

On foreseeability in construction of contracts in laytime matters – a comparison between English and Scandinavian law

By Trond Solvang¹

1. Introduction

Under most legal systems it is generally recognized that adherence to the contract wording has the effect of promoting foreseeability in contract. This may be particularly true in the area of charterparty law where the industry uses standard forms, intended for use across national borders and under various legal system. Admittedly, this notion of ‘adherence to the wording’ is no formula which yields the answer to the question of construction in a given case. The wording must normally be construed within a context, and the extent to which the context shall be allowed to influence a mere literal understanding, is a discussion well known under any legal system.

This paper does not deal with foreseeability in contract within that traditional dichotomy: context oriented vs. literal construction. Rather it deals – in a tentative manner – with what may be called “background law structures” to construction of contracts. By this I mean the, so to speak, starting point taken when construing contracts which do not contain specific or elaborate wording on the question at hand.

Examples are taken from earlier times when contracts were less specific than we normally find today. A selection of case law concerning commencement of laytime will be compared under English and Scandinavian law. The selection is based on the same contract wording and essentially the same set of facts; the ship being delayed in berthing.

One aspect of such comparison is that in Scandinavian law the structural thinking is to a large extent laid down in the non-mandatory Maritime Code, intended as aid to charterparty construction. English law has no similar legislation, hence the structural thinking is taken from other sources such as basic principles of sale of goods law, which we shall come back to.

A general observation will be that there is a complexity in English law, more so than in Scandinavian law, which may have a bearing on the notion of foreseeability in construction of contracts. Moreover, some observations will be made on the interplay between the development of charterparty forms and some key English law decisions. This is of interest since the direction taken by the industry, whether or not to adopt such key rulings, may serve to illustrate foreseeability in contract, at least from a pragmatic perspective.

¹ The author is professor at the Scandinavian Institute of Maritime Law, University of Oslo.

2. The structure of port/berth charters

a) English law

We shall start with some general constituents of the port/berth charter thinking in English and Scandinavian law. We first look at English law, somewhat simplified.

The essence is that the formulation of the contract destination constitutes the point of performance by the shipowner; where the ship must be “arrived”² for the sea voyage stage to be transformed into the loading stage.³

Historically, if the berth was named in the charter, such berth constituted the destination – the place of “arrival”. If the berth was not named a right of nomination was implied in favour of the charterer and the ship became “arrived” when placed at such waiting area of the port where she was at the charterer’s immediate disposal – a port charter solution.⁴

It is important to note that under English law the ship must have so “arrived” for laytime to commence. Laytime is the contractual effect of the shipowner’s prior performance. This has been called the principle of “mutual interdependent promises”⁵ and is adopted from sale of goods law. Performance by the one party must be fully completed before a duty to perform by the other is triggered. A seller must have completed delivery of the goods for property to pass and the sales price to become earned.⁶

This principle of “mutual interdependent promises” makes good sense in the majority of cases but complications arise if the ship is prevented from being “arrived” by hindrances on the charterer’s part. Here English law resorts to the structural thinking of implied obligations imposed on the charterer not to prevent the shipowner from performing.⁷ But the nature of

² The adjectival form (the ship being arrived/an arrived ship) rather than the verbal form (the ship having arrived) is here used since the term “arrival” has the technical legal meaning of the shipowner’s contractual performance having been completed.

³ See e.g. the analysis in the *Johanna Oldendorff* [1973] 2 Lloyd’s Rep. 285 HL (pp. 304-305). For simplicity reasons the term “loading stage” is used throughout this paper rather than the (depending on the circumstances) more complete phrase “loading and discharging stages”.

⁴ *Ibid.*

⁵ See e.g. the Court of Appeal in the *Aello* [1958] 2 Lloyd’s Rep. 65 CA (p. 78).

⁶ See the sale of goods case *Mackay v. Dick* 1881 LR 6 App. Cas. 251 as discussed in the context of laytime by the Court of Appeal in the *Aello*, *supra*, p. 80.

