WWW.LAWSHIPS.COM

BY YOAV HARRIS

Harris & Co
Maritime law office

CHAMBERS & PARTNERS

2021 REVIEW

"HAS SIGNIFICANT LITIGIOUS CAPABILITIES."

"GREAT LAWYER."

"EXTREMELY SHARP AND FAST."

What happens when a container is not returned to its Owners by it's Lesees and a date for the return of the container cannot be established? Will the demurrage payable for the non-return accrue indefinitely?

The obligations and responsibility of the shipper of the cargo and the limits of the payment of demurrage – for the edification of those delaying or detaining the return of the container to the carrier.

The basic rule is simple and clear. A container belongs to the sea carrier and is used for the carriage of cargo. It is not intended to be used as a storage facility for the shipper or receiver. For each day that the container is not at the disposal of the sea carrier, loss is caused to the carrier whether by loss of rental or financing expenses. Accordingly, after the period of grace agreed the container has to be returned to the carrier, failing which demurrage is payable on a "per diem" basis, either by agreement or under the carrier's tariff.

The question arises as to what happens if the container is not returned to the carrier at the termination of the voyage is demurrage payable indefinitely, especially if the demurrage paid exceeds the value of a new container. What are the obligations on the shipper who received the container from the carrier? Will the court reduce the demurrage accrued or accruing? These questions were considered by the English Court of Appeal.

Cottonex Anstlant shipped three shipments of cotton from Jebel-1 Bandar Abbas Ali to Chittagong.

The sale/purchase arrangements were financed by documentary credits. Two shipments were shipped in April 2011 and the third in June 2011. The total number of containers used was 35 which were discharged between May and June 2011. However, as a result of the fall in cotton prices at that time a dispute arose between the Shipper and Receivers of the shipments and as a result thereof, the consignee receiver refused to accept the consignments. The shipper exercising it's rights under the documentary credits received payment from the financing bank. In these circumstances the shipper claimed that it was not entitled to accept the return of the relevant shipment.

It should be noted that the bills of loading contained a "customary clause" under which "Free Time" was allowed for the return of the containers after their discharge from the vessel at the delivery port. The clause provided that the "merchant" (defined as being either the shipper or the receiver, is obliged to return the container(s) to the carrier or it's representative after discharge and that after the expiration of the "free time", failing which the merchant would be liable for demurrage. Accordingly, the merchant had a double obligation, namely to return the containers discharge from the vessel and to pay demurrage if the containers were was not returned within the agreed "free time".

However, the containers remained in the port in their loaded condition. The receiver refused to accept delivery of them as did the shipper. The containers were "trapped" however demurrage

continued to accrue on a daily basis. On the 27 September 2011 the shippers stated to the carrier as follows: "as advised to you we do not have title to the cargo as we received payment from the financing banks who are the owners of the cargo". The shippers added that they could not pay the invoices which were produced to them for the delay as they (the shippers) could not recover the amounts from the financing banks. The shippers added that there were disputes between the financing banks, however when these are resolved, the banks will effect payment, the shippers added that immediately the disputes were resolved the banks would pay the amounts due and that they (the shippers) would continue to monitor the situation and advise of developments.
Unsurprisingly this notification did not satisfy the carrier which reiterated it's demand for the return of the containers and continued to debit demurrage. This "stand-off" extended over the following months.

In February 2012, in order to break the "deadlock", the carrier offered to sell the containers to the shipper (the effect being a quasi-constructive redelivery of the containers). However, these negotiations failed. During this period, it was possible to purchase a container at Chittagong for U.S.$ 3262 - (whereby the total of 35 containers would cost U.S.$ 114,170).

The carrier waited another year and a half and in June 2013 filed a claim for demurrage before the English Courts. At this time the accrued demurrage was U.S.$ 577,184– and as the carrier contended that demurrage continued to run, by January 2015, the accrued sum totaled U.S.$ 1,090,024 plus interest .

Bearing in mind, that in contractual claims, the defendant usually has an interest to contend that there was no breach of the contract and it was of full force and effect. However, in this matter the parties positions were the opposite of what is normally contended in that the obligation to pay demurrage is an obligation continuing during the period of the contract. Accordingly, the carrier's contention was that the contract was still valid and binds the parties. The shipper however, purported to argue that the contract had been "breached" and no longer existed as from the time of it's breach and thereafter the obligation to pay demurrage no longer applies. In other words, the "demurrage clock" ceases to run from the time of the breach.

