

## Unpaid freight – A claim in debt or a claim in damages?

**In the recent case of D'Amico Shipping Italia SPA v Endofa DMCC & Anor (2016), the Commercial Court looked at the issue of when freight is payable as a debt.**

The case involved an application by the vessel owner for summary judgment that a balance of freight was due and owing from the voyage charterer. For the charterer successfully to defend the application, they would have to show that:

- (i) freight was not recoverable as a debt; and
- (ii) instead, that the charterer's failure to give instructions to discharge was a breach of the charterparty which prevented freight becoming due to the owner.

Whether the charterer owed a debt or was liable in damages was important because the issue of mitigation is relevant to a claim in damages but not to a claim in debt. If the claim was in damages, there would be a triable issue on whether the owner failed to mitigate its loss and summary judgment would be inappropriate.

The Court was required to consider the question: When is freight due? The issue at the centre of the matter was, "whether freight only becomes payable once bulk is first broken, i.e., when discharge begins, or... when the owner tenders the vessel to the charterer and makes it available for discharge".

The answer depends on the words of the charter, which in this case provided that freight is payable "BBB", or "before breaking bulk". The judge drew a clear distinction in time between "before breaking bulk" and "on breaking bulk".

The judge also placed particular importance on a bespoke clause which provided: "If the freight and any other amount due to the owners, including, but not limited to accrued demurrage is not received by the owners before notice of readiness is tendered, the owner may ... refuse to commence discharging the cargo until such time as the payment due is received by the owners."

This clause clearly envisaged that freight would be due and payable as a debt, not only before discharge commenced, but before the NOR was issued, i.e. "when the vessel became an arrived ship and was made available to the charterers for the charterers to procure its discharge."

Although the case was decided on the particular terms of the charterparty, the judge commented that the conclusion was in keeping with the general law and commercial practice concerning the payment of freight. For an owner to have a lien over cargo for freight, i.e. a right to withhold discharge and to retain possession of the cargo until freight which is due is paid, freight must be due when the owner is ready to discharge and has signalled his readiness to the charterer and not when the charterer is ready to start discharge.

Not all charterparties provide that freight is payable "BBB". Some charterparties, such as the widely used Gencon form, provide that freight is payable on delivery. Under such charterparties, it is the owner's obligation to commence discharge only when the charterer is ready and able to pay for the cargo as it is discharged. If the charterer does not do so then the owner's entitlement to be paid freight accrues as a debt if the owner is ready to make delivery.

In this case, the Court found that the owner's claim to be paid the balance of freight was a claim in debt because under the terms of the charterparty freight had become due.

However, situations arise whereby a breach on the part of the charterer prevents the owner's entitlement to freight from falling due under the charterparty terms and therefore from accruing as a debt. In such circumstances, the owner's remedy will be in damages, assessed upon the usual principles. As mentioned above, whether an owner is able to mitigate his loss is relevant to a claim in damages, but if the owner is unable to mitigate his loss then the owner's damages should be equal to the full amount of freight which otherwise would have been paid, had it not been for the charterer's breach.



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