⁷ The principle was laid down in the *Vergottis v. William Cory* 1926 2 K.B. 344 (p. 355) and later applied e.g. in the *Aello*, *supra*, p. 78.

such implied obligation is far from clear. In some areas, like the charterer's duty to procure cargo to enable "arrival" of the ship, the law seems to be settled.⁸ In other areas not.⁹

Moreover, if the charterer is in breach of such implied obligation the shipowner's remedy is damages for detention, not laytime proper.¹⁰ This kind of splitting-up of remedies causes complications since the contract often contains exceptions to the running of laytime. If for example Sundays and holidays are excluded from laytime – shall such days be excluded also during a period of detention, prior to laytime? If the answer is 'no', for example on the footing that damages for detention is outside the scope of the charterparty terms, the slight paradox may ensue that the shipowner benefits from the charterer preventing the shipowner from performing.¹¹

Another structural aspect relates to port charters in particular. When the contract destination is held to be a proper waiting place in the relevant port this means that the loading stage begins upon the ship's arrival there. This in turn means that the subsequent sailing time to berth is for the charterer's time as part of the loading stage. And this in turn means that there is a limit as to how far from the relevant berth the waiting place can be located; the ship must be at the charterer's immediate disposal.¹²

This criterion of the ship having to be at the charterer's immediate disposal has generated a fair amount of litigation. The courts have seen it as an important task to establish workable criteria for what constitutes "arrival" in a port charter, through a line of cases in the *Leonis v.*

⁸ See the House of Lords in the *Aello* [1960] 1 Lloyd's Rep. 623 HL (p. 643).

⁹ In the *Atlantic Sunbeam* [1973] 1 Lloyd's Rep. QB 482 the ship's "arrival" depended on a prior *jetty challan* (berthing allowance) from the port authorities. The court expressed doubt as to whether the shipowner or the charterer was responsible for procuring the *challan* but if the responsibility of the charterer, the implied obligation to be imposed consisted in the mere exercising of due diligence, and on the evidence no want of diligence was found. See also the *World Navigator* [1991] 2 Lloyd's Rep. 23 CA which was decided on different grounds but where comments are made (p. 31) on the apparent discrepancy between the *Aello* and the *Atlantic Sunbeam*.

¹⁰ A remedy sounding in laytime proper rather than damages was discussed but dismissed by the Court of Appeal in the *Aello*, *supra*, p. 80. Likewise it was discussed but dismissed in earlier cases, see *Förnyade Rederi Aktiebolaget Commercial v. Blake & Co.* [1931] 39 Lloyd's Rep. 205 CA (p. 211) and *Samuel Crawford v. Cory Brothers* [1926] 25 Lloyd's Rep. 464 Privy Council. In the latter case (p. 468) the point was merely raised by the court as one not having been addressed by the parties.

¹¹ See e.g. the *Radnor*, *infra*, addressing a similar paradox under Gencon 'time lost' clause.

¹² See e.g. Lord Reid's statement in the *Johanna Oldendorff*, *supra*, p. 291, to the effect that sailing time to berth, in that case, of about three hours "is wholly immaterial because there will be at least this much notice before the berth becomes free ...". See discussions to the same effect at p. 307.

Rank,¹³ the Aello,¹⁴ the Johanna Oldendorff¹⁵ and the Maratha Envoy.¹⁶ The so-called Reid test of the Johanna Oldendorff from 1973 governs still today, essentially stating that the ship must lie at a usual waiting area within the limits of the destination port.¹⁷

These criteria are intended to promote foreseeability in contract but they are also capable of creating inflexibility and unreasonable results.¹⁸ Due to configurations at various ports the ship may be left waiting a few hundred meters outside those within-port-criteria, thus not being “arrived”. Generally, this kind of arbitrary effects has a propensity for generating further litigation.¹⁹ Moreover, it should be recalled that those port charter criteria are not really derived from the contract wording. They are derived from policy considerations which again are linked to the mentioned structural approach of English law – the principle of “mutual interdependent promises”.

b) Scandinavian law

Having been through these structural aspects of English law we turn to Scandinavian law and the Maritime Code.

