



Notice of Readiness and The Arrived Ship and entering the laytime and demurrage regime – revisiting “The Johanna Oldendorff” (1973) and 45 years later taking a trip round “The Arundel Castle” (2017)

Introduction

*The Johanna Oldendorff*¹ is one of the leading cases on laytime. In this case, Lord Diplock described the essential characteristics of a voyage charterparty to be comprised of four successive stages:

1. The Loading Voyage – the voyage of the chartered vessel from wherever she is, to the place specified in the charterparty as the place of loading.
2. The Loading Operation – the delivery of the cargo to the vessel at the place of loading and its stowage on board.
3. The Carrying Voyage – the voyage of the vessel to the place specified in the charterparty as the place of delivery.
4. The Discharging Operation – the delivery of the cargo from the vessel at the place specified in the charterparty as the place of delivery and its receipt by the charterer or other consignee.

The first and third stages involve performance solely by the shipowner, whereas the second and fourth stages require acts of performance by both the shipowner and the charterer. It is in those two stages that many disputes have arisen.

Having estimated the amount of time for loading and discharge as well as for the carrying voyage, the owner has set the rate of freight in order to make the voyage viable. When the notice of readiness has been given, time starts to count in accordance with the provisions contained in the charterparty. When laytime has expired, the demurrage period commences and the shipowner is entitled to special compensation for any delay or excess time, as any unforeseen delays will cost the shipowner money and result in a loss on the voyage. Historically, the reason behind this system was in order to give the charterer, the shipper or the receiver the time to prepare for loading and discharge. Accordingly, the charterer has the risk of ensuring that the loading procedure is carried out within the laytime. Conversely, the shipowner has the risk of delay before laytime has commenced.

The dispute as to which party is to bear the risk of the vessel waiting at a port for a berth has been a subject of controversy, since the beginnings of commercial shipping. This controversy arises mainly due to the fact that the parties are free to regulate their own contract and are not restricted by conventions or statutes. Even in the present time, despite a fairly comprehensive test and criteria, cases are still being heard in arbitrations and in the Courts revolving around determinations of whether a vessel can be considered as having arrived and the meaning of port limits.

The principles

In order for laytime to start, there are certain conditions which must be satisfied. Firstly, the vessel must have reached the agreed destination. The vessel must have become an “arrived ship” at the specified port of loading or discharge. The charterparty will determine when the

¹ E. L. Oldendorff & Co. v Tradax Export S.A. (*The Johanna Oldendorff*) [1973] 2 Lloyd's Rep 285



vessel has arrived. Secondly, the vessel must be ready in all material respects to load or discharge the cargo. Thirdly, the vessel must tender a notice of readiness confirming that the vessel has arrived at the agreed destination and that she is ready to load or discharge cargo.

Once the vessel has reached the agreed destination, she is said to be an “arrived ship”. Charterparties usually make a distinction between “berth charters” and “port charters”. Unless the charterparty specifically and expressly stated where the notice of readiness is to be tendered, then whether a ship is “arrived” will depend on whether the charter is a “berth charter” or a “port charter”.

In the case of a berth charter, unless the charterparty otherwise provides, the vessel will not be considered arrived until she reaches the specified or nominated berth within a named port. In order to qualify as an arrived ship, the notice of readiness must be tendered once the vessel has reached the berth and be ready to begin loading or discharging operations. Until then, the vessel is still at the loading voyage or carrying voyage stage, and no obligation lies upon the charterer to load or receive the cargo. This would be so even if the vessel was unable to berth due to the specified berth being occupied. The importance of arrival at the agreed berth is that the shipowner will bear the risk of delays up to that point in time, whereas the charterer bears the risk thereafter.

Unfortunately, the position is not so straightforward in the case of port charters, where the contractual destination of the vessel is a named port and the charter will have to nominate a berth. This may partly be due to the larger area involved and partly to the variety of definitions of a port, which are dependent on whether it is regarded from a geographical, administrative or commercial perspective.

