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# *"The Asbatankvoy Charterparty Clauses for the Commencement of Laytime–Interpretation under English and American Law"*

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The Asbatankvoy Charterparty (formerly Exxonvoy 69) was produced by the Association of Ship Brokers and Agents (U.S.A) Inc and it is one of the most widely used charter forms. The purpose of this article is to analyse the Asbatankvoy charter clauses for the commencement of laytime. Emphasis will be given on the analysis of the 'reachable on arrival' clause with reference to English and American cases.

## I
## CLAUSES 5 AND 6

Under clause 5,[1] laytime shall not commence before the date stipulated in Part I, except in Charterer's sanction. The second part of this clause deals with the cancellation of the charterparty in a case in which the vessel is not ready by 4.00 p.m. on the cancelling date. The charterer has to give notice within 24 hours after the cancellation date.

While under common law, a notice of readiness is usually given only at the first port- unless there is a different provision in the charterparty, clause 6[2] of this charter form provides for tender of notices of readiness at each port of loading or discharge. Notice should be given to the charterer or his agent

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[1]Clause 5 provides the following: "5. LAYDAYS. Laytime shall not commence before the date stipulated in Part I, except with the Charterer's sanction. Should the Vessel not be ready to load by 4:00 o'clock P.M. (local time) on the cancelling date stipulated in Part I, the Charterer shall have the option of cancelling this Charter by giving Owner notice of such cancellation within twenty –four (24) hours after such cancellation date; otherwise this Charter to remain in full force and effect."

by letter, telegraph, wireless or telephone. Tender by radio is considered sufficient under clause 6.[3]

### *A. Tender of Notice of Readiness*

It has been supported[4] that the notice of readiness as provided in clause 6 is the initial step that determines the responsibility for port time consumption as between owner and charterer. Therefore, it would be wholly unreasonable for the owner to assert that the tender of an "arrived" vessel could be made a day, a week or any amount of time prior to the commencing date for the laydays. The words "commencing date" have a plain and literal meaning and in that, the charter denotes the earliest date on which the notice of readiness can have validity.

However, it is now generally accepted that the notice of readiness can be given before the time that it is agreed in the charterparty. Until recently, it was accepted by courts that laytime always starts at the agreed time and not earlier.[5]

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[2]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 sea loading or discharging terminal and all fast when loading or discharging alongside a wharf), whichever first occurs. However, where delay is caused to the 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."

[3]*In the Matter of the Arbitration Under Charter Party dated August 21, 1973 between Andros Compania Maritima, S.A., as Owners of the Andros Sea and Sun Oil Company of Pennsylvania, as Charterers* SMA No 979 (1975) (Captain Jones F. Devlin, Jr., R. Glenn Bauer, Esq., Manfred W. Arnold, Arbs).

[4]By the dissenting member of the arbitral panel in *in the Matter of the Arbitration between A/S Brovigtank, as Owners of the M/S Cate Brovig and Buques Centroamericanos, S.A., as Charterers* SMA No 1281 (1978) (Lloyd C. Nelson, A. Joseph Slattery, Frank L. Crocker, Arbs).

[5]*In the matter of the arbitration between Trave Schiffahrts –Gesellschaft mgH & Co. KG, Owners of the S.S. Schleswig-Holstein and Amoco Transport Company, Charterers* SMA No 1288 (1978) (Hammond L. Cederholm, A. J. Slattery, Joseph Simms, Arbs); *In the Matter of the Arbitration between R/A Trajan, (Hilmar Reksten Managers) Owners of the T/T "Fabian", and Amoco Transport Company, as Charterers, under Charter Party dated October 13, 1976* SMA No 1492 (1980) (John P. Palmer, Hammond L. Cederholm, Ferdinand E. Sauer, Arbs); *In the matter of the Arbitration between Trade & Transport, Inc, as Agents for Owners of the M/T Trade Endeavor and Energy Transport Limited, as Voyage Charterer under the Charter Party dated April 5, 1979* SMA No 1648 (1982) (Aghelos C. Boulalas, Myron Boluch, Milton G. Nottingham, Arbs); *In the Matter of the Arbitration between Neptunea Astro Oceanico S.A., as Owners of the Michael C and Coscol Petroleum Corporation, as Charterers* SMA No 1658 (1982) (Manfred W. Arnold, A. Joseph Slattery, Theodore Tsagaris, Arbs); *In the matter of the arbitration Mount Pleasant Shipping Corp., Owner of the M/V Mount Pleasant and Internor Trade, Inc, as Charterer* SMA No 1772 (1982) (Jack Berg, Arb.); *In the matter of the Arbitration between Isomar S.A. of Panama (R.P.) Owner of M/V Ladylike and Vial Trading S.A. Santiago Charterer under a Baltimore Form C Charter Party dated September 7, 1992* SMA No 3345 (1997) (John P. Besman, Walter R. Muff, Michael A. van Gelder, Arbs).