The Code takes as a starting point that laytime commences when the ship has reached the end destination of the sea voyage; the berth where cargo operations will occur.²⁰ However, if the ship is prevented from arriving there by hindrances on the charterers’ side, the system is (and has been so from 1860) that laytime is advanced in time to the place where the ship

¹³ (1907) 13 CC 136 (CA).

¹⁴ The decision by the House of Lords, *supra*.

¹⁵ *Supra*.

¹⁶ [1977] 2 Lloyd’s Rep. 301 HL.

¹⁷ See Lord Reid’s speech in *Johanna Oldendorff*, *supra*, p. 291. See however the somewhat differently formulated criteria in Viscount Dilhorne’s speech, p. 299.

¹⁸ See the quite differing approaches to this point in the *Maratha Envoy*, by Lord Denning in the Court of Appeal decision, [1977] 1 Lloyd’s Rep. 217 (at p. 222) and Lord Diplock in the House of Lords, *supra* (at p. 308).

¹⁹ See to this effect Davies, *Commencement of laytime*, 4th ed., London, Informa, 2006: “Lord Reid’s test in the *Oldendorff* decision does not appear to be of easy application to many ports and, in addition, can often lead to considerable time consuming and costly research in attempting the establishment of the limits of the various powers exercised by port authorities. The views expressed above [that waiting areas should be expanded to ‘off port’] are prompted simply by a desire to see the ‘arrived ship’ concept made easier and more certain of application, also in the hope that, one day, the English law will be in step with so many other maritime nations.”

²⁰ Section 332 first sentence of the Norwegian Code. In the following the Norwegian Code will be used as reference; the numbering of the Swedish and Finnish provisions differs from that of the Norwegian and Danish.

has to wait.²¹ This approach of advancing laytime means that Scandinavian law does not adopt the English structure of “mutual interdependent promises”. Rather the principle of *mora accipiendi* is adopted, derived from the sale of goods law in the civil law tradition: if the buyer does not co-operate so as to enable delivery by the seller, the legal effect of delivery occurs by reason of contractual tender for delivery by the seller.²²

In the context of laytime this has various implications.

Firstly, there is no split-up between laytime proper and a separate regime of damages for detention as under English law. This also means that there is no need to venture into the nature of a charterer’s implied obligations as under English. The criteria are objective: is the cause of the delay to the ship attributable to the charterer? If ‘yes’, laytime commences from where the ship has to wait. Admittedly it must be asked: What is the nature of such hindrances attributable to the charterer? But the answer to this seems to be less complex than the English equivalent of asking whether the charterer is subject to implied obligations and, in turn, the nature of those obligations.²³

Secondly, since there is no split-up between laytime proper and damages for detention there is also no complicating aspect of the application of charterparty laytime exceptions to a separate regime of damages for detention, as under English law.

Thirdly, based on this structure of *mora accipiendi* laytime will only count during the time the vessel is delayed by reason of a charterer-related hindrance. This means that when such hindrance ceases, performance by the shipowner resumes during the sailing time to berth. Moreover, the fact that this sailing time will be for the shipowner’s time makes redundant much of the need of the English law criteria as to exactly where the vessel must wait to become “arrived”. It is not in the same way a question of the ship having to be at the charterer’s immediate disposal during the waiting time. The decisive point is the nature of the hindrance, not exactly where the ship has to wait.

3. Comparison of English and Scandinavian case law

a) berth charters and the effect of ‘order clauses’

We now turn to some examples from case law under the respective systems to see how one and the same charterparty wording has been treated differently. We shall also see how the development of charterparty forms has been affected by some of the English law solutions.

²¹ Section 333 first sentence.

²² For further analyses see Solvang, *Forsinkelse i havn – risikofordeling ved reisebefraktning* (Delay in port – risk allocation in voyage chartering), Oslo, Gyldendal, 2009, pp. 264-272 and 439 flw.

²³ See further Solvang, *supra*, pp. 667-672.

