Damages which are not disposed of by demurrage: What is a separate type of loss?

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This article offers a definition of the loss which is constituted by delay. Logically, not only damage to the vessel and cargo, and expenses incurred to avoid such damage, but all losses which are distinct from the loss constituted by delay and from the normal expenses of waiting at a port might be considered separate and so recovered in addition to demurrage. However, the law must respect the market's understanding of the losses that are covered by demurrage (with regard to 'hotel bunkers' and bottom-fouling, for instance). It is also suggested that whether specific expenses can be recovered in addition should not be fixed by precedent but allowed to change as the market's perception of what is normal alters.

In 1990, in *The Bonde*[1] Potter J held that in order for a shipowner to recover damages in addition to demurrage, there must be both a breach of a separate obligation (that is, an obligation other than the obligation to load or discharge within the time allowed) and a loss of a type separate from delay to the vessel. In September 2020, in *The Eternal Bliss*[2] Andrew Baker J followed the view taken by Bankes LJ in *Reidar v Arcos* that there was no need for any breach of a separate obligation; owners can recover damages in addition to demurrage simply on the basis that they have suffered a loss 'in substance distinct from any claim for the detention of the vessel'.[3] The issue as between *The Bonde* and Bankes LJ is to be considered by the Court of Appeal later this year.

The purpose of this article is to offer an account of what should be treated as a separate type of loss from the losses dealt with demurrage. This question will necessarily arise both on the approach taken in *The Bonde* and on the approach of Bankes LJ. It is well settled that, under English law, if there is a breach of a separate obligation over and above the obligation to load or discharge within the laytime, but the only loss caused to the owners is delay to the vessel which occurs during the loading or discharge stages of the charterparty, the owners can only recover demurrage.[4]

[1] *Richco International Ltd v Alfred C Toepfer International GmbH (The Bonde)* [1991] 1 Lloyd's Rep 136.
[2] *K Line Pte Ltd v Priminds Shipping (HK) Co, Ltd (The Eternal Bliss)* [2020] EWHC 2373 (Comm), [2021] Bus LR 213, [2020] 2 Lloyd's Rep 419.
[3] The words used by Bankes LJ in *Aktieselskabet Reidar v Arcos Ltd (Reidar v Arcos)* [1927] 1 KB 352, 362, (1926) 25 Ll L Rep 513, 516 (CA).
[4] R J Gay 'Damages in addition to demurrage' [2004] *LMCLQ* 72, 89–96; there is an exception in the special case where an obligation is expressly or by necessary implication taken outside the whole regime of laytime and demurrage. Compare my article at pp 96–97 discussing *R&H Hall v Vertom Scheepvaart en Handelsmaatschapij BV (The Lee Frances)* (QBD (Comm), 18 May 1989, unreported but noted (15 July 1989) LMLN 253).

How to give a principled account of what is a 'separate type of loss'

It may be a mistake to look for a single general definition of all the types of loss that are to be treated as separate from the loss which consists in the detention of the vessel. If (as in *Reidar v Arcos*) deadfreight on the voyage in question is to be treated as separate from the detention of the vessel at the load port and if deterioration of the cargo, leading to a need for the owners to settle a cargo claim, is to be treated as separate from detention of the vessel at the discharge port,[5] it is hard to see how any single definition could encompass both of these. In particular, I have argued elsewhere that the criterion for what is to be a separate type of loss cannot be what was foreseeable by the parties at the time the contract was made;[6] this article will not argue that point over again.

The proper approach may be to give an explanation of the loss which consists in the detention of the vessel, that is the specific type of loss which demurrage liquidates, so that it can be seen that these other types of loss are distinct from that specific type of loss. However, it has been surprisingly difficult to give an exact definition of the type of loss which demurrage liquidates.

The well-known case of *Suisse Atlantique*[7] was a case about what losses are liquidated by demurrage and about the interpretation of *Reidar v Arcos*, before it was transformed in the House of Lords into a case about the (heretical) doctrine of fundamental breach of contract. The contract was a consecutive voyage charterparty for the voyages which the vessel might make in two years; it was agreed when freight rates were high and so the freight rate was high, but the demurrage rate was not correspondingly high; a few months into the contract freight rates had fallen back and it was more cost-effective for the charterers to delay loading and discharge under this contract, pay demurrage for the time lost and charter in other vessels at market rates of freight, rather than have additional cargoes carried under this contract. The charterers' case was that the owners' loss of freight on the additional voyages which were not performed was dealt with ('liquidated') by the payment of demurrage. One of the owners' arguments[8] relied on *Reidar v Arcos*, saying that in that case the shipowner had recovered damages for a loss of freight in addition to demurrage.[9]

