

# DEMURRAGE TIME BAR CLAUSES

10 MARCH 2020 • ARTICLE



The question of precisely what demurrage time bar clauses require has long been a question of some controversy, in light of the English High Court's highly technical and demanding approach in the *Sabrewing*[1] and the *Adventure*[2] cases, contrasted with the more relaxed commercial approach in the *Eternity*[3] and the *Abqaiq*[4].

"Tanker voyage charters often contain notoriously stringent provisions for the valid issuance of a demurrage claim by owners."

In the *Amalie Essberger*[5] the High Court recently sought to clarify the position, but in so doing, some lingering uncertainty remains.

Tanker voyage charters often contain notoriously stringent provisions for the valid issuance of a demurrage claim by owners, typically requiring (i) notice and/or particulars of a demurrage claim in writing; (ii) together with all available supporting documentation – sometimes identified; and (iii) within a prescribed period from completion of discharge – often 90 days, failing which the charterers will be relieved of liability to pay the claim.

Since such clauses exclude the charterer's liability to pay a demurrage claim, under English law courts and tribunals will apply certain rules in construing such clauses, including requirements that the wording of the clause must be clear and unambiguous; each clause turns on its own individual wording, which must be given its ordinary and natural meaning; and if there are two possible constructions, the one which exhibits the most commercial common sense should be preferred.

Disputes over the application of the time bar have mostly concerned the requirement to provide all available supporting documentation within the prescribed period.

In the *Amalie Essberger*, several issues were addressed with regards to a typical time bar clause.

## FACTS

The tanker vessel had been voyage chartered under an amended Asbatankvoy charterparty which contained the following demurrage time bar clause:

*Any claim for demurrage, deadfreight, ~~shifting expenses or other charges or invoices~~ shall be considered waived unless received by the Charterer or Charterer's broker in writing with all supporting calculations and documents, within ~~sixty (60)~~ 90 days 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:*

1. *Vessel and/or terminal time logs;*
2. *Notices of Readiness;*
3. *Pumping Logs; and*
4. *Letters of Protest ...*

Following the charter voyage from Rotterdam to Spain, the owners submitted their demurrage claim within the 90-day period together with supporting documentation on 22 December 2017. However, this documentation did not contain the vessel's pumping log at Rotterdam and the Master's letter of protest, which had already been provided to the charterers on 1 December 2017. The charterers applied for summary judgment that the claim was time-barred on the grounds of failure to comply with the requirements of the demurrage time bar clause.

## DECISION

The English High Court addressed the following questions:

### 1. What is meant by "all available supporting documents"?

The Court held that this obligation required the owners to provide all the documentation upon which they relied to substantiate each and every part of their claim and which contained information objectively sufficient for the charterers to assess the merits and validity of that claim.

However, the Court added that this obligation should not be onerous, and did not require the owners to produce all relevant or material documentation, including potentially adverse documents such as would be disclosable in legal proceedings.

### 2. Was the requirement to provide specific documents a rigid one?

The clause required the owners' claim to be supported by the vessel and/or terminal time logs, notices of readiness, pumping logs and any letters of protest.

The Court held that these documents had to be provided, unless they did not exist or were impossible to obtain, whether or not they were considered supporting documents. The Court added that failure to do so would render the claim time barred.

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This decision follows the enforcement of strict compliance with express requirements in other circumstances, such as where claims were time barred for the owners' failure to submit original, not copy, documents in London Arbitration 8/01, a signed copy of the charterparty in the *Obo Venture*[6] and a signed and valid NOR in London Arbitration 18/89 and the *Eagle Valencia*[7] respectively.

### 3. Do all the supporting documents have to be provided at the same time?

The Court considered that the answer to this question was no. It favoured a more liberal approach – the supporting documents did not need to be provided to the charterers in one go or simultaneously with the demurrage claim, provided that all of them were received before the end of the 90-day period.

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### 4. What if the charterers already had a required supporting document?

This question arose because some of the supporting documents (a pumping log and letter of protest) had already been provided to the charterers before the demurrage claim was issued. Even though the demurrage claim made no reference to these earlier documents, the High Court held that it was acceptable that the owners had separately provided the documents to the charterers within the required 90-day period. Notably, these documents were identified in the demurrage clause (see above), and so the charterers should have known that they were relevant to the claim.

This decision arguably casts doubt on the High Court decision in the *Sabrewing*, where a stricter approach was adopted.

### 5. In the absence of some supporting documents, is the whole claim time barred?

Whilst this issue did not need to be decided in the *Amalie Essberger*, the Court expressed its non-binding view that, if any supporting document has not been provided, the *whole* of the demurrage claim would fail, not just the part to which the document related.

Notwithstanding its non-binding nature, this approach adopts the strict rationale in the *Sabrewing*, where the High Court held something similar, and casts doubt on the decision in the *Eternity*, in which the High Court held that a failure to provide specified documents only time-barred the part of the claim to which those documents related.

## COMMENTS

The High Court in the *Amalie Essberger* emphasised that the purpose of the time bar is to provide speed, clarity and certainty in the evaluation and resolution of demurrage claims.

However, its decision appears to give rise to uncertainty as to the correct approach to the construction of time bar provisions, applying both strict compliance and commercial expediency.

In these circumstances, owners should, as a matter of best practice, consider very carefully the wording of their demurrage time bar clause and the requirements of presenting any claim thereunder – and submit all relevant and material supporting documentation within the required time-frame, particularly specifically-named documents. In addition, owners should ensure they include specific documents required in other clauses of the charterparty that support part of a claim or that are referred to in the primary demurrage documentation, such as letters of protest. This may be a particularly difficult task where tanker charterparties, as they often do, consist of email recaps and multiple sets of incorporated pro-forma terms.

**"Owners should ensure they include specific documents required in other clauses of the charterparty that support part of a claim."**

[1] *Waterfront Shipping Company Ltd v Trafigura AG (The Sabrewing)* [2007] EWHC 2482

[2] *Kassiopi Maritime Co Ltd v Fal Shipping Co Ltd (The Adventure)* [2015] EWHC 318 (Comm)

[3] *The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd v FR8 Singapore Pte Ltd (The Eternity)* [2008] EWHC 2480 (Comm)

[4] *National Shipping Company of Saudi Arabia v BP Oil Supply Co (The Abqaiq)* [2011] EWCA Civ 1127

[5] *"Amalie Essberger" Tankreederei GmbH & Co KG v Marubeni Corporation* [2019] EWHC 3402 (Comm)

[6] *Mira Oil Resources of Tortola v Bocimar NV (The Obo Venture)* [1999] 2 Lloyd's Rep 101

[7] *AET Inc Ltd v Arcadia Petroleum Ltd (The Eagle Valencia)* [2010] EWCA Civ 713

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