The test at common law for when a vessel has “arrived” under a port charterparty was set out in case of *The Johanna Oldendorff* which held that in order for the vessel to qualify as having arrived at the port and therefore be entitled to give notice of readiness, it must satisfy two conditions. The first condition is that if the ship cannot immediately proceed to a berth, she must have reached a position within the port where waiting ships usually lie. The second condition is that the vessel must be at the immediate and effective disposition of the charterers.

The Johanna Oldendorff

The earliest cases in English law, as to the question of when a vessel is an “arrived ship” under a port charterparty go back over one hundred years. It was thought that the decision in *Leonis v Rank*² had provided the shipping community with an authoritative answer; however, due to changes in commercial shipping practice which did not reflect the positions under standard form of voyage charterparties of the time, a series of decisions on this topic arose, between 1957 and 1977. Three cases in particular reached the House of Lords: *The Aello*³, *The Johanna Oldendorff* and *The Maratha Envoy*⁴.

The case of *Leonis v Rank* had established that where the agreed destination was a port, the ship is an “arrived ship” when she is within the commercial area of the port, and at the disposition of the charterers even though she may not be in the position to load or discharge cargo at the place she has reached. In the case of *The Aello*, the House of Lords interpreted the “commercial area” of a port as “*the area in which the actual loading spot is to be found and to which vessels seeking to load cargo of the relevant description usually go, and in which the business of loading such cargo is usually carried out*”. Several years after the decision, *The Aello* was overruled by the House of Lords in *The Johanna Oldendorff*.

² *Leonis Steamship Co Ltd. v Rank Limited* [1908] 1 KB 499

³ *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co (The Aello)* [1961] AC 135

⁴ *Federal Commerce and Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1977] 2 Lloyd's Rep 301



Under a voyage charterparty, the Owners of the MV “Johanna Oldendorff” chartered her to carry grain from USA to “London or Avonmouth or Glasgow or Belfast or Liverpool/Birkenhead or Hull at the charterers’ option”.

Clause 3 of the charterparty provided that:

“...Time to count from the first working period on the next day following receipt during ordinary office hours of written notice of readiness to discharge whether in berth or not...”

Further to instructions, the vessel proceeded to Liverpool/Birkenhead and anchored at Mersey Bar anchorage but no berth had been nominated at that time. The next day she proceeded to Prince’s Pier landing stage, Liverpool, and cleared with the customs. At the time the vessel reached the port, no berths were available. She was then ordered by the port authority to proceed back to anchor at the bar light vessel. She did so and anchored at the Mersey Bar, the usual waiting place for grain ships discharging at the port, which although within the legal limits of the port was 17 miles from the docks, but within the administrative limits of the port. The notice of readiness was tendered and received shortly after. The vessel lay at anchor at the Bar for 17 days waiting to discharge. The Owners claimed demurrage.

The point of issue was whether the vessel was an “arrived ship” at the Mersey Bar, as was argued by the Owners, or whether laytime only began to run 16 days later when she was eventually admitted to a berth. The arbitrators failed to agree and the umpire referred the case as a special case to the Court making an award, in favour of the Owners with an alternative award in favour of the Charterers. On appeal, Mr Justice Donaldson upheld the alternative award in favour of the Charterers. The Court of Appeal, by a majority, affirmed that decision. The decision was further appealed to the House of Lords.

In reviewing the cases, the House of Lords criticised the test based on arrival within the “commercial area” of a port, as had been advanced in *The Aello* and overruled it on the grounds that such an area was difficult to define and caused unnecessary uncertainty in the law with no regard for practical commercial implications.

Lord Reid expressed a more appropriate test in these terms:

“..Before a ship can be said to have arrived at a port, she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances, proof of which would lie in the charterer.”

Therefore, the vessel must be within the geographical and legal area of the port in the sense commonly understood by the parties. Consequently, a vessel could never be considered to have “arrived” if the port authorities ordered it to stay outside this area. The decisive test is whether the vessel at this point, is immediately and effectively at the disposal of the charterer in the sense that it can reach the berth quickly when informed that one is vacant. The vessel is presumed to be effectively at the disposal of the charterer when anchored at the place where ships usually lie when waiting for berth at that port, proof to the contrary resting with the charterer. Even if the vessel is anchored elsewhere, the shipowner is allowed to prove that it is equally at the effective disposal of the charterer, though in this case the burden of proof rests with the shipowner.

