LA marine

Demurrage fees and Bills of Lading

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A recent case has put the thorny issue of container demurrage fees under the spotlight. In *MSC Mediterranean Shipping v Cottonex Anstalt,* the English Court was asked to consider whether MSC could claim demurrage fees, over a period of 3.5 years, after a receiver failed to collect cargo.

The case concerned a cargo of cotton that had been shipped under five bills of lading in 35 containers to Chittagong, Bangladesh. As a result of a legal dispute between the shippers and the receivers, the containers had remained in storage. That legal dispute was played out in the Courts in Bangladesh. The receivers tried to prevent payment for the goods being made to the shipper, on the basis that there was something wrong with the bills of lading, which they alleged were potentially fraudulent.

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During the 3.5 years the shippers had made attempts to persuade the local customs authorities to release the cargo inside the containers for unpacking, but the requests had been refused. It had therefore not been possible to stop the demurrage accruing on the containers. The amount of demurrage that had actually accrued was 10 times the value of the cargo and was in excess of USD1.0 million by the time the issue got before the English Court.

The terms of the bill of lading required the shipper to return the 35 containers within 14 days after discharge to a destination/place nominated by MSC. If this did not happen – then MSC were entitled to claim demurrage. MSC took the view that they were entitled to the demurrage on an indefinite basis for as long as the shippers were in breach of that bill of lading term.

Matters came to a head when MSC started legal proceedings under the bill of lading in England against the shipper for the demurrage that had accrued. That claim was brought under clause 14.8 of the bill which stated that "demurrage was payable by the "merchant" which was defined as the shipper or consignee claiming the goods under the bill of lading.

The shipper was understandably keen to avoid paying all of the demurrage and presented a number of arguments before the Court to avoid liability for the entire bill.

The central plank to its defence was that the demurrage had in fact stopped running at some stage during the 3.5 years. It was also alleged that MSC could have mitigated their loss by taking steps to have recovered the containers themselves or, brought replacement containers in order to lessen the loss.

As far as the bill of lading demurrage clause was concerned, the Court decided that clause 14.8 was a "liquidated damages clause." In practical terms this meant that MSC were not legally obliged to take steps to mitigate/lessen its loss.

The Court was however sympathetic to the shipper's argument that in the months after the discharge of the containers in Bangladesh, that they were in breach of the bill of lading contract, because they were unwilling or physically unable to redeliver the containers. That breach was a fundamental one and went to the heart of the contract. At the point in time when the fundamental breach took place, MSC had no legitimate reason to carry on with the contract and to keep claiming demurrage.

The Court therefore decided that within several months of the discharge of the containers – when it became clear that the shippers could not redeliver the containers to MSC, that the demurrage was no longer payable.

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