

# The *Eternal Bliss*

How has The *Eternal Bliss* changed existing thinking on damages and demurrage for losses caused by exceeding laytime?

Sean O'Sullivan QC



# Introduction

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- Everyone knows that demurrage is liquidated damages for delay resulting from the Charterers' breach of the obligation to load/unload within laytime.



- But in what circumstances can the Owners claim unliquidated damages **in addition** to demurrage?
- Answer now provided by the Court of Appeal in K Line Pte Limited v Priminds Shipping (HK) Limited (The *Eternal Bliss*) [2021] EWCA Civ 1712



# Facts (1)

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- Long-term COA. K-Line were the Owners and Priminds were the Charterers.
- Voyage in question involved carriage of 70,133 mt of soyabeans from Brazil to China in June 2015.
- NOR tendered on 29 July 2015 but vessel waiting for 31 days at the anchorage due to port congestion and lack of storage space ashore for soyabeans.
- Cargo exhibited significant mould and caking upon discharge. Receivers claimed against Owners. Cargo claim settled for USD 1M.



# Facts (2)

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- Preliminary point of law (under s.45 of Arbitration Act 1996)
- Assumed facts:
  - The Charterers were in breach of the obligation to discharge within the permitted laytime (but only of that obligation)
  - Delay to discharge caused the deterioration in the condition of the cargo
  - The Owners (or their Club) suffered loss/damage as a result, settling cargo claim
- So the Owners had been paid demurrage as a result of the Charterers' failure to discharge within the laytime, but also wanted to recover costs of dealing with the cargo claim.



# Clause 19 of Norgrain 1973 Form (amended)

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"Demurrage at loading and/or discharging ports, if incurred, to be declared by Owners upon vessel nomination but maximum USD 20,000 per day or pro rata ... Any time lost for which Charterers/Receivers are responsible, which is not excepted under this Charter Party, shall count as laytime, until same has been expired, thence time on demurrage".



# First instance decision (1)



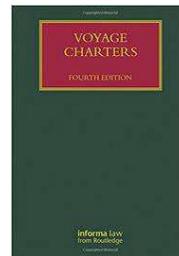
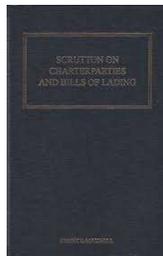
- Andrew Baker J
- Described case as “*opportunity to resolve a long-standing uncertainty on a point of law of significance*”.
- Main point of principle: what is it that demurrage liquidates?
- The answer depended on the construction of the demurrage clause. Problem was that the demurrage clause itself does not say how rate arrived at. Nor do any of standard demurrage clauses.
- Asserting that commercial parties would understand demurrage as compensating shipowner only for loss of use of ship beyond the laytime, not for physical injury to ship, cargo or crew.



# First instance decision (2)

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- Unimpressed by submission that allowing the Owners to claim for different losses would create uncertainty.
  - Parties inevitably have to distinguish between different losses if the Owners are able to prove a separate breach
- Analysis of case law
  - Majority in Reidar v. Arcos [1927] 1 KB 352 not deciding whether the Owners can recover for a different loss in a “one breach” case.
  - Potter J in The *Bonde* [1991] 1 Lloyd’s Rep. 136 had been wrong to decide that demurrage only remedy for breach of obligation to load at contractual rate.
- Analysis of textbooks



# The Court of Appeal (1)



- Males LJ delivered the judgment of the Court.
  - Issue is whether demurrage is liquidated damages for all the consequences of the charterer's failure to load or unload within the laytime, or only for some of them.
  - The answer depended on meaning of the word "demurrage" as understood by those involved in the shipping business.
  - How other LD clauses in other fields have been construed is irrelevant.



# The Court of Appeal (2)

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- Previous case law is inconclusive. Only The *Bonde* had directly decided the point and Potter J's decision was not binding on the Court of Appeal. Textbooks only showing that highly experienced shipping lawyers have taken different views of this issue.
- Approached the issue as one of principle.
- Decided that, absent any contrary indication in the particular charterparty:
  - 1) Demurrage liquidates the whole of the damages arising from failure to complete cargo operations within the laytime.
  - 2) If a shipowner wants to recover damages in addition to demurrage arising from delay, it must prove breach of a separate obligation.



# The Court of Appeal (3)

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## 7 reasons for the Court's decision

- 1) LD clauses intended to provide certainty and avoid disputes. To conclude that LD clause would only liquidate some of the damages would be an unusual and surprising agreement for commercial people to reach.
- 2) Demurrage rate is the product of negotiation between the parties in which loss of earnings is only one factor.
- 3) Andrew Baker J's approach would lead to more disputes as to which particular losses are of the "type" or "kind" covered by the demurrage clause (e.g. hull fouling).



# The Court of Appeal (4)



- 4) In the specific context of cargo claims, Andrew Baker J's decision transfers the risk from insured shipowner to uninsured charterer. Yet cost of insurance is normal running expense paid by shipowner.
- 5) The *Bonde* has stood for 30 years apparently without causing any dissatisfaction in the market. Powerful reason not to depart from it.
- 6) Not persuaded that reasoning in The *Bonde* was "*clearly faulty*" (as held by Andrew Baker J).
- 7) Demurrage as only remedy provides clarity and certainty, while individual parties or industry bodies can stipulate for different result if they wish.