We start with the berth charter concept and so called order clauses. These were clauses giving the charterer an express right to nominate the berth, however, with no clear stipulation as to where the vessel must have arrived for laytime to commence. Disputes arose when charterers nominated berths which were occupied. Could the charterer in this way put the risk of delay on the shipowner?

English courts took the view that such order clauses constituted a berth charter solution. The reasoning was that a subsequent nomination by the charterer was in principle no different from the nominated berth having initially been written into the charter. Moreover, such right to nominate was seen as a true option: the charterer had no duty to consult the convenience of the shipowner since no such restriction was contained in the contract wording.²⁴

The same question was put before the Norwegian and the Swedish supreme courts which reached a different outcome from the English. According to the Scandinavian courts there must be an implied requirement that the nominated berth be available, otherwise the shipowner would be too much at the charterer's mercy.²⁵ Laytime therefore counted from where the ship was left waiting.

Following these differences in outcome some observations may be made on how the industry reacted to the English law solution.²⁶ Express order clauses were obviously retained but added wording was adopted placing the risk of occupied berth on the charterer through the acronym 'wibon'²⁷ (whether in berth or not) or, as in Gencon 1946, 'time lost waiting for berth to count as loading or discharging time'.

²⁴ *Tharsis Sulphur v. Morel Brothers*, 1353 [1891] 2 QB 647 (p. 652).

²⁵ *Nordiske Domme* (ND) 1907.225 and 1923.126 (Norwegian Supreme Court), ND 1901.539, 1905.241 and 1932.125 (Swedish Supreme Court). Some of the cases contain discussions on the relationship between express order clauses and the system of the Code contemplating implied rights of ordering by the charterer. Those discussions are however immaterial to the question at hand, see Solvang, *supra*, pp. 510-523.

²⁶ These observations are not based on any empirical research on cause and effect in this context; there may for example have existed 'wibon' provisions relating to berth charters before authoritative English law decisions were rendered on the meaning of order clauses. It seems, however, that the main tendency of the observations is appropriate, as also confirmed by the House of Lords in the *Kyzikos*, *infra*. See to the same effect Davies, *supra*, pp. 76 *flw.*; Tiberg, *The law of demurrage*, 4th ed., London, Sweet&Maxwell, pp. 259 *flw.*; Schofield, *Laytime and demurrage*, 5th ed., London, LLP, pp. 159 *flw.*

²⁷ See e.g. Iron Ore clause 6 and Baltimore Grain clause 14. Other standard forms contained qualifications obliging charterers only to nominate berths which were 'available', 'accessible', 'reachable' etc. No doubt the intended effect was essentially the same as 'wibon' or 'time lost' but these qualifying terms became entangled in the English split-up system of charterers' breach and the remedy of damages for detention, separate from laytime proper. An account of that topic would exceed the scope of this paper, see further discussion in Solvang, *supra*, pp. 605-649 and 719-727.

Also these phrases became subject to litigation under English law. By ‘wibon’ it was recognized that the intention was to depart from the earlier English order-clause decisions.²⁸ ‘Wibon’ was therefore construed in line with the English port charter solution.²⁹ From a Scandinavian perspective ‘wibon’ merely adopted the solution already given to order clauses by the courts.

The Gencon ‘time lost’ clause became more complex under English law. Since the clause was phrased ‘time lost shall count as loading or discharging time’, this was believed to mean something other than laytime proper.³⁰ Thus, time waiting for berth counted as a separate regime unaffected by the charterparty laytime exceptions.³¹

In a series of cases³² this had the somewhat absurd effect of the shipowner benefitting from having to wait for a berth.³³ Eventually, in the *Darrah* from 1976³⁴ the House of Lords put an end to this line of cases. It is worth quoting part of the reasoning:

“In recommending your Lordships to overrule the construction of a standard clause in a much used form of charterparty ..., I am not unaware of the importance of not disturbing an accepted meaning of a clause commonly used in commercial contracts upon which the parties to such contracts have relied in regulating their business affairs. But this is a consideration which in my view carries little weight in the case of the “time lost” clauses in the Gencon form of voyage charters. In the first place, results of ascribing to the clauses the meaning accepted since 1966 do not make commercial sense; it gives the shipowner the

²⁸ See e.g. the House of Lords in the *Kyzikos* [1989] 1 Lloyd’s Rep. 1 (p. 7).

