Although Mustill L.J. accepted that laytime commenced when discharge commenced, he did not accept that there was an inchoate notice of readiness, taking effect later. He concluded that the parties agreed in the charterparty to a tender of a valid notice of readiness. If an invalid notice had been accepted as effective later, this would have been contrary to the charter terms. This would have extinguished the right and freedom of the parties to conclude a charter and its terms as they wanted.[17]

He rightly said that the charterers often may not know when the vessel becomes ready so that an inchoate notice becomes effective.

The parties had rights under the charterparty, such as the giving of a notice of readiness but they could waive them. Waiver should be assumed to exist when discharge commenced but this act alone was not enough. It had

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[14]The Mexico 1 [1990] 1 Lloyd's Rep. 507, at 512: Mustill L.J. said: "For this purpose it is necessary to distinguish between the idea of the inchoate notice of readiness in its purest form, and a modified version advanced by Mr Hunt in his able argument for the shipowners (and I believe preferred by the arbitrators). The former posits that the invalid notice automatically takes effect, without more, as a notice at the moment when the ship becomes ready. I find this notion impossible to accept, for more than one reason.

To start at the beginning one must ask whether the laytime would automatically begin upon the ship's becoming ready, even if no notice was ever given at all. (I stress "automatically" because for the time being I exclude special facts, which might found an express or implied agreement, waiver or the like). The owners have not sought to assert an affirmative answer, for such a proposition would be unarguable in any case where the charterer expressly relates laytime to the giving of a notice. One must then enquire what reason there would be for reaching a different answer when the master had given a notice stating that the ship was ready when she was not? If there is any reason, it must be found in the idea that the master's message, which was not a valid notice and which, moreover, stated something which (in terms of English charter-party law) was untrue; it nevertheless had validity as an 'inchoate' notice . . . ."

[15]Surrey Shipping Co Ltd v. Compagnie Continetale (France) S.A. (The Shackleford) [1978] 2 Lloyd's Rep. 154. This case is analysed hereafter in this section.

[16]Ibid, at 514.

[17]Ibid, at 513: Mustill L.J. said:"Here, as is nowadays commonplace, the parties have stipulated for the giving of a notice to be the trigger for the charterers' obligations. There must have been some reason for this. Why construe the clause as omitting half the requirement for a valid notice of readiness? And why above all construe it as starting the charterers' obligation by reference to an event (namely readiness) happening at a precise moment of which he has no notice and may be completely unaware? I can see no ground for such an unbusinesslike reading of a perfectly clear contract."

to be proved that by accepting the commencement of discharge, the charterers had waived their right to a new notice of readiness.

It may be suggested that discharging or loading should be construed as a waiver to a valid notice of readiness. By allowing these acts the charterers may show that they have knowledge of the vessel's arrival and readiness and they accept the invalid notice of readiness. As persons with experience in the shipping business, they would have complained immediately of the notice's invalidity and they would not have permitted the beginning of loading or discharging.

Although the vessel's arrival can be acknowledged immediately and easily, this is not the case for the vessel's readiness. Readiness is usually ascertained when the first steps for loading or discharging start. This means that it is impossible to complain about the invalidity as soon as a notice is tendered.

Furthermore, the requirement for knowledge for the existence of a waiver is missing. The facts and circumstances of each case are of importance and should be viewed carefully.

A solution to the problem of a premature and invalid notice of readiness could be solved by giving more than one notice.[18] In this way, commercial certainty is established and inchoate notices, which take effect upon a later event, are not permitted.

In *T.A. Shipping Ltd v. Comet Shipping Ltd (The Agamemnon)*,[19] similar issues about the notice of readiness and the commencement of laytime were analysed. Thomas J. said:[20]

> . . . the Principles on which the Mexico 1 is based are straight forward, easy to operate and give rise to far fewer problems than contractual language that would enable 'inchoate' notices to be given which would take effect upon a further event stipulated in the charter-party.

About the effect of an 'inchoate' notice of readiness, it was commented that persons in the shipping community could accordingly modify the charterparties' clauses for their commercial needs.[21] It could be provided that the inchoate notice would be effective when a further event took place. In the absence of such a provision, an invalid notice could not be regarded as "inchoate" and, effective and valid later.

It was emphasized that a contract was very important and could not be ignored. When a contract existed, there should not be any differentiation

[18]Ibid, at 513.
[19]T.A. Shipping Ltd v. Comet Shipping Ltd (The Agamemnon) [1998] 1 Lloyd's Rep. 675.
[20]The Agamemnon [1998] 1 Lloyd's Rep. 675, at 681.
[21]Ibid, at 681.

from its clauses,[22] unless there was a new agreement by the parties or a waiver by conduct, as will be analysed hereafter.

It was held that the test for validity of the notice of readiness did not concern the geographical position of the vessel. It did not matter if the statement in the notice of readiness was true or not about the geographical position or about the fact that the vessel had reached the point which was nearest to the port or berth. What was of significance was the fact that the condition in the charterparty about the notice of readiness had been met and the vessel was at the point stipulated in the charterparty where the NOR could be given when it was given. There was no difference between an invalid notice, which was a 'nullity' and a notice, which was 'inchoate' and effective, later.[23]

It can not be accepted that it does not matter if the statement is true or not, as this statement concerns the arrival of the vessel. If the master lies about the position of the vessel the notice is invalid and fraudulent. It has been held that an untruthful or inaccurate notice was invalid and the statements should be of existing fact.[24]

The situation is different when the notice of readiness is tendered outside the stipulated hours in the charterparty,[25] as was the case in *Galaxy Energy International Ltd v. Novorossiysk Shipping Co (The Petr Schmidt)*.[26] The Court of Appeal held that a notice was invalid if the statements made in it were in fact incorrect when the notice was tendered, received or given. It did not follow that the statements could not also relate to the time when they were made. The primary requirement was that they should be statements of existing fact.[27] There was an implied representation that the statements were accurate at the time of the tender but this did not mean that the notice was invalid because the statements were made at some earlier time. Although the notices were "received" by the charterer's machine at the same time as they

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[22]Ibid, at 678, 679: Thomas J. said: "At the same time, a contract is a contract. If the consequence of reading the contract as if it meant what it said is that, for instance, a master who is uncertain whether his ship is 'arrived' or whether it is 'ready' may find it prudent to give more than one notice-an inconvenient consequence-this comes about not because Courts are more pedantic than commercial men, but because the commercial men who wrote the charter-party chose to make laytime to refer to the happening of a particular event. I do not believe that any tribunal, whether Courts or arbitrator, does service to the interests of practical commerce by enforcing the parties' rights as if the contract had expressed the commencement of laytime in terms of some quite different event."