As was held in *Pteroti v. National Coal Board*,[6] laytime did not begin to run, even though loading had already begun, before the time stipulated in the charterparty as the earliest time for the commencement of laytime. However, there was a different ruling on this topic in *The Front Commander*.[7] The Court of Appeal held that in the absence of contrary agreement, where a charterer, who received an early notice of readiness prior to the earliest layday ordered the vessel to load and did in fact load the vessel prior to the commencement of the earliest layday, laytime started to run at the end of the notice period. This decision reflects the commercial reality. No-one would expect that time for loading or discharging does not count, although these actions have started, because a valid notice of readiness has been tendered earlier than the agreed date. According to this ruling, a charterer is not permitted to treat time for loading/unloading as free time, unless there is an express provision in the charter.

Arbitral panels in New York have also held that the notice of readiness can be given before the time that it is agreed in the charterparty. In *in the Matter of the Arbitration between R/A Trajan, (Hilmar Reksten Managers) Owners of the T/T "Fabian," and Amoco Transport Company, as Charterers, under Charter Party dated October 13, 1976*,[8] the panel held that where a berth was not available Clause 6 Part II laid down two conditions for the running of the notice time, i.e., that the vessel ". . . Upon arrival at customary anchorage shall give the Charterer or his agent notice . . . ." It followed that the notice of readiness in these circumstances could be properly tendered before the commencing layday. It was also held that the word "shall" in clause 6 indicated that the vessel must tender on arrival, regardless of how close or far removed from the first layday.

### *B. Tender of the NOR at the Customary Anchorage*

Under clause 6 of the Asbatankvoy charter form, upon arrival at anchorage at each port of loading or discharge, the vessel tenders notice that the vessel is ready to load or discharge cargo, but laytime commences upon the expiration of six hours after receipt of this notice of readiness,[9] or upon the vessel's arrival in berth whichever first occurs.

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[6]Pteroti v. National Coal Board [1958] 1 Q.B. 469.

[7]Tidebrook Maritime Corporation v. Vitol SA (The Front Commander) [2006] EWCA Civ 944; [2006] 2 All ER (Comm) 813; [2006] 2 Lloyd's Rep 251.

[8]*In the Matter of the Arbitration between R/A Trajan, (Hilmar Reksten Managers) Owners of the T/T "Fabian," and Amoco Transport Company, as Charterers, under Charter Party dated October 13, 1976* SMA No 1492 (1980) (John P. Palmer, Hammond L. Cederholm, Ferdinand E. Sauer, Arbs).

[9]"Laytime: Six hours notice time, Shifting and Deballasting" (1987) 3(4) *Charterparty International* 54, 56.

The notice should be tendered when the vessel arrives at the customary anchorage. It is not enough to arrive at the mooring area.[10] In *in the Matter of the Arbitration -between Transocean Transportation Limited, Disponent Owner -and- Metropolitan Petroleum Company, Inc. Charterer of S/T Daphne under Charterparty dated October 25, 1978*,[11] it was held that dropping anchor at the customary anchorage and performing normal lighterage operations required to get to the berth did not transform the anchorage into a berth for purposes of eliminating the six hour notice provision. It was also held that a "berth" in this context was either a "wharf" or a "sealoading or discharging terminal."

### *C. Arrival at the Customary Anchorage within or outside the Port?*

In clause 6 of the Asbatankvoy charter form, it is not mentioned whether the customary anchorage should be within the port or not for the tender of the notice of readiness. The effect of the "Reid Test" in *The Johanna Oldendorff*[12] was that there was a presumption that a vessel was an 'arrived ship' when she was at the disposal of the charterer, such as when she anchored at a place where ships usually lay waiting for a berth. Further evidence was admissible so that the shipowner could prove that, although the ship was waiting at some other place in the port, it was as much at the disposition of the charterer as it would have been if it was in the vicinity of the loading/discharging berth;[13] but this place still had to be *within the limits of the port*. It was unacceptable to lie outside the port, even in a usual waiting place.

There are many discussions about this test. Many difficulties arise as there are many ports which have no clear legal, administrative, fiscal or other limits.[14] It is obvious that the difficulty in finding the limits of the port can give rise to conflicts. Given the facts that every port is different and not every waiting place is suitable for every kind of vessel and cargo, it is hard to find

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[10] *In the Matter of Arbitration Between Almare Soc. Di Nav., Genoa,Owner of the M/V Almare Quinta, and Huron Liberian Co, Charterer under a Charter Party dated December 21, 1977* SMA No 1537 (1981) (Donald E. Zubrod, Hammond L. Cederholm, Jeremiah W. Jenks, Arbs).

[11] *In the Matter of the Arbitration -between- Transocean Transportation Limited, Disponent Owner -and- Metropolitan Petroleum Company Inc, Charterer of S/T Daphne under Charterparty dated October 25, 1978* SMA No 2539 (1988) (Richard L. Jarashow, Lloyd C. Nelson, Jack Berg, Arbs).

