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LAY TIME

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1. NOTION AND REGULATION OF LAY TIME

In accordance with article 130 of the Merchant Shipping Code of the Russian Federation lay time or lay days is understood as the time during which the carrier presents the vessel for loading of cargo and keeps it under loading of cargo without payments additional to freight, and which is determined by agreement of the parties, in the absence of such agreement by dates usually accepted in the port of loading. This determination correctly reflects the essence of lay time but not fully reflects its content and importance. Actually, a condition on lay time imposes obligations both upon the shipowner and the charterer as well as guarantee their interests.

On the one hand, the shipowner bears obligation to present the vessel for loading/discharge and to keep it under loading/discharging for a certain time without collecting any additional payments, since payment for these actions is included into freight when the contract of carriage is being agreed as well as guarantee its interests by limitation of time, during which the vessel may be kept under loading or discharge without additional payment. The shipowner has the right to collect a certain sum of money if the charterer exceeds the limits of lay time – "demurrage".

On the other hand, the charterer bear obligations to carry out loading/discharge of the vessel within a certain time (lay time), at the same time the shipowner is guaranteed that the vessel will be at its disposal during a certain time. In case of completion of loading/discharging operations before expiration of lay time the charterer has the right to remuneration – "dispatch".

The institute of lay time has a rather certain purpose, it is in distribution of risks between the charterer and the shipowner connected with various postponements of the beginning of loading-discharging operations or their stoppage. Thus, losses caused by delay of the vessel will be referred to the charterer or the shipowner, whether lay time begins or not as well as whether lay time stops.

The specific character of lay time lies in the fact that when regulating the conditions of the lay time the paramount importance is the agreement of the parties and norms of regular law, since article 131 of the Merchant Shipping Code establishes that "in the absence of agreement of the parties a duration of demurrage time (see below the definition) is determined by dates usually accepted in the port of loading". The lay time is also regulated by normative acts, however, norms concerning the lay time are of dispositive nature, which brings the parties' agreement (charter) to the foreground.

Of great importance in the regulation of the lay time is activity of international organizations such as the Baltic and International Marine Conference (BIMCO), International Maritime Committee (IMC), Federation of National Associations of Ship's Brokers and Agents (FONASBA). Such organizations work out standard proforma charters which have conditions that regulate the lay time, demurrage, dispatch, for example, charters "Gencon", "Scancon", "Genorcon". Such proformas are not obligatory and may be changed, however, owing to their conveniences and prevalence the participants of the merchant shipping often resort to help of such proformas. In connection with the fact that when arising disputes on lay time it depends much on the interpretation of terms and clauses used in the charter, such organizations work out rules of the interpretation of definitions used in charters (Charterparty Laytime Definition 1980, Voyage Charterparty Laytime Interpretation Rules 1993).

2. BEGINNING OF CALCULATION OF THE LAY TIME

In accordance with item 2, article 130 of the Merchant Shipping Code of the Russian Federation the lay time is calculated in working days, hours and minutes, beginning from the next day **after presenting a Notice of Readiness of the vessel for loading of cargo**. Thus, counting of the lay time is not to be started until the shipowner gives the notice of readiness of the vessel for loading operations. The time of giving the Notice is regulated by charter conditions. There is a question: when the Notice of Readiness of the vessel for loading may be given. Based on the analysis of the world practice, content of proforma charters, ports' customs and normative acts it follows that in order to give the notice of readiness the vessel should:

- be considered arrived (arrived ship)
- be in all respects ready for loading (the vessel is in all respects ready to load/discharge)

A moment from which the vessel is considered arrived depends on a type of the charter which regulates the lay time. There are the following types of charters:

- *port charter*, the charter in which the port (its name) is specified as a place of loading/unloading. Correspondingly, the vessel is considered arrived at the agreed place of destination when it arrives at the port's commercial zone where vessels usually wait for loading or unloading. The vessel is considered arrived even if it does not come to the place where it will be handled (unloaded;

- *dock charter*, if the place of destination of the vessel is a dock or there is a special clause that it should be specified by the charterer, the vessel is considered arrived since its docking;

- *berth charter*; if the charter indicates a berth or pier or there is a special clause that it should be appointed later, the vessel is considered arrived since the time when it is placed to the berth or pier. With such charter any risk of delay before the vessel is placed to the berth falls on the shipowner.