[23]Ibid, at 680.

[24]Galaxy Energy International Ltd v. Novorossiysk Shipping Co (The Petr Schmidt) [1998] 2 Lloyd's Rep. 1; [1997] 1 Lloyd's Rep. 284.

[25]London Arbitration 9/98, LMLN 488, 21 July 1998, at 1-3.

[26]Galaxy Energy International Ltd v. Novorossiysk Shipping Co (The Petr Schmidt) [1998] 2 Lloyd's Rep. 1; [1997] 1 Lloyd's Rep. 284.

[27][1998] 2 Lloyd's Rep. 1, at 4.

were sent and even if the office staff might have taken them off the machine or dealt with them before 06.00, the notices were given in writing and by means which were equivalent to leaving them at the offices to be attended at 06.00 the following day under clause 30. It is obvious that this case shows the way that the charterers and the shipowners are operating.[28]

The ruling in *The Petr Schmidt* is correct. A notice of readiness tendered outside the stipulated hours in the charterparty does not include a false statement about the arrival or the readiness of the vessel. Once again this case shows that the Courts are in favour of the shipowner's position and interests. This is justified in this case because it would be unfair to shipowners to have their notice nullified because they tendered it outside the stipulated hours. However, they do not trigger the commencement of laytime earlier than the agreed time in the charterparty. Charterers are also benefited by this ruling, because they can be prepared earlier so that loading or discharging can begin at once, without any delay, which might render them liable.

Even if a notice of readiness is invalid, laytime commences if there is an agreement to that effect between the parties to the charterparty,[29] or a waiver or estoppel regarding its validity. There are two types of waiver:[30] 1) **Unilateral waiver** is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.[31] It occurs when one party only has the benefit of a particular clause in a contract and decides unilaterally not to exercise the right or to forego the benefit established by the particular clause. If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him to do so.[32] 2) **Waiver by election** is concerned with the reaction of someone when faced with the conduct of another, or a particular factual situation has arisen and entitles the former person to exercise or refrain from exercising a particular right to the prejudice of the latter.[33]

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[28]N.Graydon, "Voyage Charters-Notice of Readiness-The Petr Schmidt-Galaxy Energy International Limited v. Novorossiysk Shipping Company" International Journal of Shipping Law (1997) Part 2, 95-96, at 95.

[29]London Arbitration 6/04 LMLN 636, 31 March 2004, 1-3, at 2.

[30]The Happy Day [2002] 2 Lloyd's Rep. 487, at 506.

[31]Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850, at 882, 883.

[32]Barrat Bros. (Taxis) Ltd v. Davies; Lickiss (First Third Party); Milestone Motor Policies at Lloyd's (Second Third Party) [1966] 2 Lloyd's Rep. 1, at 5.

[33]Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850, at 882, 883; Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391.

A waiver cannot be inferred or assumed, but it requires an overt action.[34] However, it is not necessary to make an express declaration about it.[35] There should be an unequivocal and clear communication of one's intention,[36] whether by words or conduct.[37] The waiver must be determined by reference to all the prevailing facts and circumstances.[38] The question of waiver is ultimately a question of law or of mixed fact and law.[39] It is the court's duty to examine any conduct or act which is alleged to be unequivocal in its context for ascertaining a waiver. The Court will also examine any relationship between the person who waives and any person alleged to have made the unequivocal communication on its behalf.[40]

Waiver does not vary the terms of the contract, but it is conduct on the part of a party to a contract which affects his remedies for a breach of contract by the other party.[41]

By applying the principles set out in *Matthews v. Smallwood*[42] to a case of an invalid notice of readiness, a waiver will exist if there is an act by the charterer indicating that he accepts the invalid notice and he has knowledge of the relevant circumstances.[43] The person who alleges release or abandonment or waiver has the onus of proving these. It was held[44] that proof of recognition of a right does not throw the onus of proving absence of knowledge on the other person. This means that if the shipowner proves that the

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[34]Mardorf Peach & Co Ltd v. Attica Sea Carriers Corporation of Liberia (The Laconia) [1977] 1 Lloyd's Rep. 315, at 331.

[35]Bremer Handelsgesellschaft M.B.H. v. Vanden Avenne Izegem P.V.B.A. [1978] 2 Lloyd's Rep. 109.

[36]Mardorf Peach & Co Ltd v. Attica Sea Carriers Corporation of Liberia (The Laconia) [1977] 1 Lloyd's Rep. 315.

[37]Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850, at 881, 882; Bremer Handelsgesellschaft M.B.H. v. C. Mackprang JR [1979] 1 Lloyd's Rep. 221, Italmare Shipping Co v. Ocean Tanker Co Inc. (The Rio Sun) [1982] 1 Lloyd's Rep. 404, Youell and Others v. Bland Welch & Co. Ltd. and Others (The "Superhulls Cover" Case) (No. 2) [1990] 2 Lloyd's Rep. 431, Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391; The Happy Day [2002] 2 Lloyd's Rep. 487, at 507.

[38]Bremer Handelsgesellschaft M.B.H. v. C. Mackprang JR [1979] 1 Lloyd's Rep. 221.

[39]Panchaud Freres S.A. v. Etablissements General Grain Company [1970] 1 Lloyd's Rep. 53.

[40]The Happy Day [2002] 2 Lloyd's Rep. 487, at 507.

[41]Enrico Furst & Co v. W.E. Fischer, Ltd [1960] 2 Lloyd's Rep. 340, at 350.

[42]Matthews v. Smallwood [1910] 1 Ch. 777, at 785: Parker J said: "Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease. It is not enough that he should do the act which recognizes, or appears to recognize, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose . . . If, knowing the breach, he does distain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything. Logically, therefore, a person who relies upon waiver ought to shew, first, an act unequivocally recognizing the subsistence of the lease, and, secondly, knowledge of the circumstances from which the right of re-entry arises at the time when that act is performed."