[12] E.L. Oldendorff & Co G.M.B.H. v. Tradax Export S.A. *(The Johanna Oldendorff)* [1971] 2 Lloyd's Rep. 96; [1972] 2 Lloyd's Rep. 292; [1973] 2 Lloyd's Rep. 285.

[13] E.L. Oldendorff & Co G.M.B.H. v. Tradax Export S.A. (The Johanna Oldendorff) [1973] 2 Lloyd's Rep. 285, 307.

[14] D. Davies, "Some considerations of the "Johanna Oldendorff" and the "Loucas N" cases. Does The "Johanna Oldendorff" decision go far enough?" [1974] *Lloyd's Maritime and Commercial Law Quarterly* 1, 4.

whether the waiting place is within the limits of the port or not. This can be proved by the number of cases which have been brought to arbitration and the courts on this issue. However, the fact that that usual waiting place might be found outside the limits of the port does not mean that the vessel should not be considered an 'arrived ship.' Telecommunications and other facilities have been improved radically. Things are not as they used to be in the past. The vessels are more rapid and manoeuvrable than they used to be, due to newly developed equipment.

In *Maritime Bulk Carriers Corp. and Garnac Co Inc.*,[15] it was held that under a port voyage charterparty containing a 'whether in berth or not' clause, the vessel *Polyfreedom* had only to arrive at the named discharging port in order to be considered an 'arrived ship.' She could give a notice of readiness although she was waiting at anchor at the usual waiting area and this area was not within the legal, fiscal or geographical limits of the port. It was proved that the recommended anchorage where ships usually waited before entering the port of Rotterdam was outside the above mentioned limits of the port, although this usual waiting area was within the administrative limits as the movements of vessels were under control by the local port authorities. The Panel took into consideration the "distance from anchorage to berth" and the "commercial good sense" and concluded that the vessel was at the disposition of the charterers and an 'arrived ship.'[16]

By the use of the phrase "berth or no berth" in the Asbatankvoy charter form, it has been suggested that there is no requirement for the tender of the notice from a customary anchorage within the limits of the port.[17] Although there is no English or American case law on the issue whether the customary anchorage should be within or outside the limits of the port, if we adopt a rule as the one in *The Polyfreedom*, it should be suggested that the customary anchorage could be outside the limits of the port. This would not prevent the tender of a valid notice of readiness.

### *D. Tender of an Invalid NOR*

Many disputes between the charterers and the shipowners about the commencement of laytime arise when an invalid notice of readiness has been tendered. An example can be found in *The Happy Day*,[18] in which the vessel

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[15]*Maritime Bulk Carriers Corp. and Garnac Co Inc. (The Polyfreedom)* 1975 AMC 1826.

[16]Ibid, at 1832,1833.

[17]Cooke J., Kimball J. D., Young T., Martowski D., Taylor A., Lambert L., *Voyage Charters*, (2nd edition, LLP, 2001), 765.

[18]Glencore Grain Ltd v. Flacker Shipping Ltd (The Happy Day) [2001] 1 Lloyd's Rep. 754; [2002] 2 Lloyd's Rep. 487. See the author's article: "The Happy Day and Issues on the Invalidity of a Notice of Readiness under English Law," 38 J.M.L.& C. 191 (2007).

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 Court of Appeal 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[19] or reservation in respect of the notice previously served, or any indication that further notice of readiness was required before laytime commenced.[20]

As already mentioned, under clause 6 of the Asbatankvoy charter, laytime commences upon the expiration of six hours after receipt of this notice,[21] or upon the vessel's arrival in berth whichever first occurs. By this clause the problems such as those in *The Happy Day* are avoided. If no valid notice has been tendered upon arrival at the customary anchorage, laytime, nevertheless, commences upon arrival in the berth. 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 arrival of the vessel in the berth triggers the commencement of laytime.

### *E. The Six-Hour Period under Clause 6*

Someone might wonder what the purpose of the six hour notice period is. This period is not considered as laytime.[22] The six hours are to allow the

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[19]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.

[20]*The Happy Day* [2002] 2 Lloyd's Rep. 487, 500.

[21]"Laytime: Six hours notice time, Shifting and Deballasting" (1987) 3(4) *Charterparty International* 54, 56.

[22]*In the Matter of the Arbitration between R/A Trajan, (Hilmar Reksten Managers) Owners of the T/T "Fabian," and Amoco Transport Company, as Charterers, under Charter Party dated October 13, 1976* SMA No 1492 (1980) (John P. Palmer, Hammond L. Cederholm, Ferdinand E. Sauer, Arbs).

charterer time to bring the cargo to the place where the ship has to load.[23] Furthermore, in *in the Matter of the Arbitration between A/S Brovigtank, as Owners of the M/S Cate Brovig and Buques Centroamericanos, S.A., as Charterers*,[24] in which the charterparty was on the EXXONVOY 1969 form, but it included the same clauses as Asbatankvoy charter form,[25] the majority of the panel held that the purpose of the six-hour period was to provide charterers with time to prepare for docking or shifting of the vessel from the port anchorage to the cargo berth. As such, it was excluded from used laytime. Nevertheless, it was not intended that the charterer, through its use, could alter the commencement of laytime as stipulated in Part I of the charterparty by these six hours. If that had been the case, the charterparty would have so stated. Instead, an early notice, while requiring the sanction of charterers to trigger early commencement of laytime, did not need such sanction to trigger the preparation time.

