



Introduction

Coal Trade Review is a publication in which are reviewed shipping and contractual matters relevant to the international trade with coal, ores and mineral concentrates.

In this issue, the Editor reviews the following topics:

- **The Shipping Conditions For Sales Of Indonesian Coal Basis FOBT Kalimantan**
- **When The Geared Vessels Should Be Considered Ready To Discharge?**
- **The Computation of Time Spent By The Geared Vessel Waiting For Berth**
- **Delivery Of Commodity Cargoes Against A Bill Of Lading Retained On Board**

If you have any comments about the matters reviewed in this edition, please address them to editor@commoditylaw.eu

Review Of The Shipping Conditions For Sales Of Indonesian Coal Basis FOBT Kalimantan

by Vlad Cioarec, International Trade Consultant



Laycan Fixation Notice

The buyers must give to sellers notice of the 15 days' laycan spread with at least 45 days prior to the first day of the contract delivery period. The 15 days' laycan must fall entirely within the contract delivery period.

Vessel Nomination Notice

If the sellers will accept the laycan, then not later than 21 days prior to the first day of the laycan, the buyers shall have to narrow the vessel's laycan to a 10 days' spread, to nominate the vessel and declare the quantity of cargo required to be loaded with the 5% contractual tolerance.

Vessel Requirements

The type of vessel required to be nominated by the Indonesian shippers will be in function of the quantity of coal required by the buyers.

If the quantity of coal required is in the range of 30,000 – 60,000 metric tonnes, the Indonesian shippers will deliver the coal at an open sea anchorage (e.g. Taboneo Anchorage, Muara Satui Anchorage, Tanjung Anchorage) and will require the buyers to nominate geared bulk carriers in order to allow the shippers to load the coal from barges using the vessel's cranes operated by local stevedores.

The bulk carriers with a deadweight in the range of 30,000 – 60,000 tonnes are equipped with 4 cranes with a lifting capacity (Safe Working Load) of 30 metric tonnes each, fitted with 4 electro – hydraulic grabs with a capacity of 10 – 12 cubic meters each. The vessel's gear certificates (i.e. certificate of test and thorough examination of lifting appliances, certificate of test and thorough examination of derricks used in union purchase, certificate of test and thorough examination of loose gear, certificate of test and thorough examination of wire rope) must be valid and up-to-date. The vessel's gears must have been examined and certified by a surveyor to be in safe working condition at least once in the last 12 months preceding the laycan at loading port.

The coal cargoes up to 60,000 metric tonnes can also be delivered on FAS (Free Alongside Ship) terms rather than FOBT terms. In a FAS delivery, the sellers bear the costs and risks until the coal is placed alongside the ship ready for loading. The buyers shall bear all costs and risks from that moment. Therefore, a FAS (Free Alongside Ship) delivery would be more favourable to the Indonesian sellers who can deliver the coal in barges alongside the ship provided by the buyers, leaving the buyers the task to find and pay the stevedores for loading the coal on board the ship.

If the quantity of coal required exceeds 60,000 metric tonnes, the Indonesian shippers will deliver the coal either at a shore terminal or at an open sea anchorage by means of a floating transshipper. In such case, the Indonesian shippers will require the buyers to nominate a gearless bulk carrier.

The nominated vessel must have self-trimming holds to allow the shippers to deliver the coal spout or grab trimmed.

The nominated vessel must have all the IMO required certificates valid, including a Certificate of Fitness for the Carriage of Solid Bulk Cargoes listing coal as a permitted cargo, a Certificate of Fitness for the Carriage of Dangerous Goods, the Bulk Carrier Booklet endorsed by the Flag State Administration, the International Ship Security Certificate, Maritime Labour Certificate, Safety Management Certificate and the Document of Compliance with the ISM Code.