[43]London Arbitration 10/84 LMLN 387, 3 September 1994, at 2.

[44]Fuller's Theatre and Vaudeville Company, Limited v. Rofe [1923] A.C. 435.

charterer knew the invalidity of the notice of readiness but he did not rejected it, this does not mean that the charterer has the obligation of proving the absence of his knowledge. It is the shipowner's duty to prove that the charterer knew the relevant facts. It is evident that the knowledge of the facts is essential and this might sometimes be difficult to prove.

Therefore, the requirements for a waiver are that the charterer has knowledge of the relevant facts and does some act which unequivocally shows that he is waiving any deficiency in the notice of readiness.[45]

By having the cargo available for loading when the vessel berthed the charterers have been held as treating the notice as valid.[46] Therefore, there was a waiver of the right for a new valid notice. In another case, it was held that although a premature notice of readiness had been signed, the charterers believed that it was accurate. By accepting a nullity, they did not waive expressly or impliedly their right to reject an ineffective notice of readiness.[47] A new valid notice should have been given. This happened because the requirement of the knowledge of the relevant facts was missing in order to have a waiver. It can be added that there was good faith on the part of the charterers that the notice was valid. They had an expectation that the shipowners would honestly and fairly perform their duty for a valid notice of readiness under the charterparty. It must be shown that the person who waived knew the underlying facts relevant to his choice or indication of intention.[48]

It is generally considered that the right, which is waived should be for the benefit of the party who waives.[49] When the right concerns a notice of readiness, the party for whose benefit the right exists is the charterer.[50] If this requirement (about benefit) does not exist, then the Courts cannot conclude that the charterers have waived their right to a notice of readiness. It can be concluded that this is a further requirement for the existence of waiver.

In *Sofial S.A. v. Ove Skou Rederi (The Helle Skou),*[51] the vessel was chartered on a berth charterparty (Gencon form), which provided inter alia that laytime would commence at 1 pm if notice of readiness were given during office hours before noon and at 6 am next working day if notice of readiness

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[45]Plasticmoda Societa per Azioni v. Davidsons(Manchester) Ltd [1952] 1 Lloyd's Rep. 527.

[46]London Arbitration 26/89 LMLN 262, 18 November 1989, at 3-4.

[47]London Arbitration 1/90 LMLN 266, 13 January 1990, at 2.

[48]Matthews v. Smallwood [1910] 1 Ch. 777, Fuller's Theatre and Vaudeville Co v. Rofe [1923] A.C. 435.

[49]Italmare Shipping Co v. Ocean Tanker Co Inc. (The Rio Sun) [1982] 1 Lloyd's Rep. 404, at 409: It was said: "In the present case, the charterers were the persons for whose protection the anti-technicality clause was inserted. The relevant facts for them to know were whether or not the respondents intended to exercise their option to withdraw, if non-payment was not rectified."

[50]Pteroti Compania Naviera S.A. v. National Coal Board [1958] 1 Q.B. 469.

[51]Sofial S.A. v. Ove Skou Rederi (The Helle Skou) [1976] 2 Lloyd's Rep. 205.

was given during office hours after noon. Clause 22 provided that the vessel should be presented with holds clean, dry, and free from smell. This clause was very important, because the chartered vessel had to carry skimmed milk in bags and the previous cargo had been fishmeal in bags. The vessel arrived at Antwerp. Notice of readiness was given before the vessel arrived in the berth and later loading began. Then, it was discovered that the ship was not free from smell. The already loaded cargo had to be discharged so that the vessel could be cleaned. The vessel reberthed later and was reloaded. A dispute arose and one of the questions raised was: What is the effect of a notice of readiness, which is given prematurely?

Donaldson J held that as the charterers had accepted the notice of readiness they could not later claim to reject it, unless upon a ground of fraud, which was not alleged in that case.[52]

It was not permissible to accept an invalid notice of readiness and then reject it. The reason for this might be that the shipowners may have relied on the acceptance and acted accordingly. They would not be expected to change everything and behave differently whenever the charterers changed their mind. If that had been accepted, there would have been uncertainty, confusion and probably economic hardship on the part of shipowners.

By the above, it was concluded that the acceptance estopped the charterer from demanding a valid notice of readiness. The meaning of estoppel will be analysed hereafter in detail.

As was accepted in *The Jay Ganesh,*[53] the parties to a contract -in this case a charterparty- always rely on good faith.

Even though "good faith" is not a general principle of the Common Law, it can be said that it might be implied in the relation between the shipowners and the charterers. Good faith is an expectation of each party to a contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community.[54] Another definition is that good faith in a contract means just and honest conduct, which should be expected of both parties in their dealings, one with another and even with third parties who may be implicated or subsequently involved. Good faith requires that each party should be fair and honest in negotiations and, once the agreement has been reached, that the parties should also perform their respective obligations and enforce their rights honestly and fairly.[55]

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[52]The Helle Skou [1976] 2 Lloyd's Rep. 205, at 214.

[53]United Nations/Food and Agriculture Organisation –World Food Programme v. Caspian Navigation Inc. (The Jay Ganesh) [1994] 2 Lloyd's Rep. 358.

[54]E.A. Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations" 87 Colum. L. Rev. 217.

[55]W. Tetley, "Good faith in contract: Particularly in the contracts of arbitration and chartering" 35 J. Mar. L. & Com. 561, at 564.

In civil law systems, nobody can ignore the principle of good faith, which is taken as granted in contracts. In English law, there is no doctrine of good faith. Lack of good faith while negotiating and performing contracts inevitably results in disputes between the parties.[56]

On the part of shipowners, there is good faith that the requirements are met and the notice of readiness is valid. There is further good faith that the charterers accepted the notice of readiness, valid or not, if they did not reject it immediately when they received it.

On the part of the charterers, there is good faith that the notice is given when the vessel is ready to load or discharge. The existence of this requirement cannot be examined when the notice is tendered as it usually happens with the requirement for an "arrived ship." Readiness will be evident only when the vessel is in the berth for loading or discharging.

