HFW SHIPPING UPDATE

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Last week, in *The Eternal Bliss*, Andrew Baker J sitting in the Commercial Court division of the High Court of England & Wales delivered one of the most significant judgments of recent years concerning the construction of charterparties which will have widespread implications for the global bulk shipping industry.

As the Judge aptly stated, *"From time to time, a case provides the opportunity to resolve a long-standing uncertainty on a point of law of significance in a particular field of commerce."*

***The Eternal Bliss* is certainly such a case.**

The point concerned whether, in circumstances where the only breach of a charter that is alleged by an owner against a charterer is the failure to discharge within the allowed laytime (or, as Andrew Baker J put it, a failure to discharge at the rate specified in the charter), is an owner's sole remedy against the charterer demurrage – that is, where owners suffer loss of a different type as a result of the delay must there be a breach of a separate obligation if damages in addition to demurrage are to be recovered.

This has long been a vigorously contested issue between owners and charterers which has divided opinion between judges and legal commentators, and Andrew Baker J noted *"it may take a judgment from the Court of Appeal for the controversy to be settled definitively."*

Demurrage is liquidated damages for failing to discharge at the required rate - *"It is well-established that demurrage is by nature liquidated damages, but in respect of what does demurrage, calculated in accordance with the voyage charter, fix (and therefore limit) the owner's recovery?" [22], However, "What does the law take to be covered by a demurrage rate? What does demurrage liquidate?" [27]*

The competing schools of thought which are captured generally in the following passages of the leading texts, Scrutton and Voyage Charters are examined in detail in the judgment.

Scrutton sides with owners:

> *"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"; "Where there is no further breach of charter beyond the failure to load or discharge within the laydays, but the charterer's breach causes the shipowner damage in addition to the detention of the ship, the position is not clear but it is submitted that the better interpretation of Aktieselskabet Reidar v Arcos is that these losses can be recovered in addition to demurrage", Scrutton on Charterparties, 24th Ed. (2020), at 15-001, 15-006.*

Voyage Charters sides with charters:

> *"The varying reasoning of the members of the court in Reidar v Arcos left it in doubt whether, if damages in addition to demurrage are to be recovered, it is necessary to show breach of a separate obligation as well as damage of a different kind from delay in the completion of the loading and discharging operation. In Suisse Atlantique …, both Mocatta J and the Court of Appeal took the view that it is necessary to show a separate breach. The contrary view was taken in The Altus, in which Suisse Atlantique was not referred to, but in The Bonde Potter J, after reviewing all the authorities, preferred the view taken in Suisse Atlantique, which it is submitted is the better view", Cooke, Young et al., "Voyage Charters",* 4th Ed. (2014), at 16.14.

In summary, Andrew Baker J decided the issue in favour of the owners and held that it is **unnecessary** to prove a separate breach in order to recover damages in addition to the detention of the ship, i.e. demurrage and proceeds to find:

> *"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. Where such delay occurs, the demurrage rate provides an agreed measure by which the parties are bound for the owner's claim for damages for detention,* **but it does not seek to measure or therefore touch any claim for different kinds of loss** *[emphasis added], whatever the basis for any such claim." [61]*

Implications of the decision

Whilst this is a first instance decision of a single judge and there is conflicting authority, it is likely to open the proverbial Pandora's box for claims by owners against charterers for damages other than demurrage that result from a delay in loading or discharge.

The principles applied are equally applicable to standard laytime and demurrage provisions in the widely used charters such as the Gencon and Asbatankvoy forms.

At the time of preparing this case note there are reports of congestion at Chinese ports reaching record levels with examples of some vessels waiting several months to discharge. The approach taken by Andrew Baker J in *The Eternal Bliss* presents the spectre of a wide ranging exposure to damages for charterers arising from matters (other than cargo damage) such as hull fouling and other vessel maintenance issues (including steaming to and from drydocking facilities and the related costs of docking), deviations to bunker and effect crew changes and deadfreight where delay results in the permitted loading amount being restricted to winter limits.

