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BLISS FOR CHARTERERS - COURT OF APPEAL RULES IN NEXT ROUND OF *THE ETERNAL BLISS*

K LINE PTE Limited v Priminds Shipping (HK) Co Limited [2021] EWCA Civ 1712

The Court of Appeal has reversed the decision of the court at first instance in *The Eternal Bliss*. We discuss the latest twists and turns in this momentous demurrage case and its impact for the shipping industry.

The courtroom witticisms bandied between Christopher Hancock QC (for charterers - Priminds), Simon Rainey QC (for owners – K-Line) and the three Court of Appeal Justices, Sir Geoffrey Vos, Lord Justice Newey and Lord Justice Males at the appeal hearing of *The Eternal Bliss* belied the significance for the shipping industry of the point at issue. Nonetheless, those in the room were no doubt more aware than most of the divisive nature of the question to be answered: does demurrage serve as an exclusive remedy for *all losses* arising from a charterer's breach where the vessel is detained beyond the agreed laytime to load or unload or *only losses* relating to the freight-earning use of the vessel?

Background

By way of background, as detailed in our 2020 briefing on the decision at first instance ([HFW | Commercial Court rules on what damage is liquidated by demurrage](#)), discharge of the vessel's cargo of soybeans was delayed due to port congestion and lack of storage space ashore such that the cargo deteriorated. The owners settled the cargo interests' ensuing claim for USD 1.1 million. At first instance and on appeal, it was accepted by charterers that owners were *not* at fault and that the settlement agreement was indeed reasonable.

High Court

At first instance, owners claimed damages from charterers for losses arising out of the settlement agreement between owners and cargo interests. These losses claimed by owners were in addition to their claim for demurrage but were also brought under the auspices of the demurrage clause.

The judge, Mr Justice Andrew Baker, found in favour of owners and allowed an additional claim for unliquidated damages for cargo claims resulting from the detention above and beyond demurrage for loss of use of the vessel.

Court of Appeal

At appeal, charterers relied on the decision in *The Bonde*¹, arguing that in order to claim for a loss additional to loss of use of the vessel, owners have to show a separate breach on the part of the charterers beyond detention of the vessel. As the demurrage clause provides for the compensation arising from delay / detention exclusively, an additional breach is required to claim for a separate head of loss.

Although charterers' submissions at the hearing extolling the benefit of certainty of demurrage as an exclusive remedy were described as "*pushing on an open door*" by Sir Geoffrey Vos, the appeal judgment itself emphasises the "*clarity and certainty*" provided by such a ruling. A victory for simplicity and common sense, perhaps.

On behalf of owners, Simon Rainey QC's submissions focussed on the definition of demurrage, arguing that demurrage only quantifies loss of the freight-earning use of the vessel and does not seek to measure any other kinds of loss. Such other losses are not taken into consideration when fixing demurrage rates. Therefore, if detention results in additional losses, owners should be entitled to claim separately (albeit under the same breach). The court disagreed in its judgment: "*It is more accurate to say that the demurrage rate is the result of a negotiation between*

¹ *The Bonde* [1991] 1 Lloyd's Rep 136,

*the parties in which the loss of prospective freight earnings is likely to be one factor, but is by no means the only factor.*²

Few new arguments were raised at the hearing and much of the discourse revolved around the correct interpretation of previous cases, and the merits of their findings. This was reflected in the judgment which stated that, *The Bonde* aside (by which the Court was not bound), in the absence of a prior "*decisive answer*" in ratio, the issue was approached as "*one of principle*".

Conclusion

This appeal judgment will be seen by many as a restoration of the industry status quo or at least the industry understanding prior to the first instance decision and a victory for charterers. Undoubtedly, there will also be disquiet from shipowning interests in respect of this decision's curtailment of an owners' right to claim damages beyond demurrage. For now, the solution seems to be found in Lord Justice Males' remark that "*if our judgment does not meet with approval in the market, it should not be difficult for clauses to be drafted stating expressly that demurrage only covers certain stated categories of loss.*"³

For the time being, *The Eternal Bliss* Court of Appeal decision provides clarity on the question of demurrage as a complete remedy. However, whether owners will petition for leave to appeal to the Supreme Court is yet to be seen. As such, for how long charterers' bliss will last remains to be seen.

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² *K LINE PTE Limited v Priminds Shipping (HK) Co Limited* [2021] EWCA Civ 1712, para 54

³ *K LINE PTE Limited v Priminds Shipping (HK) Co Limited* [2021] EWCA Civ 1712, para 59

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