The nominated vessel must have sufficient deballasting capacity to enable the loading terminal

operator to achieve the maximum loading rate applicable to that size of the vessel without the interruption of loading, i.e. the ballast water must be discharged at a rate which prevents the interruption of loading.

For the coal shipments at North Pulau Laut Coal Terminal, Taboneo Anchorage, Muara Satui Anchorage and Tanjung Anchorage, the Indonesian shippers use the RightShip Vetting System to determine whether to accept or reject the vessel nomination. To obtain RightShip approval, the nominated vessels must receive a minimum three star rating level. The nomination of vessels over 18 years of age is not acceptable because the RightShip Vetting System downgrades them automatically to a two star rating and require their physical inspection.

ETA Notice

If the vessel nomination is accepted by the port operators, the buyers will charter the vessel and then give the ETA Notice at least 14 days prior to the vessel's ETA at the loading port.

ETA Updates

The buyers must ensure that the vessel's Master will give through the port agents the ETA notices at 7 days, 3 days, 48 hours and 24 hours before the vessel's ETA and inform the port operators of any deviation in excess of 24 hours from the initial ETA.

Conditions For The Vessel Substitution

The buyers may substitute the originally nominated vessel provided that:

- they give the vessel substitution notice to the port operators at least 5 days before the ETA of the originally nominated vessel;
- the substitute vessel will not arrive earlier than the ETA of the originally nominated vessel;
- the substitute vessel complies with the contract requirements in respect of type, size and de-ballasting capacity to be able to load the cargo quantity ordered by the buyers within the contractual time allowed for loading;
- the vessel's demurrage rate is not higher than that of the originally nominated vessel.

The Submission Of The Vessel's Loading Plan

The buyers must ensure that at least 72 hours prior to the vessel's ETA at the pilot station of the loading port, the vessel's Master must provide through the vessel's agents the following information:

- the vessel's loading plan;
- the final quantity of coal required to be loaded based on the vessel's loading plan;
- arrival and departure drafts;
- the quantity of ballast water on board and the estimated time required for deballasting.

If the Master does not provide this information to the terminal operator at least 72 hours prior to the vessel's ETA, any time lost thereby shall be solely for the buyers' account.

Conditions For The Vessel Presentation For Loading

The vessel must present for loading with the cargo holds clean, dry, empty, free of waste material and remnants of previous cargo and with the draught marks legible.

The gearless vessels shall be considered physically ready to load only after passing the inspection of holds. The inspection of holds shall be made by a qualified marine surveyor appointed by the sellers. The marine surveyor shall certify the cleanliness of holds by issuing the Hold Cleanliness Inspection Certificate. If the vessel has previously carried potential contaminants such as phosphates, sulphur, cement, salt, potash or iron ore, the marine surveyor inspecting the holds must certify that the holds are clean and free of contaminants.

If the vessel is an OBO (Ore/Bulk/Oil) Combination Carrier which has previously carried petroleum products, the Master can tender NOR only upon the vessel passing the inspection of PT Sucofindo.

All expenses and time incurred for making the holds gas-free and obtaining the Gas Free Certificate will be for the buyers' account.

The geared vessels shall be considered physically ready to load only after passing the inspection of holds and survey of the loading equipment.

If the loading equipment is not fully functional but the vessel is ready to commence the loading of coal with the available cranes and grabs, then the vessel shall be considered ready to load, even though not at the contractual rate of loading.

The only consequence of temporary non-availability of a crane or grab would be a proportional reduction in loading rate during the period of breakdown. The revised loading rate shall be assessed by an independent surveyor based on the lifting capacity of the functional cranes and grabs. This would be equally applicable to the breakdown existing at the time of the vessel's arrival as well to the breakdown occurring subsequently.

The time lost due to the breakdown of cranes or grabs shall be deducted on a pro rata basis in function of the ratio between the cranes and/or grabs in breakdown and the total number of cranes and grabs.