In a case of **waiver/equitable estoppel**,[57] a) there should be an unequivocal representation made by words or conduct that a party did not intend to enforce their strict legal rights, b) the other party should have acted upon that representation and c) it would be inequitable in all the circumstances to permit the first party to re-assert their rights.[58] Knowledge on the part of the representor is not necessary, and the estoppel may be suspensory only. The party making his election is communicating his choice whether or not to exercise a right which has become available to him. His representation is therefore in the nature of a promise which has legal consequences. For this reason, it is regarded as a promissory estoppel.[59]

As mentioned above, the representation that a party will not exercise a legal right can be made by words or conduct.[60] A written representation must be given its true meaning and to amount to an estoppel must be clear and unequivocal.[61]

In a case of estoppel by conduct,[62] a person acts in a certain way and he can not depart from a particular state of affairs. This would be unjust for the

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[56]Ibid, at 615.

[57]Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391, at 399; Youell and Others v. Bland Welch & Co. Ltd. and Others (The "Superhulls Cover" Case) (No. 2) [1990] 2 Lloyd's Rep. 431.

[58]Youell and Others v. Bland Welch & Co. Ltd. and Others (The "Superhulls Cover" Case) (No. 2) [1990] 2 Lloyd's Rep. 431, at 449; K. Lokumal & Sons (London) Ltd v. Lotte Shipping Co. Pte Ltd. (The August Leonhardt) [1985] 2 Lloyd's Rep. 28, at 35.

[59]Youell and Others v. Bland Welch & Co. Ltd. and Others (The "Superhulls Cover" Case) (No. 2) [1990] 2 Lloyd's Rep. 431, at 450.

[60]K. Lokumal & Sons (London) Ltd v. Lotte Shipping Co. Pte Ltd. (The August Leonhardt) [1985] 2 Lloyd's Rep. 28.

[61]Woodhouse A.C. Israel Cocoa Ltd. S.A. and A.C. Israel Cocoa Inc. v. Nigerian Produce Marketing Company Ltd [1972] 1 Lloyd's Rep. 439.

[62]Panchaud Freres S.A. v. Etablissements General Grain Company [1970] 1 Lloyd's Rep. 53.

other person who believes this state of affairs as settled.[63] In a case of an estoppel by convention, there must be a mutually manifest conduct by the parties which is based on a common assumption.[64] Estoppel by convention exist in a case, where both parties to a transaction acted on an assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other.[65] Its effect was to preclude a party denying the assumed facts of law because it would be unjust to allow them to go back on the assumption.[66] There should exist mutual manifest conduct by the parties on the common assumption which the parties have agreed on. This agreement might not be expressed, but might be inferred by conduct or silence.[67] It is not enough that each of the parties acted on an assumption not communicated to the other. However, a concluded agreement is not a requirement.[68]

It was further noted that in a case of estoppel if there is silence by one party, he will be estopped from asserting that the facts are other than those which they were mistakenly assumed to be. This kind of estoppel exists only in the case in which the party estopped was under a legal duty to dispel the other party's misunderstanding.[69] Although silence was accepted as a way of representation, in *Allied Marine Transport Ltd. v. Vale do Rio Doce Navegaçao S.A., (The "Leonidas D"),*[70] silence and inaction were of their nature equivocal because there could be more than one reason why the person concerned had been silent and inactive. The owners could not show that they had acted in any way upon any representation by the charterers.

It was said that an estoppel by representation is founded on an agreed statement of facts the truth of which has been assumed by the convention of the parties, as the basis of a transaction into which they are about to enter. A representation of fact made by a representor and believed by the representee is not sufficient.[71]

It was said:[72]

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[63]Ibid, at 57.

[64]Orion Insurance Co. Plc. v. Sphere Drake Insurance Plc. [1990] 1 Lloyd's Rep. 18.

[65]Republic of India v. India SS Co Ltd [1998] AC 878, at 913.

[66]The Happy Day [2002] 2 Lloyd's Rep. 487, at 510.

[67]Republic of India v. India Steamship Co Ltd (The Indian Grace No 2) [1998] 1 Lloyd's Rep. 1, at 11.

[68]The Indian Grace [1998] 1 Lloyd's Rep. 1, at 10.

[69]K. Lokumal & Sons (London) Ltd v. Lotte Shipping Co. Pte Ltd. (The August Leonhardt) [1985] 2 Lloyd's Rep. 28, at 35.

[70]Allied Marine Transport Ltd. v. Vale do Rio Doce Navegaçao S.A., (The "Leonidas D")[1985] 2 Lloyd's Rep. 18.

[71]K. Lokumal & Sons (London) Ltd v. Lotte Shipping Co. Pte Ltd. (The August Leonhardt) [1985] 2 Lloyd's Rep. 28, at 34.

[72][1985] 2 Lloyd's Rep. 28, at 34.

> "When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed."

Therefore, it was held[73] that a reasonable man experienced in chartering and shipping matters, would immediately object to an invalid notice of readiness. The owners would rely on the actions and inactions of the agent/charterer. In this case, the charterers were estopped from contending that the original notice of readiness was invalid, as they did not reject it and their agents accepted it.

Similarly, when a vessel arrived at the discharging port and tendered notice of readiness on the same evening, although the charterparty provided that it should be tendered between 9am and 5pm, it was held that the acceptance of the written notice of readiness was an estoppel from alleging that the notice was invalid. The notice had become effective from the moment that it had been accepted.[74]

In *Surrey Shipping Co Ltd v. Compagnie Continentale (France) S.A. (The Shackleford)*,[75] the chartered vessel arrived at Constantza roads and anchored. Notice of readiness was immediately given and accepted at the same time by the receivers.[76] The vessel was at the usual waiting place and at the immediate and effective disposition of the charterers. Free pratique and customs entry could not be obtained from the authorities at Constantza in accordance with the port regulations at that time until the vessel had berthed. Unfortunately, she could not proceed to a discharging berth because there was congestion.

The Court held that the notice of readiness was a good notice in that the vessel had arrived at Constantza and was ready to discharge but it was premature in that no customs entry had been obtained. Under the terms of the charter, the receivers could have rejected or ignored the notice but they had accepted it and this created an estoppel by conduct so that the charterers could not then allege that the notice was premature. The Court of Appeal held that by accepting the notice of readiness before the vessel had reached

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[73]London Arbitration 6/90 LMLN 274, 5 May 1990, at 4.

