Does the "Pacific Voyager" litigation mark the demise of the "Monroe Doctrine" on the allocation of risk before a vessel enters into its chartered service

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1. The problem arises in voyage charterparty cases, which are usually contracts for a definite voyage or adventure.

2. It arises because

   2.1. Usually there is a gap in time between the making of the charter and the time when loading is required (usually represented by the "lay" date in the laycan).

   2.2. The shipowner does not want to guarantee an arrival date at the loadport.

   2.3. But the charterer does not want the owner to be free to arrive whenever, and is not content to rely on a cancelling clause.

   2.4. The parties therefore compromise by putting in terms which are neither a guarantee of arrival time nor carte blanche to owner.

   2.5. The usual suspects are combinations of

   - An obligation on the shipowner to proceed to the loadport with utmost or all possible or all convenient speed or despatch.

   - An expected readiness to load date ("ERTL").

   - At estimated time of arrival at the loadport ("ETA LP").

- An itinerary including estimated time of arrival at the previous discharge port ("ETA DP").

- The above are usually in addition to a cancelling date, which gives the charterer the right to cancel for late arrival, but is not a promise by the shipowner to arrive in time, and therefore does not carry damages.

2.6. What do they mean and, in the result, on whom do they put the risk of delay before the approach voyage and before arrival at the loadport ?

3. Every charterparty is different and previous authority does not lay down any rule of law binding on a later case about a different charterparty, even if the critical words are identical. "*I do not think that an authority can lay down any rule about construing another charterparty*": **Evera v North Shipping "the North Anglia"** [1956] 2 Lloyd's Rep 367 @ 373-374,.

4. But, while every charterparty must be construed on its own terms, "*… in a business world (such as the shipping world) previous decisions on the same or similar clauses must be treated as <u>authoritative</u> in the interests of business certainty*" alternatively "*previous cases on similar wording should be regarded as <u>helpful guides</u>*" (emphasis added): both formulations are in the same paragraph in **Pacific Challenger** [2019] 1 Lloyd's Rep 370 (CA) at [12].

5. Starting with a clean sheet, when a charterparty for a definite voyage contains (1) an obligation to proceed with utmost despatch generally or to the loadport; (2) an estimate or estimates and (3) a cancelling date, an obvious and perhaps the most natural interpretation of the shipowner's obligations is that:

5.1. There is *necessarily* an implied condition that the vessel will *arrive* at the loadport in a reasonable time, meaning a reasonable time for the voyage contemplated. The estimates are among the factors from which the reasonable arrival time can be assessed.

5.2. There is an added obligation to proceed with utmost (etc.) despatch which is not inconsistent with, or needless because of, the obligation to arrive in reasonable time.

5.3. The obligations are absolute, but subject to any exceptions which, on true interpretation, apply to any delaying factor.

5.4. But, given the obligation to *arrive* in a reasonable time there is no need to imply a term as to when the vessel will *start* the approach voyage.

5.5. The estimates are also contractual representations of fact that the owner has made the estimate honestly and on reasonable grounds (common ground in all the cases), but are not otherwise promissory obligations.

5.6. The cancelling date permits cancellation but creates no obligation and has no impact on the shipowner's obligation.

6. That interpretation is supported in **Jackson v Union Marine** (1874) LR 10 CP 125, a case about insurance on freight, which depended on the rights and obligation under the charterparty. There was an obligation to proceed with all possible despatch to the loadport, but no ERTL or ETA LP or itinerary or ETA DP or cancelling date, and the vessel was required for a particular voyage. It grounded on the approach voyage and the charterer cancelled. It was held that the charterparty was rightly cancelled for failure of a condition but the owner was not liable for damages.

7. The Exchequer Chamber's *rationes* were:

7.1. a necessarily implied absolute obligation on the shipowner to arrive in a reasonable time, which meant in time for the voyage or adventure contemplated, and which was a condition: (1874) LR 10 CP @ 142-143, 144-145. In particular, per Bramwell B. at 142 "*If this charterparty is read as a charter for a definite voyage or adventure, then it follows that there is <u>necessarily</u> an implied condition that the ship shall arrive at [loadport] in time for it."* (emphasis in the original). The two obligations (arrive in time; proceed with utmost despatch) " *are not repugnant. Nor is either superfluous or useless*".

7.2. The failure to arrive in time was caused by perils of the sea during the approach voyage, which were excepted, so there was no claim for damages.

8. That is, however, not how the law developed, and the sheet is not clean.

9. In **Monroe v Ryan** (1935) 51 Lloyd's List LR 179 there was an obligation to proceed with all convenient speed to the loadport, an ERTL and a cancelling date. There was a gap in time

between the date of charter and when the vessel was needed for the adventure. The vessel was delayed during an intermediate charter. The charterer's claim for damages succeeded.

10. The Court of Appeal's *rationes* were:

    10.1. The obligation to proceed with all convenient speed "*means this in the charterparty, that the vessel will proceed at a time when it is reasonably certain that she will arrive at the loading port on or about the expected date"* (1935) 51 Lloyd's List LR @ 181 RHC.

    10.2. The charterparty exceptions clause did not apply before commencement of the approach voyage: (1935) 51 Lloyd's List LR @ 182 RHC (Greer LJ) 183LHC (Maugham LJ) 183RHC (Roche LJ). This second part has not been controversial.