## II
## CLAUSE 7

Clause 7[26] of the Asbatankvoy form provides for the running of laytime. Time lost due to the vessel's condition or breakdown or inability of the vessel's facilities to load or discharge cargo or if regulations of the owner or

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[23]*In the matter of the Arbitration between Reefer Express Lines Pty, Ltd, as Disponent Owners of M/V Abdel Moumen and Albury Sales Company, Inc, as Charterers* SMA No 1583 (1981)(Frank L. Crocker, Arb.).

[24]*In the Matter of the Arbitration between A/S Brovigtank, as Owners of the M/S Cate Brovig and Buques Centroamericanos, S.A., as Charterers* SMA No 1281 (1978) (Lloyd C. Nelson, A. Joseph Slattery, Frank L. Crocker, Arbs).

[25]The charterparty provided inter alia: "5. LAYDAYS. Laytime shall not commence before the date stipulated in Part I, except with the Charterer's sanction. Should the vessel not be ready to load by 4:00 o'clock P.M. (local time) on the cancelling date stipulated in Part I, the Charterer shall have the option of cancelling this Charter by giving Owner notice of such cancellation within twenty-four (24) hours after such cancellation date, otherwise this Charter to remain in full force and effect.

> 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."

[26]Clause 7 provides the following:

> "7. HOURS FOR LOADING AND DISCHARGING. The number of running hours specified as laytime in Part I shall be permitted the Charterer as laytime for loading and discharging cargo; but any delay due to the Vessel's condition or breakdown or inability of the Vessel's

port authorities prohibit loading or discharging of the cargo at night, will not count as used laytime. However, if the charterer, shipper or consignee prohibits loading or discharging at night, time so lost shall count as used laytime. Time consumed by the vessel in moving from loading or discharge port anchorage to her loading or discharge berth, discharging ballast water or slops, will not count as used laytime.

## III
## CLAUSE 9

The last sentence of clause 6 of the Asbatankvoy charter form provides that where delay is caused to a 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. If the last sentence of clause 6 were considered alone, it would mean that the risk of delay getting into berth would remain with the shipowners. But this is not acceptable and this last part of the clause should be read with clause 9, which will be analysed hereafter.

Under clause 9[27] of the charter form under analysis, the vessel will be loaded or discharged at a safe place, which is ***reachable on arrival*** and which will be designated and procured by the charterer, provided the vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the charterer. The charterer shall have the right of shifting the vessel at ports of loading and/ or discharge from one safe berth to another. There is a provision that time for shifting will count as used laytime except as otherwise provided in clause 15.

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facilities to load or discharge cargo within the time allowed shall not count as used laytime. If regulations of the Owner or port authorities prohibit loading or discharging of the cargo at night, time so lost shall not count as used laytime; if the Charterer, shipper or consignee prohibits loading or discharging at night, time so lost shall count as used laytime. Time consumed by the vessel in moving from loading or discharge port anchorage to her loading or discharge berth, discharging ballast water or slops, will not count as used laytime."

[27]Clause 9 provides:

"9. SAFE BERTHING-SHIFTING. The vessel shall load and discharge at any safe place or wharf or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. The Charterer shall have the right of shifting the Vessel at ports of loading and/ or discharge from one safe berth to another on payment of all towage and pilotage shifting to next berth, charges for running lines on arrival at and leaving that berth, additional agency charges and expense, customs overtime and fees, and any other extra port charges or port expenses incured by reason of using more than one berth. Time consumed on account of shifting shall count as used laytime except as otherwise provided in Clause 15."

*A. The 'Reachable On Arrival' Clause*

Under the Voylayrules 1993 definitions, 'reachable on arrival' or 'always accessible' means that the charterer undertakes that an available loading or discharging berth be provided to the vessel on her arrival at the port which she can reach safely without delay in the absence of an abnormal occurrence. The Baltic Code 2000[28] and the Charterparty Laytime definitions 1980[29] include similar definitions of the phrase. These definitions apply only if the rules are incorporated to the charterparty.

In *Sociedad Carga Oceanica SA v. Idolinoele Vertriebsgesellscaft mbH (The Angelos Lusis),*[30] Megaw, J. held that the phrase 'reachable on arrival' was intended to impose on charterers a contractual obligation of value to shipowners. It was held that the charterers' obligation was to nominate a reachable place where she could load at the point, whether within or outside fiscal or commercial limits of port, where in the absence of such nomination she would be held up.