Lord Reid stated that as long as the vessel was within the port limits, it was of no business importance to the charterer where the vessel waits, provided that it is a place where she is



counted as being in a queue system for a vacant berth, a place where the charterer can communicate with her as soon as he knows when a berth will become available for and a place from which the vessel can proceed to the available berth when she receives the charterer's communication, so as to arrive there as soon as the berth has become vacant or so shortly thereafter as not to be significant for practical purposes.

As the Mersey Bar was within the administrative limits of the port of Liverpool/Birkenhead and as it was normal anchorage for vessels waiting for berth at that port, the "Johanna Oldendorff" was held to be an arrived ship.

The House of Lords had spent around six days of the hearing considering the position of ports where the usual waiting place lies outside the limits of the port of discharge. Lord Reid drew attention to the fact that there are many ports where the usual waiting area for the port was well outside the port area. He stated that the formulation of the test for an arrived ship showed it to be concerned not only with the nature or quality of the vessel's position, but also whether that position is inside the port limits. He stated that:

"...I think it ought to be made clear that the essential factor is that before a ship can be treated as an arrived ship she must be within the port and at the immediate and effective disposition of the charterer and that her geographical position is of secondary importance. But for practical purposes it is so much easier to establish that, if she is at a usual waiting place within the port, it can generally be presumed that she is there fully at the charterers' disposal."

In responding to an argument that the limits of many ports are indefinite, Lord Reid stated that:

"I find it difficult to believe that there would, except perhaps in rare cases, be any real difficulty in deciding whether at any particular port the usual waiting place was or was not within the port. The area within which a port authority exercises its various powers can hardly be difficult to ascertain. Some powers with regard to pilotage and other matters may extend far beyond the limits of the port. But those which regulate the movements and conduct of ships would seem to afford a good indication. And in many cases the limits of the port are defined by law."

In defining the port limits, a sequence was to be applied. Firstly, consideration should be given to whether there was a national or local law that defined the limits that would apply to that port. Secondly, in the event that there was no such law, then a good indication of what the port limits were would be to look at the area of exercise by the port authority of its powers to regulate the movements and conduct of the ship. The House of Lords declined to provide an exhaustive definition of port limits.

Nevertheless, even after the decision in *The Johanna Oldendorff*, questions still arose as what the position would be when the vessel has to wait at the customary anchorage which is not within the legal, fiscal and administrative area of a port.

In the case of *The Maratha Envoy*, the charterer had nominated Brake, a river port on the Weser as the port of loading but as no berths were available there, the vessel had been instructed not to proceed upstream but to wait at the Weser light. The lightship was stationed in the Weser estuary, 25 miles downstream from Brake, and was the normal waiting place at that port for vessels such as the "Maratha Envoy", since there were no suitable anchorages on the river within the port itself at which vessels could lie while waiting for a vacant berth. The vessel conducted a number of voyages upriver to Brake, where she tendered notice of readiness, but then turned and returned back to the anchorage. These manoeuvres were described by the judge as being "voyages of convenience" and these did not serve to make the vessel an arrived ship.



Interestingly, the Court of Appeal was ready to apply the test laid down in *The Johanna Oldendorff* exclusively on the requirement of the vessel being at the disposal of the charterer whilst at the waiting place at anchorage, as she would have been if she was waiting in the immediate vicinity of the berth, without considering port limits.

The House of Lords rejected this view and endorsed the test in *The Johanna Oldendorff*, stating that although until that case had been decided, there may have been uncertainty under a port charter as to where within the named port a vessel must be in order to complete her voyage stage, there was legal certainty that in neither a port or berth charter was the voyage stage complete by the arrival of the vessel at any waiting place short of the limits of the port.

Lord Diplock stated:

“Where charterers and shipowners as part of their bargain have desired to alter the allocation of the risk of delay from congestion at the named port which would otherwise follow from the basic nature of their contract, they have not sought to do so by undermining whatever legal certainty had been attained as to when a voyage stage ends. Instead they have achieved the same result without altering the basic nature of the contract, by inserting additional clauses to provide that time should begin to run for the purposes of laytime or demurrage if, although the voyage stage is not yet ended, the ship is compelled to wait at some place outside the named port of destination until a berth falls vacant in that port.”