In response, counsel for the charterers (Mr Donaldson QC) suggested that *Reidar v Arcos* could be distinguished in that in *Reidar v Arcos* the shipowner suffered a loss of freight on the present voyage, while in *Suisse Atlantique* the owners had lost freight from future voyages.[10] The suggestion would be that demurrage liquidates the owners' loss of freight from future voyages. However, that cannot be an exact definition. If (as will be suggested below) damage to the vessel caused by delay constitutes a separate type of loss which may be recovered in addition to demurrage, then the owners should surely be able to recover not only the cost of repairing the damage but the loss of the vessel's earnings for the time taken by the repairs, which is a loss of earnings from future voyages. What is liquidated by demurrage must be the loss of earnings from future voyages that is caused *directly* by delay to the vessel.

In the Court of Appeal in *Suisse Atlantique*, Diplock LJ said: 'The nature of the damage of which the parties have estimated the quantum in their agreed sum for demurrage is that during the period of detention the vessel is unable to earn freight',[11] and that:

> What happened as a result of the undoubted breaches by the respondents here was that the vessel was detained, that during the period of detention she could not earn freight, she could not be used as a

[5] Andrew Baker J considered this obvious. See *The Eternal Bliss* (n 2) [45].

[6] Gay (n 4) 85.

[7] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1965] 1 Lloyd's Rep 166 (Mocatta J), [1965] 1 Lloyd's Rep 533 (CA), [1967] AC 361 and [1966] 1 Lloyd's Rep 529 (HL).

[8] The owners' fourth submission: *Suisse Atlantique* (Mocatta J) 172, 175–77.

[9] Since the charterers had only delayed loading and discharge and had not committed any separate breach, the owners had to rely specifically on the *ratio* of Bankes LJ, but that point belongs to a discussion which is not being repeated in this article.

[10] *Suisse Atlantique* (n 7, Mocatta J) 177. Donaldson QC also submitted that the *ratio* of Bankes LJ in *Reidar v Arcos* (n 3) was wrong as a matter of law: *Suisse Atlantique* (HL) 380G–381A, but that also belongs to the discussion which is not being repeated here.

[11] *Suisse Atlantique* (n 7, CA) 540.

> freight-earning instrument – and that is all. For that head of damage the parties have agreed, perhaps wisely or perhaps unwisely, the figure that the defaulting charterers shall pay. And in my view that is all to which they ['the claimants in this case', that is the owners] are entitled'.[12]

However, to say 'during the period of detention' is not exactly correct.[13] If the vessel is held up for five days at the load port, the owners' loss is not that they lose earnings for those five days themselves. The owners' loss is a loss of potential earnings from future voyages, which the owners will lose because the vessel will complete her present engagement five days later, and so will lose five days' earnings down the line. In a particular case, it may be that five days' delay at the load port does not cause any loss of future earnings: it might be that the vessel was held up for five days waiting for a berth to load, but if she had left the load port five days earlier she would have been hit by bad weather which would have delayed her by five days, and so the detention of the vessel at the load port would not actually delay the arrival of the vessel at the discharge port or the completion of the voyage charter engagement as a whole. Nevertheless, the natural direct consequence of delay at a port for so many days is that the vessel would complete the whole engagement that many days later, and so the owners would lose that many days' earnings from future fixtures.

Agreement on demurrage as liquidated damages for delay means not only that the charterers are exposed to a rate which is fixed at the time when the charterparty is made rather than to whatever may be the market rate for a follow-on fixture at the time when the charterparty is being performed, but also that the owners' recovery does not depend on showing that the delay to the vessel actually caused a loss of earnings. What is liquidated by demurrage is the natural tendency, in the ordinary course of things, for detention of the vessel to lead to a loss of earnings from future fixtures.

The vessel's running expenses during the period of detention

In *The Nikmary*[14] the main dispute between the shipowner and Vitol as voyage charterer was about whether one of Vitol's chartering clauses was effective to prevent time from counting at the load port, where the vessel had waited from 5 December, when she had tendered a valid notice of readiness, until 2 January, when she was called onto the berth. But there was also an issue arising from a small diversion on the charterers' instructions during the voyage, for the vessel to call at an interim port where the cargo was treated with additives.[15] The relevant clause provided: 'Charterer shall pay for any interim load/discharge port(s) at cost. Time for additional steaming, which exceeds direct route from first loadport to furthest discharge port, shall be paid at the demurrage rate plus bunkers consumed … plus actual port costs, if any'.[16]

The owners seized on the word 'bunkers', which can include both fuel oil (for the vessel's main engine) and diesel oil (for the vessel's auxiliary engines).[17] Thus, they claimed that they were entitled to be paid not only for the fuel oil used by the additional steaming but also the diesel oil consumed during this additional steaming time.[18] Moore-Bick J rejected this claim, saying: 'The way in which cl.29 is worded suggests to me that the parties used the word "bunkers" to mean fuel oil rather than diesel oil'.[19]

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[12] ibid 541.