Whilst this exposure may in many instances be passed on by CFR sellers to receivers under the sale contract – relevantly Andrew Baker J did not accept that a demurrage provision in a sale contract was a basis for distinction from a voyage charter [49 & 50] - in circumstances where the demurrage liability alone may amount to several million dollars because of the delay, the possibility of exposure to additional substantial damages for other losses suffered by shipowners will clearly be of concern (notwithstanding it may be passed to receivers under the sale contracts or bills of lading which raise enforcement and other commercial considerations), particularly in the current economic environment.

Background facts[1]

K-Line (as owners) and Priminds (as charterers) entered into a COA for 9 separate voyages to be performed by tonnage to be

1 Summarised from paras 8 to 15 of the judgment

nominated by K-Line.

The COA was subject to the terms and conditions of the North American Grain Charterparty 1973, Amended 1/7/74 (Norgrain) form as amended and supplemented by the parties.

The cargo for each voyage was to be 60,000 m.t., 10% more or less in K-Line's option, of Heavy Grain, Soya or Sorghum in bulk.

The COA set a contractual discharge rate of 8,000 m.t. per weather working day Saturday, Sunday and Holidays excepted even if used (Friday 1700 hrs to Monday 0800 hrs not to count) with the demurrage clause providing:

> *"Demurrage at loading and/or discharging ports, if incurred, to be ~~paid at the rate of~~* **declared by Owners upon vessel nomination but maximum USD 20,000 per day or pro rata / despatch half demurrage laytime saved at both ends.** *per day or for part of a day and shall be paid by Charterers in respect of loading port(s) and by Charterers/~~Receivers~~ in respect of discharging port(s). Despatch money to be paid by Owners at half the demurrage rate for all laytime saved at loading and/or discharging ports. Any time lost for which Charterers/Receivers are responsible, which is not excepted under this Charter Party, shall count as laytime, until same has been expired, thence time on demurrage."*

K-Line nominated the dry bulk carrier Eternal Bliss for a voyage and she loaded 70,133 m.t. of soybeans at Tubarao for discharge in China. Loading was completed and bills of lading were issued on 11 June 2015.

The Eternal Bliss arrived at Longkou anchorage and was kept at the anchorage for 31 days apparently due to port congestion and lack of storage space ashore for the cargo. Upon discharge, the cargo is said to have exhibited significant moulding and caking throughout the stow in most of the cargo holds. Prior to the vessel's departure a US$6 million letter of undertaking was provided on behalf of owner interests in favour of the cargo receivers as security for the receivers' cargo claim in return for the receivers refraining from arresting the ship.

K-Line settled the receivers' and their insurers' claims at a total cost of circa U$1.1 million, and commenced arbitration against Priminds seeking damages or an indemnity in respect of that cost. Apart from an allegation of breach by failure to indemnify K-Line, the only allegation of breach made against Priminds is that it failed to discharge the subject cargo at the rate specified by the COA.

The following question of law referred to the court under s.45 of the Arbitration Act 1996 was determined by Andrew Baker J as a preliminary issue:

> *"If the facts were as presently assumed in respect of the voyage charter of m.v. 'Eternal Bliss' ..., is the charterer liable to compensate or indemnify the owner in respect of the loss, damage and expense referred to therein by way of:*
>
> *(a) damages for the charterer's breach of contract in not completing discharge within permitted laytime;*
>
> *(b) an indemnity in respect of the consequences of complying with the charterer's orders to load, carry and discharge the cargo?"[21]*

As noted already, Andrew Baker J summed up the issue for consideration as follows:

> *"The main point of principle involved asks what it is that demurrage liquidates. It is well-established that demurrage is by nature liquidated damages, but in respect of what does demurrage, calculated in accordance with the voyage charter, fix (and therefore limit) the owner's recovery?"*

The agreed facts were as follows:

> *"(i) Eternal Bliss was detained at the discharge port beyond the contractual laytime, due to port congestion and a lack of storage.*
>
> *(ii) Priminds was therefore in breach of its obligation to complete discharge within the permitted laytime.*
>
> *(iii) The condition of the cargo deteriorated as a result of the detention beyond the laytime, and not due to any want of care by K-Line.*
>
> *(iv) K-Line suffered loss and damage and incurred expense as a result of the detention beyond the laytime, including dealing with and settling the cargo claims brought by the cargo interests and insurers.*
>
> *(v) The loss, damage and expense suffered by K-Line were:*
>
> > *(a) not caused by any separate breach of charter other than Priminds' obligation to discharge within the contractual laytime;*
> >
> > *(b) not caused by any event which broke the chain of causation; and*
> >
> > *(c) reasonably incurred. [the court was not required to investigate what defences may have available to owners or whether the settlement amount was otherwise reasonable]*
>
> *(vi) The loss, damage and expense suffered by K-Line were consequences of compliance with Priminds' orders to load, carry and discharge the cargo."*

