



## Congestion Delays At Ports - Who Pays?

*The appeal decision from the UK High Court in Novologistics Sarl v Five Ocean Corporation (the “Merida”)<sup>1</sup> provides guidance in determining which party bears the risk of the cost of delay due to congestion at load and discharge ports. On their face, the terms of the charterparty for the “Merida” were not entirely consistent, which introduced a level of uncertainty with very significant consequences.*

This issue is particularly relevant for parties who regularly trade to or from historically congested ports, such as Newcastle in Australia, at which the queue of vessels off the port have become a fixture of the NSW coast. Industry reports indicate that the total cost of demurrage for the vessels in the queue off Newcastle could amount to around A\$1 million per day. Accordingly, the issue of who bears liability to pay such costs is of great commercial significance.

### The Law

The form of a charterparty generally determines which party is responsible for demurrage due to congestion. The general position is that, in the case of:

- a port charter party, a Notice of Readiness (“NOR”) can be tendered once the vessel arrives off the port and any delay after the tender of NOR is for the Charterer’s account; and
- a berth charter party, NOR can only be tendered once the vessel berths and any delay whilst the vessel waits off the port for a berth is for the Owner’s account.

### The Facts

In the “Merida” the voyage charterparty provided, *inter alia*, as follows:

*“one good safe chrts’ berth terminal 4 stevedores Xingang to one good and safe berth Cadiz and one good and safe berth Bilbao” (the “Opening Term”); and*

Clause 2:

- (1) *The vessel to load at one good and safe port/one good and safe charterer’s berth Xingang and to discharge at one good and safe port/one good and safe charterer’s berth Cadiz and at one good and safe port/one good and safe charterer’s berth Bilbao.*
- (2) *Shifting from anchorage/warping along the berth at port of load and at ports of discharge to be for owners’ account, while all time used to count as lay time.*

The “Merida” arrived at the port of Xingang and Owners purported to tender NOR. Demurrage costs of US\$502,267.24 accrued whilst the vessel waited to berth. Owners contended that the charter was a port charter and that the risk of demurrage rested with Charterers. Charterers did not agree.

[1] [2009] EWHC 3046 (Comm).

## The Issues for Determination

The question for determination was whether the vessel had “arrived” for the purpose of tendering NOR and the commencement of the running of laytime. The answer to this issue in turn depended on whether the charterparty was properly a port or berth charter. At first instance, the arbitrators found in favour of Owners, focussing on the language of clause 2 as opposed to the Opening Term, and finding that the charterparty was a port charter.

Upon appeal to the UK High Court, Mr. Justice Gross overturned the arbitrators’ award, after finding that:

- a) following the judgment of Lord Diplock in the “Johanna Oldendorff”, the place of arrival at a port is the point geographically and in time when the voyage transit ends and the loading/discharging operation begin. Applying this to the wording of the Opening Term in the voyage charter for the “Merida”, Gross J. found that the Charterers had the right to nominate the berth at Xingang and, thus, the charterparty was a berth charterparty and not a port charterparty; and
- b) clause 2(1) of the charterparty did not operate to make the charterparty a port charterparty but only provided for a safe port warranty. Gross J. found that the Opening Term, which clearly provided for a berth charter, should prevail over any perceived inconsistency in the subsequent terms of charterparty. As far as clause 2(2) was concerned, the clause merely provided for the responsibility for the costs incurred in shifting the vessel, but did not have an impact on the overall laytime provisions or of itself make the charter a port charter.

Accordingly, Gross J. allowed the appeal and entered the verdict for the Charterers.

## Lessons to be Learned

It is important not to mistake safe port warranties for contractual provisions dealing with when a vessel will be taken to have “arrived” at a port and be entitled to tender NOR and have laytime commence. It is particularly important to give close attention to the wording of any charterparty to ensure that clear and unequivocal wording is used to provide when and where laytime starts to count, in particular if vessels are caught up in queues at ports but not yet at a berth.

This issue takes on particular significance for trades to or from ports where congestion is to be expected and we recommend that the participants in such trades carefully review their charterparty terms to ensure that (a) they accurately provide for the desired contractual position and (b) there is no actual or apprehended conflict between such primary terms and the remaining terms of the charterparty which could lead to dispute and costly litigation.

For further information on this article contact:

Nathan Cecil, Senior Associate  
Direct Tel: (02) 9230 9450  
nathan.cecil@nortonwhite.com

Ilka Frischen, Overseas Law Graduate  
Direct Tel: (02) 9230 9412  
ilka.frischen@nortonwhite.com

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Sydney Office  
Level 4, 66 Hunter Street, Sydney NSW 2000, Australia  
PO Box R364 Royal Exchange, Sydney NSW 1225, Australia  
DX 10296 Sydney Stock Exchange  
Tel: (61+2) 9230 9400 Fax: (61+2) 9230 9499  
24 Hour Client Emergency Contact: +61 (0)402 422 266