[13] The judgments in the Court of Appeal in *Suisse Atlantique* (n 7) were given extempore.

[14] *Triton Navigation SA v Vitol SA (The Nikmary)* [2003] EWHC 46 (Comm); [2003] 1 Lloyd's Rep 151. (In *The Nikmary* the voyage charterparty was not subject to arbitration, and so the case came before the High Court not by way of appeal from an arbitration award but at first instance.)

[15] ibid [45]–[48].

[16] Clause 29, quoted in *The Nikmary* (n 14) [46].

[17] ibid [45].

[18] It appears that the owners' claim did not relate specifically to diesel consumed while the vessel was in port but rather they were claiming for the diesel consumed during the whole of the time taken by the deviation (or perhaps – see *The Nikmary* (n 14) at the beginning of [48] and also the wording of the relevant clause) only for the diesel consumed during the additional steaming and not for the diesel used while the vessel was in the port where the additives were put into the cargo.

[19] ibid [48].

However, on his way to this conclusion the Moore-Bick J stated:

> Steaming time necessarily involves the consumption of fuel oil, so it is not surprising that the second sentence of cl.29, which approaches the matter from the point of view of additional steaming time, should provide for the bunkers consumed in the process. No separate provision is made, however, for time spent in port. That is probably because demurrage, being liquidated damages for detention, notionally reflects the full cost to the owner of keeping his ship in port. As such it is deemed to cover all normal running expenses, including the cost of diesel oil required to run the ship's equipment.[20]

And when he stated his conclusion, after 'the parties used the word "bunkers" to mean fuel oil rather than diesel oil', he continued: 'envisaging that the payment of demurrage would adequately compensate the owners for the additional cost of diesel oil resulting from the prolongation of the voyage'.[21]

These comments about what demurrage 'covers' are a part of the *ratio* for a decision of the High Court,[22] but given their role in the judgment (as support for a conclusion about the meaning to be given to a word in a particular clause, which was in the end 'a matter of impression') and the context, they should not be pressed too hard. It is submitted that 'it [demurrage] is deemed to cover all normal running expenses' must be accepted as authoritative, but that given the context it would be a mistake to treat either the 'the full cost to the owner of keeping his vessel in port' or 'the cost of diesel oil required to run the ship's equipment' as authoritatively extending what is covered by demurrage beyond 'normal running expenses'.

Demurrage has to liquidate not only the expected loss of earnings from future voyages arising from delay to the vessel, but also the ordinary running expenses of the vessel for the period of delay. These are two sides of the same coin, in the same way as generally damages for the repudiation of a contract may be claimed either on the basis of the loss of the profit which the injured party would have made if the contract had been performed, or on the basis of the injured party's wasted expenses.[23]

However, the clause in question provided for the charterers to pay 'actual port expenses, if any' and so when Moore-Bick J spoke about the cost to the owner of keeping the ship in port, he may have had in mind only the cost of keeping the vessel running while in the port. What the judge said need not be taken as an authoritative statement as to whether, when a demurrage clause applies because the laytime and demurrage provisions apply (rather than the demurrage rate being used to fix the compensation for a deviation, as in *The Nikmary)*, the rate will cover all or only some of the port expenses which the owners incur.

Also, in *The Nikmary* the owners were relying on the word 'bunkers' to claim for all the diesel oil consumed, and were not attempting any distinction between bunkers burned for one purpose and bunkers burned for another purpose. Therefore, Moore-Bick J had no need to consider whether demurrage would necessarily cover the cost of running all of the vessel's equipment, including for instance the 'hotel bunkers'[24] consumed in keeping an oil cargo heated or generating inert gas, or might only cover the equipment needed to keep the vessel herself running.

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[20] ibid [47].

[21] ibid [48].

[22] *The Nikmary* proceeded to the Court of Appeal, but only in relation to the main dispute: *Triton Navigation SA v Vitol SA (The Nikmary)* [2004] EWCA Civ 1715, [2004] 1 Lloyd's Rep 55, [1].