# What do we think?



- Key difference is starting point: CoA assume everything included unless stated otherwise.
- Hard to fault Andrew Baker J's analysis of past authorities and textbooks, but CoA's decision seems right as a matter of principle.
- Clarity and certainty as the touchstone. Avoid disputes about which "types" or "kinds" of loss covered.
- Agree with the CoA's view that demurrage rate will usually be product of negotiation, rather than linked in any precise way to vessel's expected daily earnings.



# What happens next?

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- Understand the Owners have petitioned the Supreme Court for permission to appeal.
- Will shipowners/ industry bodies (e.g. BIMCO) revisit their demurrage clauses or demurrage rates in the light of this result?
  - Seems unlikely.
  - CoA has really only restored the status quo ante.

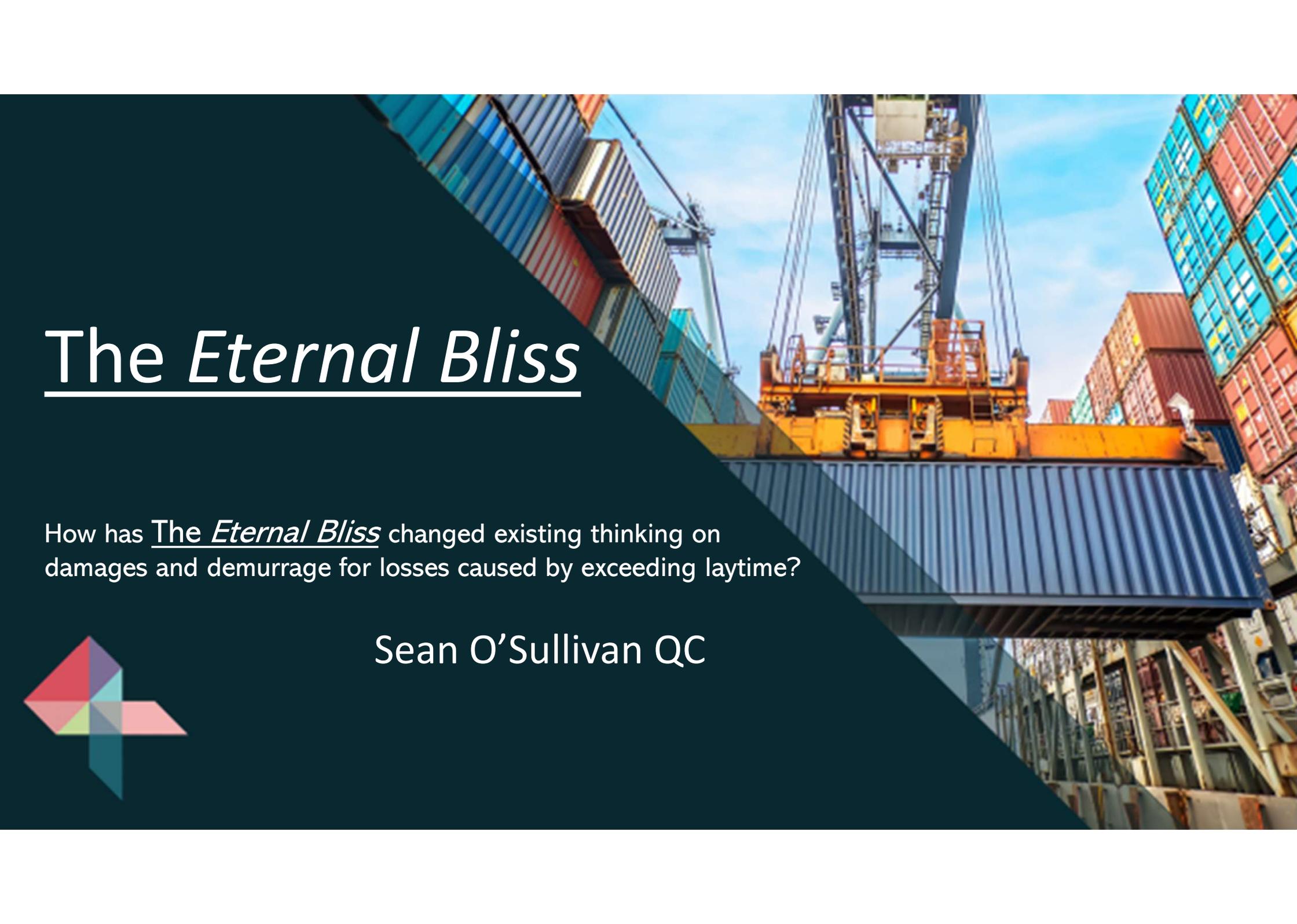


# Where does that leave us?



- Can still have two breaches + two types of loss cases: Reidar v. Arcos shows that damages still recoverable, even if second breach is caused by failure to complete within laytime
- Repudiatory breach of C/P = damages at large (usually referred to as “damages for detention”).
- Wider impact: reinforcing presumption when dealing with liquidated damages that intention is to capture all losses resulting from the relevant breach.





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