

Circular Ref: 2018/0010

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Delay in Arbitration - Claims can be struck out!

In a recent case of *Dera Commercial Estate v Derya Inc (The “Sur”) - QBD (Comm Ct) (Carr J) [2018] EWHC 1673 (Comm)* - 13 July 2018, disputes arose relating to cargo carried on board the vessel *Sur* under a bill of lading governed by the Hague Rules. Within the time bar of one year of Hague - Visby rules, both the parties, the defendant ship owners (“the Owners”) and the claimant cargo interests (“Dera”) appointed their arbitrators in 2011.

Thereafter, no formal procedural steps were taken by either side in the arbitration until 23 March 2015, when the Owners served particulars of claim seeking a *declaration* of non-liability. On 1 June 2015, Dera served particulars of its cargo claim. Reply submissions were served on 26 August 2015 by the Owners, and on 16 October 2015 by Dera.

The tribunal found that there been inordinate and inexcusable delay on the part of Dera as it has far exceeded the usual limitation period to bring claims, and that such delay had caused serious prejudice to the Owners and created a substantial risk that it was not possible to have a fair resolution of the cargo claim. Accordingly, the tribunal struck out the cargo claim under section 41(3) of the *Arbitration Act 1996* (“the 1996 Act”).

Dera challenged the award for serious irregularity under section 68 of the 1996 Act, alleging apparent bias on the part of the tribunal. Dera also appealed the award under section 69 of the 1996 Act, raising the various questions of law.

It was held that whether or not delay was inordinate would always be a fact-sensitive exercise in each case. Additionally, the court held that once proceedings had been issued, the claimant was bound to observe the procedural rules and proceed with reasonable diligence. Accordingly, the inordinate and inexcusable delay by the claimant within the limitation period could be relied upon to support the defendant’s application to strike out after the expiry of the limitation period. In law, the legal (or persuasive) burden of proof lay at all times on the owners to establish (on a balance of probabilities) not only that there was inordinate but also inexcusable delay. In addition, the Court concluded that a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the tribunal was biased.

FDD department of ALCO’s advice to Andrew Liu’s clients is that:

- (a) The Owners can ask the Clubs to close the files, where Cargo claimants had protected the time, but failed to particularize their claim in any form for many years.
- (b) FDD department has assisted ship owners, charterers, sub-charterers with novel arguments to progress their claims or defend the claims.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk