DAMAGES IN ADDITION TO DEMURRAGE
The Eternal Bliss

The High Court in *The Eternal Bliss*[1] recently issued an important clarification in the field of damages in addition to demurrage. Overturning High Court authority that has stood for almost 30 years,[2] Andrew Baker J declared that a separate type of loss without a separate breach is sufficient for such damages to be claimed.

The Facts

The relevant facts of *The Eternal Bliss* may be stated briefly.

The claimant shipowner (K-Line) and defendant charterer (Priminds) entered into a contract of affreightment for a series of voyages. The parties drafted the contract relying on a Norgrain standard form, Clause 18 of which provided for a contractual discharge rate of 8,000 m.t. per weather working day. The claimant subsequently nominated the *Eternal Bliss* as the ship for one particular voyage.

The following facts were assumed for the purposes of this preliminary judgement:

> (1) The ship was delayed at the discharge port for 31 days after laytime had begun to run. This placed the defendant in breach of their obligation to discharge the cargo within laytime, as calculated by the rate under Clause 18.
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> (2) At that point, the cargo of soybeans had deteriorated, with the result that K-Line had to settle claims by cargo-owners and insurers at a cost of US$1.1 million.
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> (3) The only relevant breach was Priminds' failure to discharge within laytime.
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> (4) The deterioration in cargo was strictly due to the detention of the ship beyond laytime.

Thus, the issue before the High Court was essentially: could a shipowner claim damages in addition to demurrage in a case where there was a *separate type of loss* but no separate breach?

The Judgment

The judgement of Andrew Baker J principally focuses on three decisions.

(a) Reidar v Arcos

The first is *Reidar v Arcos*,[3] widely regarded as a leading case on damages in addition to demurrage. We do not propose to rehash the facts or controversy of the case here. It suffices for our purposes to note that much of the debate has centred around whether the Court of Appeal considered there to be one or two breaches committed by the charterer.[4] In particular, Bankes LJ and Sargant LJ were split, leaving the *ratio* of the case to be found in the judgement of Atkin LJ. Unfortunately, case-law prior to *The Eternal Bliss* was split on whether Atkin LJ supported the "one-breach"[5] or "two-breach" approach.[6]

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[1] *K-Line PTE Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)* [2020] EWHC 2373 (Comm).
[2] *Richco International Ltd v Alfred C Toepfer International GmbH (The Bonde)* [1991] 1 Lloyd's Rep 136.
[3] *Aktieselskabet Reidar V. Arcos Ltd* [1927] 1 K.B. 352, (1926) 25 Lloyd's Rep. 513.
[4] Gay, 'Damages in addition to demurrage' [2004] LMCLQ 71, 76.
[5] See *Total Transport Corp of Panama v Amoco Transport Co (The Altus)* [1985] 1 Lloyd's Rep 423.
[6] See *The Bonde* [1991] 1 Lloyd's Rep 136.

Why does this matter? The assumption seems to be that if the *ratio* of *Reidar* involves two breaches, then it stands as binding authority for the proposition that both a separate breach and a separate type of loss are required to claim damages in addition to demurrage.[7] As Andrew Baker J noted, this is incorrect. He rightfully pointed out that even though he agreed that Atkin LJ was a "two-breach man", this did not mean that the Court of Appeal was asserting that two breaches were a necessary condition for claiming such damages. The mere fact that the Court of Appeal majority found two breaches on the facts of *Reidar* did not mean that two breaches were always required.

On that basis, Andrew Baker J concluded that *Reidar* did not preclude the recovery of damages in addition to demurrage in a one-breach case.[8]

(b) Suisse Atlantique

Andrew Baker J next turned to the case of *Suisse Atlantique*, a House of Lords decision which has been cited in favour of the "separate breach" requirement.[9] Here, he undertook a close analysis of the case judgement at three levels: the High Court;[10] Court of Appeal;[11] and House of Lords.[12] He concluded that none of the judges had expressly stated that a separate breach was required, pointing out that on the facts of *Suisse Atlantique*, there was no separate type of loss to begin with.[13] In his view, the focus of their Lordships was on the *type of loss* incurred rather than the type of breach.

Thus, for instance, Viscount Dilhorne in *Suisse Atlantique* suggested that there needed to be a breach separate to the "detention of the vessel". Under Andrew Baker J's analysis, this did not point to the need for a second breach, but rather the need for a breach giving rise to a loss different from the mere detention of the vessel.[14]

(c) The Bonde

Following the analysis above, Andrew Baker J concluded that the only case actually standing in the way of K-Line's recovery was *The Bonde*, where Potter J had expressly stated that both a separate breach and a separate type of loss were required.[15]

However, and crucially, Potter J's decision relied heavily on the two cases of *Reidar* and *Suisse Atlantique.* Thus, based on the analysis above, Andrew Baker J argued that Potter J had relied on "faulty reasoning" based on *Reidar* and a "plain misreading" of the House of Lords judgement in *Suisse Atlantique.*

On that basis, Andrew Baker J took the bold step of holding that *The Bonde* was "wrongly decided" and "should not be followed".[16] In no uncertain terms, he declared that damages in addition to demurrage could be recovered where there was a separate type of loss but no separate breach.[17] On the facts, he found that the cargo damage was "quite distinct" as a type of loss, and hence recoverable.

Discussion

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[7] *Ibid.*
[8] *The Eternal Bliss* [2020] EWHC 2373 (Comm), [37].
[9] See *The Bonde* [1991] 1 Lloyd's Rep 136.
[10] *The Eternal Bliss* [2020] EWHC 2373 (Comm) [74].
[11] *Ibid,* [76].
[12] *Ibid,* [80]-[85].
[13] *Ibid,* [73], [85].
[14] *Ibid,* [81]
[15] *The Bonde* [1991] 1 Lloyd's Rep 136.
[16] *The Eternal Bliss* [2020] EWHC 2373 (Comm), [128].
[17] *Ibid,* [148]-[149].