[74]London Arbitration 8/92 LMLN 324, 4 April 1992 at 2-3.

[75]Surrey Shipping Co Ltd v. Compagnie Continentale (France) S.A. (The Shackleford) [1978] 2 Lloyd's Rep. 154.

[76]Clause 13 of the Baltimore C grain charterparty provided the following: "Notification of the vessel's readiness at port of discharge must be delivered at the office of 'AGROEXPORT BUCHAREST/CONSTANTZA' or their Agents 'NAVLOMAR CONSTANTZA', at or before 4 p.m. (or at or before 12 noon if on Saturday) on official working days, vessel also having been entered at the Custom House and the laydays will then commence at 8 a.m. on the next business day, whether in berth or not, whether in port or not, whether in free pratique or not."

any berth and before customs entry had taken place, laytime began to run from 8 am on the next business day.

It was held that acceptance of a notice of readiness meant acceptance as an effective notice.[77] By the acceptance, although the notice was premature and accordingly invalid, the receivers treated it as valid and in this way waived their right to another valid notice, when all the conditions were fulfilled. It is noticeable that in order to waive a right someone has to have such authority. Persons with this authority might be the charterers, their agents, or receivers authorised by the charterers. In this case the receivers obviously had authority to accept a premature notice. However, as has been shown in *The Mexico 1*, acceptance is not always enough to create an estoppel or waiver of the right to a valid notice of readiness.

A significant case, which brought a change in the jurisprudence, is *Glencore Grain Ltd v. Flacker Shipping Ltd (The Happy Day)*.[78] By a berth charterparty,[79] it was agreed that the vessel should proceed from Odessa to Cochin.

The vessel arrived off the port, but missed the tide. For this reason, she could not immediately enter the port and waited for the next tide. A notice of readiness was given outside the berth at 16.30 on Friday, 25 September 1998. There was no congestion. No other notice was given, but discharge started the following day. The charterers contended that as it was a berth charterparty, the vessel completed the voyage when she arrived in the berth. After arriving there the master should tender the notice of readiness. The two reasons for the invalidity of the NOR were: a) it had been given before arriving in the berth and b) the vessel was not at the immediate and effective disposition of the charterers. The dispute was referred to arbitration.

The award stated that it was a berth charterparty. The arbitrators concluded that laytime commenced at the same time as it would have commenced if under clause 30 a valid notice of readiness had been given. This meant that

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[77]Ibid, at 159.

[78]Glencore Grain Ltd v. Flacker Shipping Ltd (The Happy Day) [2001] 1 Lloyd's Rep. 754; [2002] 2 Lloyd's Rep. 487.

[79]The charterparty (amended Synacomex form) provided (inter alia) the following: "6. Laytime at loading . . . ports shall commence . . . if written notice of readiness to load is given . . ."

"28. If by reason of congestion the vessel is unable to enter the loading/discharging ports, Master has the privilege to tender Notice of Readiness in accordance with the Charter Party by cable radio and laytime is to commence as per clause 6, 30, 31, whether in berth or not, whether in port or not, whether in free pratique or not, whether entered customs or not, provided vessel has arrived in the commercial area of the port or any anchorage designated by Port Authorities. Shifting time from anchorage or place of waiting to loading/discharging berths not to count . . ."

"30. At first or sole discharging port notice to be given to Receivers/Agents during normal local office hours and laytime to start counting at 8 am next working day, whether in berth or not, whether in port or not, whether in free pratique or not, whether customs cleared or not. Time from Friday 5 pm until Monday 8 am . . . not to count even if used."

laytime commenced on Tuesday 29 September 1998, as the notice of readiness would have been effective on Monday 28 September 1998.

The charterers appealed on a question of law: "Can laytime commence under a voyage charterparty requiring service of a Notice of Readiness when no valid Notice of Readiness is ever served? If so, when does it commence?"

Langley J. held that the fact that discharge had commenced to the knowledge of the charterers without protest or reservation on their part was not a sufficient happening to make laytime start. He relied on the ruling in *The Mexico 1* and *The Agamemnon*, in which it was accepted that a notice of readiness could not be taken as an 'inchoate' NOR, taking effect later when the vessel was ready to discharge the cargo and time could not begin when the charterers knew or ought to have known the vessel's readiness.[80] This also meant that laytime did not commence when the vessel became an 'arrived ship' if the reason for the invalidity of the notice was that it had been given before she had arrived at the stipulated place.

Consequently, the established law was the rejection of the doctrine of 'inchoate' notice of readiness.[81] However, although in both cases (*The Mexico 1* and *The Agamemnon*) the charterers had stated that laytime commenced when the cargo began being unloaded, there was not any similar reference in *The Happy Day*.

Langley J. held that it was not possible to infer any agreement or convention from the mere facts of commencement and continuation of discharge and that an invalid notice was not rejected because that would mean that the charterparty (providing for a valid notice of readiness) would have been totally altered. There had been no estoppel, waiver or implied variation of the contract in relation to the requirement for a valid notice of readiness. The notice of readiness given was not accepted by the charterers.[82]

From the above it can be concluded that according to *The Happy Day*, where a charterparty provides for a valid notice of readiness to be tendered so that laytime commences and where the notice is tendered prematurely, laytime does not commence although the vessel started discharging later. This means that in a case like this the shipowners can not claim demurrage

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[80]The Happy Day [2001] 1 Lloyd's Rep. 754, at 760: Langley J. concluded: "In reaching the conclusion he did, Lord Justice Mustill [in The Mexico I] emphasized (p.513) that the contract itself provided for the commencement of laytime to be started by a valid notice "and in no other way," and as a result rejected the notion (adopted by the arbitrators) that an invalid notice could be treated as "inchoate" becoming effective when the cargo was or was known to be available for discharge. For my part, I can see no basis on which a different conclusion could be justified by substituting the time when discharge actually commences for the time when the vessel was or was known to be ready for discharge. That too, absent estoppel or the like, would be to re-write the contract in a manner which I think to be illegitimate and inconsistent with the reasoning of Lord Justice Mustill."

[81]Ibid, at 500.