*B. 'On Arrival'*

Regarding the words 'on arrival,' it has been held that arrival did not mean that the vessel should be an 'arrived ship.'[31] In *Shipping Developments Corporation SA v. V/O Sojuzneftexport (The Delian Spirit),*[32] the vessel had to anchor in the roads outside the harbour, 1¼ miles from the berth but within the administrative, pilotage and fiscal limits of the port of Tuapse. The master gave notice of readiness, which was accepted by the charterers' agents. Free pratique was granted after the vessel arrived in the berth and loading began. The Court of Appeal held that the vessel was within the

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[28]Baltic Code 2000 has the following definition:

> "'Reachable on her arrival or always accessible'-means that the charterer undertakes that an available and accessible loading or discharging berth will be provided to the vessel on her arrival at or off the port which she can reach safely without delay proceeding normally. Where the charterer undertakes the berth will be ALWAYS ACCESSIBLE, he additionally undertakes that the vessel will be able to depart safely from the berth without delay at any time during or no completion of loading or discharging."

[29]Charterparty Laytime definitions 1980 provide the following:

> "'Reachable on arrival' or 'Always accessible'-means that the charterer undertakes that when the ship arrives at the port there will be a loading/discharging berth for her to which she can proceed without delay."

[30]Sociedad Carga Oceanica SA v. Idolinoele Vertriebsgesellscaft mbH (The Angelos Lusis) [1964] 2 Lloyd's Rep. 28.

[31]Inca Compania Naviera S.A. and Commercial and Maritime Enterprises Evanghelos P. Nomikos S.A. v. Mofinol Inc. (The President Brand) [1967] 2 Lloyd's Rep. 338.

[32]Shipping Developments Corporation SA v. V/O Sojuzneftexport (The Delian Spirit) [1971] 1 Lloyd's Rep. 64 (Donaldson J); [1971] 1 Lloyd's Rep. 506 (CA).

'commercial area' of the port while it anchored in the Roads, but the decision was based upon the construction of a clause in the charterparty which had the effect of broadening the area within which the ship could be said to be an "arrived ship."

When Lord Denning, M.R. in the Court of Appeal analysed the phrase 'reachable on arrival' in clause 6[33] of the charterparty it was noted that even though the clause established the obligation of the charterers to 'indicate' a place which she could reach for the discharge of the cargo, the words 'on her arrival' at the port did not mean that she was to be an 'arrived ship' in the technical sense of being within the commercial area of the port. All that was necessary was that she should have arrived off the port ready to proceed to a berth. The clause was put in so as to protect the owner when the vessel arrived off the port-when she was ready to come in to discharge- and save him from having to wait outside to his loss.[34]

In *in the matter of the arbitration between Petrofina S.A., as owners of the Fina America and Kerr McGee Refining Corporation, as charterers,*[35] the panel held that clause 9 obliged the charterers to provide a berth reachable on arrival for cargo operations, but it did not require them to provide a berth at which the vessel may be examined by the USCG[36] to secure documentation which the vessel warranted it possessed in the first instance. Owners always had the obligation to make the necessary arrangements with the USCG to perform whatever inspections were required for the vessel to tender an NOR.

### *C. The Laura Prima*

Many problems are caused by the last sentence of clause 6 and the first sentence of clause 9. *Nereide S.P.A. di Navigazione v. Bulk Oil International Ltd (The Laura Prima)*[37] should be mentioned, as it dealt with these issues. Although it concerned an Exxonvoy 1969 form, this form was substituted by the Asbatankvoy charter and it is useful to see how the Courts interpreted it.

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[33]Clause 6: "The vessel shall load and discharge at a place or at a dock or alongside lighters reachable on her arrival, which shall be indicated by Charterers, and where she can always lie afloat, any lighterage being at the expense, risk and peril of the charterers . . . ."

[34]*The Delian Spirit* [1971] 1 Lloyd's Rep. 506, 509.

[35]*In the matter of the arbitration between Petrofina S.A., as owners of the Fina America and Kerr McGee Refining Corporation, as charterers* SMA No 2867 (1992) (Manfred W. Arnold, Jack Berg, Donald Laing, Jr., Arbs).

[36]USCG: United States Coast Guard.

[37]Nereide S.P.A. di Navigazione v. Bulk Oil International Ltd (The Laura Prima) [1982] 1 Lloyd's Rep. 1.

Under an Exxonvoy 1969 charter form,[38] the vessel arrived at the loading place in Libya and tendered notice of readiness. She was unable to proceed to her loading berth due to congestion. The Court of first instance held that clauses 6 and 9 had to be read together in the context of the charterparty as a whole and it was clear that it was a port charterparty and there was no express provision in the charter that the risk of congestion in the port was to be placed on the owners.

The Court of Appeal held that the last sentence of clause 6 provided that delay in getting to its berth for reasons beyond the control of the charterers should be at the owners' risk just as in clause 7 any delay due to the vessel's breakdown or inability of the vessel's facility to load or discharge within the allowed laytime was not to count as laytime. The last sentence of clause 6 was not an exception to liability under clause 9 but was a provision stating that a delay caused for any reason beyond the charterers' control after notice of readiness had been given was not to count as laytime.

