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In this issue of *The Arrest News:*

Demurrage: Were We Right All Along? by Craig Dunford QC (Northern Ireland)

What, actually, is demurrage?

It is, said Males LJ (delivering the Court of Appeal's judgement in The Eternal Bliss [2021] EWCA Civ 1712, in which he sat with Sir Geoffrey Vos MR and Newey LJ) "…as every shipping lawyer knows, a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the laydays or laytime" (Scrutton on Charterparties, 24th edition (2020), Art 170).

The issue before the Court of Appeal in this case was whether demurrage constituted liquidated damages for *all* the consequences of the charterer's failure to load or unload within the laytime (as Potter J had held in *The Bonde* [1991] 1 Lloyd's Rep 136), or only *some* of them, which was the conclusion reached at first instance in this case by Andrew Baker J - see [2020] EWHC 2373 (Comm). The charterer appealed – essentially, with a view to (re-)establishing the correctness of *The Bonde*.

Following a detailed excursion into the case law and textbooks on this point, no clear answer to it emerged, leading the Court of Appeal to approach the issue as one of principle. The Court concluded that, 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 damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation. In reaching this view, the Court's reasoning was:

1. Whilst it was possible for contracting parties to agree that a liquidated damages clause should liquidate only some of the damages arising from a particular breach, that would be an unusual and surprising agreement for commercial people to make which, if intended, ought to be clearly stated (and had not been, in this case);
2. Some statements in the case law indicated that demurrage was intended to compensate a shipowner for the loss of prospective freight earnings by reason of a charterer's delay in completing cargo operations – a position which the Court accepted was the loss which was *primarily* contemplated and, in most cases, would be the only loss occurring. But it did *not* follow that this was all that demurrage was intended to do. The cases showed that demurrage was frequently either higher or lower than an estimated daily freight rate. It was therefore more accurate to say that the demurrage rate was the result of a negotiation between the parties in which the loss of prospective freight earnings was likely to be one, but by no means the only, factor. And whilst freight rates moved up and down sensitively to market conditions, the same was not necessarily true of demurrage rates;
3. At first instance, the trial judge had initially defined demurrage as quantifying 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, and nothing more. But he had then revised that view in the light of the judgement of Moore-Bick J (as he then was) in *The Nikmary* [2003] 1 Lloyd's Rep 151, in which he had said that demurrage covers not only the loss of prospective freight, but also "all normal running expenses, including the cost of diesel oil required to run the ship's equipment". If this latter definition were correct, then the Court of Appeal said that there would inevitably be disputes as to whether particular losses were of the type or kind covered by the demurrage clause;
4. In the course of argument, the Court (Newey LJ) had pointed out that the cost of insurance was one of the normal running expenses which the shipowner had to bear. A shipowner typically had P&I insurance against cargo claims, while a charterer, typically, would not insure against liability for unliquidated damages resulting solely from a failure to complete cargo operations within the laytime. The charterer's protection in that regard was its stipulation for liquidated damages in the form of demurrage. To allow the shipowner's construction of demurrage as extending potentially beyond the liquidated amount stipulated for would, the Court held, amount to a transfer of the risk of unliquidated liability for cargo claims from the shipowner who had insured against it to the charterer who had not. The Court's view was this disturbed the balance of risk inherent in the parties' contract;
5. *The Bonde* had stood for some 30 years, apparently without causing any dissatisfaction in the market, and this was a point of considerable commercial force;
6. The reason at (5) above would have had less force if the Court of Appeal had agreed with the first instance judge that the reasoning in *The Bonde* was clearly faulty. However, the Court of Appeal did not agree with the first instance judge on this point;
7. If the appeal were allowed, this would produce clarity and certainty, while leaving it open to individual parties or to industry bodies to stipulate for a different result if they wished to do so.

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Ship Arrest in Ireland – Time Charterer's Debts by Hugh Kennedy, Kennedys (Ireland)

Ship arrest procedure in Ireland is quick, straightforward, and requires no security from the arresting party. As is the case in most maritime jurisdictions, only certain types of claims give rise to a right to arrest a ship. Therefore, it is important to consider the jurisdict ional basis of each claim to ensure there is a right of arrest - and avoid a potential liability for wrongful arrest.