[23] As explained in *Omak Marine Ltd v Mamola Challenger Shipping Co (The Mamola Challenger)* [2010] EWHC 2026 (Comm), [2011] 1 Lloyd's Rep 47, the possibility of recovery on the basis of wasted expenses depends on a presumption that the injured party would have made a profit at least as great as its wasted expense, and it is open to the party in breach to rebut this presumption. But demurrage is liquidated damages for a potential loss of future earnings and so there is no place for the question to be asked whether the owners have actually lost such earnings.

[24] So called because they are costs incurred because the vessel is accommodating cargo.

The Bonde and *The Luxmar*

In *The Eternal Bliss*[25] Andrew Baker J considered what (on his view of the law) would have been the correct conclusion in two cases where the judgments actually given held that, in order for the party in the position of the shipowner to recover damages in addition to demurrage, there would have to be not only a separate type of loss but also a separate breach[26] by the party in the position of the charterer. In these two cases it was because the losses claimed by the party in the position of the shipowner were accepted as being separate from the loss liquidated by demurrage that the decision of the court turned on whether it was sufficient for the party in the position of the shipowner to establish a separate type of loss or the party had also to establish a separate breach of the contract. Thus, these two cases may give us authoritative examples of what is a separate type of loss. (They are the only examples established by authority, other than the deadfreight in *Reidar v Arcos* and the owners' loss in *The Eternal Bliss* itself.) However, as will be explained, these two examples may not be relevant to the position as between owners and charterers under a voyage charterparty.

The Bonde and *The Luxmar*[27] were both cases on fob commodity sale contracts, where the sellers (the shippers of the cargoes) did not load the cargo within the laytime allowed. In *The Bonde* the contract provided that the buyers had to put in their vessel before the end of the shipment period, or pay 'carrying charges' for an extension to the window for shipment, and these charges would run until the date of the bill of lading,[28] that is, until the day when the loading operation was completed. The sellers failed to complete loading within the laytime; they accepted that they were liable under the sale contract to pay demurrage to the buyers, but claimed at the same time to be entitled to carrying charges in respect of all the days until loading had been completed, including the days in respect of which the buyers were entitled to demurrage.[29] One argument for the buyers was that, if the sellers were entitled to carrying charges in respect of these days, the buyers were entitled, in addition to demurrage, to recover back the amount of their liability for carrying charges in respect of these days as damages for the sellers' breach in failing to complete loading in time.[30]

It is suggested that, on these facts, if the obligation to load within the laytime is taken seriously as an obligation of the contract,[31] the correct analysis is that the carrying charges in respect of these days could not ever become due from the buyers to the sellers, because the sellers cannot take advantage of their own breach in failing to load within the laytime to earn additional carrying charges.[32]

However that may be, Andrew Baker J said:

> The basic argument … for the seller … as to what a demurrage rate is and what, therefore, a demurrage clause does not preclude … was that a demurrage clause provides an estimate of the loss of prospective freight likely to be suffered if the ship is kept beyond the laydays, and therefore 'demurrage is not and/or should not be the exclusive compensation where failure to load within the contractual laytime has consequences other than the detention of the ship. As agreed compensation for detention of a ship, it does not cover … the separate and independent head of loss represented by the necessity to pay carrying charges for the excess time taken in loading.' In my view, that argument was sound in principle.[33]

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25 *The Eternal Bliss* (n 2) [125] and [135]–[136].

26 That is, a breach other than a failure to load within the laytime.

27 *ERG Raffinerie Méditerranée SPA v Chevron USA Inc (The Luxmar)* [2006] EWHC 1322 (Comm), [2006] 2 Lloyd's Rep 543.

28 *The Bonde* (n 1) 138.

29 ibid.

30 ibid 139, argument (i).

31 In *The Bonde* (n 1) Potter J accepted (at 142–43) a submission that the only purpose of the sellers' 'guarantee' of the loading rate was to provide a mechanism for the reimbursement of demurrage by the sellers to the buyers: that is, this 'guarantee' was not a genuine obligation of the contract but only a provision for an indemnity in respect of the buyers' liability to the owners of the vessel.

32 Compare what Sargant LJ said in *Reidar v Arcos* (n 3) 365–66: 'It cannot be that by their delay in loading they [the charterers] were entitled to diminish the extent of the cargo which they were under obligation to load, and thus take advantage of their own default'. In *The Bonde* this was the buyers' argument (ii) (at page 139); it was rejected by Potter J, who held (at pages 144–45) that the principle of construction that it is not intended that a party should benefit by its own breach of contract would have to be introduced as an implied term, and the test for an implied term was not met in this case.