NOR And Commencement Of Laytime

The vessel's Master shall tender NOR upon the vessel's arrival at the outer anchorage or pilot station of the port of loading at any time, day or night, including Saturdays and Sundays, but excluding the Major Indonesian Holidays.

The 12 hours' Notice time shall start to count from the time of acceptance of NOR by the port operators provided that the vessel has arrived within the agreed laycan period and is in all respects ready to load the coal cargo.

The vessel shall be considered ready in all respects for loading if:

- she has obtained the ISPS clearance prior to the NOR tendering;
- she is not subject to an arrest order;
- she presents for loading in a seaworthy condition;
- she passes the holds' inspection.

If the Master tenders NOR before obtaining the ISPS clearance, the NOR shall be invalid and the Master will have to tender a new NOR upon receiving the ISPS clearance.

If the vessel is arrested prior to the commencement of loading, the sellers' loading obligation will be subject to the directions of the court which issued the arrest order. In such case, the Master may tender a new NOR only after the arrest order is lifted.

If the marine surveyor rejects the holds, the NOR tendered at anchorage shall be deemed invalid and the Master will have to tender a new NOR after he obtains the Hold Cleanliness Inspection Certificate from the marine surveyor. In such case, the laytime will start to count at 12 hours after the new NOR has been accepted by the port operators, unless the shippers commence the loading sooner in which case the laytime will start to count from the time of commencement of loading.

Given that the Indonesian coal shippers schedule their shipments in function of the vessel's laycan, the commencement of laytime will also depend upon whether the buyers' vessel tenders valid NOR within the agreed laycan period or not.

If the buyers' vessel arrives at loading port and tenders valid NOR before the first day of the agreed laycan period, the NOR shall not become effective before 07:00 hours on the first day of the laycan and the 12 hours' Notice time shall commence to run from 07:01 hours on the first day of the laycan, unless the shippers commence loading sooner in which case the laytime will commence to run from the time of commencement of loading.

If for any reason, including the vessel's late arrival or failure to pass the holds' inspection, the vessel does not tender valid NOR before the end of the cancelling day (the last day of the laycan period), the berthing of vessel after the laycan shall be subject to the consent of the shippers and the laytime will commence to run when the loading starts.

The commencement of laytime will also be in function of the Master's compliance with the deadline imposed by the port operators for the submission of the vessel's loading plan. If the Master fails to provide the vessel's loading plan to the terminal operator or to the shippers at least 72 hours prior to the vessel's ETA, the vessel shall not be included in the berthing programme on the expected readiness date and the 12 hours' Notice time shall not commence to run before the 72 hours' time limit from the submission of the vessel's loading plan has elapsed.

In case of the vessel substitution, the commencement of laytime will also be in function of the buyers' compliance with the 5 days' time limit imposed by the port operators for the submission of the vessel substitution notice. If the substitute vessel arrives and tenders NOR before the expiry of the 5 days' notice period, the NOR shall not become effective before 07:00 hours on the fifth day after the day of substitution and the 12 hours' Notice time shall not commence to run before 07:01 hours on the fifth day after the substitution notice date.

The laytime shall cease to count at the time when the loading, trimming and final draft survey have been completed or when the cargo documents required to effect the Customs clearance are on board, whichever is the later.

Sellers' Obligation To Have The Goods Ready For Loading

The sellers must have the goods ready for loading at 07:00 hours on the first day of the laycan period.

The sellers shall be liable for any delay resulting from their failure to provide a free berth or anchorage and/or to have the coal cargo ready for loading and/or to provide the stevedores and/or the functional loading equipment in due time and any time lost thereby by the buyers shall be for the sellers' account.

Loading Conditions

The coal cargoes shipped at shore terminals by means of shiploaders shall be delivered free on board the vessel spout trimmed.

The coal cargoes transhipped from barges by means of floating transshippers shall be delivered free on board the vessel grab trimmed, i.e. trimmed by transshipper's grabs.