The judgment contains a forensic analysis of the cases and legal commentary on the issue, in particular the judgments of the Court of Appeal in Aktieselskabet Reidar v Arcos[2] [1927] 1 K.B. 352 and Suisse Atlantique v d'Armement Maritime v N.V. Rotterdamsche Kolen Centrale[3] (which considered Reidar in detail).

In Reidar the vessel was chartered to load a cargo of timber at Archangel on the White Sea for carriage to Manchester. The charterers exceeded the laytime and demurrage became payable with the delay having the

2 [1927] 1 K.B. 352
3 [1967] 1 AC 361

effect that the amount of cargo that the vessel could load was limited to the winter deckload limit – had the cargo been loaded within the laytime an additional 30% of cargo could have been loaded.

The charterer's obligation was to load a *"full and complete cargo"*. The only claim made by the shipowner was for damages for breach of that obligation, asserting that the 'full and complete cargo' the charterer was obliged to load was to be assessed assuming loading at the contractual loading rate, i.e. the amount that could have been loaded had loading been completed within the allowed laytime.

The charterer's defence was "*there was no obligation to load a full summer cargo, only an obligation to load a full cargo as and when cargo was in fact loaded, that is to say there was in the event only an obligation to load a full winter cargo*" [31].

The Court of Appeal unanimously dismissed the charterer's appeal. However, the members of the Court appeared to arrive at their respective decisions via different routes which has been the source of debate since regarding whether Atkin LJ agreed with Bankes LJ that there was only one breach of contract or with Sargant LJ who said there were two. In turn, this has led to the debate regarding whether or not it is necessary to *"show breach of a separate obligation as well as damage of a different kind from delay in the completion of the loading and discharging operation"* if damages in addition to demurrage are to be recovered.

Andrew Baker J determined that Atkin LJ was with Sargant LJ in saying there were two breaches [35]. However, critically, the Judge also proceeded to find that:

> *"What Reidar v Arcos decided, by the majority ratio, is that (i) the content of a voyage charterer's obligation to load a 'full and complete cargo' is to be determined assuming loading at the contractual loading rate, and (ii) the demurrage clause does not defeat a claim for deadfreight for breach of the full load obligation even where that breach itself results from a failure to load at the loading rate required by the charter."[36]*
>
> *That means in turn, … that Reidar v Arcos is* ***not*** *[emphasis added] authority for the proposition that Bankes LJ's approach is wrong as regards the scope and effect of the demurrage clause." [37]*

The decision in *The Bonde*[4] was also considered.

In that case it was found that, applying Reidar, in order to recover damages in addition to demurrage the owner was required to demonstrate that "*in order to recover damages in addition to demurrage for breach of the charterers' obligation to complete loading within the lay days, it is a requirement that the plaintiff demonstrate that such additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation.*" Andrew Baker J held that the The Bonde was *"premised on the faulty reasoning that if the majority view in Reidar v Arcos was that it was a 'two breach' case"* and should not be followed. [126(v)].

