

**What are the unresolved arguments over demurrage following the settlement of The Eternal Bliss litigation, and where will the challenges come from?**

Neil Hart KC, Essex Court Chambers

**FIRST INSTANCE<sup>1</sup>** (Andrew Baker J)

Detention loss v cargo liability loss

***The Delta Kanaris and The Delta Harmony*** [2019] EWHC 2385 (Comm) at [72]–[73]: Bryan J (without full argument): “alternative possibility” - owners entitled to recover hull cleaning costs in addition to demurrage even without “independent obligation within the charterparty”

***The Bonde*** [1991] 1 LLR 136, Potter J (emphasis added):

“where a charter-party contains a demurrage clause, then in order to recover damages in addition to demurrage for breach of the charterers’ obligation to complete loading within the lay days, it is a requirement that the owner demonstrates that such additional loss is **not only different in character from loss of use but stems from breach of an additional and/or independent obligation.**”

***The Eternal Bliss*** - assumed facts for case stated (s.45 Arbitration Act 1996):

- A. *The vessel was detained at the discharge port beyond the contractual laytime, due to port congestion and a lack of storage.*
- B. *The charterer was therefore in breach of its obligation to complete discharge within the permitted laytime.*
- C. *The condition of the cargo deteriorated as a result of the detention beyond the laytime, and not due to any want of care by the shipowner.*
- D. *The shipowner suffered loss and damage and incurred expense as a result of the detention beyond the laytime, including dealing with and settling the cargo claims brought by the cargo interests and insurers.*
- E. *The loss, damage and expense suffered by the shipowner were:*

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<sup>1</sup> *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd, The Eternal Bliss* [2020] EWHC 2373 (Comm); [2020] 2 Lloyd’s Rep 419, Andrew Baker J

- a. *not caused by any separate breach of charter other than the charterer's obligation to discharge within the contractual laytime;*
  - b. *not caused by any event which broke the chain of causation; and*
  - c. *reasonably incurred.*
- F. *The loss, damage and expense suffered by the shipowner were consequences of compliance with the charterer's orders to load, carry and discharge the cargo.*

**APPEAL**<sup>2</sup> (Vos MR, Newey LJ, Males LJ)

Males LJ giving judgment: issue on appeal “*depends on the meaning of the word “demurrage” as that would be understood by those involved in the shipping business. For that reason it is not helpful to consider how liquidated damages clauses in other fields such as construction law have been construed.*” [17]

CA reversed Andrew Baker J. Back to **The Bonde**. Held: “*in the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them. Accordingly, if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation.*” [52]

6 main reasons:

1. No partial liquidation for one breach
2. Demurrage not just reflection of freight
3. All losses better than deciding which ones
4. Owners insured
5. **The Bonde** long-standing and correct
6. Parties can draft if want to liquidate some losses but not others

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<sup>2</sup> *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd, The Eternal Bliss* [2021] EWCA Civ 1712; [2022] 3 All ER 396

## ARGUMENTS / CHALLENGES

### 1. Meaning of demurrage/market understanding:

- As per cases cited by CA<sup>3</sup>
- Andrew Baker J at [58]: would not normally occur to owners and charterers “that agreeing a demurrage clause liquidated, for example, claims in respect of physical injury to ship, cargo or crew, as they would understand, I suggest, that the demurrage rate simply compensated the owner for the use of the ship beyond the laytime, that use not being paid for by the freight.”
- Time:
  - rate
  - damages for detention: by reference to market rate for use of vessel<sup>4</sup>: Carver 12-207.
  - Disport time/risk: charterers’ risk

### 2. Kind of loss

- Andrew Baker J: breach in exceeding laytime: demurrage liquidates pure detention losses; can show other kinds caused by same breach.
- CA: breach in exceeding laytime: liquidates all losses. Must show different obligation and breach of it; and check the loss is not already liquidated by demurrage provision: **Chandris v Isbrandtsen-Moller Co Inc** (1950) 84 Ll L Rep 347; [1951] 1 KB 240; see CA in **Eternal Bliss** at [31]:
- Drafting c/p: different kinds of loss?
- Baughen<sup>5</sup> suggests (adopting formulation of Andrew Baker J, and modified version of Moore Bick J's statement in **The Nikmary**): “Demurrage liquidates the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime together with all normal running expenses, including the cost required to run the ship's equipment, during this time.”

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<sup>3</sup> **Chandris v Isbrandtsen-Moller Co Inc** [1950] 1 K.B. 240; **Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale** [1965] 1 Lloyd's Rep. 533; **Navico AG v Vrontados Naftiki Etairia** [1968] 1 Lloyd's Rep 379; **The Nikmary** [2003] 1 Lloyd's Rep. 151

<sup>4</sup> **Nolisement (Owners) v Bunge & Born** [1917] 1 K.B. 160; **The Noel Bay** [1989] 1 Lloyd's Rep. 361 at 366; **The Mass Glory** [2002] EWHC 27 (Comm); [2002] 2 Lloyd's Rep. 244 at [52]. See also Carver at 12-207

<sup>5</sup> Baughen, *One Breach, One Remedy: The Eternal Bliss in the Court of Appeal*: JIML 28 (2022) 5, 286

- Kind of breach? *Aktieselskabet Reidar v Arcos Ltd* [1927] KB 352

### 3. Clubs

- Loss left with Owners?
- Other obligations: collateral contracts / “representations”
- Insurance: Edwin Peel: “insurance should be a response to the risk for liability; not the driver of where that risk should lie.”<sup>6</sup>

### 4. Implied Indemnity

### 5. Other areas of law

- CA at [17] (emphasis added): the issue “depends on the meaning of the word “demurrage” as that would be understood by those involved **in the shipping business**. For that reason it is not helpful to consider how liquidated damages clauses in other fields such as construction law have been construed.”
- Interpretation; surrender of rights<sup>7</sup>
- Liquidated damages v exclusion<sup>8</sup>

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<sup>6</sup> Peel, *The Scope of a Demurrage Clause* [138 LQR 348], July 2022

<sup>7</sup> *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689

<sup>8</sup> See Lord Upjohn in *Suisse Atlantique Societe D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361