Maritime Bulletin – Eternal Bliss: Demurrage is not an exclusive remedy

It is not uncommon for voyage charterers to breach the charterparty by failing to load or discharge at the agreed rate and thus exceed the permitted laytime. It is also not uncommon for this to involve no other breach of the charterparty. Owners in such circumstances are entitled to demurrage at the stipulated rate. But what if the delay has caused physical damage to the cargo (e.g. perishable cargoes that have gone mouldy)? The cargo interests sue owners and a settlement is reached whereby certain sums are paid over by owners (or, more likely, their P&I club). In circumstances where only the laytime obligation has been breached, can owners nonetheless recover those settlement sums from charterers in the form of unliquidated damages *in addition* to the demurrage payable? Or are owners limited in their remedy to the stipulated demurrage? Does 'demurrage' provide exclusively for breach of the laytime obligation no matter the damage suffered, or does it simply compensate owners for the continued use of the vessel beyond the stipulated laytime?

Previously, if one were advising their client, one would probably (and quite confidently) point to the decision of Potter J in The "Bonde" [1991] 1 Lloyd's Rep 136, where it was held that demurrage is an exclusive remedy for breach of the laytime obligation. If owners wanted to recover unliquidated damages in addition to demurrage, they had to show a separate breach of the charterparty. However, if one were advising their client now, that advice is likely to be different. In the recent case of The "Eternal Bliss" [2020] EWHC 2373 (Comm), Andrew Baker J gave a detailed judgment in which he held that unliquidated damages can be awarded in addition to demurrage even where charterers have only breached their obligation to load/discharge within the stipulated laytime. In doing so, Andrew Baker J found that The "Bonde" was wrongly decided. He did, however, grant Charterers permission to appeal, leaving it to the Court of Appeal to have the last (or possibly second-last) word on the matter.

Background

The "Eternal Bliss" involved an application under section 45 of the Arbitration Act 1996 for the determination of a preliminary question of law arising in the underlying arbitration. For the purposes of the application, the parties agreed certain facts as set out at [17] of the judgment. Those agreed facts included that (1) the vessel was detained at the discharge port beyond the contractual laytime due to port congestion and a lack of storage (putting Charterers in breach of the laytime obligation); (2) that detention was the sole cause of the deterioration of the cargo; and (3) Owners suffered loss as a result of the detention including settling the claims by cargo interests/insurers, such loss being reasonably incurred. The question of whether unliquidated damages could be recovered in addition to demurrage was therefore directly in issue.

Judgment

Both parties (and Andrew Baker J) agreed that the question was one of contractual interpretation. In theory, parties can "*contract using language in their demurrage clause that answers the present issue*"; [28]. In reality, however, parties use

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standard industry agreements which say very little about the scope of the demurrage clause contained therein. This included the contract of affreightment between the parties, which was drawn up on the Norgrain form (as amended and supplemented). Andrew Baker J therefore posed these questions at [27]: "*What does the law take to be covered by a demurrage rate? What does demurrage liquidate?*"

Charterers argued that, because demurrage is a liquidated damages clause, the starting point is that it provides an exclusive remedy for breach of the laytime obligation and that important commercial considerations (particularly, financial certainty) support such an interpretation. Andrew Baker J disagreed, observing that such a starting point "*begs the very issue of construction that has to be determined*"; [23]. In doing so, he dismissed as irrelevant the line of construction cases that Charterers relied on in support. He also dismissed the argument that Owners' approach would cause undue uncertainty, noting that parties will always have to grapple with the difficult question of whether the type of loss in question fell within the scope of the demurrage clause; [59].

Fundamentally, Andrew Baker J agreed with Owners, finding that demurrage was, by its nature, simply the measure of the value of the vessel's lost time (or, as Owners put it, the loss of the use of the vessel as a freight-earning chattel). That is the only type of loss/damage which demurrage seeks to liquidate; [58] to [61]. Other types of losses (such as the cargo claims) therefore fell outside the scope of the demurrage clause and could be recovered as unliquidated damages. Accordingly, Owners did not have to prove a separate breach. Demurrage is not linked to a particular breach, but rather responds to a particular type of loss (i.e. 'loss of use'). Andrew Baker J considered that this was consistent with Inverkip Steamship v Bunge [1917] 1 KB 183, where the Court of Appeal held that 'loss of use' (or, 'damages for detention') was captured by a demurrage clause no matter the breach in question; [59].

Andrew Baker J's judgment contains a thorough analysis of the case law, including the Court of Appeal's decision in Reidar v Arcos [1927] 1 KB 352 and the various judgments in Suisse Atlantique v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361 (HL), and [1965] 1 Lloyd's Rep 533 (CA). Ultimately, Andrew Baker J held that, on the proper interpretation of that case law, there was nothing which required him to come to a different conclusion. The only judge who had directly considered the issue was Potter J in The "Bonde", however Andrew Baker J found Potter J's reasoning to be faulty, concluding that he had misinterpreted the case law; [127] and [128]. Given this, and given that no other cases otherwise bound him, Andrew Baker J concluded that the demurrage clause did not prevent an additional claim by Owners for unliquidated damages in respect of losses which were unrelated to the use of the vessel (holding that the cargo claims were indeed unrelated).

For completeness, Andrew Baker J held that it was unnecessary to determine whether there was an implied indemnity (Owners' alternative argument) given his conclusion on the main issue. But he added that, if he had found in favour of Charterers on the main issue, he would have rejected the implied indemnity argument; [150] and [151].

Conclusion

Despite the lengthy and detailed analysis of the relevant case law, Andrew Baker J's conclusion fundamentally rests on his understanding of the underlying principles, including the nature of demurrage. It is those principles which are likely to be called into question when the Court of Appeal is asked to consider Andrew Baker J's judgment on appeal. For now, the uncertainty surrounding this important issue continues.

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