Comments

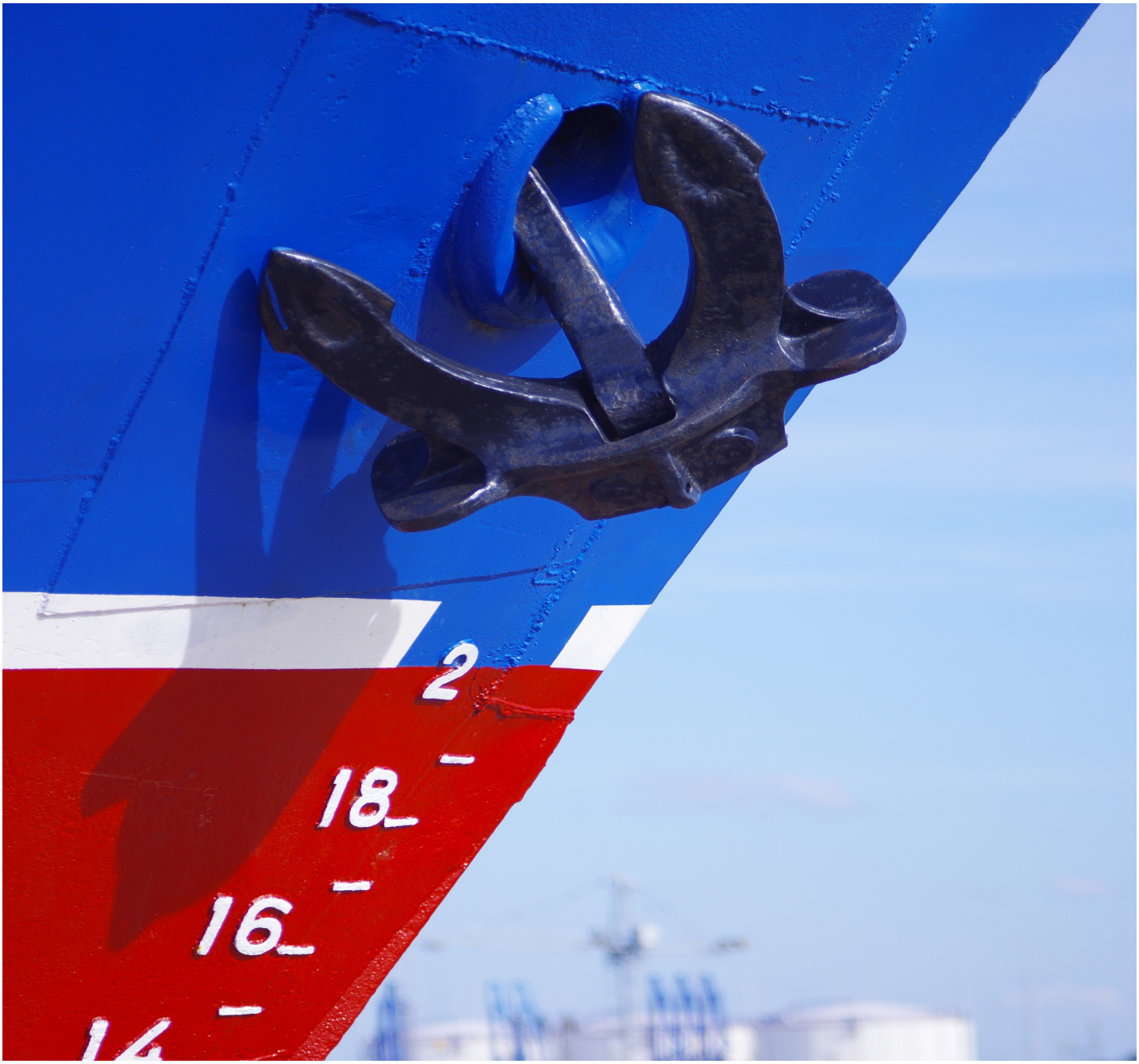
As noted already, the decision in ***The Eternal Bliss*** is one of the most significant charterparty cases of recent years. Andrew Baker J's forensic and erudite analysis of the relevant authorities and legal commentary provides a strong basis for the judgment to be accepted as the definitive ruling on the scope of what damage is liquidated by a demurrage provision.

The fact that a shipowner does not have to establish a separate and independent breach of a charter in order to recover a different type of loss arising from a failure to load or discharge the vessel within allowed laytime has serious implications for charterers and receivers, and is expected to cause receivers to reconsider what has become a common practice using vessels for storage on the basis that their only financial exposure is demurrage.

Whilst CFR sellers may have back-to-back demurrage terms in their sales contracts, this may offer little comfort where they are the first in the firing line under the charter (or seen by owners as the easier target or the target with the deepest pocket) and left with the prospect of having to pursue their buyers for very substantial damages in addition to demurrage. Of course, sellers that are not in a back-to-back position contractually may have an even greater exposure.

The decision may bring eternal bliss to vessel owners, and the opposite for charterers.

4 [1991] 1 Lloyd's Rep. 136



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