It is clear that this statement supports the idea that owners and charterers can agree to include specific words in the charterparty providing that time will run, even if the vessel is waiting outside port limits, or time lost clauses.

Lord Diplock added that it would be a disservice to the shipping community if less than 5 years after the Reid Test had been laid down, it was not reaffirmed in *The Maratha Envoy* and its proper application insisted upon.

The Arundel Castle

Since the decisions of *The Johanna Oldendorff* and *The Maratha Envoy*, arbitration Tribunals and Courts have continued to see an array of cases requiring application of the criteria of the Reid Test as well as consideration of a multitude of issues, such as the meaning of the “immediate and effective disposition of the charterers”.

Earlier this year, a case came before the Commercial Court which yet again, required consideration of what is required for a vessel to count as an arrived ship for the purposes of commencement of laytime under a voyage charterparty. *The Arundel Castle*⁵ case required the Court to revisit the principles set out in *The Johanna Oldendorff* and the meaning of “port limits”.

The Owners, Navalmar UK Limited, entered into a voyage charter with Charterers, Kale Made Hammadeeler Sanayi Ve Ticart AS, in respect of the MV “Arundel Castle”. The nominated load port was Krishnapatnam, India. At Krishnapatnam, the vessel was unable to proceed straight to berth due to congestion and therefore anchored at a location to which it had been directed by the port authority. Once anchored, the Owners tendered notice of readiness. A demurrage claim followed which was rejected by the Charterers and a dispute arose as to whether the notice of readiness was valid. Owners commenced arbitration.

⁵ Navalmar UK Limited -v- Kale Made Hammadeeler Sanayi Ve Ticart AS (*The Arundel Castle*) [2017] 1 Lloyd’s Rep 370



Clause 15 of the fixture recap provided that:

“(Notice of Readiness) to be tendered at both ends even by cable/telex/telefax on vessels arrival at load/dish ports within port limits. The [notice of readiness] not to be tendered before commencement of laydays.”

At clause 35 of the fixture recap the GENCON 94 form of charterparty was incorporated as follows:

“Otherwise Gencon 94 printed form charterparty with logical amendments on [basis] the terms as per fixture recap.”

The GENCON 94 form included the following at clause 6(c):

“If the loading/discharging berth is not available on the Vessel’s arrival at or off the port of loading/discharging, the Vessel shall be entitled to give notice of readiness within ordinary office hours on arrival there...Laytime or time on demurrage shall then count as if she were in berth...”

The arbitrators agreed with the Charterers and held that the notice of readiness was invalid because it was not given within the port limits as required by the terms of the charterparty, and instead it was tendered while the vessel was outside port limits. Owners’ demurrage claim failed.

The arbitrators drew a distinction between clause 6(c) of GENCON94 which referred to the vessel’s arrival at or off the port of loading/discharging, and the wording under the recap which provided for notice of readiness to be tendered on the vessel’s arrival at the load/discharge ports within port limits. The reference to being “*at or off the port*” would have meant that it did not matter that the vessel was waiting at a place that was outside port limits, and that in such a case, time would still have run.

The reference in the fixture recap of “within port limits” took precedence over the terms of the GENCON charter. The arbitrators applied the principle of construction which provides that agreed terms, such as those in a fixture recap, will take precedence over inconsistent terms in incorporated standard forms. Therefore, the notice of readiness was invalid as it was tendered not at the agreed place as stipulated by clause 15 of the fixture recap, that is to say, within port limits.

The dispute, however, went further than simply turning on conflicting terms within a contract and which clause should take precedence. One would assume that Counsel for the Owners knew that the arbitrators would find the wording of the fixture recap to be overriding and would seek to give effect to the intention of the parties, therefore, Owners also sought to argue a wide interpretation of what constitutes “port limits”.

The Owners contended that “port limits” could include places where vessels are customarily asked to wait by the port authorities and/or that are outside the legal, fiscal or administrative area where vessels are ordered to wait for their turn no matter the distance from that area.

Alternatively, the Owners cited the Laytime Definitions for Charterparties 2013, which defines the word “port” as follows.