11. The reasoning for finding that obligation to proceed was later supplied by Devlin J in **The North Anglia** [1956] 2 Lloyd's Rep 367 @ 374

    "*The obligation is that the ship "shall with all convenient speed sail and proceed to [loadport]. Now, there is no date at all as to when the ship is to sail; nor is there any warranted date as to which she is to arrive. What, then, does the obligation mean ? If it is to be given any effect at all, some time for sailing must be put in. If there was nothing in the terms of the charterparty which could guide the Court, I think the Court would be constrained to hold that it means "shall forthwith with all convenient speed sail and proceed to [loadport], or it might mean "shall within a reasonable time sail and proceed to [loadport] …*
    But the shipowner is permitted to have recourse to the expected readiness to load …
    … it is reasonable to construe the charterparty as providing that he should "sail at such time as is calculated to get him to [loadport] at or about the date he said he expected to be there".
    (emphasis added)

12. This, in the shipping context, is the Monroe Doctrine. The essence is that a start date must be put in, and is extrapolated backwards from the ERTL.

13. It places the risk of delay before the start date on the shipowner, without benefit of exceptions, and the risk of delay on the approach voyage also on the shipowner, but with benefit of exceptions.

14. The obligation to start by the start date is probably a condition, by analogy with **Jackson v Union Marine.** This was conceded by owners in **The Almare Seconda** [1981] 2 Lloyd's Rep 433, 435

15. It is on analysis an implied term because it involves putting something in that is not there. These depend on necessity not reasonableness. The necessity depends on "*nor is there any warranted date as to which she is to arrive"*.

16. But is this true ? According to **Jackson v Union Marine**, at least where the charter is for a definite voyage, it is a *necessarily* implied condition (better than a warranty) that the vessel *arrive* in a reasonable time for the adventure. The obligation of utmost (etc.) despatch is additional, not repugnant, and not superfluous. All this renders the implication of a *start date* unnecessary.

17. In most cases there will be no material difference between the implication of an arrival date (**Jackson v Union Marine**) and a start date (the Monroe Doctrine). But there may be in cases of delay during the approach voyage. In such cases, under **Jackson v Union Marine**, there is a breach of condition (which might or might not be excepted) whereas under the Monroe Doctrine there is not. There may be breach of the obligation of utmost despatch, (which may or many not be excepted) but that is not a condition. Termination would depend on whether that breach went to the root of the contract.

18. **Jackson v Union Marine** was not cited in **Monroe v Ryan** nor the **North Anglia** nor the **Pacific Voyager**. It is probably too late, however, in practical terms, to argue that they were all *per incuriam.*

19. If there is an obligation to proceed with all convenient speed and a clause requiring an ETA LP, the result is the same as in **Monroe v Ryan**: **The Myrtos** [1984] 2 Lloyd's Rep 449 (*a fortiori* if there is an ETA LP written into the charterparty).

20. If there an obligation to proceed with utmost despatch and an itinerary including ETA DP, the result is similar but subtly different. This is the **Pacific Voyager** [2019] 1 Lloyd's Rep 370. There is an absolute obligation to start the approach voyage at the date after a prospectively reasonable time for discharging at the last DP: [14].

21. The reasoning is slightly different from **Monroe v Ryan** itself and is a development of **The North Anglia**. At [13]-[14]:

21.1. "*as Devlin J said in the North Anglia (at page 374) if the obligation is to be given any effect at all, some date for sailing must be put in"* [13].

21.2. The date must be either "*forthwith*" or "*within a reasonable time*" [13].

21.3. *"The itinerary shows that "forthwith" could not be meant".* The implication is therefore a reasonable time.

21.4. Given the ETA DP the reasonable time and therefore the start date is the ETA DP plus a reasonable time for discharging [14].

22. To summarise after the **Pacific Voyager,** by way of checklist:

22.1. If there is an express obligation to proceed to the loadport with no express start date, a start date must be implied, ie. "*must be put in"*: **The North Anglia** at p.374; **Pacific Voyager** at [13].

22.2. The start date might be either "*forthwith*" or "*within a reasonable time*": **The North Anglia** at p.374; **Pacific Voyager** at [13]. That will depend on the other terms: **Pacific Voyager** at [13]-[14].

22.3. If there are no other terms of any arguable relevance the start date will probably be "*forthwith"*: **The North Anglia** at p.374.

22.4. If there is an ERTL or an ETA LP (either required by, or already in, the charterparty) the start date will be a reasonable time and that will be "*a time when it is reasonably certain that she will arrive at the loading port on or about the expected date"*: **Monroe v Ryan** p. 181; **The Myrtos**.

22.5. If there is an itinerary including an ETA DP the start date will be a reasonable time and that will be the ETA DP plus a reasonable time for discharging: **Pacific Voyager** [14].

22.6. If there is an itinerary falling short of an ETA DP the start date will probably be the time at which discharge at the last DP would be completed on a reasonable extrapolation from the itinerary: by analogy with the **Pacific Voyager**.

22.7. If there is only a cancelling date, it is an open question what the start date is. The candidates are "forthwith" on the basis that the cancelling date is irrelevant to the shipowner's obligations and there is nothing to displace "forthwith"; and "*a date when it was reasonably certain that the vessel would arrive at the loading port by the cancelling date*" on the basis that, in addition to triggering the right to cancel, the cancelling date is relevant as the parties' latest anticipated time of arrival: Popplewell J in **The Pacific Voyager** [2018] 1 Lloyd's Rep 57 at [26], expressly not approved, and left open, by the CA at [20]. On the hypothesis that a start date has to be implied, Popplewell J's is clearly the better view.

23. To answer the question, the **Pacific Voyager** does not mark the demise of the Monroe Doctrine. To the contrary it cements the essential tenet, the need to "*put in*" a start date. It does, however, tweak it by making the start date depend on a close consideration of the other terms, and permitting the possibility of a range of subtly different results, rather than imposing one doctrinaire but certain result applicable whatever the other terms.