The coal cargoes loaded from barges by the geared vessel's cranes fitted with grabs shall be delivered free on board the vessel grab trimmed, i.e. trimmed by vessel's grabs.

If the seller shall load the coal cargo using the vessel's cranes, the vessel's cranes shall be operated by local stevedores appointed and paid for by the seller. Any time lost due to the vessel's gears breakdown caused by the stevedores' negligence shall count as laytime or time on demurrage.

Any damage caused by the stevedores to the vessel affecting the seaworthiness of the vessel or the proper working of the loading equipment must be repaired after each occurrence. Any time lost to repair the damage caused by the stevedores to the vessel shall count as laytime or time on demurrage.

The claims for damages caused by the stevedores to the vessel during loading must be settled directly between the shipowners and stevedores.

Cargo Weight Determination

The weight figure used for invoicing and issuance of Bills of Lading shall be determined by a marine surveyor based on the vessel's draft survey before and after loading.

Sellers' Warranty As To The Cargo Fitness For Safe Carriage

Due to the propensity of Indonesian steam coal cargoes to self-heat, the contracts for the procurement of Indonesian steam coal contain a warranty as to the suitability of coal cargoes for sea carriage, as in the following clause:

“The shipment of coal will be fit to be carried safely in the vessel's holds from the loading port to the port of discharge and shall not pose any risk of causing any damage or loss to the vessel by self-heating and spontaneous combustion.”

Master's Right To Reject The Coal Cargoes Considered Unsafe

Due to the numerous incidents involving self-heating of coal cargoes after being loaded on board the vessels off Kalimantan, in 2010 the P&I Clubs required their members operating in the region to engage surveyors to conduct pre-loading survey of coal cargoes loaded off Kalimantan. The surveyors are required to inspect the coal cargoes prior to shipment, to assess the risk of self-heating and reject the coal cargoes which are considered too hot or otherwise unsafe for carriage on board the vessels. Therefore, the FOB buyers should stipulate in their procurement contracts that the surveyors and Master of the vessel have the right to refuse to accept for loading the coal cargoes which in their opinion constitute a risk to the safety of the vessel.



by Vlad Cioarec, International Trade Consultant

When The Geared Vessels Should Be Considered Ready To Discharge?

One feature of the contracts for the procurement of coal by the Indian steel and energy companies on CFR terms basis is the buyers' requirement to nominate geared bulk carriers suitable for discharge of coal cargoes by grabs because the Indian ports do not have high-capacity cranes for the discharge of coal.

The question of geared vessels' readiness to discharge the coal cargoes was raised by Steel Authority of India Ltd. in two charter party disputes to avoid the payment of demurrage charge for the time lost by three geared vessels waiting for berth.

In 2014 Indian law case **Steel Authority of India Ltd. v. Dampskibaselsbaket Norden A/S**, Steel Authority of India Ltd. rejected two demurrage claims under a contract of affreightment for the carriage of cargoes of coking coal in bulk from Newport News to Indian ports Vishakhapatnam and Haldia.

The first cargo was shipped on board the vessel "Nord Fighter". The cargo quantity on board the vessel was 51,544.726 MT of which a quantity of 25,189 MT had to be discharged at Vishakhapatnam and the balance of 26,355.73 MT had to be discharged at Haldia.

When the vessel arrived at the port of Vishakhapatnam on 12th May 2008, the discharging berth was occupied. The Master tendered NOR at 09:45 hours on the same day from the waiting place.

The vessel berthed on 17th May 2008 at 17:00 hours and commenced discharging operations at 18:30 hours.

The vessel arrived with a non-functional crane (crane no.3) which was under repair and made available only on 20th May at 22:00 hours.

The vessel completed the discharging operations at Vishakhapatnam on 21 May at 03:45 hours and then sailed to Haldia to discharge the balance quantity of cargo.

The shipowner calculated the laytime on the basis of the NOR tendered on 12th May at 09:45 and claimed the payment of demurrage charge for the time spent by the vessel in excess of the laytime.