33 *The Eternal Bliss* (n 2) [125].

It is suggested that Andrew Baker J may be understood as having said that if (contrary to the correct analysis) the buyers would be liable to the sellers for carrying charges for the excess days, then the buyers should be entitled to recover back the amount of that liability from the sellers, in addition to the demurrage rate, as damages for the seller's failure to load within the time agreed.

In *The Luxmar* the facts were more complicated: in fact the buyers did not take delivery of the cargo, and the court held that the buyers were in repudiatory breach of the sale contract. However, a question arose[34] which for our purposes may best be put (as it is by Andrew Baker J[35]) by observing that if the buyers had not repudiated the contract the sellers would inevitably have completed delivery of the cargo after the end of the laytime and by the time when delivery would have actually been completed the market price of the commodity had fallen, and then asking whether in these circumstances the buyers would have been entitled, in addition to demurrage for the delay in loading, to damages for late delivery, representing the difference between the market price at the date when the cargo should have been delivered and the market price when the cargo was actually delivered.

Andrew Baker J stated:

> Where in an fob contract a delivery date is stated, as such, but time is not of the essence (either on the proper construction of the particular contract or because the buyer does not choose to terminate for late delivery though entitled to do so), and the seller delivers late on a falling market, the buyer will have a claim for damages for late delivery unaffected by any laytime/demurrage clause. There is to my mind no rational basis for saying that the position is different merely because the effectively warranted delivery date is a function of the laytime provisions rather than a delivery date expressly stated as such. The idea that by agreeing also a demurrage clause … the buyer is agreeing to forgo his normal late delivery claim under s.53 of the Sale of Goods Act 1979 is startling and, in my respectful view, not at all likely to be the intention of traders agreeing fob sales.[36]

In a commodity sale contract, in cases where the provision for laytime and demurrage is treated as a free-standing provision of the contract rather than as an indemnity in respect of the possible liability for demurrage of the fob buyer or cif seller as the charterer of a vessel, presumably the fob buyer or cif seller is being treated as notionally the owner or time-charterer of a vessel, and as such suffering a loss (or potential loss[37]) by virtue of the delay to the vessel. However, the losses considered in *The Bonde* and *The Luxmar* were losses suffered by a fob buyer not as the notional owner or operator of a vessel but in its capacity as buyer (or, in *The Bonde*, as buyer under a sale contract with a provision for 'carrying charges'). Thus, consideration of these losses will not assist us in thinking about what types of loss that are actually suffered by the owners of a ship are sufficiently separate from the losses which are liquidated by demurrage.

Cargo damage and its consequences

The Eternal Bliss was a decision on a preliminary point of law. The owners' case was that a cargo of soya beans was loaded with a high moisture content, the ship was delayed before berthing at the discharge port in China for a month (in August) and, upon discharge, the cargo was significantly damaged by mould and caking throughout the stow in most of the holds. The owners were required to provide security for a cargo claim to the receivers in order to avoid the arrest of the vessel (and it is to be inferred that the security would respond to a judgment from the Chinese courts). The facts assumed for the decision on the point of law also included that the charterers were not in breach of the charter otherwise than in respect of the delay at the discharge port, that the cargo damage did not result from any failure of the vessel to care for the cargo and that the owners had acted reasonably in settling the cargo claim.

[34] By way of the buyers' counterclaim; see *The Luxmar* (n 27) [4].
[35] *The Eternal Bliss* (n 2) [136].
[36] ibid [135].
[37] See above, in the text following n 13.

It may be observed that, although the English courts continue to be reluctant to accept the real effect in many jurisdictions of a 'clean on board' bill of lading, as a statement that the cargo when loaded was in actual good order and condition and so making the owners liable if the cargo is not discharged in the same good order and condition, nevertheless owners can recover when the cargo is found damaged at discharge and the owners are held liable for the damage, on the basis of the rule in *Biggin v Permanite*,[38] that if one party (B) is in breach of contract, and that breach causes a claim by a third party against the other party (A) which A settles, A does not have to show that A was actually liable to the third party, but only that A acted reasonably in settling the third party's claim. This is the way in which cargo damage which is caused by delay to the vessel can be a cause of loss to a shipowner.[39]

Andrew Baker J stated: 'This is a case of cargo damage, and loss suffered by [the owner] in respect of it by way of liability or the reasonable settlement of potential liability'.[40] He continued:

> In my judgment, the damage to the cargo is quite distinct in nature from, and is additional to, the detention of the ship, *as a type of loss*. On the assumed facts, [the owner] felt that loss to the extent of the cost of its settlement of cargo claims made against it and there is an unbroken chain of causation in that regard. That is every bit as different as was the deadfreight in *Reidar v Arcos*. If there had been a separate breach, *Reidar v Arcos* would simply have applied on its majority ratio to answer this case in [the owner's] favour.[41]

The same must also apply if owners take steps to avoid cargo damage that would give rise to a third-party claim which the owners would then have to settle. Suppose, for instance, that the vessel is carrying a cargo of low-quality bagged rice which has been fumigated before leaving the load port to a standard that means that at the end of the time which should be taken by the carrying voyage and by discharge within the laytime, with a small margin for likely delays, the rice should still be in acceptable condition. But at the discharge port the vessel is kept waiting at the anchorage because the charterers are still engaged in selling the cargo, and this delay will mean that, by the time the cargo is eventually discharged, the insects will have started to manifest themselves again so that the cargo will be in an unacceptable condition, and the owners (or the owners' Club) know that the local courts will hold the owners liable for the condition of the cargo. So, acting reasonably in order to mitigate this impending loss, the owners (or the Club's correspondents on the owners' behalf) employ a company to refumigate the cargo in the holds and also (out of a proper concern for the safety of the crew) incur expenses keeping the vessel on a lay-by berth and putting the crew into a hotel for the time during which the fumigant makes it unsafe for them to stay on board. The cost of refumigating, and the expenses incurred in order to refumigate safely, will also be a separate type of loss from the loss liquidated by demurrage.

It may now be urged that 'hotel bunkers' are a cost incurred in preventing damage to the cargo, and are logically distinct from the running expenses of the vessel as such, and so the owners of a tanker should be entitled to recover this cost as a separate type of loss in the situation where the charterers fail to discharge within the laytime and as a result the owners have to continue to heat the cargo.

However, this situation is different from the case of refumigating, because (we may assume) fumigating the cargo at their own expense is not something the owners ever agreed to do, while (normally) the owners will have undertaken by the terms of the charterparty to keep the cargo

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[38] *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 (CA).

[39] What was being supposed in *The Eternal Bliss* (n 2) is a case where there was actual damage to the cargo and the owners were facing the prospect of being held liable to the extent (more or less) of the actual diminution in value of the cargo. We are not supposing a case in which there is trifling damage to the cargo and the receivers use this as a pretext to reject the whole cargo, and the owners are facing the prospect of being held liable for the whole value of the cargo – in that case, the unreasonable attitudes of the receivers and the local court might be considered to break the chain of causation.

[40] *The Eternal Bliss* (n 2) [44].

[41] ibid [45] (emphasis in original).

heated. If owners are to recover for 'hotel bunkers' as a separate type of loss, they will be recovering in addition to demurrage the cost of performing what they undertook to do in way of caring for the cargo, for longer than the period of the carrying voyage and the laytime allowed for discharge.

Also, it may be said that such logic cannot be our only guide in deciding what is to be treated as a type of loss which is not liquidated by demurrage: rather, we have to count as separate those losses which the market generally would think were not dealt with by the demurrage rate agreed, and *not* to count as separate those things which the market generally would expect to be covered by the demurrage rate. 'Hotel bunkers', in particular, are expenses which do not arise because of the characteristics of a particular port or of the local law in the country of discharge, but will inevitably be incurred if the vessel is held up before berthing for discharge. The true position may be that tanker owners in general are well aware that, if the vessel is delayed before discharging, they will incur these costs in addition to the running expenses of the vessel, and they would wish (if only they could) to agree both a basic demurrage rate to apply if the vessel is delayed before loading and also a daily supplement to apply if she is delayed with cargo on board, but the state of the market is such that the owners lack the commercial muscle to get this agreed. It may be said that it is not the business of an account of what is a separate type of loss to enable owners to obtain by the back door payment in respect of a type of expense of which they will have been well aware, but for which they were not able to obtain any separate payment by commercial negotiation.

Damage to the ship

Andrew Baker J stated: 'I do not think it would occur to commercial parties unaware of the case-law that agreeing a demurrage rate liquidated, for example, claims in respect of physical injury to ship, cargo or crew'.[42]

It may be argued that if damage to the vessel is a separate type of loss, then logically the bottom-fouling which is caused when the vessel is kept waiting at a warm-water port must also be considered a separate type of loss. Certainly, the word 'damage' includes matters such as the deposit of dust which cannot be cleaned off easily, and so it must also include the accretion of barnacles on the underwater parts of a ship.

If there were a statute or a term of a contract in terms of 'damage' then the statute or contractual term would apply to bottom-fouling. But the exercise on which we are engaged does not begin from the word 'damage' as a fixed starting point. Rather, we are engaged in articulating, from one side, the types of loss which are distinct from the losses which are liquidated by demurrage, and from the other side, the types of loss which the market accepts are disposed of by the demurrage rate agreed. The word 'damage' only enters in because it has been proposed as a way of articulating one type of loss which is separate.

A foul bottom will cause a loss of earnings from future voyages (and from the present voyage, if the fouling occurs at the load port) by way of the vessel being slower and so taking longer to earn the same freight (or perhaps, burning more fuel to achieve the same speed) and it will also give rise to a loss of earnings (together with the expense of the cleaning operation) if the vessel is taken out of service to remove the encrustation. Both of these are distinct from the natural tendency of delay at a port to cause the vessel to begin her next freight-earning engagement so many days later.

However, demurrage also liquidates the normal running costs of the vessel during the period of delay, and these will include ordinary wear and tear during the period, for instance the running hours on the generators which keep the vessel alive while she is waiting at an anchorage. The accretion of barnacles could be considered as another form of ordinary wear and tear, and so as part of what is liquidated by demurrage.

[42] ibid [58].

Nevertheless, there may have been a change in whether it is natural to treat this as ordinary wear and tear. When the NYPE form was issued in 1946, bottom fouling was expected: 'as the vessel may be from time to time employed in tropical waters during the term of this Charter, Vessel is to be docked at a convenient place, bottom cleaned and painted whenever Charterers and Captain think necessary, at least once in every six months'.[43] Now, however, the performance of hull coatings is such that, in the ordinary course of things, barnacles will not adhere but will be polished off, and a vessel should not need to be drydocked for repainting any more often than she would need in any event to go into dry dock for special survey. It may be suggested that what expenses are to be considered as covered by demurrage should not be treated as fixed once for all by the decisions of the courts but rather may be allowed to alter as the market's perception of what is a normal running expense shifts.

There is also an argument which proceeds in a back-to-front way, but may be persuasive. Intuitively, if a vessel which is waiting at an anchorage leaves her position once a week and spends a few hours steaming up and down to polish the marine growth off her hull, that appears something separate from the ordinary costs of waiting off a port. If the expense which is incurred in order to avoid a particular consequence of delay is something distinct from the ordinary running costs of the vessel, then that particular consequence itself may also be viewed as distinct from the ordinary consequences of delay.

Excess port expenses

In *Reidar v Arcos* there was no issue about any additional port expenses incurred during the period of delay, because the charterparty provided, in effect, that the charterers were to pay the vessel's port expenses.[44] (And, as we have seen,[45] in *The Nikmary* the interim ports clause provided for 'actual port expenses, if any' to be for the charterers' account.)

If the vessel is to tender a notice of readiness (NOR) and then wait in a position where she is as nearly as possible at the immediate disposition of the charterers, then in the ordinary course of things the owners will incur some port dues while waiting, and it certainly is universally accepted in the industry that demurrage liquidates dues incurred because the vessel is waiting at an anchorage. If the charterparty requires the vessel to be in an inner anchorage to tender NOR and the inner anchorage is more expensive,[46] then it surely must be accepted that the demurrage rate agreed also liquidates the additional cost of waiting in the inner anchorage.[47] However, it does not automatically follow that demurrage liquidates every sort of port expense incurred while waiting.

Nor does it follow from what has been said so far that demurrage covers every sort of running expense which the owners may incur while the vessel is waiting. For example, if the situation in the area of a port is such that for the safety of the vessel crew and cargo the vessel has to wait not at anchor but drifting in international waters off the port, then the extra costs involved might reasonably be considered a different type of expense.

Also, the cost of insurance is included in the running expenses liquidated by demurrage, and if the vessel is chartered to load or discharge at a port in an area for which her war risks insurers charge an additional premium (AP) and there is no provision in the charterparty by which the charterers are

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[43] New York Produce Exchange time charter form, cl 21.

[44] Clause 20 of the charterparty, quoted at [1927] 1 KB 352, 354, provided for the owners to pay only a lump sum agency fee and a rate per 'standard' on the cargo loaded, so that any additional port dues incurred because the vessel was kept at the load port longer than the laytime allowed would be paid by the charterers.

[45] Above, at n 16 and in the text following n 23.

