

‘THE ETERNAL BLISS - What is Demurrage?’

In a recent court case, *The Eternal Bliss*[2021] EWCA Civ 1712, some clarity was provided by the Court of Appeal on what demurrage constitutes. I think the decision has some consequences for future Charterparties.

The facts of this case are as follows:

A Vessel with 70,000mts of Soyabeans loaded in Brasil and then sailed to Longkou, China, for discharge.

At the discharging port, the Vessel had to wait for 31 days. That additional waiting resulted in moulding and caking of the cargo on board.

The receivers claimed the cargo damage to the shipowners. The Shipowners tried to recover the costs (about 1.1 Mio USD) in arbitration from the Charterers, together with the demurrage.

During the Arbitration proceedings, the parties agreed to bring the case to the Court to decide *on a matter of law*.

Initial High Court Proceedings

The question of law for this High court case was: *what is demurrage*, and consequently: *Is the Owner restricted from claiming losses, over the pre-agreed damages, called demurrage, for the Charterer’s breach of exceeding the contractually agreed laytime?*

High Court decision

In my opinion, the initial High Court decision pretty much reflects the definition of demurrage used by Charterers and Shipowners in the ‘industry’ itself: *Demurrage is the remuneration for the detention of the Vessel once the agreed laytime is exceeded.*

Once the Charterer exceeds the agreed laytime, the Vessel cannot be used by the Owners for other employment and for that, the Charterer pays damages. Therefore, such *detention* aside, the Charterers are liable for other damages caused by that breach to discharge a Vessel within the agreed laytime. In his decision, the High Court Judge took a rather bold, in-depth approach in defining the previous law cases on this matter, which appeared to be far from clear-cut.

Court of Appeal decision

However, the Court of Appeal had a more legal approach in its decision. In their view, remuneration for detention is not the only thing demurrage is intended to do.

According to the Court of Appeal, Demurrage is, from a legal perspective, the only form of damages that can be claimed by the Owners when the Charterers breach by exceeding the agreed laytime. The Owner is, therefore, not allowed to claim demurrages ‘at large’, unless the Charterers breached a second warranty, aside from exceeding the agreed laytime.

Why this is an important case?

Providing the, by many legal experts praised, clarity the Court of Appeal has laid out in the *Eternal Bliss* is commendable.

However, I also see a discrepancy in the definitions used by Chartering professionals and Legal professionals.

tAn example of this discrepancy surfaced, in my opinion, in the additional comments made in the Court of Appeal decision:

With references to statements made in **The Nikmary [2003]** case, the Court of Appeal, almost colloquially, commented that the demurrage covered 'normal running expenses' and that these running expenses included a P&I Cover. According to the Court of Appeal, Such cover was intended to protect against the loss suffered in the case.

In my opinion, the latter comment reflects that the courts are not fully aware of how a P&I cover functions from an Owner's perspective. The courts, therefore, fail to understand that such cover is not an insurance policy and that part of the loss directly or indirectly will end up as a loss for the Owner again.

Conclusion

How to deal with these new insights knowing the outcome of The Eternal Bliss? Not all trades/ship types will have issues with cargo degradation, but I do see problems with, for example, hygroscopic liquid cargoes like FAME/Biodiesel.

Cargo damage aside, the Owner may have additional losses providing a Nitrogen blanket on top of cargo in the event of a longer than anticipated waiting time. The same applies to high heat cargoes, where the delay results in additional heating costs. For such cargoes, an amended or added clause may be necessary. Another solution would be to add something in the cp that clarifies that demurrage is solely intended for the detention of the Vessel in the event charterers exceed the agreed laytime of the CP.

If you have any doubts or reservations about the wording used, please do not hesitate to contact me for further assistance.

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Best regards,
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