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[38]Clause 6 of the charterparty provided the following inter alia:

"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."

Clause 7 provided:

"7. Hours for loading and discharging. The number of running hours specified as laytime in Part I shall be permitted the Charterer as laytime for loading and discharging cargo; but any delay due to the Vessel's condition or breakdown or inability of the Vessel's facilities to load or discharge cargo within the time allowed shall not count as used laytime. If regulations of the Owner or port authorities prohibit loading or discharging of the cargo at night, time so lost shall not count as used laytime; if the Charterer, shipper or consignee prohibits loading or discharging at night, time so lost shall count as used laytime. Time consumed by the vessel on moving from loading or discharge port anchorage to her loading or discharge berth, discharging ballast water or slops, will not count as used laytime."

Clause 9 provided:

"Safe berthing-shifting. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. The Charterer shall have the right of shifting the Vessel at ports of loading and/or discharge from one safe berth to another on payment of all towage and pilotage shifting to next berth, charges for running lines on arrival at and leaving that berth, additional agency charges and expense, customs overtime and fees, and any other extra port charges or port expenses incurred by reason of using more than one berth. Time consumed on account of shifting shall count as used laytime except as otherwise provided in Clause 15."

The House of Lords held that clauses in charterparties as in other contracts had to be construed as a whole and it was impossible to ignore the opening words of clause 9 in construing the penultimate line of clause 6 and the reference in clause 7 to loading. Discharging berth meant 'designated and procured berth' because it was to that berth the vessel would be moving, the time occupied by such movement being excluded from the laytime calculation. 'Reachable on arrival' was a well known phrase and meant precisely what it said. The berth was required to have two characteristics: it had to be safe and it also had to be reachable on arrival. If a berth could not be reached on arrival, the warranty was broken, unless there was some relevant protecting exception. The finding by the umpire was that the sole cause of delay to the vessel getting into berth was the unavailability of a berth due to the presence of other vessels over which the charterers had no control. This fact was unequivocal, but it did not avail the charterers, unless the berth which the vessel was prevented from reaching by reason over which they had no control was one which had already been designated and procured by the charterers in accordance with clause 9. Thus, clauses 6 and 9 were not in conflict with each other.

The ruling of *The Laura Prima* was not generally adopted, as can be seen in *in the matter of the Arbitration between Ore Sea Transport S.A., as Disponent Owners of the M/V Siboto and Amoco Transport Company as Charterers*.[39] Regarding *The Laura Prima*, the panel said that the phrase "reachable on her arrival" meant that the charterers must have allocated to the vessel a safe berth or place that could be reached on its arrival. It was a safe berth clause and not a berth availability clause as Mr Justice Mocatta held in *The Laura Prima*.

However, it can be suggested that *The Laura Prima* has the effect that the last sentence of clause 6 cannot operate unless the berth is reachable on arrival. The berth is not reachable if it cannot be reached due to congestion. But what can make a berth unreachable?

### *D. Causes which make a Berth Unreachable, Covered by Clause 6*

It was held that there were no grounds for distinguishing between the causes which might make the berth unreachable for the vessel unless the particular cause or causes were specifically exempted elsewhere in the charter or were a consequence of the owners' breach of the charter or were such

[39] *In the matter of the Arbitration between Ore Sea Transport S.A., as Disponent Owners of the M/V Siboto and Amoco Transport Company as Charterers* SMA No 1469 (1980) (Jack Berg, Lloyd C. Nelson, Frank L. Crocker, Arbs).

as to frustrate the adventure as a whole.[40] Berth congestion and cargo unavailability cannot be considered as types of delay over which the charterer has no control.[41] The availability of a berth is a risk undertaken by the charterers. The same applies for the availability of the cargo. The charterers usually have to supply the cargo for loading. Delay due to the fact that the charterers failed or refused to designate a berth or due to the fact that they ordered the vessel to wait is not included in the cases covered by clause 6.

In *Triton Navigation Limited v. Vitol S.A. (The Nikmary)*,[42] it was held that delays due to charterer's failure to provide a cargo were not included in clause 6. The problem in this case was not congestion in the usual sense of a queue of vessels waiting their turn to berth but the scheduling of supplies. The reference to the vessel's condition formed part of a phrase that also referred to breakdown and inability of the vessel's facilities to load or discharge cargo within the time allowed. That was clear indication that it was directed to aspects of a vessel's condition that had a direct effect on its ability to handle cargo. And as a matter of construction, it did not extend to aspects of a vessel's condition that existed before a valid notice of readiness was given but had already ceased to exist at that time.

