

Demurrage time bars: 'Less is not always more!'



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Voyage charters often include additional rider clauses requiring an owner to submit any claim they may have for demurrage within a prescribed period following completion of loading/discharge operations. This article explains why, where a charterparty makes clear provision as to how demurrage claims are to be submitted by an owner, it is essential that such provisions are strictly complied with.

Introduction

It is common to find additional rider clauses in voyage charters requiring an owner to submit any claim they may have for demurrage within a prescribed period following completion of loading/discharge operations, often within 90 days, failing which the claim is 'deemed to have been waived and forever time barred'. The prescribed time bars for the submission of demurrage claims are usually the most onerous and time-sensitive an owner will have to comply with, when compared with the time bars otherwise applicable for contractual claims under voyage charters – the default position is six years under English law¹.

The reason behind these clauses is that there are often similar provisions in the underlying contract(s) of sale for the cargo, requiring the charterer to submit their own claim(s) for demurrage within similar, prescribed, tight time frames. Generally, the English courts and arbitration tribunals will uphold these time bar provisions, so long as the wording of the clause is clear and unambiguous. However, the approach has shifted over the years², as discussed later in this article.

Earlier case law

Strict compliance with the clause

One of the earliest cases on the subject of demurrage time bars is *The Oltenia*³. The relevant rider clause required the demurrage claim to be

submitted in writing with 'all available supporting documents'. The judge held:

'I cannot regard the expression "all available supporting documents" as in any way ambiguous...the owners are in my view shut out from enforcing a claim the substance of which and the supporting documents of which (subject always to de minimis exceptions) have not been presented in time.'

In *The Sabrewing*⁴ the owner had failed to produce copies of signed pumping logs within the prescribed 90 days and this was held by the English court to be fatal to the whole of their claim, not just to the parts of their demurrage claim to which the logs related. Here, the judge concluded:

'Clause 23 required owners to present "a claim in writing" within 90 days of discharge of cargo, "together with supporting documentation substantiating each and every constituent part of the claim". Unless such a claim, with supporting documentation, is presented within the relevant time period, charterers are released "from all liability in respect of any claim for demurrage", i.e. not merely that constituent part of the claim that is not supported by relevant documentation.'

Accordingly, if, as here, only one composite claim for demurrage was made, owners are time-barred in respect of the entirety of the claim, notwithstanding that the absence

1 John Schofield, *Laytime and Demurrage* (6th edition, 2011), chapter 6.

2 *Eversheds, Demurrage Time Bars – An overview (17 January 2014) accessed 1 May 2015*

3 [1982] 1 Lloyd's Rep 448.

4 [2008] 1 Lloyd's Rep 286.

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of documents only relates to one constituent part of the claim.'

Some have criticised the trend of the above cases, where the courts seem to have taken an overly literal interpretation of the subject time bar clause, without true regard to issues such as materiality. Conversely, it is difficult for a judge or arbitrator to find to the contrary where the wording of a time bar clause is clear and unambiguous and, after all, has been entered into between two commercial parties.

A more flexible approach

An example of the English courts taking a more flexible (and, thus, a more 'owner friendly' approach) can be found in *The Eternity*⁵, where the judge held:

'I confess that I find the proposition that a claim put in on time but in respect of part of which the accompanying documents are non-contractual gives rise to a bar to the entire claim is a commercially surprising construction. I am not persuaded that on its proper construction the effect of clause 20 was such that the failure to provide "all supporting documentation" (whether needed by reason of the requirements of clause 19 or otherwise) for one constituent part of the claim discharged liability for the entire demurrage claim.'

In *The Abqaiq*⁶, the owner submitted a demurrage invoice, together with 'all supporting documents' within the 90 days prescribed in the charter. However, a dispute arose in relation to an earlier invoice submitted by the owner for bunkers and time consumed at the load port. The charterer argued that the first invoice had to be brought as a clearly stated demurrage claim and that the owner had failed to do so within the 90-day limit. Although the charterer succeeded at first instance, the Court of Appeal overturned the decision on the grounds that the charterer had been put in possession (within the 90-day time frame) of all the factual material which they required in order to satisfy themselves

that each and every part of the claim was well founded. They were able to satisfy themselves as to the extent of their liability without the need for the invoice to be marked expressly as a 'demurrage invoice'.