[82]Ibid, at 494, 495.

for the delay, and the charterers can claim dispatch money for the entire period of laytime, which does not start counting.

The decision of the Commercial Court was generally supported by charterers. On the other hand shipowners believed that the result was uncommercial and unfair,[83] because of the conclusion that it was a berth charterparty and this concerned the allocation of risk delays. It was mentioned that by referring to the 'commercial absurdity of this case,' the charterers would be entitled to dispatch in cases where they unloaded the vessel because the notice of readiness was premature and consequently invalid.[84]

It has been suggested[85] that the following would be ways of re-allocating risk:

(a) By including a "reachable on arrival clause" in the charterparty: The charterer must provide a "reachable on arrival" berth, otherwise he is in breach.

(b) "Time to count whether in berth or not" clause. This was used in *The Happy Day*.

(c) "Time lost waiting for a berth to count as loading . . . time" clause.

(d) Other clauses for specific ports.

The same author suggests that a situation as in *The Happy Day* would not arise in a tanker charterparty, such as the Tankervoy 87 charter[86] and the Asbatankvoy charter form,[87] because these forms provide that laytime will commence six hours after notice of readiness has been tendered or received or on the vessel's arrival in berth whichever is the earliest. It was suggested

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[83]Jin Draeger and Andrew Leir, "The "Happy Day"- A landmark Judgement for Charterers" The Charterer Newsletter December 2002.

[84]"The Happy Day" Maritime Review November 2002 13-18, at 14.

[85]Y. Baatz, "Happy Day? Not for Shipowners" (2001) 3(1) Shipping & Transport Lawyer 10-13, at 11, 12.

[86]Clause 9: "Laytime. 9. (a) The laytime specified in Part I (I) shall be allowed to Charterers for loading and discharging of cargo and other Charterers' purposes.

Other than when the vessel loads or discharges by transshipment at sea, laytime shall commence at the first loading and at the first discharging port or place six hours after the tender of notice or upon arrival in berth if that occurs earlier, and at any subsequent port or place laytime shall resume when notice is tendered. Time shall run until hoses have been disconnected, which shall be effected promptly, but if the vessel is delayed after disconnection of hoses for more than two hours awaiting bills of lading or for other Charterers' purposes, time shall continue to run from disconnection of hoses until the termination of such delay . . .

[87]Clause 6 provides: "6. 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 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 berth after giving notice of readiness for any reason over which Charterer has no control, such delay shall not count as used laytime."

that it would be preferable to have a port charter rather than a berth charterparty. In each case, it should be stated that laytime commences at the latest as soon as loading or discharging begins.[88]

As was mentioned above, the court of first instance in *The Happy Day* held that it was not possible to infer any agreement or convention from the mere facts of commencement and continuation of discharge and that an invalid notice was not rejected. It did not necessarily follow that charterers must have agreed to give up their right to a notice, particularly when discharge commenced at a time when a valid notice could not have been given. The Court of Appeal held[89] that if no contract or custom existed, there was no requirement that the shipowner must give a NOR to unload to the charterers. If it was required it should state that the vessel had arrived at the place where she might tender notice according to the terms of the contract and that she was ready to discharge or load.

Potter L.J. rejected the argument[90] that there had been a variation.[91] He held that where a contract was varied by agreement, the obligations to be performed by the original contract were altered. Any formalities which applied to the contract, also applied to its variation. A variation should be capable of being analysed in terms of offer and acceptance, consideration and certainty of terms.[92] Waiver and estoppel, by contrast, are based upon the conduct of one party and do not alter the terms of the contract, but affect the remedies in respect of a breach of the terms by the other party.

He said that the doctrine of waiver might be invoked and applied and that the commencement of loading by the charterer or receiver without rejection of or reservation regarding the NOR could properly be treated as an acceptance of the vessel's readiness to load. To argue that laytime should begin at

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[88]Ibid, at 13.

[89][2002] 2 Lloyd's Rep. 487, at 507.

[90]Mr. Eder for the shipowner submitted that the appropriate analysis in contractual terms was that of an offer by the owners to allow the charterers to discharge the vessel on the basis that the previously tendered NOR was valid and that laytime would run throughout discharge, which was accepted by charterers without suggesting that the NOR was invalid or that laytime was not running; alternatively, an offer by charterers to discharge the vessel on the basis that the previously tendered NOR was valid and/or that laytime would run during discharge, accepted by owners in allowing discharge to proceed. In this connection he relied upon the principle that the law applied an objective test as to the communications between the parties, whether by words or conduct, and submitted that each must be taken to have appreciated that the other was acting on the basis attributed to them.

[91]Ibid, at 506: "The difficulty with such a formulation however is that the Court is being asked to spell positive offer and acceptance out of conduct alone in a situation where the parties' obligations were governed by a formal written contract pursuant to which the owners were at all times purporting to act. There was thus no apparent bilateral intention to vary or re-negotiate the express terms of the charter, as opposed to an apparent willingness on the part of the charterer to treat as valid a notice appropriate in form and purportedly served in compliance with the terms of the charter."

[92]Ibid, at 505.

the point when the charterers or their agents became aware that the cargo was ready, would give rise to uncertainty.[93]

It was held that laytime could commence under a voyage charter requiring service of a notice of readiness when no valid notice of readiness had been served in circumstances where (a) notice of readiness valid in form was served on the charterers or receivers as required under the charter prior to the arrival of the vessel, (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 order of the charterers or receivers without either having given any intimation of rejection[94] or reservation in respect of the notice previously served, or any indication that further notice of readiness was required before laytime commenced.[95]

It was held that whether or not the party entitled to notice had waived a defect on which he subsequently sought to rely, would depend on the effect of the communications or conduct of the parties. It seems clear that in an appropriate commercial context, silence in response to the receipt of an invalid notice—in the sense of a failure to intimate rejection of it—might amount to a waiver of the invalidity. The question whether there was an agreement, waiver or estoppel was a question of law and fact and depended on the circumstances of each case.

Langley J. at first instance had rejected the argument that the fact alone that unloading had begun with the knowledge and consent of the charterers or their agents and without any reservation of the charterers' position would have meant that there was an agreement, waiver or estoppel; but the Court of Appeal held that if discharging had commenced and the charterers knew that fact and gave their consent, without making any reservation regarding the invalidity of the notice of readiness, this could be regarded as an implied agreement, waiver or estoppel. This meant that laytime could commence when the vessel was being discharged with the knowledge of the charterers although a premature but otherwise valid notice of readiness had been tendered by the shipowners.