Steel Authority of India Ltd. rejected the demurrage claim on the grounds that it accepted the vessel's NOR only from the time when all the four cranes along with the four grabs were made available in operational condition on 20th May.

The second cargo was shipped on board the vessel "Navios Kypros". The cargo quantity on board the vessel was 53,731.008 MT of which a quantity of 25,743 MT had to be discharged at Vishakhapatnam and the balance of 27,988.088 MT had to be discharged at Haldia.

The vessel arrived at Vishakhapatnam and tendered NOR at 14:00 hours on 28th July 2008. The vessel berthed on 31 July 2008 at 11:30 hours and commenced discharging at 15:30 hours. On 1 August 2008, the crane no.2 suffered a breakdown during discharging operations which could not be repaired during the time spent at Vishakhapatnam. The discharging operations at Vishakhapatnam were completed with the available cranes on 2 August 2008 at 21:30 hours.

Thereafter, the vessel sailed to the port of Haldia where it arrived and tendered NOR at 19:00 hours on 4 August 2008. The vessel berthed at 02:30 hours on 5 August 2008 and commenced discharging operations at 04:15 hours on the same day.

The non-functional crane was repaired and made functional only at 12:50 hours on 8 August 2008.

The discharging operations at Haldia were completed at 10:00 hours on 9 August 2008.

The shipowner calculated the laytime on the basis of the NOR tendered on the vessel's arrival at Haldia on 4 August 2008 and claimed the payment of demurrage charge for the time spent by the

vessel in excess of the laytime.

Steel Authority of India Ltd. rejected the claim on the grounds that it accepted the NOR tendered at Haldia only from the time when all the four cranes along with the four grabs were made available in operational condition, i.e. on 8 August 2008.

The dispute concerned the meaning of the following charter party clauses:

“35. Time counting provision:

At each discharging port, even if at second discharge port vessel arrives on demurrage, time to count 24 hours after Notice of Readiness is served on arrival of the vessel within port limits at each port of discharge and whether in berth or not and free pratique and *ready in all respects to discharge the cargo*. If turn time of 24 hours expires on Saturday afternoon, laytime will commence at 8.00 hours on first working day.

40. *In the event of breakdown of gears/cranes and other equipment of the vessel by reason of disablement or insufficient power etc., the period of such insufficiency shall not count as laytime.*

43. Charterers guarantee to discharge the cargo at the average rate of 10,000 metric tons Vizag/Paradip, 12,000 metric tons Haldia, basis 5 hatches (served by minimum 4 cranes all minimum 25 tons each with minimum 10 CBM grabs) and pro rata if less, per weather working day of 24 consecutive hours, Sundays and holidays included (SHINC) provision to be applicable after commencement of laytime.

44. Owners guarantee that vessel has minimum 4 number of cranes each of capacity minimum 25 tons and minimum 4 number of grabs each of minimum 10 cubic meters capacity with cycle time of 4 minutes and serving all hatches and accordingly the minimum capacity to discharge is 12,000 tons per day of 24 consecutive hours. Owners also guarantee that vessel has fully automatic grabs [...] *A joint survey shall be conducted in order to ascertain the particulars of cranes and grabs as above. In the case of any deficiency, the surveyors' report shall be binding on the Owners and Charterers and the rate of discharge shall be reduced proportionately ...*”

The charterers contended that the vessel “Nord Fighter” had to be ready in all respects to discharge the cargo at the time of tendering the NOR at Vishakhapatnam, with all the discharging equipment ready. The subsequent repair of the non-functional crane did not validate the NOR tendered at anchorage.

Similarly, the vessel “Navios Kypros” had to be ready in all respects to discharge the cargo at the time of tendering the NOR at Haldia on 4 August 2008, with all the discharging equipment ready. The subsequent repair of the non-functional crane on 8 August did not validate the NOR tendered on 4 August.