In reaching this conclusion in *The Abqaiq*, the Court of Appeal disagreed with the court in *The Sabrewing* that the requirements under a demurrage time bar clause dictate strict, and absolute, compliance.

Recent case law

The most recent case on demurrage time bars is *Kassiopi Maritime Co v Fal Shipping Co Ltd (M/T Adventure)*⁷. In this case, the ship was chartered on an amended BPVOY4 form. The relevant charterparty provisions read as follows (**our emphasis**):

- '19.7 No claim by owners in respect of additional time used in the cargo operations carried out under this clause 19 shall be considered by charterers unless it is accompanied by the following supporting documentation:
- 19.7.1 the vessel's pumping log signed by a senior officer of the vessel and a terminal representative showing at hourly intervals the pressure maintained at the vessel's manifold throughout the cargo operations; and
 - 19.7.2 copies of all NOPs issued, or received, by the Master in connection with the cargo operation; and
 - 19.7.3 copies of all other documentation maintained by those onboard the vessel or by the terminal in connection with the cargo operations.
- 20.1 Charterers shall be discharged and released from all liability in respect of any claim for demurrage, deviation or detention which owners

⁵ [2008] EWHC 2480 (Comm).

⁶ [2011] EWCA Civ 1127.

⁷ [2015] EWHC 318 (Comm).

may have under this charter unless a claim in writing has been presented to charterers, together with all supporting documentation supporting each and every constituent part of the claim, within 90 days of the completion of discharge of the cargo carried hereunder.'

The owner submitted a formal demurrage claim and provided the following documentation in support of the same: a demurrage invoice; a laytime/demurrage calculation for both the load and discharge ports; a Notice of Readiness, a statement of facts and four letters of protest issued at the load port; and a Notice of Readiness, a pumping record, a statement of facts, four letters of protest and an empty tank certificate issued at the discharge port. However, the arbitration tribunal found in favour of the charterer, holding that the owner's claim was time-barred as they had failed to provide the following documents:

- (a) the port log and time sheets referred to in the letters of protest; and
- (b) a manuscript note from the master, indicating that he had received '*free pratique*' at the discharge port.

The owner appealed to the English High Court, on the basis that the proper construction of clause 20.1 required the owner to provide only 'essential' supporting documentation and not 'all' relevant supporting documentation.

The court dismissed the appeal and agreed with the charterer that the claim was time-barred.

- In particular, the judge ruled that clause 19.7.3 did not require the owner to disclose all relevant documents upfront, as this would place a too far-reaching and commercially impracticable obligation upon the owner. The purpose behind this clause was to focus on '*contemporaneous records*

kept by vessel relating to the cargo operation', which had not been otherwise covered by clauses 19.7.1 and 19.7.2.

- The judge indicated that the case of *The Abqaiq* provided clear guidance as to which documents should be presented in support of a demurrage claim. The judge referred to '*documents which objectively the charterers would or could have appreciated substantiated each and every part of the claim*' and by which they '*were thereby put in possession of the factual material which they required in order to satisfy themselves that the claim was well-founded*'.
- However, clause 20.1 laid an obligation upon the owner to provide '**all supporting documents**' in their possession. In this case, the port logs and time sheets were considered '*primary documents containing factual material which should be made available to the charterers so that they may satisfy themselves that the claim is well founded, consistent with the purpose of the clause*'.

Conclusion

While some English High Court cases have indicated a shift towards a more relaxed judicial approach, when it comes to compliance with demurrage time bar provisions, perhaps also more in line with commercial practice, the most recent case of *The Adventure* serves as a timely reminder that where a charterparty makes clear provision as to how demurrage claims are to be submitted by an owner, it is **essential** that such provisions be strictly complied with. Failure to do so could be fatal to the claim. It further underlines the importance of carefully considering and submitting all available documentary material that could be considered evidence, supporting various aspects of a demurrage claim. Overall, when it comes to submitting demurrage claims, the general rule of thumb for an owner should be '*the more documentation you serve in support, the better*'.