Defence 02 Sep, 2021

“Arrived ship”, NORs and demurrage time bars: owners beware!

Nicola Cox
Head of Defence Claims

Steven Knaggs
Senior Claims Manager

A recent unpublished LMAA arbitration award* for one of the Club’s owner Members has concluded that, where a vessel tenders NOR too early, not only does laytime not start to count because the NOR is invalid, but owners are also not able to claim damages for breach of charterers’ “reachable on arrival” obligation.

Owners had tendered the NOR too early, namely at the end of the sea passage, before the vessel had reached customary anchorage. It is well established under English case law that an NOR that is invalid because it is tendered too early is a “nullity” and cannot be used or relied on to trigger the commencement of laytime and demurrage when, subsequently, the vessel becomes an “arrived ship”. However, what is not clear is why the giving of an NOR that is invalid because she has not yet “arrived” prevents owners from claiming damages for a breach of charterers’ “reachable on arrival” obligation. (Owners pleaded their damages claim at the demurrage rate, making deductions for allowed laytime.)

Moreover, the tribunal found that charterers’ silence after they received owners’ (invalid) NOR did not amount to waiver on charterers’ part as to the validity of the NOR. Therefore the tribunal held that laytime only commenced when the vessel subsequently berthed, in accordance with Asbatankvoy clause 6 (”laytime… shall commence upon th the expiration of six (6) hour after receipt of such notice, or upon the Vessel’s arrival in berth... whichever first occurs”). This means that a charterer can receive an NOR which they know (or believe) to be defective with impunity, knowing that, if the charterer says nothing and the owner does not serve another (this time, valid) NOR, laytime will only commence sometime later, ”upon Vessel’s arrival in berth”. It flies in the face of previous cases which spoke, in this context, in terms of the need for “fair dealing” and the parties needing to know where they stand.

Points for owners to remember:

1. NORs don't need to be in any particular format - email notifications as to the vessel's arrival and readiness to load/unload should be sufficient. In this case, however, charterers argued that email service was defective because clause 6 Asbatankvoy was unamended and therefore referred only to "*letter, telegraph, wireless or telephone*". The Tribunal considered that it did not need to decide this point and therefore left the question unanswered, however charter parties should refer to modern forms of communication for service of NORs to avoid such arguments being raised;

2. As the adage goes: if owners are in doubt about the validity of their NOR, keep serving NOR's "*without prejudice to the validity of any previous NOR/s".*

3. A further option may be for owners, when serving each NOR to write to charterers as follows "*Please confirm charterers' acceptance of this as a valid NOR. If charterers or their agents or sub charterers know of any facts or circumstances that affect the validity of this NOR they must say so to owners, otherwise charterers shall be deemed to have waived their right to dispute the validity of this NOR*". However, this has not been tested in English case law, as far as the writers are aware, and it is not known whether a court or arbitration tribunal would find in owners' favour in this scenario. For this mechanism to work, owners must also show that charterers (or their agents or sub charterers) knew of relevant facts or circumstances but did not tell owners about them.

4. Ensure that all relevant documents, including NORs and emails referencing the tendering of NOR, are included when submitting a demurrage claim. *See also ABQAIQ [2011] which is a published decision for another West (owner) Member.*

* Since this is an arbitration award, the names of the parties, the vessel and the tribunal must be kept confidential.

This news publication was put together with the assistance of John Habergham from Myton Law who was the solicitor instructed by Members in this case.

Defence Cover

View West's Defence Cover product change to read more details.

View here →