The arbitral tribunal held that the words “ready in all respects to discharge the cargo” in Clause 35 of the contract of affreightment did not state that all the cranes should be available for discharge, nor did it state that the vessel should be ready to discharge the cargo at the discharge rate provided in the contract of affreightment. It was sufficient that the vessel to be capable of discharging the cargo.

Thus, even if the vessels “Nord Fighter” and “Navios Kypros” arrived with a non-functional crane, they were ready to discharge the cargoes on board, though not at the rate stipulated in the contract of affreightment.

Notwithstanding the breakdown of one crane, the whole cargo quantity could be discharged using the other functional cranes. The breakdown of one crane did not prevent the discharge of cargo, but merely reduced the rate of discharge.

If the charterers could commence and complete the discharge of cargo with the available cranes, “it

would be absurd to say that the consequence of breakdown of a crane ... is that laytime does not count at all after tender of NOR”, when the only consequence of non-availability of crane is a proportional reduction in discharge rate during the period of breakdown.

As long as the vessel's functional cranes can be used for discharging the cargo from all the holds, the time counts. During the crane breakdown period the time shall count on a pro rata basis in function of the number of cranes available for the discharge operations.

Only if the vessel arrives with all cranes defective, NOR is invalid, because in such case the vessel would be totally unable to discharge the cargo.

Commentary

There is a distinction between the clauses which require the vessel to be ready in all respects to commence discharging the cargo as per the discharge rate agreed in the charter party or CFR sale contract, with all generators, cranes and grabs in good working condition and the clauses which require the vessel to be ready in all respects to discharge the cargo.

The first type of clauses include the requirement that the vessel's generators be able to provide continuous and sufficient electric power to the vessel's cranes and the requirement that the vessel's cranes be able to serve all cargo holds, work simultaneously and continuously with lifts of the minimum capacity stated in the contract (charter party or CFR sale contract). If after berthing, the surveyors discover a deficiency to the generators that will affect the continued normal discharge operations or to the cranes and/or grabs that will affect their discharging capacity, then the vessel will not be considered ready to discharge and the time lost until the remedy of deficiency will not count as laytime or time on demurrage. If nonetheless, the charterers or CFR buyers commence discharging the cargo with the available cranes and grabs, this shall be considered a waiver on the reliance on the condition of contract and the time shall count pro rata in function of the number of cranes available for the discharge of cargo.

In the second type of clauses, the geared vessel's readiness to discharge does not necessarily mean that the vessel's gears must be ready to discharge the cargo at the contractual rate or that all the vessel's cranes and grabs must be available for commencing the discharging operations.

If the vessel's discharging equipment is not fully functional but the vessel is ready to commence discharging operations from all the holds with the functional cranes and grabs, the vessel is still considered ready to discharge the cargo, even though not at the contractual rate.

The Computation Of Time Spent By The Geared Vessel Waiting For Berth

In case of the first type of vessel readiness clauses, the vessel's failure to provide the discharging equipment at the required capacity after berthing will entitle the cargo receivers to claim the deduction of time lost subsequent to berthing until the vessel is in fact ready to commence discharging the cargo with all cranes and grabs in good working condition. But the time lost by the vessel at anchorage counts in full, because the Master and crew cannot arrange the discharging equipment, including fitting the grabs into cranes, before berthing.

In 2012 Indian law case **Great Eastern Shipping Company v. Steel Authority of India Ltd.** the vessel “Jag Rishi” had to wait for berth from the time of arrival in port on 5th February 2008 until 12th February 2008. After berthing, two grabs needed repairs. One grab was fixed after 45 minutes, but the second grab was ready after 11 hours and 45 minutes.

The shipowner calculated the laytime on the basis of NOR tendered on 5th February and claimed the payment of demurrage charge for the time spent by the vessel in excess of laytime.