[46] As in *Ocean Pride Maritime Partnership Ltd v Qingdao Ocean Shipping Co (The Northgate)* [2007] EWHC 2796 (Comm), [2008] 1 Lloyd's Rep 511, [52] and [65].

[47] Equally, if – as may have been more usual in the 19th century – the charterparty requires the vessel to tender NOR and wait within an enclosed dock, and so the owners have to pay dock dues rather than anchorage dues, the rate of demurrage agreed will also liquidate the dock dues.

liable for APs, then the position must be that the payment of freight covers the APs incurred during the laytime allowed. But it does not necessarily follow that the demurrage agreed (which may be the same rate for a load port in a safe area as for a discharge port in an AP area) covers the APs the vessel may incur while waiting; possibly, these could be considered something different from the ordinary running expenses of the vessel.

As regards port expenses, the costs of being on a berth will be higher and more varied than the cost of waiting at an anchorage: berth dues ('wharfage') will usually be higher than anchorage dues; there may be the expense of compulsory gangway watchmen and compulsory garbage removal; in some ports if a vessel stays on a berth for too long, the port authority will add 'fines' for overstaying to the berth dues; and in some ports the vessel will have to leave the berth when a container vessel comes in and come back onto the berth after the container vessel has left, thereby incurring two additional sets of shifting expenses. The freight for the cargo will naturally cover the expense of the vessel being on a berth at the port for the laytime agreed. But, once again, it does not follow that the demurrage agreed is intended to liquidate the expenses of staying on a berth for longer than the laytime. It might be said that if the charterers have undertaken to load or discharge within a fixed laytime (perhaps also allowing a few hours' turn time after NOR is tendered) then the owners are entitled to expect that the vessel will not have to be on a berth in the port for longer than the turn time and the laytime agreed.

At least one London arbitration tribunal appears to have been willing to treat some of the additional expenses of waiting on a berth as a separate type of loss from the expenses of waiting at an anchorage. In *London Arbitration 23/07* and *London Arbitration 1/09*[48] owners claimed in addition to demurrage for the costs of wharfage and watchmen during a period while discharge was halted. The tribunal(s) rejected this claim, but did so on the basis of *The Bonde*, holding that the owners could only recover if there were a separate breach by the charterers, and that the only breach there had been was the failure to discharge within the laytime. Thus, the tribunal(s) seem to have been willing to entertain the idea that these expenses would be recoverable in addition to demurrage if there had been a separate breach.[49]

However, the understanding in the industry is that demurrage covers port dues such as wharfage and watchmen which arise from having to wait on a berth rather than at an anchorage. This understanding is expressed by Andrew Baker J, who said about these two arbitration reports that: 'On any view, the port costs for which damages were being claimed were within the purview of demurrage'.[50] Thousands of voyage charter accounts will have been adjusted on this basis, and any owners who try to argue that they can recover in addition to demurrage for such port costs will be conscious that they are arguing against what is generally accepted.

Nevertheless, as with bottom fouling, what is normal may have changed (at least in relation to some trades, such as hydrocarbon cargoes which are pumped in and out at terminals[51]) so that it is now outside the normal course of things for a vessel to have to wait on a berth, and once again it might be suggested that notions of what is covered by demurrage should shift accordingly.

If this suggestion were ever to be accepted, then care would be needed when saying that the owners may recover for expenses over and above those of waiting at an anchorage. If the laytime allowed is three days and the vessel waits at an anchorage from day 1 to day 10, and then loads on the berth

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[48] As mentioned in *The Eternal Bliss* (n 2) [139], these two reports appear to relate to the same voyage from Zhenjiang (China) to Vitoria (Brazil).

[49] Also, another London tribunal has treated shifting expenses as a separate type of loss which may be recovered in addition to demurrage, *London Arbitration 18/05*.

[50] *The Eternal Bliss* (n 2) [140].

[51] In *The Nikmary* (which related to a tanker loading a cargo of gasoil) Moore-Bick J remarked in passing that 'it would be contrary to all normal practice' for a vessel to be called onto the berth at the load port before the shipper had a cargo ready for her. See *The Nikmary* (n 14) [23].

from day 11 to day 13, the owners will have incurred the expenses of being on a berth in respect of days when the vessel was on demurrage; but the amount will naturally be the same as what the owners would have had to pay if the vessel had been on the berth from day 1 to day 3. It might reasonably be left to the commercial sense of arbitrators to determine both whether expenses are distinct from the ordinary expenses of waiting at an anchorage and whether they are additional to the expenses which the owners would have incurred if the vessel had completed cargo operations within the laytime.