FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

FOIL UPDATE 22nd November 2021

What is demurrage?

K Line PTE Limited v Priminds Shipping (HK) Limited (2021) EWCA Civ 1712

Demurrage is "a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the laydays or laytime" The issue arising on this appeal was whether demurrage was liquidated damages for all the consequences of the charterer's failure to load or unload within the laytime, as the High Court had held in *The Bonde (1991),* or only some of them, as the judge had held in this case.

That issue arose because, in circumstances where the charterer committed no other breach of the charterparty, the delay in discharging a cargo of 70,133 mt of soybeans caused it to deteriorate. This led to a claim by the receivers, reasonably settled by the shipowner, who now sought to recover its outlay from the charterer as damages for failure to complete discharge within the laytime.

Mr Justice Andrew Baker had previously held that "agreeing a demurrage rate gives an agreed quantification of the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more". Accordingly, because the present claim was for "a different kind of loss", the shipowner was entitled to recover the sum paid to settle the receivers' claim as unliquidated damages falling outside the scope of

IN BRIEF

In allowing the defendant/appellant's appeal, the Court of Appeal held that in the absence of any contrary indication in a particular charterparty, demurrage liquidated the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them.

the demurrage clause in addition to the demurrage of US $20,000 per day paid by the charterer for the period of delay.

Allowing the appeal, having reviewed the relevant case law spanning the last 100 years, the Court of Appeal held that the cases were inconclusive. However, the appellate court did not agree with the trial judge that "the preponderance of views evident in dicta" was that demurrage "serves to liquidate the loss of earnings resulting from delay" and nothing more. If anything, the balance tipped the other way. Nor was there any clear consensus in the textbooks.

The court therefore approached the issue as one of principle. Its conclusion was that, in the absence of any contrary indication in a particular charterparty, demurrage liquidated the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them. Accordingly, if a shipowner sought to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation.

The court's reasoning was that first, while it was possible for contracting parties to agree that a liquidated damages clause should liquidate only some of the damages arising from a particular breach, that was as an unusual and surprising agreement for commercial people to make which, if intended, ought to be clearly stated.

Secondly, statements could be found in the case law to the effect that demurrage was intended to compensate a shipowner for the loss of prospective freight earnings suffered as a result of the charterer's delay in completing cargo operations. No doubt this was the loss which was primarily contemplated and, in most cases, would be the only loss occurring. But that did not mean that this was all that demurrage was intended to do. The statements cited were made in cases where the present issue was not being considered. The cases showed that demurrage was frequently either higher or lower than an estimated daily freight rate. It was more accurate to say that the demurrage rate was the result of a negotiation between the parties in which the loss of prospective freight earnings was likely to be one factor, but is by no means the only factor. Moreover, it appeared that while freight rates move up and down sensitively to market conditions, the same was not necessarily true of demurrage rates.

Thirdly, if demurrage quantified "the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more", as the judge held and did not apply to a different "type of loss", there would inevitably be disputes as to whether particular losses were of the "type" or "kind" covered by the demurrage clause.

Fourthly, the cost of insurance was one of the normal running expenses which the shipowner had to bear. A standard expense for a shipowner was the cost of P&I cover which was intended to protect it against precisely the loss suffered in this case, that is to say liability to cargo claims, whether justified or not. Thus, a shipowner would typically have insurance against cargo claims, while a charterer would not typically have insurance against liability for unliquidated damages resulting solely from a failure to complete cargo operations within the laytime. Rather, the charterer had protected itself from liability for failing to complete cargo operations within the laytime by stipulating for liquidated damages in the form of demurrage. Accordingly, the consequence of the shipowner's construction is to transfer the risk of unliquidated liability for cargo claims from the shipowner who had insured against it to the charterer who had not. That seemed to disturb the balance of risk inherent in the parties' contract.

Fifthly, there was no previous case in which its reasoning had been criticised. *The Bonde* had now stood for some 30 years, apparently without causing any dissatisfaction in the market.

Sixthly, that reason would have less force if the judge had been correct in his view that *The Bonde* "is clearly faulty" or that the judgment "is explicable only if a *non sequitur* lies at its heart", but the appellate court did not accept the judge's criticisms of *The Bonde*.

Finally, to allow the appeal would produce clarity and certainty, while leaving it open to individual parties or to industry bodies to stipulate for a different result if they wished to do so. If this judgment did not meet with approval in the market, it should not be difficult for clauses to be drafted stating expressly that demurrage only covered certain stated categories of loss.

Charles Patterson, Legal Director at **Thomas Miller Law** and a member of the Marine SFT comments:

The full case report is available at: K Line PTE Ltd v Priminds Shipping (HK) Co Ltd ("Eternal Bliss") [2021] EWCA Civ 1712 (18 November 2021) (bailii.org)