²⁹ It is however not obvious from the wording of ‘wibon’ that the vessel would have to wait at the “within-port” criteria as developed in the English port charter concept, while the ‘time lost’ clause would not be so restricted, see footnotes, *infra*.

³⁰ See e.g. the *Radnor* [1955] 2 Lloyd’s Rep. 668 CA (p. 675). From a Scandinavian perspective it is worth noticing Davies’ critical remarks to such a finding, *supra* (p. 77): “It is also strange that the court should think that the words loading and discharging time meant something different to laytime; to commercial men the terms are synonymous.”

³¹ Moreover, time lost waiting for (an available) berth counted as a separate regime unrelated to the otherwise applicable port charter criteria; the vessel would not have to wait “within-port”. That can be contrasted with ‘wibon’ despite the obvious similarity in meaning; ‘wibon’ was, according to the House of Lords in the *Kyzikos*, *supra* (p. 7), shorthand for “whether in berth (a berth being available) or not in berth (a berth not being available)”.

³² The *Radnor*, *supra*; the *Vastric* [1966] 2 Lloyd’s Rep. 219 QB; the *Loucas N* [1970] 2 Lloyd’s Rep. 482 QB.

³³ That was so not only when waiting for berth prevented the ship from being “arrived” according to the English port charter criteria but also when being so “arrived”, see footnotes *supra*.

³⁴ [1976] 1 Lloyd’s Rep. 359 HL.

chance of receiving a bonus dependent upon whether a) his ship is lucky enough to be kept waiting for a berth and b) is so kept waiting during a period which includes time which would not have counted against permitted laytime if the ship had been in berth.”³⁵

Hence the earlier understanding of splitting-up into separate regimes was set aside essentially on the footing that it led to results which did not make commercial sense. From a Scandinavian perspective this development is of particular interest.

Firstly, the Gencon phrase ‘loading or discharging time’ does not within the context of the Code mean anything separate from laytime. The Code uses this very term ‘loading and discharging time’ as a common denominator for laytime and time on demurrage.³⁶

Secondly, the phrase ‘time lost waiting for berth’ fully accords with the structure of the Code: laytime starts from where the ship has to wait in case of charterer-related hindrances, including occupied berth.³⁷ Thus, in a case from 1969³⁸ the Danish Commercial Court gave the Gencon ‘time lost’ clause the same meaning as the laytime provisions of the Code. The ship was left waiting some 30 nm at a nearby port from the port of destination. Such waiting time was held to count as laytime proper under the Gencon³⁹ and it was stated to have so counted also under the provisions of the Code. This also illustrates how the Code was not aligned with the English law port charter “arrival” criteria.

b) port charters and ‘at or off port’, ‘wipon’

A further illustration of charterparty development relates to the English “arrival” criteria in a port charter context. It would be conceivable that the industry adopted the English law thinking by inserting clauses, something like:

“Laytime only to count from arrival at a waiting place within the limits of the port. However, the charterers are under an obligation to facilitate such arrival, and if in breach of such obligation, they shall compensate the shipowner by paying damages for detention separate from the regime of laytime/demurrage proper.”

However, modern standard charter forms do not say so. Rather they take the simpler approach of expanding the area from where laytime can commence. For example the Gencon 1994 states:

³⁵ Ibid, p. 366.

³⁶ Section 330.

³⁷ Section 333 first sentence.

³⁸ ND 1969.70 SØHa.

³⁹ To that effect see also ND 1976.105 SØHa.

“If the loading ... berth is not available on the vessel’s arrival at or off the port of loading ..., the vessel shall be entitled to give notice of readiness ... on arrival there.”

Other forms may add the acronym ‘wipon’ (whether in port or not) intended to achieve the same result.

From a Norwegian perspective such expansion of the waiting area is unproblematic. It is in line with the existing structure of the Code as sanctioned by case law.⁴⁰ The decisive point is not the exact location of the waiting place but the nature of the hindrance.

