

THE SCOPE OF A DEMURRAGE CLAUSE

“Demurrage” is the term given to an agreed charge which is paid by a charterer to a shipowner, under a voyage charterparty, for detaining the vessel beyond the time agreed for loading and unloading (“laytime”). If laytime is exceeded, the shipowner will lose the opportunity of future employment of the vessel, sometimes for the same charterer, as for example under a consecutive voyage charter. Demurrage might be viewed as the “price” paid for an extension of laytime, but it is now established that it amounts to liquidated damages which are payable for the charterer’s breach in detaining the ship beyond laytime. What has not been clear for some time is whether, and when, a shipowner is entitled to damages in addition to demurrage; in particular, is it sufficient to establish that the owner has incurred loss different in kind from that which is covered by the demurrage clause, or is it also necessary to establish that the charterer is guilty of a further breach, in addition to that of exceeding laytime. The Court of Appeal has returned to this issue in *K Line Pte Ltd v Priminds Shipping (HK) Ltd; The Eternal Bliss* [2021] EWCA Civ 1712. It held that a further breach is also necessary, allowing an appeal from the decision of Andrew Baker J. ([2020] EWHC 2373 (Comm); [2020] 2 Lloyd’s Rep. 419) that a different kind of loss is sufficient. Given the uncertainty (reflected in the divided view of the High Court and the Court of Appeal) and the importance of the issue to the shipping industry (even if it does not often arise in practice), permission to appeal to the Supreme Court, if sought, would not be unexpected. It is respectfully submitted that the decision of Andrew Baker J is to be preferred.

The issue arose on this occasion in the form of a preliminary point of law under s.45 of the Arbitration Act 1996 which was to be determined on the basis of an assumed set of facts, the key elements of which are as follows: (i) *The Eternal Bliss* was detained at the discharge port beyond laytime; (ii) the charterer was therefore in breach of its obligation not to exceed laytime; (iii) this was the only breach committed by the charterer; (iv) a consequence of detention beyond laytime was that the cargo of soybeans deteriorated; (v) the shipowner suffered loss as a consequence, in the form of liability to the cargo receiver. A curious feature of the case is that the damage to the cargo appears to have been the result of a combination of the moisture content on loading and the delay in unloading. As pointed out by Males L.J., if the bills of lading were subject to the Hague-Visby Rules, the shipowner ought not, on such facts, to have been under any liability to the cargo receivers, but the point of law was resolved on the assumption either that such liability was incurred, or was reasonably settled by the shipowner.

The voyage charter for *The Eternal Bliss* was entered into pursuant to a contract of affreightment subject to the terms and conditions of a Norgrain form, under clause 18 of which demurrage was to be declared by the shipowner upon vessel nomination, subject to a maximum of US\$20,000 per day. As is usually the case, the clause simply stated that “demurrage” was payable, without more. As Andrew Baker J. observed, the main point of principle in *The Eternal Bliss* is “what is it that demurrage liquidates” ([2020] EWHC 2373 (Comm); [2020] 2 Lloyd’s Rep. 419 at [22])? His answer, in principle, was that “[a]greeing 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" ([2020] EWHC 2373 (Comm); [2020] 2 Lloyd's Rep. 419 at [61]). The loss incurred by the owner in settling the cargo receiver's claim was not loss of the kind liquidated by demurrage and was therefore recoverable, in addition to demurrage. Without dissenting from the finding of a different kind of loss, the Court of Appeal held that damages in addition to demurrage are only recoverable if a different kind loss is the consequence of a breach other than exceeding laytime, i.e. in other words, demurrage liquidates the damages payable for all loss which is solely a consequence of exceeding laytime. As that was the only breach committed by the charterer, damages in addition to demurrage were not recoverable and the charterer's appeal was allowed.

The Court of Appeal observed that previous cases did not provide a decisive answer and there is no clear consensus in the textbooks; the issue has to be approached as one of principle. There is no dissent from that view and this note will focus principally on the points of principle invoked by the Court, but a brief reference to the case law is still needed in order to do so.

First, what is clear from previous case law is that a breach other than exceeding laytime is, alone, not sufficient to recover damages in addition to demurrage. If the only consequence of such a breach is the detention of the vessel, the owner is confined to demurrage. So, for example, in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 K.B. 240; [1950] 2 All E.R. 618, where dangerous cargo was shipped in breach of contract but the only consequence was delay to the ship beyond laytime, there was no recovery beyond the demurrage provided for by the charter (cf. *Inverkip Steamship Co v Bunge & Co* [1917] 2 K.B. 193). It is therefore a *necessary* condition for recovery of additional damages that the owner has incurred a different kind of loss.

