Interlegal

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INTERLEGAL SHIPPING QUARTERLY NEWSLETTER

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Damages on the top of Demurrage

There has been a significant development of the demurrage related issues in English law recently. By his judgement in *The "Eternal Bliss"* case Andrew Baker J resolved a long-standing uncertainty whether a shipowner under a voyage charter is entitled for the reimbursement of damages for other types of losses on the top of demurrage, which result from the charterer's failure to complete cargo operations within the agreed laytime.

Brief facts of the case are that the vessel loaded in Brazil and arrived to China with 70 thousand tons of soybeans, but instead of being discharged within the agreed almost 9 weather working days she was kept at anchorage for some 31 days with further 12 days of discharge. Such a substantive extension in on-board storage of cargo led to its significant deterioration, i.e. moulding and caking.

This resulted in the receiver's claim to the owner as for the compensation of the damaged cargo, which was finally settled in the amount of USD 1.1 million. By way of recourse the owner claimed the said amount from the charterer grounding the claim on the only allegation of the charterer's breach of the contractual obligation to complete discharge within the permitted laytime.

Previously established precedents did not give clarity to this point of law, where one said that additional damages could only be recovered if caused by separate breach, while other argued that it would be enough to prove different kind of loss even though it is caused by the same fault on the charterer's part.

The "Eternal Bliss" judgement brought to light this issue having established that in case the time is lost due to the charterer's failure to load or discharge cargo within the agreed laytime, the shipowner may be entitled to recover other losses which are by-product of the ship's delay in addition to demurrage, and what is remarkable – without the need to prove that such other losses are caused by the charterer's breach of any other provisions of the contract.

BIMCO's new Arbitration Clause

In September 2020 BIMCO adopted an updated standard Law and Arbitration Clause, the development of which was announced last year.

There are few features in the revised clause, and the most significant one is that the clause is amended with the fourth arbitration venue available, that is the Hong Kong arbitration. The standard Hong Kong arbitration clause provides two options of laws to be applied, namely Hong Kong or English law, while the proceedings shall be conducted in accordance with the Hong Kong Maritime Arbitration Group Terms.

Traditional venues remain the same, i.e. London (LMAA), New-York (SMA) and Singapore (SCMA).

Of course, as with previous editions of the clause, parties are still free to make their own choice and add the applicable law and arbitration apart from the named venues.

The clause itself is shortened and unified for all the available venues, thus irrespective of the choice made the structure of the clause remains the same thus making it more convenient to navigate through the wording.

Additionally, Mediation was expelled from the Law and Arbitration Clause and made into a free standing provision which might be incorporated by the parties if they are willing so.

BIMCO's updated Law and Arbitration Clause also addresses issues of proper communication in arbitral proceedings (and their commencement) with a provision requiring parties to a contract to clearly identify who are authorised to receive arbitration notices and communication.

The revised Clause, when properly incorporated into the contract and where all the gaps are sufficiently filled in may significantly reduce problems which regularly arise when the parties decide to refer the dispute to arbitration.

Elaboration in "Subject to…" terms understanding

Everyone dealing with contracts, in particular with shipping contracts has dealt with terms of the agreements which are "subject to" something. It is a general approach that while the agreement is still subject to anything, there is no binding agreement yet. Meantime, there might be cases when albeit it is directly specified that there are still some "subjects", the contract may be considered as valid and thus binding for the parties.

Such ambiguities may arise, for instance, when the parties create new "subject to" terms, which are outside well recognized phrases like "subject to contract", "subject to board approval", etc. Thus newly created "subject to" term may appear not to be so straightforward and would need further evaluation whether they prevent the contract to be valid at all or just serve as an excuse when the performance of the contract is obstructed.

These issues were addressed in the recent High Court case *The "Leonidas"*, where the parties agreed all the terms of a charter party, which however included provision "subject to enough material; suppliers, receivers and management approval". Within the course of the negotiations the subjects were lifted except the only one, i.e. "suppliers approval".

The question arose whether the terminal's rejection of the vessel as unsuitable for berthing due to her dimensions led to the voidness of the charter party or it was just a performance condition in a valid contract.

The judge deeply investigated the subject matter and the legal background of the case, hence the decision provides a comprehensive clarification on the interpretation of "subject to" terms in commercial contract negotiations, which is of high essence for evaluation of each further case, while the final verdict in this particular case was that where the contract contained "subject to" provisions the charterer was not bound by the contract until it communicated a decision to be bound.

OUR RECENT CASES & ARTICLES

Recent updates in the "Safe Port" warranties treatment.

The issue of the port and berth safety is among those which raise various disputes between the interested parties. READ MORE>>

Mission possible: to release vessel with cargo on board within 3 days.

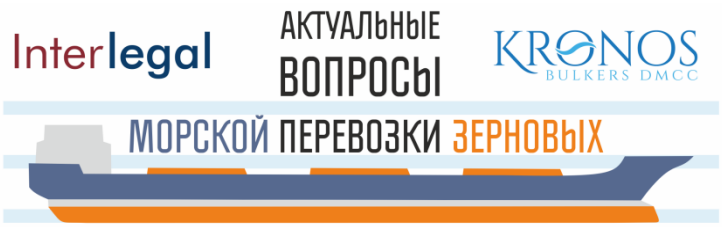
In high-peak trading season, each trader is focused on fulfilling its obligations as the counteragent, having completely forgotten that the contract may be cancelled for completely other reasons, not related to quantity or quality of the products supplied. READ MORE>>

Lawfulness of bunkering operations outside the 12-mile zone.

The Client filed a request to Interlegal concerning law regulations of bunkering operations outside the 12-mile zone. READ MORE>>

Discharge of cargo residues and washwater: instruments of legal defense for Interlegal client.

Interlegal lawyers performed a detailed and complex analysis of national and international law regarding legal status of respective waters, permissions and prohibitions, shipowner's rights, obligations and liability, consequences of discharge and powers of governmental bodies both within and outside 12-mile area. READ MORE>>



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