The requirements for a waiver, i.e. knowledge of the facts, action and benefit to the charterers were fulfilled. It is submitted that the Court of Appeal was justified in accepting the commencement of laytime without a valid notice of readiness when the vessel was accepted as ready to discharge and when discharge commenced if the charterers have knowledge of the relevant facts. But one question arises: How can knowledge be proved? As already

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[93]The Happy Day [2002] 2 Lloyd's Rep. 487, at 509.

[94]Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.

[95]The Happy Day [2002] 2 Lloyd's Rep. 487, at 500.

mentioned, a waiver is a matter of law and facts. The shipowners will have the burden of proving that the charterers had knowledge of the facts but they waived the tender of a valid notice of readiness.

In most cases the readiness of the vessel can be ascertained only when the vessel starts being loaded or unloaded. To require that the charterers or their agents have knowledge of the vessel's readiness for the existence of waiver would be unthinkable and harsh on the charterers. At least, by accepting the commencement of loading/discharging as a waiver the charterers are somehow benefited. However, this ruling is for the benefit of the shipowners, because they do not need to tender a second notice of readiness and laytime commences.

It was also held that the only realistic basis on which the conduct of the charterers could be regarded as equivocal in relation to their intention to waive the invalidity of the notice was to make the assumption that the charterers intended, and reserved the right, later to rely on the invalidity without disclosing that intention, when they must have been aware that if such intention or reservation were made clear, the owner would immediately serve fresh NOR to protect his position. An assumption of lack of fair dealing of that kind was not one which it was appropriate to make on an objective consideration of the parties' intentions for the purpose of the doctrine of waiver. The unequivocal indication arising from commencement of loading was that the notice previously tendered was at that point accepted as valid, but it was no more than that. On that basis, the detailed provisions as to laytime contained in cl. 30 were apt to apply as from the time of the validation of the notice by acceptance, and neither the conduct of the charterers/receivers nor the circumstances of the case suggested waiver in that respect.[96]

In *Glencore Grain Ltd v. Goldbeam Shipping Inc; Goldbeam Shipping Inc v. Navios International Inc (The Mass Glory)*,[97] Glencore Shipping Ltd. entered into a contract of affreightment with Goldbeam Shipping Inc. on the Synacomex form with amendments for the carriage of between three and five cargoes of heavy grain, soyabeans, sorghums, soyapellets or soyabean-meal in bulk from a range of river Plate and other South American ports to a range of ports in South East Asia and the Far East. In due course Goldbeam nominated the vessel *Mass Glory* to perform one of the voyages under the contract. Goldbeam was not the owner of *Mass Glory*, but had itself chartered the vessel on Mar. 25, 1998 on substantially the same terms from Navios International Inc. Navios was not the owner of the vessel either, having taken her on hire from her owners, Bonusnauta Shipping Corporation, under a charter-party dated July 3, 1997 for a period of 11/13 months with

[96]Ibid, at 508.

[97]Glencore Grain Ltd v. Goldbeam Shipping Inc; Goldbeam Shipping Inc v. Navios International Inc (The Mass Glory) [2002] 2 Lloyd's Rep. 244.

an option in favour of the charterers for a further period of 11/13 months. The port of Xiamen in China was the first discharging port. The vessel entered Xiamen and passed the normal inward inspection. Even though she was ready to berth, and although there was an available berth, she could not occupy it because the cargo documents were not in order and the sellers of the cargo ordered the vessel not to allow anyone to have access to the vessel without production of an original bill of lading. The master gave a notice of readiness. As both the charterparties were berth charters and the vessel was prevented from entering the berth, the notice was not valid. Later discharging commenced but no further notice of readiness was given.

A dispute arose and it was referred to arbitration. The arbitrators held that the notice of readiness was invalid and laytime did not commence until the time that the discharge started. Glencore and Goldbeam appealed.

The Court held that, as it was a berth charterparty the carrying voyage had not ended when the vessel reached the anchorage and the owners were not entitled to give notice of readiness. The notice which had been given was invalid because the owners gave it prematurely, before the vessel had reached the place stipulated in the charter.[98]

In this particular case, the parties had clearly provided when laytime should begin and there was no reason not to apply those provisions. If it had been accepted that laytime commenced when it was known that the vessel was ready to discharge, this would have the effect of changing the terms of the charterparty. Moore Bick J. held that this would be illegitimate and inconsistent with the reasoning of Mustill L.J. in *The Mexico 1*. When interpreting and analysing the terms of a contract such as a charterparty, the will of the parties should always be considered. This of course does not mean that the interpretation should lead to a change in the terms and their purpose.

Moore Bick J said that the notice of readiness was tendered in order to start laytime and for the allocation of the risk of delay in loading or discharging.[99] The parties to the charterparty agreed how important a notice was. If they had agreed for the notice to be given for bringing some other clause of the charterparty into operation, it could not be omitted as unnecessary. It would be unjustified to modify the terms of the charterparty in order to alleviate "what

[98]Ibid, at 254.

[99]Moore Bick J said: ". . . It is therefore necessary to consider whether, despite the lack of a valid notice of readiness, laytime started to count for some other reason when discharging operations began. Two points may be made at the outset. The first is that the parties in the present case have provided in clear terms for the steps, which must be taken in order for laytime to begin, and there is no reason in principle why the contract should not be permitted to operate in accordance with the terms. It follows, as Lord Justice Mustill observed in The Mexico I, that it is difficult to see how time could begin to count in these circumstances in the absence of waiver or agreement. The second is that it is always open to the parties, if they so wish, to provide for contingencies of this kind, for example, by providing that time actually used before the commencement of laytime is to count. "

is perceived to be some element of unfairness, especially in a case where the unfairness arises from the failure of one party to operate the contract in accordance with its terms."[100]

It was also held that the arbitrators were right to hold that the carrying voyage ended only when the vessel reached the discharge berth at Xiamen. The notice of readiness was only received and not accepted by the agents to whom it had been tendered and the charterers did not agree to treat it as valid.[101] The beginning of the discharge did not make the notice valid. This meant that following *The Mexico 1* the notice could not be treated as inchoate and later effective when the discharge began. There was no agreement or waiver of a valid notice of readiness.

