When Does Laytime Commence?

The Court of Appeal published its judgement in "The Front Commander" (Tidebrook Maritime Corporation v Vitol SA of Geneva [2006] EWCA Civ 944) at the beginning of July, and gave welcome clarification of the impact of early loading on the commencement of laytime. The earlier High Court decision had been widely criticised within the industry as the judge's decision was felt to unfairly benefit charterers. In a unanimous decision, the recent appeal reflects both commercial and common sense.

The case involved the charter of "The Front Commander" from disponent owners, Tidebrook Maritime Corporation, to Vitol SA as Charterers, for the carriage of a cargo of crude oil from West Africa to Europe, under an Asbatanikyrov charter, as amended by Vitol’s Voyage Chartering Terms, and by "Special Provisions" included for the voyage in question. The relevant clauses were:

Asbatanikyrov clauses:

Clause 5. Laytime shall not commence before the date stipulated in Part I, except with Charterer's sanction....

Clause 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...that the vessel is ready to load...and laytime shall commence upon the expiration of 6 hours after receipt of such notice....

Additional clauses:

Clause 31. Operational Compliance Clause. Owner shall indemnify Charterer for any damages, delays, costs and consequences of not complying with Charterer's voyage instructions given in accordance with the Charterparty....The vessel shall not tender Notice of Readiness prior to the earliest layday date specified in this Charterparty and laytime shall not commence before 0600 hours local time on the earliest layday unless Charterer consents in writing.

Clause 33. If Charterers permits vessel to tender NOR and berth prior to the commencement of laydays, all time from berthing until commencement of laydays to be credited to Charterer against laytime and/ or time on demurrage. Saved time to be split 50/50 Owners/ Charterers.

Laydays were due to commence 9 January 2004 but it became apparent that the vessel would arrive early at the load port. Therefore, Charterers sent a number of messages to Owners via their brokers in relation to the early arrival. The first message, sent 6 January, read as follows: "Charterers confirm NOR to be tendered on arrival Escravos, and to berth/load as soon as instructed by terminal." Two further messages were sent 7 January: "Charterers confirm that 'Front Commander' to tender NOR on arrival Escravos" and "Front Commander will tender NOR on arrival at 08 January 0030 and we want her to berth / commence loading 08 January. NOR was tendered at 0000 hours on the 8 January. On instructions from the terminal, the vessel berthed and started to load at 1648 hours on the same day.

When Owners submitted a demurrage claim to Charterers, a dispute arose as to the time to count at the loadport.

Owners included in their demurrage calculation the period of time following tender of NOR (allowing 6 hours notice period as per c/p terms), claiming that time began to run prior to the earliest layday. Owners gave Charterers 50% of time saved under clause 33 of the charter. Owner's position was that the messages sent by Charterers on 6 and 7 January constituted the written consent necessary under Clause 31 for laytime to commence before the earliest layday and that the NOR was the trigger to the running of laytime.

Charterers withheld the amount for the same period on the basis that clauses 5 and 31 of the Charterparty were to be read and interpreted separately. They argued that ordering a vessel to start loading before the commencement of laydays did not amount to express consent that laytime should start before the first layday.

In the High Court, the judge agreed with the Charterers that their emails of 6 and 7 January constituted neither explicit nor implicit consent to the commencement of laytime, but only to the early service of the NOR and that charterers wanted the vessel to berth and commence loading early. The decision was widely criticised for giving charterers an unfair windfall profit simply because, when following charterers orders, Owners had not received Charterers express agreement that laytime would start early.

Before the Court of Appeal, Charterers maintained their position that the necessary written consent to sanction the early commencement of laytime had not been given. The Court of Appeal disagreed, stating that Charterer's interpretation of the Charterparty (specifically clause 31) was "unrealistic, uncommercial and a trap for the unwary Master or Owner's agent." The decision is welcome further evidence of the court's appreciation of commercial common sense. Rix LJ, who gave the lead judgment referred to "The Happy Day" (2002) 2 LLR 457, in which the Court of Appeal held that an invalid NOR took effect when discharge started, thereby avoiding the absurdity of Owners being liable to pay dispatch when the vessel had been discharging for three months, and Potter LJ's comment in that case that a contrary conclusion would have amounted to a "lack of fair dealing".

Rix LJ considered the Owners' obligation under clause 6 of the Asbatanikyrov charter party to tender NOR when a vessel is ready to load even if the vessel has arrived early, and to clarify both the Owners' and Charterers' obligations when NOR is (validly) tendered early.

It is somewhat surprising that there was no English authority as to when laytime will, in these circumstances, and in the absence of any other clauses in the charter party, start to run. However, it is now clear that provided any notice period has also been used (i.e. the six hours under clause 33) time starts to run against the Charterers as soon as the earliest layday begins. In this respect early NOR does not oblige the Charterer to start loading before the earliest layday, but the Owner is obliged to start loading before that date if ordered to do so, and that order is the sanction that means clause 5 ("Laytime shall not commence before the date stipulated ...") does not apply so that time starts to run against Charterers.

While the law in relation to the early commencement of laytime under an unamended Asbatanikyrov charter is now clear clauses 31 and 33 of "The Front Commander" charter party were also relevant. Did these clauses amount to an express agreement that laytime would not count against Charterers if loading started early? Charterers argued that the clauses had to be read separately, and that the effect of clause 31 was that, without a further express written consent (i.e. in addition to the consent to the early tender of NOR) to the commencement of laytime, time could not count against Charterers until then, and that moreover clause 33 gave Charterers a credit of 6 hours in respect of time saved on the 8th January. Owners argued that the clauses should be construed together. Rix LJ agreed: "Each is capable of throwing light on the other".
He gave seven other reasons why he did not agree with Charterers. In particular,-

- Unless the charterparty clearly says so why should Charterers load or discharge in free time.
- The commencement of laytime is intimately connected with the service of NOR. He referred to the words of Potter LJ in “The Happy Ranger” “The commercial context and the purpose of the contractual requirement to serve NOR which is to trigger the Charterer’s obligation to unload whereby laytime starts to run immediately (in the absence of express provision). . . .”
- The sole and dominant purpose of NOR is to tender the vessel for loading or discharge and thus to act as the trigger for the commencement of laytime.
- Because when ordered to berth and load before the laydays owners were obliged to do so it makes no commercial sense that owners should also seek a separate express agreement to the commencement of laytime, particularly if, and if Charterers construction of clause 31 was correct, such a request could be met by a refusal and threat to hold owners liable to indemnify Charterers for any time lost time from not following charterers orders.
- Clause 33 provides that time used from berthing counts against Charterers, but 50% of that time is credited back to them if it occurs before the agreed laydays.

Both Scott Baker LJ and Buxton LJ agreed. The latter also went on to add “that any other solution would be wholly impractical, and would introduce a very inappropriate invitation to legalistic manoeuvring into what should be a transaction driven only by commercial practicality.”

The judgement has been welcomed by many within the shipping industry and is seen as a victory for common sense over legal technicality.

1. If the Owner refused this would amount to a withdrawal of the NOR.