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Notes from the Bar: *once on demurrage, always on demurrage?*

Date: 16 October 2017

In the shipping world, a common phrase we often hear is "once on demurrage, always on demurrage".

In this update, we will examine whether this maxim holds true in all circumstances.

What is demurrage?

Voylayrules 1993 defined laytime and demurrage as follows:

'"LAYTIME" shall mean the period of time agreed between the parties during which the owner will make and keep the vessel available for loading or discharging without payment additional to the freight.

"DEMURRAGE" shall mean an agreed amount payable to the owner in respect of delay to the vessel beyond the laytime, for which the owner is not responsible. Demurrage shall not be subject to laytime exceptions.'

It has been said that demurrage is in the nature of liquidated damages for detaining the vessel in excess of the agreed laytime.

It has also been the subject of judicial opinion that demurrage is merely payment for use of the vessel and not damages for a breach of charter party.

However, the difference between the two is probably more of an academic debate.

For practical purposes, demurrage is what charterers are required to pay to owners once the loading or discharging operations goes beyond the agreed laytime.

Once on demurrage, always on demurrage?

It is not uncommon for shipping executives to assume that the maxim "once on demurrage, always on demurrage" (the "Maxim") is a legal requirement.

However, the Maxim is in fact just an application of the laytime and demurrage provisions in the charter party and is not a legal requirement stemming from other written sources of law.

Lord Reid explained it in the case of *The Spalmatori* [1964] AC 868 as follows:

"*If a strike occurs before the end of the laytime neither party can be blamed in any way. But if it occurs after demurrage has begun to accrue the owner might well say: true, your breach of contract in detaining my ship after the end of the lay time did not cause the strike, but if you had fulfilled your contract the strike*

would have caused no loss because my ship would have been on the high seas before it began: so it is more reasonable that you should bear the loss than that I should.

The above passage very succinctly explains the rationale for this Maxim.

The net effect of the Maxim is that once the vessel is on demurrage, all laytime exceptions and excepted perils no longer applies. For example, if Sundays and public holidays are not regarded as used laytime in the charter party, they are not included in the laytime calculations until the vessel is on demurrage. Once the vessel is on demurrage, demurrage will continue to apply even on Sundays and public holidays.

We pause here to emphasize that the excepted perils referred to in the above paragraph, will operate to suspend laytime from running, *provided* these perils occurred before the vessel is on demurrage.

Once laytime has expired, and the vessel is on demurrage, a different consideration applies.

Demurrage exceptions and force majeure

It is possible, through properly worded exclusion clauses or force majeure clauses, to exclude a charterer's liability for demurrage for events which occur ***after*** the vessel is already on demurrage.

However, the wording of the exclusion or force majeure clauses must be specific and clear.

In the case of *The Forum Craftsman* [1991] 1 Lloyd's Law Rep 81, it was held by Justice Hobhouse that:-

"…the clause has to demonstrate a clear intention that the exception should apply even when the vessel is on demurrage whether or not the operation of the peril arises from the earlier breach by the charterer of his obligation to discharge within the laydays. For a clause to have such a clear intention requires language that leaves one in no doubt that that is what the parties intended…."

The decision in the *Forum Craftsman*'s case made it clear that any clauses to exclude liability for demurrage must be so clear as to leave no doubt as to the parties' intentions.

In the Court of Appeal decision in *The Lefthero* [1992] 2 Lloyd's Rep 109, the excepted peril in question was restraint of princes. The excepted peril operated ***before*** laytime expired. It was argued that since the expected peril operated

before laytime expired, the rationale for the Maxim should not apply.

The Court of Appeal held that even though the excepted peril operated before laytime expired, the exclusion clause was not clear enough to displace the Maxim.

There are a whole lot other cases which mirror the above two cases, where it is clear that a generally worded exclusion or force majeure clause will not displace the application of the Maxim.

The curious decision of *The John Michalos* [1987] 2 Lloyd's Law Rep 188 however, saw the English courts upholding a generally worded force majeure clause to the exclusion of the operation of the Maxim.

In *The John Michalos,* the force majeure clause read as follows:-

"*Charterers shall not be liable for any delay in loading or discharging including delay due to the unavailability of cargo which delay or unavailability is caused in whole or in part by an Act of God, war, hostilities, political disturbances, rebellion, mobilization, revolution, insurrection, acts to public enemy, civil commotions, sabotage, acts of Government (including but not restricted to any preference, priority, allocation or limitation order and any export or import control), fires, floods, force majeure, earthquake, storms, landslides, frost or snow, bore tides, explosions or other catastrophies, epidemics, quarantines, restrictions, strikes, embargo, blockade, railway accidents or impediments and any other causes beyond the control of Charterers.*"

In this case, laytime had already expired before discharge of any cargo. One day after laytime expired, a strike of port workers occurred and the vessel could not discharge her cargo until after the strike ended.

The charterers relied on the force majeure clause to excuse themselves from liability for the owner's claim for demurrage.

Leggatt, J. held in this case that the cause of the delay was the strike, and that the strike was beyond the control of the charterers. As such, he held that the force majeure clause operated to excuse the charterer from liability for demurrage.

The significance of this case is that it appears to be the only reported decision where a generally worded force majeure clause was held to be sufficient to excuse the charterer from liability for demurrage even though the excepted peril occurred after laytime expired.

Although *The John Michalos* was cited in several later cases, the decision has been distinguished on the basis of the difference in wording of the clauses in each case.

The John Michalos appears to be an anomaly in the general body of case law on the effect of exclusion clauses on the Maxim. The weight of other judicial decisions suggests that any exclusion or force majeure clauses intended to exclude liability for demurrage must be worded expressly and in no uncertain terms.

Key Lessons Learnt

- It is possible to contractually exclude the application of the maxim "*once on demurrage, always on demurrage*"

- However, a generally worded exclusion or force majeure clause will not be enough to exclude liability for demurrage;

- If the parties wish to exclude liability for demurrage due to any force majeure or other events, it would be wise to say it in plain simple English in the charter party.

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About the Shipping & International Trade team

The Shipping & International Trade team at Kennedys Legal Solutions provides seamless dispute resolution support for a full spectrum of shipping and international trade matters through the firm's international network of offices and liaison firms.

Over the years, Joseph Tan and his team have gathered a good following of clients comprising of shipowners, charterers, cargo interests, offshore oil & gas support operators, and commodity trading houses. He has also been consistently recommended by Legal 500 Asia Pacific as a leading practitioner in shipping and trade related work since 2011.

Apart from advising on shipping and trade related matters, Joseph is also on the Singapore Chamber of Maritime Arbitration's panel of arbitrators.

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