The Court acknowledged that it was charterers' breach that had prevented the vessel from being in a position to tender a valid notice of readiness. It was held that the obligation to tender a further valid notice remained with the shipowners. The notice represented an essential step in the contractual mechanism provided in the charterparty for allocating the risk of delay in loading and discharging. This might seem unfair but the shipowners could not argue that the notice of readiness had been invalid because of a breach by the charterers. It can be suggested that the charterers were actually benefiting from the shipowners' failure to re-tender a valid notice of readiness.

It was noted that the ruling in *The Mass Glory* regarding the commencement of laytime in the case of no valid notice of readiness should be viewed as unsafe.[102]

It is suggested that in order to protect themselves shipowners should instruct their masters to continue tendering notices of readiness. This is without prejudice to the contention that the earlier notice of readiness is valid. For the protection of the charterers, they should endorse the NOR as "received" rather than "accepted" and notify the shipowners immediately about the reservations for its validity. This should be considered as necessary because after *The Happy Day* charterers who have not forwarded their reservations when loading/discharging starts can be held to have waived the invalidity of the notice of readiness. Furthermore, every charter should provide that in case of an invalid notice of readiness laytime should commence at the commencement of cargo operations.

The master should always tender notice of readiness to the correct person under the charterparty clauses. The charterers should be advised about the vessel's readiness, and when agents are acting it should be made clear that the charterers had notice of the vessel's readiness.

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[100]Ibid, at 254.

[101]Ibid, at 251.

[102]Lloyd's Maritime and Commercial Law Quarterly, International Maritime and Commercial Law Yearbook 2003, 113-115, at 115.

It has been suggested that the following clause should be included in charterparties:[103]

> NOR, if premature, shall take effect for purposes of laytime at the earliest moment when it would have been timely; provided that under local custom and practice, or the particular circumstances, it was reasonable for the Master to give NOR when he did so, and such NOR was not intended to deceive Charterers about the arrival of the vessel or the then existing state of her immediate readiness to perform under the charter.

In this clause it is logical to require that the premature notice of readiness should only take effect at the earliest moment when it would have been timely with the requirement that it was reasonable for the Master to give NOR under local custom and practice, or the particular circumstances. The shipowners are not the only persons entitled to protection by this clause. The charterers should be protected from situations in which the shipowners tender notices of readiness although the vessel is not ready in order to trigger the commencement of laytime for their benefit.

Under clause 18[104] of the Baltic and International Maritime Council Standard Grain Voyage Charterparty (GRAINCON),[105] notice of readiness

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[103]"Happy Day—Re-visited" (2003) 34 The Arbitrator 9-10, at 9, 10, available on www.smany.org/sma/sma-pubs/html.

[104]Clause 18 of this charter form states the following: "**18. Time Counting**. (a) Notice of Readiness. Notification of the Vessel's readiness to load and discharge at the first or sole loading and discharging port shall be tendered in writing at the office of Charterers or their Agents between 0900 and 1700 on all days except Sundays (or the local equivalent) and holidays, and between 0900 and 1200 on Saturdays (or the local equivalent). Such notice of readiness shall be tendered when the Vessel is in the loading or discharging berth, if vacant, failing which from a lay-by berth or customary anchorage or waiting place within limits of the port, or otherwise as provided in Clause 18 (b) hereunder.

(b) Waiting for Berth Outside Port Limits. If the Vessel is prevented from entering the limits of the loading/discharging port(s) because the first or sole loading/discharging berth or lay-by berth or anchorage or waiting place is not available within the port limits, or as a result of waiting for the Charterers' orders, or pursuant to the orders of the Charterers or any competent official body or authority, and the Master warrants that the Vessel is physically ready in all respects to load or discharge, he may tender Vessel's notice of readiness in writing from the customary anchorage or waiting place outside the limits of the port, whether in free pratique or not, whether customs cleared or not. If after entering the limits of the loading port, the Vessel fails to pass inspections as per Clause 3 any time so lost shall not count as laytime or time on demurrage from the time the Vessel fails inspections until she is passed.

(c) Commencement of Laytime. Following receipt of notice of readiness laytime will commence at 0800 on the next day not excepted from laytime. Time actually used before commencement of laytime shall count.

Regardless of whether a valid notice of readiness has been tendered laytime or time on demurrage shall begin at 0800 on the next day not excepted from laytime following the commencement of loading or discharging of the cargo.

(d)Subsequent Ports. At second or subsequent port(s) of loading and/or discharging, laytime or time on demurrage shall resume counting from the Vessel's arrival within the limits of the port as provided in Clause 18(b) if applicable."

[105]Available on www.bimco.dk.

has to be tendered in writing[106] at the times specified in the clause. There is a very important additional sub-paragraph in paragraph (c) of the clause, which solves the problems about the tender of an invalid notice of readiness. In such case, laytime commences at 08.00 on the next day following the commencement of loading or discharging. The draftsmen of this charter party form realised all the implications caused by an invalid notice of readiness. In order to avoid the obligation of the shipowners for a new notice of readiness or the proof of waiver or estoppel to an invalid notice of readiness, they provided for this solution. By this clause, all these problems are avoided. Sub-clause (c) has been drafted to protect the owners from a potential "Happy Day" scenario whereby the vessel is loaded or discharged by the charterers despite the notice of readiness being invalid, the result being laytime not counting.

Under this clause, it is not necessary to prove that the charterers have given any intimation of rejection or reservation or any indication that a new valid notice of readiness is required. The commencement of loading or discharging triggers the commencement of laytime.

It is suggested that this sub-paragraph should be added to each charter form. By this paper, the main issues about invalid premature notices of readiness have been discussed and new suggestions have been introduced. Of course it is on the parties to a charterparty to decide how they can protect their interests and avoid situations in which laytime does not commence due to an invalid notice of readiness, although loading or discharging has started.

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[106]Clause 41 provides the following: "**41. Notices** (a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Charter Party shall be in writing.

(b) For the purposes of this Charter Party, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service."