The court of first instance found in favour of the carrier holding that demurrage is payable from the discharge of the cargo (less the agreed free time) until 27 September 2011 (the date upon which the shipper advised that they had no title to the cargo and that any obligation to pay demurrage was that of the financing banks. This sum was U.S.$ 98,959– and compensation for the value of the containers.

The carrier being dissatisfied with "short" demurrage period determined in the Judgement, filed an Appeal, arguing that the earliest time that it was possible to regard the contract as being terminated following it's breach was February 2012 (the time at which the carrier suggested to the shipper that the latter purchase the containers) and that at no prior time was the carrier obliged to regard the contract as having been terminated and under an obligation to cease to demand the payment of daily demurrage .

The shipper filed a counter appeal, arguing that the demurrage awarded by the Court of first instance was not justified in that no entity was prepared to and did not intend to take custody of the containers and that the insistence not to do so and at the same time to demand from the shipper to pay daily demurrage demonstrated a lack of good faith .

The findings of the appeal court were as follows. The court having regard to the situation where the shipper (having received full payment and therefore was not the owner of the cargo) could not, take possession of the containers remove the cargo and return the containers to the carrier and was unable to fulfill it's obligations as a "merchant", does not mean that the contract was cancelled and lacking legal efficacy.

The court determined, having regard to the Shipper's notification of 27 September 2011, that it was not possible to relate to this notification as an intention not to abide by the contract or to cancel it. However, the aforegoing is not of assistance to the carrier (as the contract between the parties is still in force) and the question which needs to be addressed, is whether at this time the commercial purpose between the parties had been frustrated and such "frustration" led to the "cancelling" of the contract.

The court determined that at the end of September 2011 four months had elapsed in one instance and two and half months in the other instance, and the release of the containers would involve Court Proceedings and Orders as the receivers, the cargo owners, had refused to take possession of them. In these circumstances the period (until 27 September 2011) was too short to and was not sufficient to be regarded as a period for it to be considered that the commercial purpose of the contract had failed. However, February 2012, namely four months thereafter, constituted sufficient time to conclude that the commercial purpose of the contract had become unobtainable. As stated, the sea carrier offered to sell the containers to the shippers enabling a situation whereby the shipper could be regarded as having returned the containers thereby performing the contractual obligations between the parties under the contract.

In these circumstances, having regard to the fact that the demurrage for the containers exceeded their value and it was possible to the purchase alternative containers at the same place and at that time there was no legitimate reason for the carrier to demand performance of the contract from the shipper. The carrier was therefore obliged to regard the contract as having been terminated and to claim damages only and not to demand performance of the contract.

In relation to the mitigation of damages, it was held that this was not related to the daily demurrage accruing. The demurrage was compensation agreed in advance by the parties for the denial of use by the carrier of equipment used for generating income or for damage to the containers when not in the possession of the carrier. In relation to the contention of the shipper that the carrier had alternative containers which it could have used, the Court preferred the approach that only if the containers had been "lost", the "alternative" containers could have been considered as an alternative profit-making asset, other such containers are to be regarded as "stock" and the detained containers are "profit making" assets of which the carrier had been deprived.

In these circumstances there was no obligation on the carrier to mitigate damages apart from attempting to recover the containers. In the circumstances of the matter the court determined that the carrier had no means to repossess the containers and awarded the carrier demurrage until February 2012, and also for the "loss" of the containers in the sum of US$ 3262 for each container.

For consideration and attention: Although the Court shortened the period of demurrage argued by the carrier, the court awarded demurrage for a significant period of 6-8 months and also awarded damages for the value of the containers

themselves. In effect the court held that it was not possible to claim demurrage indefinitely, however as stated, it awarded demurrage for a significant period. The Court rejected the shippers argument that the carrier was obliged to mitigate its damages by using alternative containers which may be available to it.

This matter is another instance of many where the Court gives force and effect to the exact wording of the contract as long as it is in force. This case constitutes an object lesson for those delaying the return of containers to the sea carrier.

MSC Mediterranean Shipping Co SA Vs. Cottonex Anstalt, [2016] EWCA Civ 789.

The author is the managing partner at Harris & Co. Maritime Lawyers.

Contents of the article are only for general information and do not constitute a legal opinion.

SOCIALS

CONTACTS

FAX: +927.(0)4.874.4040