We think the decision of Andrew Baker J is to be welcomed for bringing the law governing demurrage clauses in line with developments in the general law of contract. Default interpretations of technical terms has given way to an approach which focuses squarely on the intentions of the parties, objectively ascertained.[18] As such, the question ought to be, as Andrew Baker J rightly points out, what damages did the parties intend for the demurrage clause to liquidate,[19] and whether the term was intended to exclude or limit certain damages. In the absence of any evidence to that effect, there is little reason to assume that demurrage provisions are intended to limit or exclude all damages when there is only the single breach of detaining the ship beyond laytime.

While a welcome development in the law, the judgment in *The Eternal Bliss* leaves three questions unanswered. First, how wide reaching are the effects of the judgment? Potter J in *The Bonde* was concerned about the potentially far-reaching impact of the conclusion reached by Andrew Baker J:

> 'It might, for instance, be relied upon to assert that in the event of breach of such a clause in a fluctuating market, the buyer has a claim for damages for any difference between the market price at the actual bill of lading date and the date on which the bill would have been issued if the goods had been loaded at the contractual rate.'[20]

Indeed, the implications of the judgment are far-reaching, particularly given that there is no difference between apportionment provisions in f.o.b. contracts, as in *The Bonde*, and standard demurrage provisions, as in *The Eternal Bliss*.[21] However, in our view, Potter J's concerns about potentially expansive liability are misplaced. The question of whether such damages should be recoverable is a question of remoteness and should not be resolved through a strained interpretation of demurrage provisions. To interpret demurrage provisions in an artificial manner to compensate for the applicable rules governing remoteness is unprincipled and illogical.

Secondly, what type of loss does demurrage liquidate? The judgment in *The Eternal Bliss* makes this question the sole criterion for determining whether damages in addition to demurrage are recoverable. However, surprisingly little guidance on how to address this question is found in the judgment of Andrew Baker J. This is understandable, given that the pleadings were framed in terms of causation, which Andrew Baker J rightfully describes as unhelpful.[22] However, given the prominence this question has acquired, positive criteria for the identification of a different type of loss are desperately needed. It is unhelpful to state that 'demurrage is liquidated damages for the detention involved'[23] because that is to merely beg the question: what does the prolonged detention of the vessel involve? Andrew Baker J seems to suggest that it is merely the lost earnings on the vessel for the days detained beyond the laydays.[24] However, this seems improbable; surely, all running costs are to be covered by the demurrage provision as well.[25] Without further guidance, the best we can do is reason by analogy: cargo damage constitutes a separate type of loss; whereas the failure to obtain a higher freight because dangerous goods were carried does not constitute a separate loss.[26]

Thirdly, what is the precedential value of *The Eternal Bliss*? Just as Andrew Baker J chose to not follow *The Bonde*, a future High Court may come to the contrary conclusion and apply the doctrine in *Colchester Estates*[27] to dismiss *The Eternal Bliss*. Admittedly, this is unlikely, given the depth of the arguments before Andrew Baker J and the thoroughness of the judgment. Nonetheless, it ought to be

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[18] Lord Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553.
[19] *The Eternal Bliss* [2020] EWHC 2373 (Comm) [27].
[20] *The Bonde* [1991] 1 Lloyd's Rep 136, 139.
[21] *The Eternal Bliss* [2020] EWHC 2373 (Comm) [50].
[22] *Ibid*, [42]-[43].
[23] *Suisse Atlantique Societe D'Armement SA v NV Rotterdamsche Kolen Centrale* [1965] 1 Lloyd's Rep 533, 540.
[24] *The Eternal Bliss* [2020] EWHC 2373 (Comm) [88].
[25] *Triton Navigation v Vitol (The Nikmary)* [2003] EWHC 46 (Comm); [2003] 1 Lloyd's Rep 151 [47].
[26] *Chandris v Isbrandtsen-Moller* (1950) 84 Lloyd's Rep 347; [1951] 1 KB 240, 249-250.
[27] *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch 80.

pointed out that Andrew Baker J fails to acknowledge Viscount Dilhorne's suggestion in *Suisse Atlantique* that 'it may be that a demurrage clause in a particular case is so drawn that on its proper construction it is to be treated as imposing a limitation on liability.'[28] Thus, a demurrage clause may be specially drafted so as to cover all losses arising from a single breach. However, as Viscount Dilhorne makes clear, this is ultimately a question of construction. In *Suisse Atlantique*, a fairly standard demurrage provision was held to be a liquidated damages clause, as opposed to a limitation clause. The Norgrain form used in *The Eternal Bliss* also contained a fairly standard demurrage provision. As such, there was no good reason to construe it any differently from the clause in *Suisse Atlantique*. Unless faced with an extraordinarily unusual demurrage provision, it is unlikely that a future High Court will depart from the reasoning of Andrew Baker J in *The Eternal Bliss*.

It is, of course, worth remembering that the issue at stake can be avoided altogether with appropriate drafting. If parties choose to spell out the scope of the demurrage payments in the contract, it is the scope specified in the contract that will be given effect to. However, until the various standard form contracts are altered so as to specify the scope of such payments, we are likely to continue to see issues arise concerning the scope of demurrage.

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[28] *Suisse Atlantique Societe D'Armament SA v NV Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep 529; [1967] 1 AC 361, 395.