The greatest difficulty is determination of the moment of reaching the port by the vessel. The definition of commercial zone is not used in charters. This definition has appeared in connection with consideration of cases connected with disputing the fact of arrival of the vessel at the nominated place in accordance with the port charter. In the court practice, various significances were attached to the definition of commercial zone: "the area within which the captain may effectively present a vessel to the charter's disposal which is ready for loading and being as closer to the actual place of loading as circumstances allow" *Leonis SS Co. v. Rank (No.2) [1908] 1 K.B. 499; (1908) Com.Cas. 295*, "the area including the place of loading where operations on loading of a certain kind of cargo are usually made", case *Aello*. At present, the court practice follows the way of acknowledgment of the vessel as arrived in the port if it takes a usual place of waiting issued for berth of vessels, even if this place is located beyond the legal borders of the port, case "Polyfreedom". This interpretation of the term "Port" is supported by international organizations, thus, in accordance with the Lay time Interpretation Rules in voyage charter 1993 issued jointly with BIMCO, IMC, FONASBA, INTERCARGO, the port is understood **"the area where the vessel effects loading or unloading** at the berth of anchorage, buoy or similar place**, including usual places where vessels wait for their turn** or where they are stated or where they must wait their turn **irrespective of a distance from this area"**.

Some charters have a clause *"or as closer to it as the vessel may safely come to it".* Such clauses give the right to the shipowner to choose a place of destination if owing to obstacles which cannot be prevented by it by reasonable means, it is impossible to reach a place destination determined in the charter without wasting unreasonably long time. The vessel is considered arrived after reaching the chosen place. Such obstacles may be: ice conditions, blockade, tides and falls of tides, congestion of vessels. Application of such clauses often brings to disputes and in practice it is difficult to prove the availability of such obstacles. At the same time it may allow to avoid long demurrage of the vessel and demurrage-related losses.

The following clauses are often included into charters: *"time lost in waiting for berth is considered time of loading/discharge", "whether in berth or not", "free in turn", "time to count twenty-four hours after arrival at or off the Port", "demurrage in respect of all time", "in turn not exceeding 48 (or 24) running hours".*

All the said clauses are directed to change in usual conditions of the beginning of calculation of the lay time. As this takes place, they all, first of all, are directed to protection of shipowners' interests because they allow to begin to count the lay time before arrival of the vessel to the specified place. Clauses *"time lost in waiting for berth is considered time of loading/discharge" (Gencon), "whether in berth or not", "free in turn", "In turn not exceeding 48 (or 24) running hours"* are of importance in case of the berth charter because they allows the

shipowner to begin to count the lay time upon arrival in the port in case of absence of a free berth. Clause *"Free in turn"* means that time of waiting for berth will not be included into the lay time, on the other hand, the charterer strives for including the opposite clause into the charter "In regular turn", such clause is often may be met in coal charters. Obviously, that in case of the port charter such clauses have no sense because the vessel is considered arrived when reaching the port of destination, irrespective of putting the vessel alongside the berth. It should be taken into account that the said clauses do not mean expiration of validity of excluding clauses which suspend the course of the lay time.

Clauses *"Time to count twenty-four after arrival at or off the Port", "Demurrage in respect to all time of waiting" are included into port charter.* The first one allows the shipowner to send a notice before entrance of the vessel to port, and the second one allows to recover demurrage for all time of waiting whether the ship was in port or not.

Obviously, that the port charter or berth charter with relevant clauses is the most beneficial for the shipowner. When concluding the port charter the shipowner releases himself from risk of losses connected with waiting for a free pier or dock, in this case the expenses shall be sustained by charterer.