The voyage charterer rejected the demurrage claim. The charterer contended that since the full discharging equipment was not available for use at the time of berthing on 12th February, it means that the vessel was not ready in all respects to discharge the cargo at the time of tendering the NOR

on 5th February 2008 and therefore, the laytime commenced only from the time when all the four gears were fully operational, i.e. at 14:30 hours on 12th February. The High Court of New Delhi held that:

“Merely because some of the equipments were non-functional at the commencement of discharge did not necessarily mean that they were non-functional even at the time the NOR was served. [...] In a port charter when such NOR is issued it is normally some days before the actual berthing. If some of the equipments were temporarily non-functional at the commencement of discharge, it did not mean they were in that position even when the NOR was issued. [...] It was not possible to anticipate [at the time of tendering NOR] any partial failure of the cranes and grabs [after berthing].”

The degree of readiness of geared vessels at the time of arrival in port would depend on that of charterers or consignees to do their part of the work.

Quoting a paragraph from “Scrutton on Charterparties” 17th Edition, the High Court of New Delhi held that:

“the ship need not be absolutely ready by having all her gear fixed up for the work at a time when the charterers or consignees are not in a position to do any of their part of the work, so long as the ship can be absolutely ready as soon as they are.”

In case of the second type of vessel readiness clauses, the vessel's failure to provide the full discharging equipment at the required capacity after berthing will entitle the receivers to claim the deduction of time on a pro rata basis in function of the ratio between the cranes/grabs in breakdown and the total number of cranes/grabs. But the receivers are entitled to claim the pro rata deduction not only from the time lost after berthing but also for the time lost waiting for berth.

In 2014 case **Steel Authority of India Ltd. v. Dampskibaselsbaket Norden A/S**, the High Court of New Delhi held that in a port charter party the time lost by the vessel waiting for berth will count in the same way as the time spent by the vessel at berth. The excepted periods, which are not to be counted if the vessel would be at berth, would also not count if the vessel would be waiting for berth.

Since the vessel in that case arrived at the port of discharge with only three functional cranes instead of four, the charterer was entitled to a pro rata deduction from the time spent by the vessel waiting for berth. Had the vessel not been prevented from reaching the designated berth due to congestion in port, the vessel would have been at berth in which case only 75% of the laytime would have counted on the basis of the three functional cranes. Therefore, for the time lost by the vessel waiting for berth, the charterer should have been entitled to a similar reduction on account of breakdown of one crane, as if the vessel were in berth.

The Court based its decision on the House of Lords decision in **Aldebaran Compania Maritima S.A. Panama v. Aussenhandel AG Zurich (The “Darrah”)**¹.

In that case the House of Lords held that in the computation of the time spent by the vessel waiting for berth, the vessel must be treated as if she had been at berth and all such periods that would be excepted from the computation of laytime if the vessel had actually been at berth were to be excluded in the computation of the time spent by the vessel waiting for berth. The shipowner should not gain a greater advantage from his ship being kept waiting for berth than it would get from the ship being kept at berth.

1 [1976] 3 Lloyd's Rep. 320

Delivery Of Commodity Cargoes Against A Bill Of Lading Retained On Board



by Vlad Cioarec, International Trade Consultant

The coal cargoes shipped from Kalimantan to Indian ports are delivered to buyers against an original Bill of Lading retained by the Master on board the vessel, thereby avoiding the problems arising from the late arrival of Bills of Lading at discharge port.

This arrangement requires the seller to tender for payment two original Bills of Lading along with Master's receipt for the third original Bill of Lading, instead of the full set of three original Bills of Lading. The third original Bill of Lading is given to the Master with the instruction to hand it to the intended receiver at the port of discharge following that the intended receiver presents the original Bill of Lading back to the Master to obtain the cargo. The intended effect of this arrangement is that following the endorsement of the third original Bill of Lading by the receivers to shipowners, the remaining two original Bills of Lading to become void.