In *Inca Compania Naviera S.A. and Commercial and Maritime Enterprises Evanghelos P. Nomikos S.A. v. Mofinol Inc. (The President Brand)*, Roskill J. held the following about the phrase 'reachable on arrival:'[43]

> "'Reachable' as a matter of grammar means 'able to be reached.' There may be many reasons why a particular berth or discharging place cannot be reached. It may be because another ship is occupying it; it may be because there is an obstruction between where the ship is and where she wishes to go; it may be because there is not a sufficiency of water to enable her to get there. The existence of any of those obstacles can prevent a particular berth or dock being reachable and in my judgment a particular berth or dock is just as much not reachable if there is not enough water to enable the vessel to traverse the distance from where she is to that place as if there were a ship occupying that place at the material time. Accordingly, in my judgment, the charterers' obligation was to nominate a berth which the vessel could reach on arrival and they are in breach of that obligation if they are unable so to do."

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[40]Palm Shipping Inc. v. Kuwait Petroleum Corporation (The 'Sea Queen') [1988] 1 Lloyd's Rep. 500, 503.

[41]*In the Matter of the Arbitration between Neptunea Astro Oceanico S.A., as Owners of the Michael C and Coscol Petroleum Corporation, as Charterers* SMA No 1658 (1982) (Manfred W. Arnold, A. Joseph Slattery, Theodore Tsagaris, Arbs).

[42]Triton Navigation Limited v. Vitol S.A. (The Nikmary) [2004] 1 Lloyd's Rep. 55; [2003] 1 Lloyd's Rep. 151.

[43]Inca Compania Naviera S.A. and Commercial and Maritime Enterprises Evanghelos P. Nomikos S.A. v. Mofinol Inc. (The President Brand) [1967] 2 Lloyd's Rep. 338, 349, 350.

What can be said in case of the berth not being reachable due to bad weather or due to any other reason beyond the charterer's control, such as navigation? The case in *The Laura Prima* concerned port congestion and the Court did not take in consideration the case of bad weather.[44] "Delay" in clause 6 means postponement of the time when the vessel having arrived at the port and having tendered notice of readiness can get in the berth.[45] In *The Kyzikos*,[46] where the phrase "whether in berth or not" was interpreted, it was concluded that this did not include bad weather. This interpretation is different from the interpretation of the "reachable on arrival" phrase. It is not clear whether a similar approach can be adopted and if weather is not included in the causes for the delay. Sometimes, unforeseen weather or sea conditions have been suggested as reasons beyond the charterer's control,[47] while delays due to known or predictable weather or sea conditions have been held to be within the charterer's control.[48] The charterer has the onus of proving that the causes of delay were beyond his control.

It is well known that congestion is at the charterer's risk, while delays due to navigational risks are at the shipowner's risk. In *K/S Arnt J. Moerland v. Kuwait Petroleum Corp. (The Fjordaas)*,[49] it was held that clause 9 was not only limited to congestion, but to a delay caused by the prohibition of night navigation. Similarly, it was held that the risk of delay was on the charterers when the reason was strike.[50]

Under an Asbatankvoy charter,[51] the vessel tendered notice of readiness, but she was unable to proceed to the berth because the port authorities prohibited night navigation and because there were no tugs available. Later, when tugs

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[44]Davies D., "Laytime under Asbatankvoy" (1984) 1 *Charterparty International* 3, 3.

[45]Laytime: Delay at Sealine due to Sea Conditions (Swell) (1987) 3(7) *Charterparty International* 98, 99.

[46]Bulk Transport Group Shipping Co Ltd v. Seacrystal Shipping Ltd (The Kyzikos) (1989) A.C. 1264

[47]*In the Matter of the Arbitration of Disputes Under Charter Party of S/T Cities Service Valley Forge Charter Party dated December 4, 1970 Between Hellenic International Shipping S.A., Disponent Owner and Amoco Trading International Limited, Charterer* SMA No 954 (1975) (Donald E. Zubrod, George T. Stam, Ferdinand E. Sauer, Arbs); *In the Matter of the Arbitration between Rederi A. B. Salenia Disponent Owner of M/S Virginia Lily and Sun International Limited (formerly known as Sun Oil Trading Limited), Charterer, under a Charter Party dated December 16, 1976* SMA No 1613 (1981) (Edmund H. Orton, John H. Parker, Michael A. van Gelder, Arbs); *In the matter of arbitration between Getty Refining and Marketing company, Owner of The New York Getty and Sentry Refining, INC., Charterer* SMA No 2210 (1986) (Charles H. Bennett, Jack Berg, Ferdinand E. Sauer, Arbs).

[48]*In the Matter of the Arbitration of Disputes Under Charter Party of S/T Cities Service Valley Forge Charter Party dated December 4, 1970 Between Hellenic International Shipping S.A., Disponent Owner and Amoco Trading International Limited, Charterer* SMA No 954 (1975) (Donald E. Zubrod, George T. Stam, Ferdinand E. Sauer); *In the Matter of the Arbitration between Ocean Tankers CO., INC., as Owners of the MV "Energy Creation," and Amoco Transport Company, as Charterers* SMA No. 2025 (1984) (Hammond L. Cederholm, R. Dilauro, Joseph Simms, Arbs).

[49]K/S Arnt J. Moerland v. Kuwait Petroleum Corp. (The Fjordaas) [1988] 1 Lloyd's Rep. 336.