The state of readiness of the vessel is usually divided into two components:

- physical readiness
- legal readiness

The physical readiness of the vessel is understood as actual readiness for the loading of holds and hatches of the vessel so that the charterer can exercise control for every space of the vessel where cargo may be placed or be. However, requirements to the physical readiness may be changed depending on a type of charter. Thus, in case of the port charter a notice may be given before hatches are opened and beams are taken away, meaning that such work will be finished in time at the berth. Also, it is not required to observe the requirements that can be fulfilled with port services involved. In the port charter the vessel should in all respects be ready for acceptance of cargo before giving a notice of readiness.

The legal readiness of the vessel is understood as absence of any administrative and legal obstacles to the beginning of loading or discharging operations. The vessel should be granted free practice, not be subject to customs or other restrictions. The English practice generally agrees that that the vessel is ready without observance of certain formalities that can be observed any time, without consequences for handling the vessel. The domestic arbitration practice considers that in order to tender a notice the vessel should be fully ready, both physically and legally. The same requirements are in the codes of customs of Russian ports.

If the rule on readiness of the vessel is infringed a Notice of Readiness is considered as not given, which involves the following unfavorable consequences for the shipowner:

- lay time is considered as not started, which imposes losses connected with delay of the vessel on the shipowner,

- losses sustained by the charterer are also placed to the shipowner's charge,

The issue whether the notice of readiness may be given with a condition that the vessel will be ready by a definite time is settled in different ways in the practice and law of countries. Thus, the English and American practices do not permit such notices (*Transgrain Shipping BV v. Global Transporte Oceanio SA (The Mexico I) [1990] 1 Lloyd's Rep. 507)*. At the same time in accordance with article 129 of the Merchant Shipping Code of the Russian Federation "when transporting cargo under charter the carrier must notify in writing the charterer or consignor it is stated as the charterer that the vessel is ready or **will be ready in a definite time to load cargo".**

It also should be noted that in the international practice a notice improperly given means that the lay time will not begin unless a proper Notice is given. Correspondingly, even if cargo operations are started and the Notice is not given the lay time is not considered as commenced.

Taking into account that the Merchant Shipping Code does not include the norms of obligatory nature of the notice in respect to unloading, ass well as that the international practice proceeds from the fact that the consignees should follow the vessel themselves, the notice is usually not needed in the port of unloading if the same is not specially stipulated in the charter. When the vessel loads cargo in several ports the notice is required only in the first one.

Concerning a form of the notice the Merchant Shipping Code establishes that the Notice should be given in writing. Nevertheless, the international practice gives to the term "in writing" a wide interpretation. Thus, in accordance with the Lay day Interpretation Rules in the voyage charter of 1993 "in writing" means "expressed by any mean, visually reproducing the words", the notice may be transferred with using means of communication including electronic ones such as radio and telex.

Time during which the notice may be given is determined by charter, otherwise this time will be determined by customs of a relevant port. If the notice is not given within the said time such notice is considered as given at the beginning of the course of time provided for giving the notice.

Often the charter provides that the lay time begins to count not immediately after giving a Notice but upon expiry of a certain time after giving a Notice or at a certain time. Thus, article 130 of the Merchant Shipping Code provides that "the lay time is counted in working days, hours and minutes beginning from **the next day following after tendering a notice of readiness of the vessel** to load cargo". Charter "Gencon" provides that lay time for loading and discharging commences at 13.00 hours if the notice of readiness is given before 12.00 hours inclusively, and at 06.00 hours next working day if the notice is given during office hours after 12.00 hours.

3. CONDITIONS ON LAY TIME AND THEIR MEANING

Lay time in the charter may be exactly determined and in this case it is specially stipulated or to be counted. Lay time may also be inexactly determined.

Lay time is stipulated by indicating to days or hours

Clauses counting the lay time by indicating to days and hours include:

- *cargo shall be loaded/discharged within …. days;*
- *cargo shall be loaded/discharged within …. days with duration of 24 hours;*
- *cargo shall be loaded/discharged within …. days with duration of 24 consecutive hours;*
- *cargo shall be loaded/discharged within …. days with duration of 24 running hours;*
- *cargo shall be loaded/discharged within …. running days;*
- *cargo shall be loaded/discharged within …. working days;*
- *cargo shall be loaded/discharged within …. weather working days;*
- *cargo shall be loaded/discharged within …. running working days;*

In practice in clauses there may be met various combinations of characteristics of days or hours in which the lay time is counted. Depending on the wording of a clause the lay time is counted differently.