“PORT shall mean any area where vessels load or discharge cargo and shall include, but not be limited to, berths, wharves, anchorages, buoys and offshore facilities as well as places outside the legal, fiscal or administrative area where vessels are ordered to wait for their turn no matter the distance from that area.”



During the arbitration, there had been little relevant material provided by both parties to the arbitrators in relation to any local or national law which defined the port limits at. Consequently, the arbitrators were forced to rely on Admiralty charts for Krishnapatnam in order to establish the port limits and ascertain whether the vessel was anchored outside the port limits. It was accepted by both parties that the vessel had anchored outside of the geographical port limits of Krishnapatnam port, as shown on the charts.

The Owners appealed against the arbitration award.

On the appeal by the Owners to the Commercial Court, it was evident that the judge, Mr Justice Knowles, could have limited his decision to applying the express terms of the fixture recap. He did however, reaffirm that the reasoning of the House of Lords in *The Joanna Oldendorff*, which meant that a vessel did need to be within the port limits before it could be an arrived ship and at the time the notice of readiness was given in order for such notice to be valid, unless there was an agreed term in the charterparty to the contrary.

Mr Justice Knowles proceeded to set out the common law test, or the Reid Test, in *The Johanna Oldendorff* for when a vessel has arrived, under a port charterparty, which requires the vessel to have “reached a position within the port where she is at the immediate and effective disposition of the charterer” in the event that she cannot proceed immediately to a berth.

In *The Johanna Oldendorff*, Lord Reid stated that the question of whether the usual waiting place is, or is not within the port can be decided by the national or local law that defines the limits of the port in question, or where there is no such law, the area within which the port authority can exercise its powers to regulate the movement and conduct of ships.

Mr Justice Knowles acknowledged that in the present case the arbitrators had been provided with limited material by the parties and were entitled in the circumstances to be guided by the Admiralty chart, which designated an area as “Limit of Port of Krishnapatnam”. This limited information, with an absence of any further supporting information, permitted an inference to be made that the vessel was outside the port limits, or at least that the Owners had not proven that she was otherwise. The position of the ship was nearly 1,250 metres outside the port limits as shown on the Admiralty charts. The parties also did not address the area over which the port authorities exercised their powers.

Mr Justice Knowles stressed that in another case, if additional and more complete information was provided, it could be the case that a different conclusion would be reached, even in relation to the same port - Kishnapatnam.

In respect of the definition of “port” as set out in the Laytime Definitions for Charterparties 2013, had the parties expressly provided that these terms were incorporated into the charterparty, then any place where the vessel was ordered to wait by the relevant authority would have counted as being within the port and the vessel would have been an arrived ship. However, the judge refused to take them into account as part of the test of what was the extent of port limits.

The Court held that the step to include places outside the legal, fiscal or administrative area where vessels are ordered to wait their turn was a large and uncertain one, especially given the reference to “no matter the distance”. It would be hard to see what limits there were if all that was required was a place where vessels were ordered to wait for their turn and all the more so if the reference to “that area” meant the legal, fiscal or administrative area.

The purpose of the decision in *The Johanna Oldendorff* was to give legal certainty to the way in which the risk of delay from congestion at the port was allocated between a charterer and a



shipowner. The definition proposed by Owners went beyond reflecting what was provided in *The Johanna Oldendorff* and seriously undermined that certainty.

As the parties had not deliberately chosen to incorporate these definitions in their charterparty, the definition of port limits would not apply to the present case. Mr Justice Knowles highlighted that a strong indication that the parties did not intend for the Laytime Definitions of “port” to apply was supported by the fact that the parties had chosen to amend the GENCON wording of “at or off....port”.

Interestingly, Charterers argued that the Court should hold that port limits should be conclusively defined by the geographical port limits only, as shown by an Admiralty chart. Charterers stated that by holding so, this would promote greater certainty, but this argument was dismissed on the basis that physical limits of a port may extend far beyond the limits of what those using it would regard as the port.

The Commercial Court dismissed the appeal.

Concluding remarks

It is apparent that the decision in *The Arundel Castle* serves as a reminder to parties that the starting point for determining the meaning of an arrived ship and what constitutes port limits, remains the test as laid down in *The Johanna Oldendorff* over 40 years ago.

