How to Avoid Huge Demurrage Invoices: A Practical Note for Charterers

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As global trade is stymied by a myriad of macro-economic headwinds, many in the commodity trading business are turning to increasingly high-risk jurisdictions to make a healthy profit. In pursuit of this aim, many of our local clients are fixing vessels in the Middle East/East African region for loading and discharge of cargoes in challenging ports and with difficult contractual counterparties. Whilst the fruits of such endeavours are tantalising, and often reaped, such voyages entail significant risk of delay during operations. Naturally, with the increased delay risk comes higher demurrage rates for charterers enjoying use of those ships. If caught on demurrage, it is quite common for charterers to see their profits from the transaction quickly erode and even disappear entirely.

This article examines the English law position on laytime and demurrage with a view to guiding charterers on some simple steps to take to mitigate exposure to demurrage.

Avoiding Demurrage in English law

The purpose of demurrage is to compensate the owner for detaining its vessel beyond the contractually agreed period for loading and discharge, known as “laytime” or “lay days”. A familiar maxim in English maritime law is ‘once on demurrage, always on demurrage’, meaning once the laytime has expired, the vessel is, usually, on demurrage permanently until completion of loading or discharge. It follows that the starting point for a charterer is to try to agree laytime that allows for a margin of delay and anticipates possible causes of delay.

After the laytime has expired and demurrage commences, a charterer can avoid demurrage under English

law in one of two ways. Firstly, at the negotiation of the charterparty terms, the parties can expressly agree to exclude demurrage in defined circumstances by inserting an appropriate clause. Secondly, at common law the charterer can avoid demurrage where the owner, or those for whom he is responsible, is at fault for the delay.

This article focuses on avoidance of demurrage by reliance on an exclusion clause. However, with respect to fault-based avoidance, the general rule in English law is that it is implied that a party is not entitled to benefit from its own wrongdoing. It follows that a ship owner cannot seek demurrage for delay to loading or discharge operations for which it is at fault. Determining the presence of fault is fact-sensitive but guidance can be found in a significant body of English case law.

Exception Clauses

The first and most potent way of ensuring the demurrage is excluded in defined circumstances is to agree it with the owner and insert an appropriately worded clause into the charterparty. The ability to negotiate inclusion of effective exclusion clauses depends on the bargaining position of the parties, relationships and wider market conditions, but charterers can often help themselves by anticipating causes of delay specific to the concerned ports and parties involved.

As mentioned above, the starting point for charterers during negotiation of the charterparty terms is to try to secure the best laytime period possible. Thereafter, charterers should carefully consider the various possible causes of delay which could push charterers into demurrage. Using template terms in high-risk shipments leads to high demurrage invoices. This undertaking is by no means simple; it requires creative thinking, drawing on experience and pragmatism. Rarely will charterers be able to exclude demurrage with broad strokes, but narrower, defined risks can be avoided if clauses are worded carefully. Once delay risks are identified, charterers should seek to agree exclusions to demurrage in the charterparty.

Charterers may foresee risk of delay caused by third parties. Such delays would not normally interrupt demurrage. However, charterers may seek to do so, or at least reduce demurrage rates in certain circumstances. A non-exhaustive list of exclusions is set out below by way of example:

1. charterers have concerns about the age and condition of the vessel. Charterers seek to exclude time lost arising from unseaworthiness regardless of whether owners exercised due diligence;
2. the concerned port has a reputation for taking berth fees and then delaying the berthing slot in order to maximise ship-intake. Charterers are aware that their arrival date falls during a busy season for the port. Charterers seek to exclude demurrage for time lost waiting for a berth, or to secure a reduced demurrage rate in such an eventuality;
3. the port authorities at the concerned port are slow to provide the necessary clearance documentation due to corruption. Excluding or reducing demurrage where port authorities are causing the delay may be an option;
4. charterers need to deliver to a port in a conflict area. The international monitoring body regulating port activity is causing delays to cargo operations by conducting spontaneous vessel inspections. Charterers seek to include a clause interrupting demurrage where such inspections occur; and
5. charterers are aware of recent reports of theft of loading hoses at the concerned port resulting in time lost waiting for import of new hoses. Charterers negotiate the inclusion of an exclusion clause for time lost during laytime and/or demurrage arising from theft-related incidents at the port.

Additionally, rather than relying on the implied common law rule that owners cannot claim demurrage when they are at fault, charterers would do better to agree definitions of fault which, if occur, would result in the interruption of demurrage. For example, charterers could seek to include a clause whereby demurrage is interrupted where the vessel’s equipment breaks down. Alternatively, if the equipment breaks down but cargo operations can continue at a decreased rate, demurrage rate is reduced by a pro-

rated figure. This approach brings clarity to owners' entitlement to demurrage in fault-based situations.

When negotiating the inclusion of an exclusion clause, it is important for charterers to ensure the clause will be effective and enforceable should it be relied on. In doing so, charterers would be prudent to bear in mind the following three points:

1. an exception clause will normally be construed as applying only to the period covered by laytime, not demurrage. It will not protect the charterer after the vessel has come on demurrage, unless it explicitly so provides. For example, a statement such as 'time will cease to run when…' will interrupt laytime but will be insufficient to interrupt demurrage. To be safe, charterers should expressly state that demurrage would be interrupted;
2. where an exception clause is ambiguous, it will usually be construed against the party seeking to rely on it. Therefore, if charterers want to rely on a clause to interrupt demurrage, the meaning of the clause should be clear and precise. Charterers should seek to use as much detail as possible to define the circumstances in which demurrage will be interrupted, without narrowing the scope of the clause too much; and
3. ensure the exclusion clause takes precedence over conflicting terms in the main body of the charterparty. Conflicting provisions may give rise to ambiguity or uncertainty.

Conclusion

Trading in high-risk jurisdictions with high-risk parties necessitates high demurrage rates. Consequently, charterers need to exercise greater foresight in anticipating the likely causes of delays in loading and discharging operations at specific ports with specific parties. Once identified, charterers should attempt to negotiate realistic laytime periods and, thereafter, effectively worded demurrage exclusion clauses to guard against crippling demurrage risks. In doing so, charterers will be better placed to retain profits from high-risk trading.

Al Tamimi & Company's Transport & Insurance team regularly advises on laytime and demurrage disputes. For further information please contact Omar Omar (o.omar@tamimi.com) or Adam Gray (a.gray@tamimi.com).