Second, the one case which has previously and decisively stated that a different kind of loss is not a *sufficient* condition for recovery of additional damages is *The Bonde* [1991] 1 Lloyd's Rep. 136, in which Potter J. held that the owner must have incurred a different kind of loss and the charterer must *also* have committed a breach other than exceeding laytime. Andrew Baker J. felt emboldened not to follow *The Bonde* principally on the basis that Potter J. had misinterpreted, or perhaps more accurately over-interpreted, the decision of the Court of Appeal in *Aktieselskabet Reidar v Arcos* [1927] K.B. 352; (1926) 25 Ll.L.Rep. 513. In *Reidar v Arcos*, the charterer breached the obligation to load within laytime. A further consequence of the delay, beyond the detention of the vessel, was that it was no longer possible to load a full cargo. The voyage became subject to a winter deck load limit, whereas it would have been subject to the summer rules if loading had been completed in time. The owner sued for dead freight. The Court of Appeal held unanimously that the owner was entitled to recover dead freight in addition to demurrage, but they differed in their view as to whether the charterer had been guilty of a breach in addition to exceeding laytime. Bankes L.J. held not. There is some debate about what was decided by Atkin L.J., but the better view and that which was accepted by Andrew Baker J. is that he agreed with Sargant L.J. that the

charterer was also in breach of the obligation to load a “full and complete cargo”, since this was to be determined assuming loading at the contractual loading rate (which would have avoided the application of the winter rules). Accordingly, Bankes L.J. held only that there was a different kind of loss and awarded damages in addition to demurrage, whereas Atkin and Sargant L.J.J. held that there was a different kind of loss and a different kind of breach and awarded damages in addition to demurrage. The majority clearly disagreed with Bankes L.J.’s finding of “one breach”, but at no point did they say he was *wrong* therefore to have awarded damages for dead freight. On this basis, it cannot be said that *Reidar v Arcos* is authority for the proposition that a different kind of loss and a different kind of breach is necessary for the recovery of damages in addition to demurrage. One might go further and say that, while the majority did not say that Bankes L.J. was *right* to have awarded additional damages, the only common denominator in all three judgments was the finding of a different kind of loss.

As noted above, rather than engage with any intricate analysis of what had or had not been decided in *Reidar v Arcos*, the Court of Appeal in *The Eternal Bliss* preferred to approach the issue as one of principle. It had the option of simply departing from the decision in *The Bonde*, but it decided to affirm it and this note turns to its reasons of principle for so doing.

Two of the reasons relied on by the Court are, with respect, of doubtful utility. The first is put forward as a response to the statements of several judges that demurrage is 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 (e.g. the *Chandris* case, at 249 (Devlin J.); *Suisse Atlantique d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1965] 1 Lloyd’s Rep. 533, at 540 (Diplock L.J.); *Navico AG v Vrontados Naftiki Etairia PE* [1968] 1 Lloyd’s Rep. 379, at 383 (Donaldson J.)). That is quite an array of shipping experience. It is said not to assist the Court because such statements were made where the “present issue was not being considered” (at [54]). That may be true (though the context was not that different in *Chandris* and *Suisse Atlantique*), but the “present issue” is the proper construction of a demurrage clause, i.e. it is an exercise in establishing the intention of the contracting parties. When all three distinguished judges opined on the intention of the parties to a demurrage clause, they could very easily have stated that it is their intention to compensate for *all loss* flowing from breach of the obligation not to exceed laytime, but they did not. It is quite a big step from these very clear judicial statements that the intention of the parties is to compensate for the loss of prospective freight earnings to the Court’s conclusion that “that does not mean that this is all that demurrage is intended to do” (at [54]), and an even bigger step to the conclusion reached by the Court that it is intended to cover all loss incurred solely as a consequence of exceeding laytime.

The second reason of doubtful utility relates to insurance and the fact that the owner will normally have cover for liability for cargo claims of the type made against the owner of *The Eternal Bliss*, whereas the charterer will not typically have insurance against liability for unliquidated damages resulting solely from exceeding laytime: *ergo* the owner is protected by its insurance cover and the charterer is protected by demurrage; and to allow a claim for

additional damages based solely on a different kind of loss would “disturb the balance of risk inherent in the parties’ contract” (at [56]). For this reason to be of general application, it would need also to be shown that the charterer normally has insurance cover where a different kind of loss is accompanied by a separate breach and that the owner’s normal cover also extends to other types of loss such as the dead freight in *Reidar v Arcos*, neither of which is addressed by the court. The insurance argument is put forward solely as a reason which works in the context of *The Eternal Bliss*. But even if of general application, it is open to the objection that it has things the wrong way round: insurance should be a response to the risk of liability; not the driver of where that risk should lie.

