Container demurrage – When the clock stops ticking

A decision of the Court of Appeal in August 2016 has provided clarification on a question which has been troubling carriers and cargo interests alike – when assessing container demurrage claims, is there a cut-off date when the daily demurrage will stop accruing?

Facts
Between April and June 2011, MSC contracted with the shipper to carry 35 containers of raw cotton from Bandar Abbas and Jebel Ali to Chittagong in Bangladesh. The containers were owned by MSC and the bills of lading issued by MSC in respect of the cotton, contained a clause providing for 14 days free time at destination, after which the shipper would become liable for demurrage until the containers had been redelivered to MSC. The market price of raw cotton collapsed during the period in question and the receivers refused to take delivery of the cotton. Proceedings between the shipper and the receivers were pending in the High Court in Dhaka, Bangladesh. Meanwhile the containers remained at Chittagong port and the demurrage clock was ticking.

On 27 September 2011, the shipper sent a message to MSC confirming that they no longer had legal title to the cargo. On 2 February 2012, MSC, whilst maintaining that their claim for demurrage was still accruing, offered to sell the containers to the shipper.
In June 2013, MSC commenced an action against the shipper before the High Court in London, claiming a substantial amount of demurrage (USD 577,184 and accruing at a daily rate of USD 840). MSC asserted that the demurrage would continue to run until the containers were redelivered.

The shipper was placed in a difficult position and asserted that MSC's right to claim demurrage must come to an end once the contracts of carriage had been repudiated, which the shipper asserted was on 27 September 2011 when they informed MSC they no longer had any legal title to the cargo. The shipper argued that either MSC had no legitimate interest in affirming the contracts thereafter and/or that, from that moment in time, MSC came under an obligation to mitigate their loss by purchasing replacement containers.

High Court
The trial Judge concluded that the demurrage provision in the MSC bill of lading (tariff schedule) was a genuine pre-estimation of damage and not a penalty clause, which the shipper had contended. The Judge also held that 27 September 2011 was the key date because this was when the shipper confirmed to MSC that it no longer had any title to the goods and would be unable to redeliver the containers within the foreseeable future. It was a repudiation of the contract. In conclusion, demurrage could be recovered from the end of the free period up to 27 September 2011 when the shipper repudiated the contract. It was also held that ordinary principles relating to mitigation of loss do not apply where the parties have agreed a daily rate for demurrage, which was in reality liquidated damages for the detention of the containers.

Court of Appeal

Is the shipper liable to pay demurrage at all?
The Court of Appeal held that a bill of lading claim for demurrage for containers is the same as a claim for liquidated damages under a charterparty for the detention of a carrying vessel beyond the laydays at the port of loading or discharge. Laydays are equivalent to the free time period

afforded to cargo interests for container usage after discharge of the containers from the vessel. Therefore, once the free time period has come to an end, demurrage will start to accrue.

When did the commercial purpose of the venture come to an end?
The Court of Appeal then considered whether by 27 September 2011, the commercial purpose of the adventure had been frustrated. The Court concluded that a delay until 27 September 2011 (just 3 months after discharge of the containers) was not sufficient time to frustrate the commercial purpose of the venture. Instead, it held that 2 February 2012 (a further 4 months), when the carrier offered to sell the containers to the shipper to resolve the dispute, was the date at which the commercial purpose of the adventure had become frustrated. By that point, keeping the contract of carriage alive no longer served any legitimate commercial purpose.

The Court of Appeal recognised that a repudiatory breach of contract does not automatically discharge both parties from further performance of the contract: it is left to the innocent party to decide whether to treat the repudiatory breach as ending the contract. However, the Court noted that any proposition that demurrage charges can continue indefinitely until containers are redelivered does not take into account the commercial purpose of the adventure. For this reason, the Court of Appeal found that the option of affirming the contract after a repudiatory breach, no longer remained open to the carrier once the commercial purpose of the venture had been frustrated. Instead, from this point the carrier must accept the shipper's failure to redeliver the containers as a repudiatory breach of contract, and seek damages for its loss from that point in time.

The Court held that MSC was able to recover demurrage for the detention of the containers up to 1 February 2012 and damages in respect of the loss of the containers calculated by reference to their value on 2 February 2012.

Comment
The crux of the Court of Appeal's judgment is to place a limitation on a carrier's right to recover container demurrage in this sort of case, namely up to, but not beyond the date on which the commercial purpose of the venture has been frustrated. After that point, the carrier can still claim damages, but will be subject to the normal obligation to mitigate loss.

The Court of Appeal rejected the application of the "no legitimate interest" doctrine on the facts of this case. The Court concluded that as at 2 February 2012, the commercial purpose of the venture had been frustrated and the carrier no longer had any legitimate commercial interest in keeping the contract alive. The carrier was, therefore, taken to have accepted the repudiation of the contract on that date. This arguably involves something of a departure from the traditional view that repudiation of the contract does not bring the contract to an end, unless the repudiation is accepted by the innocent party.

The Court of Appeal did, however, confirm the first instance Judge's decision in principle, that the obligation to mitigate loss does not apply to a claim for demurrage because it is a claim for liquidated damages. The obligation to mitigate loss only applied as from 2 February 2012 when the Court decided that MSC should have mitigated their loss by purchasing replacement containers, the cost of replacement containers being the maximum additional loss recoverable by way of damages.

In conclusion, a carrier cannot simply claim demurrage indefinitely until its containers are redelivered, as MSC had argued. There will come a point at which the adventure is frustrated

and the contract repudiated, and at this moment the right to claim demurrage will come to an end. The precise moment when a contract is repudiated is very fact specific, so caution should be exercised in every case.

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