

## **Charterparty and extra-charterparty delay claims – an overview**

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### **Introduction**

Time is money in business and even more so in the maritime industry, where the question of which party bears the risk of delay is a crucial component of the contract of carriage. In the tanker trade in particular – which is tied to the volatility of the petroleum market – charterparty terms that provide compensation in the event of delays (eg, laytime and demurrage) are key negotiation points and are regularly the subject of litigation or arbitration. However, claims for delay are not limited to the terms of a charterparty. Another class of claims can be founded on tort, negligence or contract and brought by or against parties not named in a charterparty. Extra-charterparty delay claims are important in a jurisdiction such as Nigeria, where factors that result in delays (eg, port congestion, suboptimal infrastructure and malpractice) are frequent and may not be adequately handled by claims founded on a charterparty.

### **Charterparty delay claims**

The general principle of charterparty delay claims are that once laytime commences (ie, the agreed timeframe in which the charterer must unload cargo after being issued a notice of readiness), it generally runs without interruption unless the charterer can establish exceptions (eg, a force majeure event, fault with the vessel or a specific clause in the charterparty excluding the delay-causing event). When laytime ends, the charterer must compensate the owner for each day of delay under the pre-agreed demurrage rate.

The Asbatankvoy charterparty form provides the following in the context of laytime and delays:

- Clause 6 provides that where delay is caused to a vessel getting into berth after giving notice of readiness for any reason over which the charterer has no control, the delay will not count as laytime;
- Clause 7 provides that any delay due to the vessel's condition or breakdown or the inability of the vessel's facilities to load or discharge cargo within the time allowed will not count as laytime; and
- Clause 8 provides that that if demurrage is incurred at ports of loading or discharge by reason of explosion, strike, stoppage or restraint of labour or by breakdown of machinery or equipment ashore, the rate of demurrage will be reduced by half.

For claimants vested with the requisite privity, claiming compensation for delay under the above regime is straightforward. A court or arbitration tribunal is called on to interpret the provisions of the relevant charterparty only – with regard to the particular facts of the case – if a demurrage claim is disputed.

### **Extra-charterparty delay claims**

Delay-causing events have far-reaching liability effects on parties not named in a charterparty. A charterer may be able to avoid claims for demurrage where the port authority caused delay through the wrongful grant of berthing precedence to another ship. However, the shipowner that is the victim in this situation may seek compensation for the delay from the port authority. A charterer liable for delay caused by an unsafe berth may seek an indemnity for losses caused by the resulting delay from the terminal or berth operator.

**The Fotini** case is an example of a compensation award for a delay claim founded on an implied contract rather than a charterparty.<sup>(1)</sup> The defendant entered into a contract of sale with a foreign supplier for the supply of bagged cement from Spain to Lagos. The supplier hired the plaintiff's vessel to transport the cargo from Spain to Lagos. However, on arrival at the Port of Lagos, the ship could not be discharged as the defendant was unable to provide a berth due to congestion. At the defendant's request, the ship was discharged in Ghana and demurrage was incurred for the period of delay. The defendant paid the demurrage charges to the foreign supplier for the delay caused in Lagos. No one was paid for the demurrage charges incurred in Ghana. As a result, the plaintiff sued the defendant for payment of the outstanding balance and interest accrued. The defendant denied any privity of contract between itself and the plaintiff and argued that the contract was with the foreign supplier. Further, the defendant claimed that by accepting the demurrage charges paid through the supplier, the plaintiff had waived its right to demand demurrage directly from the defendant.

In allowing the plaintiff's appeal – which had been dismissed by an appeal court and a trial court – the Supreme Court held that although the contract containing the demurrage clause had been executed by the defendant and the foreign supplier, an independent contract had been created through the defendant's use of the plaintiff's vessel to sail to Ghana – an offer that the defendant accepted. Thus, a contract had developed between the two parties that was enforceable. Compensation for delay regarding the demurrage charges incurred in Ghana was awarded to the plaintiff on a quantum meruit (ie, a reasonable value of services) basis.

### **Challenges of extra-charterparty delay claims**

Extra-charterparty delay claims present unique challenges which claimants must overcome to be successful. Finding the duty of care when negligence is sought may not be straightforward. In an as yet unreported case, a claimant relying on the Evidence Act argued that the customary practice of granting

berthing precedence on order of arrival at a particular Nigerian port imposed a duty on the berth operator to spare itself from the losses arising out of not following said customary practice.(2)

### **Comment**

The starting point in extra-charterparty claims for delay is to identify their basis in tort or contract (implied or otherwise). This may not be immediately apparent and can present numerous challenges. Potential claimants are nonetheless advised to consider extra-charterparty claims in detail.

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### Endnotes

(1) *Alfortrin Limited v The Attorney General*, Volume 6, 327 to 366.

(2) Section 16(1) of the Evidence Act 2011. A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or proven to exist by evidence.