The Arundel Castle does not necessarily constitute a great development in the law, therefore, it is interesting that the appeal was brought by the owners on the basis of section 69 of the Arbitration Act 1996, as a matter of general public importance. It is questionable whether the case did in fact warrant an appeal, especially given the fact that case law has made it clear that if a vessel is ordered to wait in a customary waiting place by the port authority, but this area happens to be outside the port limits, a notice of readiness which will be tendered here will not be valid, and the owners will have no right to claim that laytime has commenced and that demurrage is accruing, whilst the vessel is waiting in that place (unless the charterparty expressly allows for the notice of readiness to be tendered outside port limits).

The judge declined the opportunity to extend the definition of port limits to be in line with the broad definition found in the Laytime Definitions for Charterparties, preferring instead the formulation by Lord Reid. Essentially, port limits will depend on the characteristics of each port, but parties should consider the following, in this order:

- (a) national or local laws;
- (b) the area within which the port authority exercises control; and
- (c) geographical limits on Admiralty charts.

Effectively, this case highlighted that in every situation there may be further additional circumstances and evidence that has to be considered in the port limits question, which may lead to different conclusions. How this sits with Lord Reid’s comments in *The Johanna Oldendorff* in which he stated that, save in rare cases, there would not be any real difficulty in deciding whether the usual waiting place was within or outside the port, is curious.

Since there are many ports throughout the world where the customary waiting place is outside port limits, this means that arriving at that usual waiting place is not necessarily sufficient to enable a valid notice of readiness to be tendered and time to start counting. However, perhaps it is now the time to consider whether the importance of being within port limits is so paramount.



Does it really matter whether the usual waiting place is within the port limits? In view of improved radio communication and the increased speed of modern ships, a vessel could satisfy the remainder of the test even if anchored at some distance from the specified berth and outside of the port, since it would usually be given advance warning of the time at which the berth was likely to become available.

Additionally, perhaps the reference and demarcation of port limits is too much of an arbitrary one. In the case of *The Arundel Castle*, the port limits were defined according to Admiralty charts and the vessel was found to have been anchored nearly 1,250 metres outside that port limit. However, what if the vessel had been just 50 metres outside the port limits, or even closer at 10 or 5 metres away – could it be properly said that a vessel was not an arrived ship purely because she was anchored on the wrong side of that fictional line?

Regardless, the decision, however, does serve to highlight to charterers and owners that they should consider the terms on which they charter the vessels. If either party requires a wider or narrower definition to apply, then this should be expressly reflected in the charter. Some charterparty forms contain provisions to avoid the effects of *The Maratha Envoy* by providing that a notice of readiness can be given once the vessel has arrived at the customary anchorage if she cannot berth immediately.

In 2013, INTERTANKO introduced the Model River Ports Clause in order to regulate the vessel's arrival at places situated away from her ultimate destination, namely at river ports. The Clause provides as follows:

“Notwithstanding any other terms in this charter party, if the vessel is to load or discharge at any river port or place, NOR may be tendered at or when passing the first inbound pilot station. Laytime or time on demurrage shall commence 6 hours later and shall cease at or passing last outbound pilot station, less the notional steaming time calculated at the vessel's service speed for the inbound and outbound passages.”

Clauses such as this can be favourable to shipowners calling at ports where pilotage up the river can take many hours, as it would allow laytime to start counting 6 hours after the tender of notice of readiness when passing the first pilot boards station.

In considering additions, the parties should ensure that any particular intentions are set out clearly in the contract and any provisions in the fixture recap do not unintentionally result in an unfavourable interpretation with all the provisions and extra clauses taken together, achieving the desired effect.

In the present context, it is also important to remember that's whereas when a notice of readiness which is simply tendered prematurely can subsequently become valid, a notice of readiness tendered prior to the vessel becoming an arrived ship cannot be perfected and will not become valid on arrival. Therefore, shipowners need to be particularly aware of the regime for tender of the notice of readiness as provided in their charterparty and if in doubt seek legal advice as to the valid tender in order to avoid any disputes and potentially lose out on demurrage.

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