Two recent Court of Appeal decisions have clarified that a ship cannot be arrested in Ireland for disbursements incurred by a time charterer, for example, fuel oil supplied to a ship on the orders of a time charterer.

MV 'LADY MAGDA'

In the 'LADY MAGDA' [2021] IECA 51 the Court of Appeal upheld the Admiralty Court's decision that a right to arrest a ship required the personal liability of the ship owner.

In this case, disbursements were incurred by ship's agents on behalf of time charterers. The ship agents arrested the vessel for unpaid port and agency fees. The court noted that "..it was expressly the responsibility 'of the Charterers to provide and pay for" such services under the charterparty. The court held that where a ship's agent pays for pilotage and other port expenses at the request of a party that it knows is not the ship owner, "that does not give rise to a personal liability on the part of the ship–owner."

The Court held that there is no maritime lien against a ship for disbursements or necessaries provided on a time charterer's orders, and no right to arrest the vessel. Certain maritime liens may arise independently of a personal obligation of the owner, for example crew wages, which are exceptions to the general principle that "every proceeding in rem is in substance a proceeding against the owner of the ship, (and) a proper maritime lien must have its root" in the ship owner's "personal liability":

MV 'ALMIRANTE STORNI'

In an earlier decision, the MV ALMIRANTE STORNI, [2020] IECA 58, the Court of Appeal upheld the Admiralty Court's decision that the owner of a ship is not liable for the debts of a time charterer.

The Court of Appeal held that Article 1(n) of the Arrest Convention does not entitle an agent to maintain a claim against the ship owner for disbursements ostensibly made "on behalf of a ship" in the absence of any personal liability on the part of the ship owner. The fees had been incurred on behalf of the charterers of the ship, who had subsequently become bankrupt, and there was no contractual liability on the part of the ship owner, either by ostensible agency or subsequent ratification. The Supreme Court refused leave to appeal the Court of Appeal decision.

Comment

Ireland is an attractive jurisdiction for ship arrest to obtain security for claims, and to establish jurisdiction, if also required. These two decisions clarify the scope and application of ship arrest in Ireland. Arrest procedure in Ireland is straight forward and we can normally arrest within a few hours of being instructed. The Admiralty Court will case manage claims to accelerate resolutions. The Admiralty Court has also promoted remote hearings and trials during the pandemic, which again ensures efficient resolutions.

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Nederland Shipping Corporation v. United States of America, 2021 U.S. App. LEXIS 33920 by George Chalos, Chalos & Co. (USA)

On November 16, 2021, the Third Circuit Court of Appeals issued a precedential landmark ruling reversing the district court's dismissal of damage claims against the government for lack of subject matter jurisdiction and remanding the matter to the U.S. District Court for the District of Delaware for further proceedings. The NEDERLAND REEFER (the "Vessel") arrived at the Port of Wilmington, Delaware on February 20, 2019, to discharge a cargo of refrigerated bananas from Chile. Following a shipboard inspection, a US Coast Guard Captain of the Port Notice Letter dated February 22, 2019 was issued advising that the Vessel's departure clearance was being withheld and the Vessel was being detained pursuant to 33 U.S.C. § 1908(e) of the Act to Prevent Pollution from Ships (APPS - 33 U.S.C. § 1901, et seq.). The Owner and Operator of the Vessel acceded to the government's demands for an "Agreement on Security" to get the vessel back in service and provided, *inter alia*, a surety bond totaling $1,000,000 which was answerable for any claims *in rem* against the Vessel; agreed to continue to employ, house, feed, insure and pay total wages of the thirteen detained sailors; agreed to waive personal jurisdiction defenses; and agreed the security would stand in place of the *res*. In exchange, the United States agreed to allow the Vessel to depart and agreed to not arrest, seize, or attach the Vessel or any other property of the Owner or Operator.