"Day, lay day are considered all calendar days if only it is not at variance with customs and special conditions. In countries where works are not usually made on Sundays and holidays, with such wording these days are not included into lay time. Actually, days are understood working days.

"Working day" means that this days is not a rest day or holiday, i.e. working days is equal to 24 hours. However, in the past in the practice of English vessels there were another interpretation of this term, it was in understanding of a working day as a certain number working hours. Such position is not logical, first, in this case the days is characterized as a whole but not hours, second, works on handling of vessels in the port may be carried out round-the-clock which is often may be met in practice.

"Running days" is the term used in order to distinguish a calendar day from working days. Such term is the most beneficial for shipowners because it permits to include Sundays and holidays into the lay time.

"The running working days appeared first in charter "Gencon" and is equal to the term "working days". This wording is unsuccessful since it contain contradictory terms.

"Working days with duration of 24 hours" – such clause may be interpreted differently. First, such day may be considered as artificial day consisting of 24 working hours, for example, if the port establishes 8-hour working days, 1 day in accordance with such understanding is equal to 3 calendar days. Obviously, that such calculation of the lay time does not meet the shipowners' interests. Second, such day may be considered as a usual calendar day not being Sunday or holiday. In order to avoid similar situations it is better to use the wording -

"Days with duration of 24 consecutive hours" or "24 running hours in this case are understood as days consisting of 24 actual subsequent hours.

The condition on the lay time often includes clauses "weather … day" *или* "weather permitting". Such conditions have the common purpose – to include periods from the lay time during which weather conditions do not allow to make loading/discharge operations. However, the said conditions have an essential difference. Thus, when the condition "weather…. day" is applied all periods are excluded from the lay time during which weather conditions actually prevented loading/discharge or would prevent in case of loading/discharge. When the condition "weather permitting" is applied the periods are excluded from the lay time during which loading/unloading operations have not actually been made owing to unfavorable weather. It is beyond the point, the second thing is better for the shipowner.

Based on the analysis of the definitions used in the construction of the clause it may be concluded that in order to maximally observe the shipowners' interests the following clause of the lay time should be applied: ***"cargo shall be loaded/discharged within … running days of 24 consecutive hours, weather permitting".***

The lay time is stipulated by indicating to the rate of loading/discharging.

When calculating the lay time by calculation of a rate of loading or discharge the clause of lay time may also have a various construction:

- *cargo should be loaded/discharged at the average rate … tons per day;*
- *cargo should be loaded/discharged at average rate … tons for hatch per day;*
- *cargo should be loaded/discharged at average rate … tons for working (suitable for work) hatch per day.*

In case of the clause *cargo should be loaded/discharged at an average rate … toms per day* in order to calculate the lay time the total amount of cargo should be divided into a relevant rate.

If the charter states a norm of loading – discharge per one hatch (*cargo should be loaded/ discharged at average rate … tons for hatch per day)*, the calculation of the lay time is made according to the largest hold. As this takes place the amount of cargo in the largest hold is divided into a hatch rate, and the received duration of loading or discharge of the largest hold is considered to be lay time for the whole vessel. If loading or discharge of the largest hold is effected with the use of several hatches, the amount of cargo in the largest hold is divided into the product of hatch rate and number of hatches. There is another way of calculation: multiplication of the hatch rate by the number of hatches (to be handed) with further dividing the total amount of cargo into the received ship's rate. The last way of calculation is widely prevalent in many countries, including Russia, however, it is less beneficial for shipowners.

The lay time is determined inexactly

In this case the following clauses are used:

- *as fast as steamer can (FAS condition);*
- *with all dispatch;*
- *as customary;*
- *in accordance with the custom of the port*.