The practice of delivering the cargoes against a Bill of Lading retained on board was initiated in the short sea trades with oil cargoes. Sub-clause 33.9 of SHELLVOY 6 charter party has the following provisions:

“Owners hereby agree that original bill(s) of lading, if available, will be allowed to be placed on board.

If original bill(s) of lading are placed on board, Owners agree that vessel will discharge cargo against such bill(s) of lading carried on board, on receipt of receivers' proof of identity.”

The shipowners' risk of delivering the cargoes against a Bill of Lading retained on board is that the intended receiver is not the true owner of cargo and the lawful holder of Bills of Lading will later make a misdelivery claim against the shipowner. One such case is presented by Mr. Jørgen Rasch, Manager of Syndicate 2 at Danish Defence Club, in the article “Delivery of cargo against Bill of Lading carried on board” posted on 9th May 1996 on Danish Defence Club's web site¹.

The claim arose from the sale of an oil cargo to a Finnish buyer on CAD (cash against documents) terms. Four Bills of Lading were issued by the Master for the cargo, of which one Bill of Lading was retained by the Master on board, while the other three Bills of Lading were sent together with the commercial invoice to a Finnish bank to collect the payment.

Upon the vessel's arrival at discharge port, the Master handed the Bill of Lading to the port agent, discharged the cargo and left the port. The Bill of Lading was duly endorsed by the forwarding agent of the consignee and redelivered to the port agent who sent it to the shipowner.

The Finnish buyer did collect the cargo without paying for it and approximately one month thereafter it went into bankruptcy.

The case reached in Court where the shipper-charterer claimed that the Master was not entitled to deliver the Bill of Lading carried on board to any third party and that the Master and shipowner should have realized that the shipper-charterer had title to the cargo until one of the Bills of Lading sent to the Finnish bank had been collected by the buyer.

On its turn, the shipowner said that it was common practice in the short sea trade to deliver the cargo against a Bill of Lading carried on board and that it was the shipper-charterer's responsibility to give the Master specific instructions if the cargo was not to be delivered against the Bill of Lading carried on board. The Court agreed and said that by its failure to instruct the Master the shipper-charterer lost its claim for damages.

In the conclusion of article, Mr. Jørgen Rasch recommended a charter party clause to be used by

¹ The article is on the Archive of General Section of Danish Defence Club's web site www.danishdefenceclub.com

shipowners in case that voyage charterers insist to place an original Bill of Lading on board. The clause has the following wording:

“If charterers or their agents place an original bill of lading on board the vessel, the master is entitled to deliver the cargo against the endorsement of such bill of lading, unless he is instructed to the contrary by charterers prior to arrival at the discharge port.

If a claim is made against owners for delivery against a bill of lading carried on board, charterers to hold harmless and indemnify owners for any and all consequences following therefrom, including the costs of security to free the vessel from arrest and legal expenses.”

The International Group of P&I Clubs have issued a circular letter in July 1990 recommending that when carriers are required to deliver cargoes against one original Bill of Lading carried on board, all the original Bills of Lading be issued with the following clause:

“One original bill of lading retained on board against which bill delivery of cargo may properly be made on instructions received from Shippers/Charterers.”

It is believed that this clause will give notice to any party purchasing the cargo against an incomplete set of Bills of Lading that delivery may be made in exchange for one original Bill of Lading retained on board and, as such, should reduce the risks of the practice.

If the ultimate destination of cargo is unknown at the time of shipment, the Bills of Lading should show the port of discharge as a range of ports or a geographical area, as stated in the charter party, to avoid vessel's arrest in case the charterer orders discharge of cargo at a different port than stated in the Bills of Lading. To ensure that Bills of Lading will be issued with the proper wording as to the port of discharge and delivery of cargo, the charter party and letter of authority given to the ship's agents for signing the Bills of Lading should include clear instructions as to the information and clause required to be included in the Bill of Lading.