Container demurrage, a modern phenomenon

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LAW MATTERS

IMPORTERS and exporters are often left without recourse to challenge container demurrage bills incurred by shipping lines through no fault of their own. However, recent developments in London have raised some issues for the maritime and logistics community to take note of.

Container demurrage is often viewed as a contractual penalty charged by shipping lines where, generally speaking, the re-delivery of a container to the shipping line is delayed.

This includes instances where containers are returned in a damaged state and are awaiting repairs. Demurrage is raised so that a shipping line does not have to prove the actual damages it suffers when a container is effectively out of circulation.

Demurrage is usually charged to the party most closely connected to the bill of lading: the named consignee or importer under the bill of lading.

In the recent English decision of MSC v Cottenex Anstalt [2015], demurrage was claimed by MSC (carrier) against Lichtenstein Anstalt (shipper) for approximately USD 900,000.00 (R 11.16 mil) for thirty-five containers over a period of three and a half years.

The containers were exported from Iran and the UAE and were discharged at the Port of Chittagong, Bangladesh. The cargo carried in the containers was sold to a cotton company in Bangladesh but was never collected from the Port. On the date this case was heard, the cargo remained packed inside the containers detained at the Port.

The main issue to be decided was whether the shipper was liable to pay the carrier demurrage for each day that the containers remained unavailable to the carrier because [they] were still being used to hold cargo.

The court held that the carrier was entitled to claim demurrage for the containers but only for some three months after the date of discharge of the last of the containers. The decision turned primarily on the fact that the court considered the contracts of carriage as at an early end.

A few of the more noteworthy conclusions of the court related to the mitigation of losses by the carrier, demurrage as a liquidated damage and the 'no loss' principle which could prevent a carrier from claiming demurrage where it was not experiencing any economic loss as a result of the detention of the containers.

South African law has been slow to develop on this issue and it remains to be seen how our courts will deal with the historic nature of a demurrage charge, and the extent to which it can be claimed, in light of the South African Conventional Penalties Act. The Act allows a court to reduce a penalty if it is deemed 'out of proportion' to the act or omission committed in breach of a contract. A further consideration is whether the total demurrage charged exceeds the value of the container.

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