The third and the fourth clause are equal to the absence of such one, i.e. the lay time is calculated in the same way as the charter has no mention of lay time at all.

Clauses like FAS are rather difficult. The point is that there is no singly opinion whether is possible to calculate the lay time beforehand on the basis of such clause. For example, English law does not permit to fix the lay time beforehand on the basis of FAS clause. The American practice has no approach to this issue, the American court guided by such clause may calculate lay time proceeding from possibilities of the vessel or actual rate of loading/discharge of the vessel ("alongside" rule). In any event, inexact determination of the lay time is not profitable for the shipowner. At present the practice has not such clauses almost.

The general rule should be noted that if loading/discharging operations are commenced prior the actual commencement of the lay time or effected within the period to be excluded from the lay time, such time shall be considered as lay time (article 130 of the Merchant Shipping Code of Russian Federation).

4. SUSPENSION OF COUNT OF THE LAY TIME

If the lay time commences it is subject to count continuously, unless the charter has customs or clauses which are at variance with this. Usually, charter have a clause of excluding Sundays and holidays from the lay time as well as periods during which loading or unloading is not effected owing to reasons beyond the parties' control (strike, force-majeure) or depending on the carrier. Such norm is in the Merchant Shipping Code, article 130. In the event is demurrage of the vessel takes place owing to the shipowner's fault such demurrage does not affect the course of the lay time.

In order to exclude Sundays and holidays from the lay time the following clauses are used: *"Sundays and holidays excluded", "Afternoon time of Saturdays, Sundays, common and local holidays shall be excluded unless they are used, otherwise the actually used time should be counted timber charter "Nubaltwood").* As this takes place, conditions of the lay time may have clauses of two kinds: *"unless used"* and *"unless used and in this case the actually used time shall be counted".* In the first case Sunday or holiday is considered as lay day completely even if only its party is used by the charterer; in the second case the time during which operations are actually carried out is included in the lay time. Thus, it is better for the charterer to include a clause of the second type into the charter.

If in the condition of lay time the term "working days" is used this means itself exclusion of Sundays and holidays from the lay time, however, in order to avoid contradictions special clauses about that are included into the charter. Sometimes such detailed description is necessary because, for example, in some countries a day off is not Sunday but Friday. In order to avoid disputes and more detailed definition the clause *"General and local holidays"* may be included into the charter that provides a possibility to exclude from the lay time not only official national holidays but also holidays established by local authorities which are usual for this region.

Shipowners wiling to protect themselves from consequences of application of exceptional clauses are striving for including the following clause in the charter: *"nonworking holidays".* The sense of the clause is the following: if during holidays the official institutions of the port work and operations on the handling of vessels are carried out, under such conditions, in spite of the fact that the day is holiday, it shall be included in the lay time.

It is more difficult to determine how Saturdays effect the course of lay time. Often, they are considered as usual working days. However, if work in the port is carried out till a certain time, for example, till 13 hours, so in order to count the time during which the operations could be actually effected as lay time, should be specially stipulate by the parties in the charter.

The clause is often included in charters that the time lost owing to reasons beyond the charter's control, consignor or consignee is not included in the lay time. The charter may provide a specific list of such reasons (charter "Meditore"). It should be accounted that the charterer may not refer to the excluding clause if he may with reasonable effort to find another way of loading or unloading.

It is usual way to include clauses in the charter which provide exclusion from the lay time the demurrage owing to strike of dockers. However, it should be taken into account that not a period of strike is excluded from the lay time but a period of demurrage of the vessel stipulated by the strike, these period may not coincide in time.

The issue who sustains expenses connected with a necessity of shift of the vessel to another berth depends on a purpose of such shift if it should be done in connection with that loading should be effected at several berths, then the lay time during shift will not stop.

