Demurrage Time Bars following The Petroleum Oil and Gas Corporation of South Africa (Pty) Limited v FRB Singapore Pte Limited (The “ETERNITY”) [2008] EWHC 2480 (Comm)

Demurrage time bar clauses are common in the industry. It is well-known they are generally drafted in favour of charterers and prescribe a short period in which owners must bring any such claim. This has not deterred London arbitrators from enforcing their provisions strictly, as was stated by the tribunal in London Arbitration 9/01 “there was nothing unfamiliar about them or about the dangers they held”. There are numerous London Arbitrations on the point.

It has thus always been important to keep a sharp lookout in respect of demurrage time bars, ever the more so since the Commercial Court’s decision in “The Sabrewing” [2008] 1 Lloyd’s Rep 286; a case that appears to have exemplified their high point. In that case owners presented a claim for demurrage together with various supporting documentation within the period provided for in the charterparty. However, the supporting documents were not described on their face as pumping logs and in any event had not been signed.

Clause 16 of the relevant charterparty (Geepceev 3) contained two common but highly material clauses:

“Charterers will not consider any claim by Owners for additional time used... in the absence of the provision by Owners of the following documentation:

(a) an hourly pumping log, signed by a responsible officer of the Vessel and a terminal or Charterers’ representative

Clause 23 further provided:

“Charterers shall be discharged and released from all liability in respect of any claim for demurrage which Owners may have under this Charter unless a claim in writing has been presented to Charterers in writing together with supporting documentation substantiating each and every consistent part of the claim within 90 days of the completion of discharge of the cargo carried hereunder.”

Mrs Justice Golster held that, where only one composite claim for demurrage was made, a failure to provide signed pumping logs was fatal to the entirety of the claim. Golster J, following previous judgements, reasoned that demurrage time bars had to be complied with carefully and strictly and that concomitant importance had to be given to the documentation required to be provided in support of any claim.

There have only ever been very limited exceptions to this strict rule; the most common of these is that expressed by Mr Justice Bingham in by in “The Cisterna” [1982] 1 Lloyd’s Rep 448 who confirmed that such a demurrage provision should be strictly enforced, subject only to a de minimis exception.

In “The Sabrewing” the Commercial Court rejected owners’ argument that their failure to provide pumping logs bearing the required signatures within the 90-day period was trivial or de minimis. Owners’ claim thus time-barred, the Court awarded charterers summary judgment.

Mrs Justice Golster considered the commercial purpose of a charter requiring the pumping logs to have been signed was to give confirmation to charterers that the pumping warranty had not been breached by owners; the express obligation on owners to get the documents duly signed by an appropriate representative and forward them within the given deadline was plainly relevant to the question whether the claim should be time-barred and included with the aim of achieving finality.

The judge now appears to be turning. On 21 October 2008, Mr Justice David Steel handed down Judgment on three preliminary issues in “The Eternity” [2008] EWHC 2480 (Comm). One of those preliminary issues concerned the operation of the demurrage provisions in the BPVoy 4 Form (“the Form”).

Pursuant to a charterparty on an amended version of the Form, the defendant owners carried cargoes of Mogas and high speed diesel to Mossel Bay in South Africa on board the M/T “ETERNITY” (“the Vessel”). On arrival at Mossel Bay, the claimant charterers contended that the cargos had become contaminated. Part of the cargo of high speed diesel was discharged. The Vessel was then detained at anchor, until she was ordered to proceed to Cape Town to discharge the rest of the cargo by “ship-to-ship” transfer.

The total amount of laytime allowed under the charterparty was 84 hours. The owners alleged that, largely as a result of the above operations, the total amount of time spent on laytime and demurrage was 754 hours and 37 minutes. Accordingly, the owners submitted a significant claim for demurrage on that basis within the time limit specified by Clause 20 of the Form.

Clause 19.7 of the Form provides, inter alia, that an owner should submit a pumping log signed by both a senior officer of the vessel and a terminal representative in support of any claim “in respect of additional time used in the cargo operations”. It was common ground that the pumping logs furnished by the owners in respect of the cargo operations at Mossel Bay and at Cape Town had not been signed by a terminal representative. The charterers contended that, as a consequence of this omission, the entirety of the owners’ claim for demurrage was now time-barred under Clause 20. The owners accepted that the element of the claim that related to the time spent physically discharging at Mossel Bay (3 hours) was time-barred, but argued that this did not affect the balance of the claim.

The judge found in favour of the owners, holding that:

(1) Clause 19 of the Form is directed at operations involving a terminal “by which is meant a shore installation with an associated representative”. It is not, therefore, applicable to a “ship-to-ship” transfer, and the owners were not under an obligation to present a pumping log signed by a “terminal representative” in relation to the discharge operations at Cape Town.

(2) On the true construction of the Form, a failure to provide contractually compliant documents in support of one element of a claim for demurrage is not fatal to the entire claim.

In so holding, the judge declined to follow the decision in “The Sabrewing” where a failure to provide signed pumping logs was held to be fatal to the entirety of a claim for demurrage. The most important feature of the judgment is the recognition by the Judge that it cannot have been the intention of the drafters of the form to have caused the entirety of a claim to become time-barred merely by virtue of the failure to submit
The efficacy of such clauses certainly remains as, where a signature by an appropriate representative is the only way of proving that something has been done (for example, proper completion of pumping logs - *The Sabrewing*, filling in of timesheets – *The Minerva*, 17 Jan. 2001, unreported, conclusion of charterparty fixture – *The Obo Venture*), any failure to forward charterers a signed version of the document in time will still be fatal to owners' claim.

There is arguably some tension between the decisions in *The Sabrewing* and *The Eternity* and, pending a conclusive ruling by the Court of Appeal on the issue, it rests to be seen how parties will seek to exploit this in future proceedings. However, the Court's decision in *The Eternity* not to follow *The Sabrewing* is to be applauded on the basis that there was not here a direct reason for timebarring the entirety of the demurrage claim.

It was correct that owners' failure to present their demurrage claim in composite form should rightly be taken to have timebarred that aspect of their claim in relation to the period of discharge at the Mossel Bay terminal. However, there were no grounds for artificially extending that timebar to the entirety of the claim. The tribunal was right to find that the absence of a signed pumping log for the Mossel Bay discharge could not somehow also defeat the balance of owners' claim in respect of the period of discharge by ship-to-ship transfer.

With thanks to Mark Seward of MFB solicitors for preparing this article.

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See further comments on the *The Sabrewing* in a recently published website article: *Beware Demurrage Time Bars and Documentation (Part II)*