[50]Sametiet M/T Johs Stove v. Istanbul Petrol Rafinerisi A/S (The Johs Stove) [1984] 1 Lloyd's Rep. 38.

[51]*The Fjordaas* [1988] 1 Lloyd's Rep. 336.

arrived, she was prevented from berthing due to bad weather and a strike of tugmen. Regarding the dispute about the phrase "reachable on arrival," the Court held that the distinction between physical causes of obstruction and non-physical causes rendering a designated place unreachable was not supported by the language of the contract or common sense.

In *in the Matter of the Arbitration between Cambria Tankers Ltd., as Owner of the Martga A and Franshaw International Trading CO., as Charterer Under an Asbatankvoy Form of Charter Party dated November 27, 2002,*[52] the arbitral panel held that the charterer could not rely on the last sentence of clause 6, because that was not a case where a properly nominated berth suddenly became unavailable by reason of unforeseen circumstances, such as casualty, emergency repairs or force majeure. On the contrary, the charterer had advance notice that the berth would be out of service. Adverse weather and port difficulties delayed the vessel and her arrival at Tampa coincided with the Port Authority's planned maintenance program. However, such operational delays were to be expected, especially in circumstances where a vessel, laden with multiple cargoes, was required to cross the North Atlantic in winter and then discharge unrelated parcels at prior ports.

Regarding the last sentence of clause 6 *Portolana Compania Naviera Limited v. (1) Vitol S.A. Inc, (2) Vitol S.A. of Switzerland (The Afrapearl)*[53] should be mentioned. The charterparty[54] was an amended Asbatankvoy

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[52]*In the Matter of the Arbitration between Cambria Tankers Ltd., as Owner of the Martga A and Franshaw International Trading Co., as Charterer Under an Asbatankvoy Form of Charter Party dated November 27, 2002* SMA No 3861 (2004) (Manfred W. Arnold, A.J. Siciliano, Nicholas X. Notias, Arbs).

[53]Portolana Compania Naviera Limited v. (1) Vitol S.A. Inc, (2) Vitol S.A. of Switzerland (The Afrapearl) [2003] 2 Lloyd's Rep. 671.

[54]Clause 6 of the charterparty provided the following:

> "6. NOTICE OF READINESS. Upon arrival at customary anchorage at each port of loading or discharge, the Master . . . shall give the Charterer . . . notice . . . that the vessel is ready to load or discharge cargo, berth or no berth, and laytime . . . shall commence upon the expiration of six (6) hours after receipt of such notice . . . 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 or demurrage."

Clause 7:

> "7. HOURS FOR LOADING AND DISCHARGING. The number of running hours specified as laytime in Part I shall be permitted the Charterers as laytime for loading and discharging cargo . . . Time consumed by the vessel in moving from loading and discharge port anchorage to her loading or discharging berth . . . shall not count as used laytime or time on demurrage."

Clause 9:

> "SAFE BERTHING –SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival . . . The Charterer shall have the right of shifting the vessel at ports of loading and/or discharge from one safe berth to another on payment of all . . . additional agency charges and expenses . . . any other extra port charges or port expenses incurred by reason of using more than one berth . . . "

form. The vessel arrived at Dakar and tendered notice of readiness. A pilot came on board and the vessel began manoeuvring towards M'bao sea berth with the assistance of two tugs. The sea pipeline ran from SAR oil terminal to the sealine berth. As the vessel approached the sea berth, the master observed oil on the surface of the sea, indicating a leak in the sealine. When the vessel was at the sea berth, she connected up to the two flexible hoses of the pipeline. Discharge commenced but increased amounts of oil were observed coming to the surface and discharge was suspended. Temporary repairs were unsuccessful and the vessel was ordered off the sea berth. After repairs, she resumed discharging later but she was stopped again as oil was again leaking from the pipeline. She shifted to the anchorage. After the final repair, discharge recommenced at the berth.

The Court held that the charterers could not avail themselves of clause 6. None of the time in question was to be characterized as delay getting into berth within the meaning of this clause, which was concerned with what happened upon arrival of the vessel at a port and after giving notice of readiness. It could not be read as applying to events subsequent to the vessel's first berthing at a port. The regime that would be applicable once the vessel had first berthed after arrival was to be found in the clauses, which followed.

## IV
## CONCLUSION

Breach of the obligation for a 'reachable on arrival' berth means that the charterer will be liable for damages for detention.

As a conclusion, it can be mentioned that regarding clauses 6 and 9, it has been argued that the Asbatankvoy charter has been designed to suit the shipowner.[55] This can be concluded by the fact that the charterers usually wish to incorporate overriding clauses giving them protection against these clauses. The overriding clauses should state the exceptions to clauses 6 and 9.[56] However, there may be an alteration of the clauses in the future in order to provide protection to the parties of a charterparty.

[55]Edkins M., Dunkley R., *Laytime and Demurrage in the Oil Industry* (1998), 11.
[56]Edkins M. and Dunkley R., *Laytime and Demurrage in the Oil Industry* (1998), 22.