5. DEMURRAGE

Demurrage is the amount to be paid to shipowner by the charterer or to other persons for demurrage of the vessel taken place as a result of detention of the vessel for more time than agreed or reasonable time granted for loading or discharge. Peculiarity of the demurrage is that its amount is determined in the charter and may not be changed depending on real losses. A period of time during which the demurrage to be recovered is demurrage. In accordance with article 131 of the Merchant Shipping Code the demurrage is an additional period of waiting previously stipulated by parties to the charter. This article provides that if the parties did not stipulate a duration of demurrage it is determined by customs of the port. Thus, the demurrage is previously agreed assessment of losses connected with demurrage, usually it is low than actual losses. Consequently, upon expiration of demurrage time the shipowner has the right to recover losses really caused by demurrage, that's why it is very important to exactly state the duration of demurrage in the charter. The dead time upon expiration of demurrage is detention.

Under the Russian legislation if the parties do not provide an amount of demurrage it is determined by customs of the port, and if there are no such ones, the real loss caused by demurrage of the vessel to be recovered. The legislation of a number of countries considers the absence of the condition on demurrage as consent of the parties that real losses shall be recovered for all time of demurrage (USA, Great Britain). The Russian legislation in such case provides a necessity to calculate the amount of demurrage on the basis of customs of the port.

The world practice and laws of some countries (USA, Russia, Great Britain) established the rule in accordance with which the demurrage passes continuously and includes Sundays, holidays, time of bad weather, also count of the demurrage does not stop owing to circumstances actually preventing loading/unloading operations. This rules are expressed by the formula "once on demurrage always on demurrage". This rules has one exclusion: periods during which operations are not effected owing to the carrier's (shipowner's) fault are excluded from the demurrage.

There are different ways of determination of the amount of demurrage. A rate of demurrage may be established on the whole in respect to the vessel for its delay within a day or pro rata (charter "Gencon"). A rate may also be established per 1 ton of cargo or per 1 ton of gross or net tonnage for day of delay or pro rata (for example, demurrage shall be paid at the rate of 3 pences for each gross-registered ton within a running days or pro rata for each part of the days (charter "Austral").

6. DISPATCH

The Merchant Shipping Code of the Russian Federation considers dispatch as a previously stipulated remuneration to the charterer for completion of loading or unloading before expiration of demurrage. Legislation of foreign countries has another approach to the notion "dispatch", in particular, it is understood as return of overpaid funds to the charterer. With such approach it is necessary to calculate an amount of dispatch in proportion to saved time. However, it is absent in practice because of complexity of such method, which makes application of this or another concept insignificant. In reality the dispatch is determined according to previously established rates and usually corresponds to the amount of demurrage. Thus, article 133 of the Merchant Shipping Code of the Russian Federation provides that if the parties do not stipulate the amount of dispatch it shall be equal to one second of the payment for demurrage.

The amount of dispatch should be effected not in respect to every port of loading or unloading (if there are several ports but in respect to all port together. This may be explained by the fact that if at different ports the different rates of demurrage and dispatch are applied, this shall result in violation of rights of the shipowner or charterer.
When determining the time for which the dispatch to be paid, the following wordings are used in the charter: *"all saved time", "any saved time", "every saved time".* Such wordings mean all calendar time without exclusions, however, the charterer may try to attach the same meaning to such wordings as to demurrage, i.e. with all relevant exclusions. Therefore, in order to avoid similar situations shipowners should include the wording in the condition of dispatchy *"for every saved running days"*.

From the point of view of the practice there is an interesting issue how dispatch is calculated if the vessel is to be loaded/unloaded in two (more) ports, as this takes place loading/unloading at the second port is completed before expiration of demurrage provided for the first port. The issue is that whether the dispatch to be recovered twice for the same saved days, i.e. for saved time in every port. The English practice proceeds from that in this case the dispatch to be paid at the double amount.

Sometimes the charter provides that saved time in loading in the next port will be included in favor of the charterer during unloading. This permits to make the following clauses: *«any hours saved during loading should be added to hours granted for unloading"*, *"days or their parts not used during loading may be added to time of unloading and any additional time used during loading may be deducted from time of unloading".* Such clauses provide transfer of time of the dispatch during loading to the demurrage as well as to deduct the demurrage during loading from the lay time of unloading.

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