From an English perspective such clauses may however be problematic. No doubt English law would give effect to the wording but the nature of the structural thinking might still influence the extent of such giving effect to the wording. For example, the notion of port charters that the loading stage is extended to the waiting place⁴¹ may well put restrictions on how far ‘off the port’ such clauses can reach. In the *Oldendorff* the distance from the waiting place to berth was 17 nm, in the *Aello* - a ship held not to be “arrived” – the distance was 22 nm. Would a ship be considered ‘at the charterer’s immediate disposal’ (thus “arrived”) from a waiting place, say, 200 nm from the destination port under an ‘at or off port’ clause?⁴²

An integral part of this is that modern charterparty forms – including Gencon 1994 – invariably deduct from laytime the vessel’s sailing time from the waiting place to berth.⁴³ Hence, the loading stage does not – in that sense – extend to the waiting place as contemplated in the *Oldendorff* analysis of port charters.⁴⁴ Moreover, the adoption of such terms further indicates that the industry does not follow the structural thinking of English law. Rather it points in the direction of the Scandinavian model of merely having the waiting time count whereafter the sea voyage resumes for the shipowner’s time; the shipowner

⁴⁰ ND 1969.70 SjøHa, supra.

⁴¹ Para 2 a) supra.

⁴² In the *Adolf Leonhardt* [1986] 2 Lloyd’s Rep. 395 QB such a distance of 200 nm was, obiter, held to be sufficiently close under ‘wipon’, however, significant doubt was expressed as to how the *Oldendorff*-criteria should be applied, and the case was decided on a different basis: that laytime exceptions would in any event have prevented time from counting.

⁴³ Gencon 1994 clause 6 lines 115-116, see also e.g. *Asbatankvoy* clause 7 in fine, and *Shellvoy* clause 14 (a).

⁴⁴ This may clearly affect the application of the English law criterion of the vessel having to be ‘at the charterer’s immediate disposal’. See footnote 11, supra,

should not benefit from the ship being initially prevented from berthing by letting the subsequent sailing time to berth form part of the laytime.⁴⁵

4. Concluding remarks

The purpose of this paper has been to raise awareness of what is called structural thinking in construction of contracts. For example the English starting point of “mutual interdependent promises” may have a different impact on construction than the Scandinavian equivalent of *mora accipiendi*.

A selection of examples has been made to illustrate this point and there could be others.⁴⁶ The examples are not intended to suggest that Scandinavian legal thinking is any “better” than the English – perhaps rather the opposite: English law analysis seems in many ways more sophisticated and richer on nuances. But such sophistication may come at the cost of complexity and self-generated legal questions in need of being resolved, something which entails aspects of foreseeability in contract in a structural sense.

Moreover, when looking at the development of charterparty forms the examples show a tendency being closer to the Scandinavian than to the English approach. And also this may entail aspects of foreseeability in contract: If the industry tends to revise and simplify the earlier solutions of construction produced by the English courts, this may in itself indicate that English legal thinking is not fully aligned with the pragmatic aims of the industry.

⁴⁵ This somewhat illogical result follows from the Oldendorff analysis whereby laytime commences upon berthing if the ship can sail directly to berth, while the loading stage is extended to the waiting place if the ship is prevented from berthing, see the Oldendorff, *supra*, p. 305.

⁴⁶ As in the area of invalid Notices of Readiness (NORs): If a ship is left waiting in port for, say, 10 days due to occupied berth and a defect in loadreadiness is subsequently discovered upon inspection at berth, the NOR would under English law be considered invalid, see e.g. the *Mexico I* [1990] Lloyd’s Rep. 507 CA. This makes good sense under the structural thinking of English port charters where performance by the shipowner, including the requirement of physical loadreadiness, must be completed at such waiting time in port. It may not make the same sense under the structure of *mora accipiendi* where such a result may entail elements of enrichment in favour of the charterer, insofar as the waiting time is occasioned by hindrance on the charterer’s side. See further Solvang, *supra*, pp. 687.