Perhaps the overriding concern of the Court was, as is often the case in a very commercial context like this, to ensure a degree of certainty. That concern is evident in relation to several of the reasons given for the requirement that the owner must prove the breach of a separate obligation; in particular, that it would be unusual for commercial parties to agree that a liquidated damages clause should liquidate only some of the loss arising from a particular breach, in the absence of a clear indication to the contrary, and the difficulty of establishing whether the loss incurred is of a different kind to that which is covered by demurrage. A clause which covers some but not all of the loss flowing from exceeding laytime, but without it being clear which loss is covered, and which is not, “forfeits many of the benefits of a liquidated damages clause which, in general, provides valuable certainty and avoids dispute” (at [53]).

There may indeed be uncertainty in some cases about what constitutes a different kind of loss. For example, Andrew Baker J. effectively conceded that it may be too narrow to confine demurrage to prospective loss of freight, when he referred approvingly ([2020] EWHC 2373 (Comm); [2020] 2 Lloyd’s Rep. 419 at [62]) to the dictum of Moore-Bick J. in *The Nikmary* [2003] EWHC 46 (Comm); [2003] 1 Lloyd’s Rep. 151 at [47] that demurrage “notionally reflects the full cost to the owner of keeping his ship in port. As such, it is deemed to cover all normal running expenses, including the cost of diesel oil required to run the ship’s equipment.” That allowed the Court of Appeal to refer to a hypothetical example where the fouling of the hull results from a delay in tropical waters and leads to a loss of fuel efficiency (see *Gay*, “*Damages in addition to demurrage*” [2004] L.M.C.L.Q. 72 at 89) and ask whether that would qualify as a normal running expense which is covered by demurrage. There are, however, several answers to the risk of uncertainty if the recovery of additional damages depends only on proving a different kind of loss. First, that risk exists even if *The Bonde* is followed and one needs to prove a separate breach, since one still needs *also* to prove that a different kind of loss has been incurred (see the discussion of *Chandris*, above). Second, if *The Bonde* is followed, the “valuable certainty” which demurrage is intended to provide may be forfeited because it is uncertain whether a separate breach has been committed, in cases where there is no doubt that a different kind of loss has been incurred to that which the parties would normally have had in mind when agreeing demurrage (see *Reidar v Arcos* where the Court of Appeal divided on the question of whether there was a separate breach, not whether the dead freight was a different kind of loss). Third, the Court of Appeal has decided that demurrage, if left undefined, covers all loss incurred solely as a

consequence of exceeding laytime, but that if the parties wish to confine its scope, they are free to do so. One might ask just how they are supposed to achieve that with any degree of certainty. If the parties spell out expressly what some of the leading judges in this area have regarded as implicit, namely that demurrage covers only “prospective loss of freight”, or “normal running expenses”, the courts would be required to give effect to that but the uncertainty of what is meant by such concepts would resurface. The Court’s suggestion that “it should not be difficult for clauses to be drafted stating expressly that demurrage only covers certain stated categories of loss” (at [59]) is open to challenge. Conversely, if demurrage covers “all loss”, the rate at which it is payable may become more uncertain and more difficult to agree. *The Eternal Bliss* might come to be regarded as a pyrrhic victory for charterers in general if it results in a higher rate in all cases to accommodate the risk of loss for which a charterer would only occasionally be liable as additional damages if a different kind of loss alone is sufficient. As the Court itself acknowledges, that is likely to be rare (at [57]), but why then assume that the parties intend also to cover the rare case by interpreting demurrage to cover all loss?

It is respectfully submitted that the Court of Appeal has elevated its concern for certainty ahead of a realistic assessment of the intention of the parties and, since this is simply a question of construction, it is the latter which should prevail. It does not seem persuasive to suppose that, when agreeing demurrage, the parties (or, to be more accurate, a reasonable person in the position of the parties) intended that the rate agreed would cover all loss of any type and arising in any circumstances, save where those circumstances happen to result in a further and separate breach to that of exceeding laytime. One might test this proposition by hypothetically asking the parties in *Reidar v Arcos* – do you intend demurrage to cover a claim for dead freight; or asking the parties in *The Eternal Bliss* – do you intend demurrage to cover a claim for liability of the owner to the cargo receivers caused by the charterer’s default? The hypothetical answer to those questions seems rather obviously to be: “no, because demurrage is only intended to address the detention of the vessel and this claim is really something different”; and not “yes, but only if it is the result of a breach other than exceeding laytime”. It is hard to improve on the approach of Bankes L.J. in *Reidar v Arcos*, at 362: “If the plaintiffs’ claim was in substance, though not in form, a claim for detention of the vessel, the special damage here claimed for would not be recoverable... Upon the special facts of this case the plaintiffs’ claim appears to me to be, both in substance and in form, essentially distinct from any claim for the detention of the vessel”. Such questions of substance are best directed at the kind of loss for which a claim is being made.

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