Despite the Owner and Operator promptly meeting all the obligations in the Agreement on Security, the government unreasonably delayed the release of the Vessel for thirty-six days. Nederland Shipping Corporation ("Nederland") commenced an action in the District of Delaware seeking to hold the government liable for breach of the Agreement on Security and seeking an award for damages as set out at 33 U.S.C. § 1904(h), which provides: "A ship unreasonably detained or delayed by the Secretary acting under the authority of this chapter is entitled to compensation for any loss or damage suffered thereby."

The government moved to dismiss the lawsuit for lack of subject matter jurisdiction. District Judge Andrews agreed, ruling that there was no subject matter jurisdiction over the dispute, because the Agreement on Security was not a maritime contract and 33 U.S.C. 1904(h) did not include a waiver of sovereign immunity. The district court further found that any cause of action, whether brought as a breach of contract or statutory claim must be brought in the Federal Court of Claims pursuant to the Tucker Act (28 U.S.C. § 1491(a)(1)).

Nederland appealed the decision to the Third Circuit Court of Appeals. In reversing the district court, the Third Circuit succinctly summarized the issues: "The fight over the contract claim is thus whether it is a maritime claim and so properly subject to admiralty jurisdiction. As to the APPS statutory claim, the fight is whether 33 U.S.C. § 1904(h) waives sovereign immunity." The Third Circuit answered both questions affirmatively and reversed the district court on both causes of action.

Specifically, the Third Circuit ruled that the Agreement on Security is a maritime contract with the primary objective being to return the vessel to her maritime trade. The Court summarized, "the essential character and purpose of the Agreement was not to secure the Vessel and crew in port; that was already done. The *primary objective* of the Agreement was rather to set the Reefer free to pursue maritime commerce." (emphasis added). The Court went on to explain that the Agreement has a "genuinely salty flavor."

The Circuit Court further found that Nederland Shipping is entitled to pursue its statutory cause of action under 33 U.S.C. §1904(h) in the district court, as the statute waived sovereign immunity as Congress provided a cause of action available for any ship unreasonably delayed or detained by the government (stating "[N]o other actor could logically be held liable. The federal government causes the unreasonable detention, and the federal government thus provides compensation for the resulting loss or damage.").

Finally, the Third Circuit rejected the government's argument that the claims were to be exclusively heard by the Federal Court of Claims under the Tucker Act, stating "[c]laims premised upon statutes that provide for independent causes of action and that waive the government's sovereign immunity need not be channeled through the Tucker Act." The Third Circuit held that the after-the-fact remedy provided by 33 U.S.C. § 1904(h) is such a statute that provides an independent cause of action and therefore jurisdiction for the claim exists in the district court.

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Maximising Sale Value by Paul Willcox & Alexandra Willcox, Eggar Forrester Shipbrokers (UK)

The worldwide uncertainties of 2020 prompted more creditors than usual to have ships arrested and sold. London's CW Kellock & Co Ltd were called in to conduct several on-line auctions in the USA, to promote sales of ships in jurisdictions as far afield as the UAE, India and Singapore, and at home to arrange for the Admiralty Marshal the sale of a fleet of 5 cruise ships.

Although the pace of 2021 has been more measured, Kellock's experience and expertise continues to be in demand. They are currently helping lawyers resolve the sale of a specialised heavy lift vessel arrested on the east coast of the USA. And they have been appointed by creditors to promote the sale of a VLCC in Singapore.

Complementing these skills, Kellock staff have this year given expert testimony on ship values in support of applications for judicial sales in the USA and Gibraltar, in arbitrations and in court proceedings in the USA.

Without the assistance of a broker, judicial sales are poorly attended, there is little competition and ships fail to achieve the values that creditors have a right to expect.

CW Kellock & Co have over 200 years of experience of marketing vessels for sale by auction. They know that the key to maximising value is to maximise participation. They are uniquely qualified to encourage buyers to embrace what is an often unfamiliar process by explaining and helping them to comply with whatever terms are set out.

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