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Demurrage Claim & Supporting Documents - Be careful of Time bar!

In a new case, *“Amalie Essberger” Tankreederei GmbH & Co KG v Marubeni Corporation (The “Amalie Essberger”) – QBD (Comm Ct) (Peter MacDonald Eggers QC sitting as a Deputy Judge of the High Court) – 11 December 2019*, the vessel *Amalie Essberger* was chartered on an amended Asbatankvoy form for a voyage from Rotterdam to Castellon, Spain, to carry a cargo of cyclohexane. The cargo was discharged by 21 December 2017.

On 22 December 2017 the Owners submitted to Charterers via broker, by email, a demurrage claim in the sum of USD154,875. In the email, the broker said that the “Owner’s demurrage invoice together with their laytime calculation and support documents” were attached and asked the Charterers to “immediately advise if any documents are missing in order for you to review this claim”.

The Charterers failed to pay the claim and the owners brought the present proceedings. The charterers denied liability and contended in any event that the claim was time-barred because it was not submitted in accordance with the requirements of Rider Clause 5 of the charterparty within the permitted time period of 90 days.

The Charterers applied for summary judgment on the ground that the Owners had no real prospect of succeeding in their claim for demurrage because of the time bar defence.

The relevant Rider Clause provided:

5) TIME BAR

Any claim for demurrage, deadfreight, shall be considered waived unless received by the Charterer or Charterer's broker in writing with all supporting calculations and documents, within 90 days [emphasis added] after completion of discharge of the last parcel of Charterer's cargo (es). Demurrage, if any, must be submitted in a single claim at that time, and the claim must be supported by the following documents:

A. Vessel and/or terminal time logs;

B. Notices of Readiness;

C. Pumping Logs; and

D. Letters of Protest ...

23) DOCUMENTATION CLAUSE

For any load/discharge operation owner must provide charterer with a complete sets of cargo documents including:

- NOR
- SOF
- Dead freight claim (If issued)
- Any letter of protest issued/received in connection with cargo operations
- Vessels cargo calculations after loading/prior discharge
- Empty tank certificate
- Vessel pumping Logs ... and Letter of Protest against high back pressure/any shore limitations which must be duly signed by Master and responsible shore personnel.
- Nitrogen log, if any nitrogen purging being carried out on cargo.
- Temperature log, if any cargo heating.

These documents should be forwarded to charterers within 7 banking days after completion of loading or discharge. Faxed copies will be accepted provided readable ...

The following documents did not accompany the demurrage claim on 22 December 2017, namely: (a) the vessel's pumping log at Rotterdam; and (b) a letter of protest issued by the master dated 30 November 2017 noting that the charterers' and the shippers' surveyor had not supplied the vessel with sealed samples of the cargo upon completion of loading. However, both of those documents had earlier been provided by the Owners to the Charterers on 1 December 2017. The Rotterdam pumping log and the letter of protest dated 30 November 2017 were referred to as "the Disputed Documents".

The issues for decision on the application were:

- 1) whether the Owners' obligation to provide supporting documents under Rider Clause 5 extended only to documents which were relevant to the demurrage claim being made;
- 2) whether the Owners' obligation to provide supporting documents under Rider Clause 5 required the owners to provide documents which were already in the Charterers' possession;
- 3) whether the supporting documents had to be provided at the same time as the demurrage claim or

whether it was sufficient that the documents were provided at some point before the expiry of the relevant 90-day period; and

- 4) in the event that the owners failed to provide a particular supporting document in accordance with Rider Clause 5, whether the Owners' entire claim for demurrage, or only that part of the claim to which the particular document related, was time-barred.

It was held that:

- The Owners need to provide documents that they have relied upon and are required objectively to establish the validity of their claim.
- There was no requirement that the owners had to submit "relevant" (including) adverse, documents, insofar as they were not "supporting" documents.
- There was no express requirement in the language of Rider Clause 5 that the supporting documents had to be provided at one time and at the same time as the demurrage claim. They can be provided within 90 days period.
- The documents already provided to the Charterers do not need to be resubmitted.
- Because the claim was not time-barred, issue (4) did not arise. However, had it been relevant, the entire claim would have been time-barred.

Accordingly, the Charterers' application for summary judgment on the ground that the Owners' demurrage claim was time-barred would be dismissed.

FDD department of ALCO advice to Andrew Liu's client is that:

- a) The list of documents that needs to be presented should be analysed carefully. The record of e-mails should also be preserved.
- b) If there is a doubt, FDD department can always be contacted any time of day or night.

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