“Once On Demurrage, Always On Demurrage?”

December 2004

Certainty is a concept that any businessman looks for. When a ship owner charters his vessel out he needs to know (amongst other things) when the Charterparty comes into effect, when laydays commence and end, and when freight or hire becomes due. He also needs to know what the consequences are of his breach of Charterparty or what remedies may be available if, for example, Charterers fail to pay hire or are likely to exceed the permitted duration of the charter period (see the Steamship website article on the “Krise Aft”). Often the underlying facts of any such breach do not fit neatly within the obligations and responsibilities of the parties as set out in the governing Charterparty and it is this uncertainty that leads to disputes.

Notwithstanding the potential for uncertainty, the shipping industry has developed a number of time-honoured principles and maxims which are intended govern when everything else is not quite so clear. One such maxim is “once on demurrage, always on demurrage”. In other words, once Charterers have used up their laytime and the vessel is on demurrage, all time used will fall for their account, whatever the apparent cause.

However to what degree is this maxim reliable? The English courts have commented on the maxim in the past but a judicial eyebrow was again raised recently in the case of the “Agios Dimitrios” 1. The court had been asked to consider whether or not demurrage could be interrupted when, save for loss of time “attributed to crew and/or ship’s mechanical failure”, there was no express provision preventing time lost as counting as time on demurrage.

The facts of the case are not unusual. The vessel was chartered on an amended Greek form to carry a cargo of phosphate, potash and salt to Amsterdam. Upon arrival at the load port NOR was tendered and Charterers instructed a surveyor to inspect the vessel and her holds. Following the inspection, which was merely superficial, NOR was accepted by Charterers on 8 May 2003 and time began to run.

Loading commenced on 12 May 2003. Laytime expired at 1801 on 20 May 2003. On 21 May, however, it was discovered that the holds still contained significant traces of the previous cargo of batley. Accordingly, loading was stopped and the vessel left the berth for further cleaning. Following cleaning, loading re-commenced on 29 May and was completed on 3 June 2003.

Owners brought a claim for demurrage and made no allowance for the time between 21 and 29 May when the vessel’s holds were being cleaned. The vessel had gone on demurrage the day before the barley was discovered. Therefore, Owners contended, if the maxim “once on demurrage, always on demurrage” was correct, the vessel would remain on demurrage during the period when the holds were cleaned. Alternatively, Owners argued, when Charterers accepted the NOR they waived their right to allege Owners were in breach of clause 23(b) of the Charterparty. This clause provided that the vessel’s holds should be fit to receive the intended cargo at the time the NOR was tendered. Charterers argued they were not stopped from relying on clause 23(b), and that the failure of the crew property to prepare the holds entitled them to deduct time lost from time on laytime or demurrage in accordance with clause 25.

The matter went to arbitration where it was held that the holds were, in fact, unclean at the time of the NOR on 8 May, that (i) demurrage was interrupted upon discovery of this fact and (ii) acceptance of the NOR did not amount to a waiver. The arbitrators commented that even though Charterers had accepted the NOR, despite the holds being unlit, they should not suffer a loss as a consequence. In the “Hele Sun” 2, Donaldson J stated that “…accepting notice is one thing. Waiving the right to damages for breach … Is quite another…”. Owners appealed.

The appeal itself was based on a number of factors, however, the crux of the matter turned on deciding whether or not the arbitrators were correct in allowing demurrage to be suspended.

The court held that the Charterers’ acceptance of the NOR merely represented to Owners that, based on the inspection that took place, the holds were apparently fit to receive the cargo. This representation did not, however, exonerate Owners from breach of their obligations under clause 23(b). When the true state of the vessel was discovered, Charterers did not rescind from any position previously made at the time of accepting the NOR. As a consequence, Charterers were entitled to deduct the time lost for secondary cleaning from time on demurrage under clause 25.

Demurrage was suspended.

So, once on demurrage, not always on demurrage.

This decision is by no means the first of its kind. When Lord Reid summed up the commercial realities which established the principle of “once on, always on”, he stated that:

“The loss must fall on someone, and one would think business people who made the contract would regard it as reasonable that the man whose fault it is should pay for it” 3.

Despite this, Lord Reid and his successors have held that, absent express provision in the Charter, exceptions which would otherwise stop the running of laytime are not to be applied to demurrage 4. In order to rely on a contractual exception, the Charterparty must make it abundantly clear that demurrage is to be benefited by the provision in question. In the “Agios Dimitrios”, clause 25 clearly referred to time deductible from demurrage.

In other cases, Owners’ claim can be taken to suspend the running of demurrage even if the Charter does not expressly provide for this. Where Owners have acted for their own convenience, Charterers cannot be expected to pay demurrage arising from the Owners’ act. When Owners removed a vessel already on demurrage from a berth to take on bunkers, Sargent LJ commented that:

“in order that demurrage may be claimed by the shippers, … they must do nothing to prevent the vessel from being available and at the disposal of the Charterers…” 5.

In the more recent decision of the “Stoll Spur” 6 the court reaffirmed the principle that demurrage cannot be claimed when Owners deliberately remove the vessel from the disposal of Charterers. The “Stoll Spur” was a parcel tanker carrying cargoes for several Charterers and arrived at the discharge port for one such Charter and tendered a valid NOR. Because there was no berth available for 17 days, Owners took the opportunity to leave the outer anchorage in order to discharge and load other cargoes, all the time retaining its position in the queue at the first discharge port. Owners contested that they were not at fault and so time used during the delay would fall as laytime and demurrage. The court held that demurrage could not be claimed as Charterers were effectively denied the use of the vessel, even though this was not the main or effective cause...
In addition, when faced with the possibility of interruptions to demurrage, one must consider causation and remoteness of damage.

"The Forum Craftsman" was discharging her cargo of sugar in Bandar Abbas when it was discovered that seawater ingress had contaminated some of the cargo. Nevertheless, because the amount of contamination was not problematic, discharge continued. Until a lack of transportation brought the operation to a halt. Whilst discharge was suspended, the vessel was ordered off berth and told to wait at anchorage. It was anticipated that the delay would be very short, however, it was a full 79 days before the vessel was able to berth. Charterers accepted that the vessel was on demurrage when she was forced off berth and to counter the maxim "once on demurrage, always on demurrage" they would have to show "some special reason why they should not be liable for the period of 79 days". Charterers argued that it was Owners' breach of their seaworthiness obligations that caused the 79 day delay and that it must be a vessel with seaworthy damage goods arriving in Bandar Abbas which resulted in a delay to discharge operations similar to those that took place. As a consequence, any losses flowing from this must fall for Owners' account. In the circumstances, the court disagreed. Hobhouse, J stated that:

"If the Charterer had performed his obligation in time, the excepted peril later occurring would have had no causal relevance at all; it only has relevance because of the charterers' earlier breach."  

To conclude, therefore, a ship owner can only be certain of the continued running of demurrage when he is not the direct cause of the time lost, through default or by denying Charterers full use of the vessel. Save for these considerations, once on demurrage the vessel will remain on demurrage if the cause of the delay has not been contemplated by either Owners or Charterers. To this extent only will the maxim "once on demurrage always on demurrage" hold true.

1. Like most maxims it is true in part and probably more accurately means that unless an exception clause refers specifically to demurrage, that exemption will only apply during the running of laytime, but see below.

2 Alphapoint Shipping Ltd v (1) Rotem Amfert Negev Ltd (2) Dead Sea Works Ltd QBD, Commercial Court - unreported
3 Sotar S.A. v Ove Skou Rederi [1976] 2 Lloyd's Rep at page 214
4 Union of India v Compania Naviera Aecolus S.A. (The Spalmafori) [1932] 2 Lloyd's Rep at page 179
5 with the possible exception of The "John Michalos" (1967) 2 LR 188 in which there was no express reference to demurrage.
6 Ropner Shipping Co Ltd v Cleaves Western Valleys Anthracite Collieries (Re Ropner) [1927] 2 LI L Rep at page 317
7 Stolt Tankers Inc v Landmark Chemicals SA (Stolt Spur) [2002] 1 Lloyd's Rep 766
8 Islamic Republic of Iran Shipping Lines v Ibera Shipping Co of Panama (The Forum Craftsman) [1991] 1 Lloyd's Rep 81
9 Ibid at age 87